

20 Effective Defenses for DUI/DWI Cases

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I. INTRODUCTION

Many people think that their drunk driving case is hopeless, especially if they have failed a breath or blood test. They wonder “Why should I hire an attorney when I’m just going to be convicted anyway? Shouldn’t I just plead guilty?”

The answer is emphatically “no.” Drunk driving cases are not hopeless. Many strong defenses are available to refute a drunk driving charge.

Some defenses are argued to the judge before a trial occurs. These may convince the judge to dismiss the case or throw out key evidence making it difficult or impossible for the prosecution to get a conviction. Other defenses are raised to the jury to create reasonable doubt and obtain a not guilty verdict.

If any defenses fit the facts of your case, a good attorney will find them and exploit them to maximize your chances of a favorable plea offer, a dismissal, or an acquittal.



II. 20 EFFECTIVE DRUNK DRIVING DEFENSES

Below are some of the most effective defenses to a drunk driving charge. Each is discussed in further detail in this booklet. There's a reasonable chance that one or more of these will benefit your case. The list is not exhaustive, so additional defenses could be available to you as well.

1. Your vehicle was stopped without legal justification.
2. The police did not have probable cause to arrest you.
3. The officer's observations have explanations other than intoxication.
4. Field sobriety tests are not scientifically valid indicators of intoxication.
5. The officer did not administer or score your field sobriety tests correctly.
6. Your performance problems on field sobriety tests were caused by medical or environmental issues.
7. You were not given *Miranda* warnings.
8. You were not given implied consent warnings.

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9. The breath testing machine was not functioning properly.
10. The breath test operator was not qualified.
11. The breath test was not administered correctly.
12. You were not observed before the breath test.
13. Your results are under the limit when considering the machine's margin of error.
14. Your physical condition caused an elevated breath test result.
15. Your blood was not drawn and stored properly.
16. Fermentation occurred in the blood test vial.
17. Your test was conducted at a hospital lab on plasma or serum and not converted to a whole blood result.
18. Your test at a hospital lab shows a false positive due to your injuries or other contaminants.
19. Your breath or blood test results don't show your alcohol level at the time of driving.
20. No one saw you drive.

III. VEHICLE STOPPED WITHOUT LEGAL JUSTIFICATION



REASONABLE SUSPICION IS REQUIRED

A police officer needs reasonable suspicion of unlawful conduct to stop you. Other than at a lawful DUI roadblock, an officer cannot pull you over randomly to check you for DUI. If the judge can be convinced that you were stopped without reasonable suspicion of unlawful conduct, all evidence obtained as a result of the stop should be thrown out leading to the dismissal of your case.

TRAFFIC VIOLATIONS PROVIDE REASONABLE SUSPICION

As a general rule, an officer can stop you for traffic violations (running a red light, speeding, etc.) and equipment violations (expired registration, broken tail lights, etc.). However, sometimes the officer will be mistaken on the law and will stop a person for conduct that is not actually a violation. A mistaken belief about the law does not justify the stop.

OTHER DRIVING TRANSGRESSIONS DON'T ALWAYS PROVIDE REASONABLE SUSPICION

Other driving transgressions that do not rise to the level of a violation may or may not justify a stop. The reason is that reasonable minds can disagree on the question of what is reasonable suspicion and the facts differ in every case.

While there are almost an unlimited number of reasons an officer may use as a basis for conducting a motor vehicle stop, there are a few regularly recurring reasons for enforcement stops that result in DUI charges. These include:

- Weaving within the lane.
- Weaving across the lane or crossing the fog line.
- Driving too slowly.
- Making wide turns or cutting turns too closely.
- Following too closely.

- Stopping for an excessive time at a stop sign.
- Failing to drive when the light turns green.

Courts reach different conclusions as to whether these driving behaviors justify a DUI stop. Ultimately, it is the facts in every case that determine what is reasonable suspicion. The decisions usually turn on how long the officer observed the driver, how many “transgressions” the officer observed, how extreme they were, and whether there were other drivers in the vicinity who could have been at risk. The shorter the observation period, the fewer driving transgressions observed, the more minor they were, and the less of a hazard to other drivers they posed, the more likely the court is to conclude the stop unjustified.

TIPSTERS DON'T ALWAYS PROVIDE REASONABLE SUSPICION

Now that most people have cell phones, an increasing number of DUI stops are precipitated by a tip. In some cases, the officer stops a driver based entirely on information from the tipster and not on any observations the officer made. In this case, the tip itself must be adequate to give the officer reasonable suspicion for the stop. The validity of the stop will depend on what information the tipster conveyed and how reliable that information was.

Courts consider tipsters who identify themselves to be more reliable than anonymous tipsters. The reasoning is that presumably people who identify themselves to the authorities are more likely to convey truthful information. Failure to tell the truth could open the informant up to civil and criminal penalties. Even when the tipster’s identity is known, the tip has to provide sufficient information to give the officer a reasonable suspicion of unlawful conduct.

Courts come out differently as to whether DUI stops based on anonymous tips are lawful. Many courts have ruled that stops based solely on anonymous tips were invalid because there was no way to determine the honesty of the tipster or the reliability of the information provided. Other

courts have upheld the stops because the tipster provided detailed information and drunk drivers pose a serious danger to the public.

PRETEXT STOPS ARE OK

An improper motivation for the DUI stop does not invalidate the stop. If the police officer has an objectively reasonable basis for making a stop—i.e., a traffic violation—it does not matter that the real reason you were pulled over was so the officer could check you for intoxication.



IV. NO PROBABLE CAUSE FOR ARREST

For your arrest to be valid, the police must have probable cause to believe you were driving while intoxicated. Probable cause is a higher standard than reasonable suspicion. Probable cause means that the facts known to the officer would lead a reasonable person to believe that a crime is being committed.

To establish probable cause, the prosecutor will rely on the arresting officer's observations of your driving, your appearance, and your performance on field sobriety tests. As discussed below, the officer's observations and field sobriety tests can both be attacked as inadequate evidence of probable cause.



V. OFFICER'S OBSERVATIONS



ODOR OF ALCOHOL

The odor of alcohol on a driver's breath is one of the first clues an officer relies on to justify the start of a drunk driving investigation. The odor of alcohol does not really mean much because alcohol itself is virtually odorless. The aroma associated with alcohol is the flavoring that gives the beverage its taste. The best proof of this is "near beer." It smells like beer, but has no effect like beer because it has little to no alcohol. Curiously, alcoholic beverages with the least amount of alcohol in the drink tend to have the strongest odor. For example, beer has a more pervasive scent than vodka.

An officer cannot determine how much alcohol you may have consumed by the odor. Most officers will concede in court that based upon the odor of alcohol they cannot tell how much a defendant had to drink. There is no scientific evidence that anyone can determine the amount of alcohol consumed by a person by the odor of alcohol emanating from them.

BLOODSHOT EYES

If the arresting officer claims that your eyes were bloodshot at the night of the arrest, your attorney might attack this claim by emphasizing that the officer does not have a baseline on how your eyes typically appear. Some people naturally have bloodshot eyes.

Even if you do not normally have bloodshot eyes, many factors can cause eyes to redden. For example, fatigue, allergies, smog, and contact lenses can all contribute to bloodshot eyes. Smoke in bars can also act as an eye irritant. There is no correlation between red or watery or glassy eyes and blood alcohol concentration.

FLUSHED FACE

A flushed face similarly does not correlate with alcohol consumption. Most motorists are upset, frustrated, and nervous when confronted by a law enforcement officer. A natural and immediate reaction is a quick flow of blood to the face, causing a reddish appearance.

A flushed face may also be the result of a normally ruddy complexion, make up, or sunburn.

SLURRED SPEECH

If the arresting officer claims that your speech was slurred, your attorney might attack this claim by emphasizing that the officer does not know what you normally sound like.

Claims of slurred speech may be refuted by police video taken during your arrest. Another approach is through friends who were with you during the night of the arrest or the person you called from jail. Even a telephone answering machine or voice mail recording of your call from jail could provide objective evidence of your speech.

VI. FIELD SOBRIETY TESTS

Law enforcement officers and prosecutors use field sobriety tests to provide probable cause for making a DUI arrest and to help prove the driver was impaired at a time close to driving. Field sobriety tests are not really tests so much as coordination exercises. Many sober individuals have difficulty performing them.

LACK OF SCIENTIFIC VALIDITY

Field sobriety tests are not very reliable indicators of intoxication and driving impairment. Only three tests have been studied to see if poor performance on them correlates with alcohol impairment. These three are the horizontal gaze nystagmus test (in which the officer asks you to follow a light with your eyes), the walk and turn test, and the one-leg stand. They have been shown to be only 65 to 77 percent accurate in predicting intoxication. And that is only when they are (1) used together and (2) administered in a carefully standardized fashion as prescribed by the National Highway Traffic Safety Administration (NHTSA).

Police officers regularly use tests that have not been studied or validated, such as finger to nose, counting backwards, reciting the alphabet, and many others.

It may be possible to convince the court to suppress any evidence of field sobriety tests due to the lack of scientific backing.

IMPROPER ADMINISTRATION OR SCORING

NHSTA has developed a detailed set of instructions for how each of the three standardized field sobriety tests is to be administered and scored. The standardized tests can be challenged on the ground that they are only valid if they are administered and scored by following the NHSTA protocols. Field sobriety tests are often videotaped. Your attorney can review the video to identify any mistakes the officer may have made and call them to the attention of the judge or jury.

ALTERNATIVE EXPLANATIONS FOR POOR PERFORMANCE

Field sobriety tests can be affected by such things as the roadside environment where they are administered, the general health of the person being tested, and the skill and training of the police officer. Thus, even when they come into evidence, your attorney may persuade the jury to disregard them for the following reasons:

1. Lack of a baseline. If the officer does not know how you would have performed on the field sobriety tests without the consumption of alcohol, the officer cannot validly conclude that poor performance was due to alcohol impairment. Sober individuals vary widely in their ability to perform balance and dexterity tests. Some are far more coordinated than others.

2. Innocent reasons for poor performance. Poor performance on field sobriety tests can be explained by many factors including:

- ✓ Wind or dust irritating the eyes.
- ✓ Distractions such as rotating or strobe lights on the police cruiser or passing traffic.
- ✓ Medical conditions, such as back, leg, and middle ear problems.
- ✓ Medications.
- ✓ Caffeine, nicotine, and aspirin.
- ✓ An uneven or slippery roadway.
- ✓ High heels or other unstable footwear.
- ✓ Age, especially for those 65 and older.
- ✓ Weight.

3. Complex instructions are given in a short period of time. Most field sobriety tests have numerous requirements. Despite the complexity of many of the instructions, the tests are often explained and demonstrated only once, and in as little as ten to fifteen seconds. You are then expected to remember the instructions without any further opportunity for study or practice.



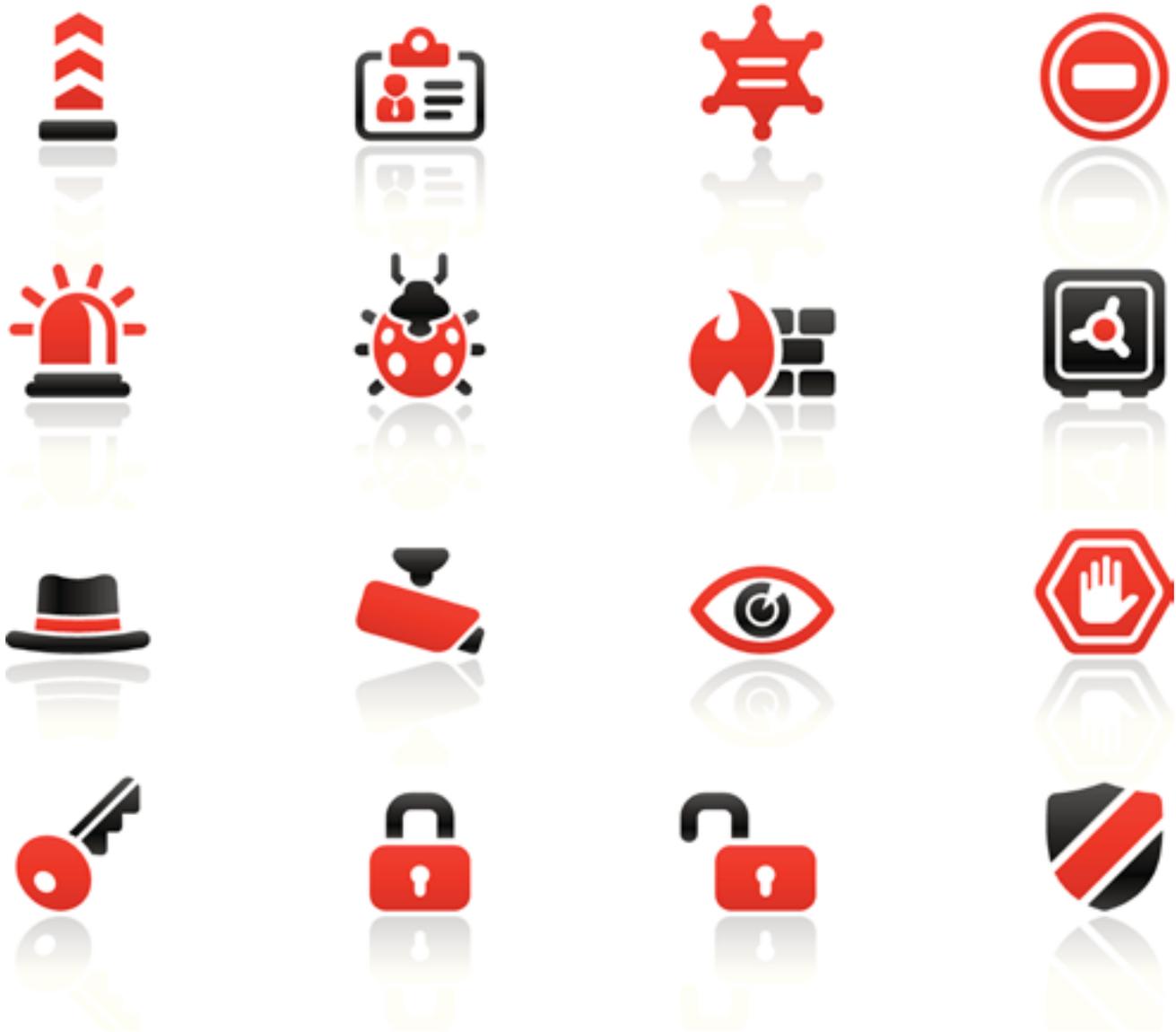
VII. *MIRANDA* WARNINGS

Failure to advise you of your *Miranda* rights (the right to remain silent and the right to counsel) or to allow you to exercise them can lead to the dismissal of the charges or the suppression of incriminating statements you made as a result of the *Miranda* violation. *Miranda* warnings must be given in misdemeanor cases, including drunk driving cases, when you are subject to a “custodial interrogation.” Exactly when that happens is not always clear.

As a general rule, the police don’t have to give you *Miranda* warnings until you are handcuffed and placed under arrest. The police don’t have to give you *Miranda* warnings when they first stop you and ask you for your driver’s for your license and registration or whether you have been drinking. Nor do they have to warn you before field sobriety tests that measure physical coordination or before asking you routine booking questions. The police may testify about how you performed on the field sobriety tests and what you said while performing the tests or refusing to perform them. The police may not, however, attempt to elicit any incriminating response from

you. Courts have also held that requests to submit to a breath or chemical test are not interrogation for purposes of *Miranda*.

The purpose of *Miranda* warnings is to protect your right to avoid incriminating yourself with your own statements. Therefore, field sobriety tests that require you to answer certain questions do require *Miranda* warnings. For example, in one case *Miranda* warnings should have been given before the police asked the suspect for the date of his sixth birthday. He did not know the proper date, and his answer amounted to an incriminating response because it demonstrated a confused mental state. A number of state courts have held that verbal field sobriety tests, including counting and alphabet tests, require *Miranda* warnings.



VII. IMPLIED CONSENT WARNING



Every state has an implied consent law. The law says that, in exchange for the privilege of driving, you agree to submit to an alcohol test when requested by law enforcement. The law authorizes penalties, usually a driver's license suspension, for drivers who refuse the test. When you are arrested, the officer is typically required to read you implied consent warn-

ings that explain your right to refuse the test and the consequences of doing so. It may be possible to suppress the test results if the officer failed to give you the warnings, delayed giving you the warnings for an unreasonable length of time, or made inaccurate or misleading statements about what would happen if you took or refused the test.

IX. BREATH TESTS



BREATH TESTS CAN BE UNRELIABLE

Most DUI suspects are given a breath test. Breath testing is the cheapest and easiest to do because the test can be administered right at the police station. It is generally considered to be less accurate and reliable than blood testing.

Most people assume that anyone with a breath test result above the legal limit will certainly be convicted. This is not true. Breath test devices are machines. Like all machines, they can break down or be used incorrectly.

Breath testing involves the analysis of microscopic amounts of alcohol. Everything involving a breath test must be done with precision and pursuant to established procedures because small errors in procedures can cause huge errors in results.

Although people trust machines and tend to believe that anything measured in a seemingly scientific way must be right, there are ways for your defense lawyer to attack the results of a breath test.

FOUR WAYS TO CHALLENGE A BREATH TEST

One approach is to look at these four issues:

- The maintenance and calibration of the machine.
- The administration of the test.
- The accuracy of breath measurement techniques.
- The physical attributes of the person tested.

MAINTENANCE AND CALIBRATION

Calibration is critical to the accuracy of the machine. If the machine is not maintained to proper calibration, the results will not be accurate. Breath machines must be checked for proper calibration periodically. How often a

calibration check is required varies from state to state, with some requiring a check before every breath test and others requiring checks only at longer intervals.

Checking the calibration involves running a test on the machine using a simulator solution of water or gas mixed with a known concentration of alcohol. The actual results should be within a plus or minus .01% of the known alcohol concentration. If they are not, the machine is not functioning properly.

Your DUI attorney will review the maintenance records for the machine you were tested on. If the records reveal calibration problems, the defense is simple: the breath machine was not functioning. This is an effective defense because the prosecution must establish that the breath test has been conducted in accordance with the rules, including the successful completion of the required preventive maintenance check and the certification of the machine's accuracy. When the evidence shows significant problems with the maintenance and calibration of the breath machine, the attack on the breath test is fatal for the prosecution.

TEST ADMINISTRATION

The administration of the test is also critical. The test must be administered by a qualified operator, and it must be done in accordance with proper procedures.

The operator must have completed a course in breath analysis and been trained and certified to operate the type of machine you were tested on. It is rare for the breath operator to be completely unqualified. However, it is not so rare to have a breath operator who is qualified to use one type of breath machine, but not to use the model on which the test was actually run.

State regulations and the machine operator's manual will spell out the detailed procedures that should be followed. Your attorney should be familiar with these procedures and can review the video of your test to find any evidence that they were not followed.

NO OBSERVATION PERIOD

Perhaps the most common error in testing procedure is failure of the police to observe the person being tested for the required time period before the test. The opportunity to present this defense regularly occurs and it is effective.

The usual observation period is 15 or 20 minutes. The purpose of the observation period is to ensure that the person tested did not insert anything into his or her mouth, or regurgitate (burp) or vomit before the test. Because breath machines are measuring molecules, only a little contamination of the breath sample is necessary to radically inflate the results. A slight burp can potentially cause major contamination to the breath sample. The burp brings alcohol-enriched gases up from the stomach and deposits them into the mouth, creating what has been termed as “mouth alcohol.” This mouth alcohol distorts the true breath alcohol test results.

What the breath test is supposed to test is deep lung air—not alcohol originating from the mouth. Deep lung air is desired because in theory it comes from the area where the breath more accurately reflects the alcohol in the blood. In most instances mouth alcohol will dissipate in 15 minutes. Therefore, if you are observed continuously for 15 minutes before the test, mouth alcohol should not contaminate the results.

Some judges will rule that breath test results are inadmissible when the police have not complied with the observation period. Even when the judge does not keep the breath test out, at trial your defense attorney can make these important points to the jury:

- State regulations require a continuous observation period.
- The state’s expert agrees that the regulations should be followed.
- The breath machine’s manufacturer requires a continuous observation period.
- Experts writing in the scientific literature unanimously agree that a pretest observation period should be performed.

- The observation period is essential to prevent contamination of the sample and gross distortion of the results.

Jurors understandably lack confidence in improperly administered breath tests. The failure of the police to follow proper procedures was shown to be very significant to jurors in the DUI jury research project sponsored by the National College for DUI Defense and the California DUI Lawyers Association.

ACCURACY OF BREATH MEASUREMENT

All machines have margins of errors. The breath machine is no exception. The margin of error means that a person's alcohol concentration may be a little higher or a little lower than the result provided by the machine. In fact, the regulations for the administration of breath tests essentially concede the inherent error in the devices. Most states require two breath tests with the results within plus or minus .02% of each other. Therefore, if your breath test result was .09%, your attorney may be able to argue that the results are within the margin of error of being under the per se value. That is, that .09% test could be as high as a .11% or as low as a .07%.

PHYSICAL ATTRIBUTES THAT CAN CAUSE ELEVATED BREATH TEST RESULTS

In addition to problems with the machine and testing procedures, a person's physical condition can lead to falsely high breath test results. The following are some potential problems that could be responsible for falsely elevated results:

- Mouth contaminants, such as dentures and denture adhesives, piercings, lip balm, or blood from mouth and nose injuries.
- Hyperventilation and blowing too hard.

- An abnormal body temperature.
- An abnormal red blood count.
- Medical conditions, such as gastroesophageal reflux disease (GERD), heartburn, diabetes, and liver disease.
- Diet.
- Inhalation of airbag dust that is then exhaled into the machine.



X. BLOOD TESTS



BLOOD TESTS CAN BE WRONG

Blood tests are generally considered more accurate than breath tests. Even so, blood testing is not infallible. Mistakes can be made in the testing process. Flawed blood test results can be successfully challenged in court.

One of the main defenses in a DUI blood test case rests inside the blood vial. Alcohol levels in blood vials can actually increase on their own through the process of fermentation. This fact, combined with errors in the collection, transportation, and storage of the sample, is how many blood battles are won by defendants.

COLLECTION PROCEDURES

Because the drawing of a blood sample is an invasive procedure, only certain persons are allowed to draw blood for the purpose of determining alcohol content. These usually include licensed physicians, registered nurses, and trained medical technicians and phlebotomists. The blood must be taken from a vein, not an artery (which sometimes occurs in hospitals). The blood sample is usually obtained from the antecubital vein, which is on the inside of the elbow.

Before drawing any blood, the puncture site needs to be sterilized. To avoid contaminating the blood sample, alcohol should not be used to sterilize the area. Sometimes alcohol is used when blood is taken in a hospital setting. There, forensic alcohol blood drawing kits are not always available. In addition, hospital personnel are not always as attuned to the needs of law enforcement as are the on-call phlebotomists who work regularly with the police.

After the sample is obtained, it is not enough to simply label the vial and place it in an evidence envelope. The sample must be mixed with an anticoagulant and a preservative. The purpose of mixing the sample is to adequately disburse the anticoagulant and preservative chemicals into the blood sample. The chemicals are already inside the blood tube before the

blood is drawn, but they must be mixed in order to ensure proper disbursement in the sample.

The prosecution must establish a chain of custody to show that the sample was not tampered with and it belonged to you.

THE TESTING PROCESS

Equally deserving of scrutiny is the blood analysis done in the crime laboratory. Most laboratories analyze blood samples using gas chromatography. Gas chromatography can separate compounds found in the blood sample in a fast and efficient manner. False positives are possible as gas chromatography cannot verify with complete certainty what compounds the device is measuring. Other volatile compounds in blood can sometimes register as alcohol depending on the sophistication of the device used.

The gas chromatograph measures microscopic amounts of alcohol. Since the sample is microscopic, it does not take much of a problem with the sample (or in the testing process) to greatly skew the results.

The blood testing process is largely automated. This enables the analyst to run dozens of samples without the analyst even being present. Your blood sample was not given individualized attention. It was just one of numerous samples that were tested that day. Without that individualized attention, the possibility of errors, such as mislabeling and cross-contamination of samples, looms.

THE FERMENTATION DEFENSE

One of the strongest attacks on the blood test is the fermentation defense. Alcohol can be produced on its own in a blood vial through the process of fermentation. Blood contains a sugar known as glucose. Glucose in the presence of microorganisms will ferment, i.e., convert into alcohol just like grape juice turns into wine.

Blood alcohol testing procedures like gas chromatography are incapable of determining where the alcohol being analyzed originated. The device cannot tell if the alcohol originally existed at the time of the blood draw, or whether it was generated in the blood vial by fermentation. For this reason, fermentation is an attack that is available in almost every case involving a forensic blood alcohol analysis.

There are a number of things that police agencies and crime labs are supposed to do to slow the fermentation process when they take a blood sample. Yet, they often fail to do all of them.

1. Sufficient preservative. The blood vial needs to contain an appropriate amount of sodium fluoride preservative and potassium oxalate anticoagulant. The right amount of sodium fluoride preservative can slow the fermentation process. But it cannot stop it.

There may or may not be an appropriate amount of sodium fluoride preservative in the vial. In many jurisdictions the crime laboratory does not put the sodium fluoride in itself. It orders vials from companies that are supposed to put the appropriate amount of sodium fluoride in the vial. These companies make mistakes and the crime labs do not test any of the vials to see if they come with the right amount of sodium fluoride in them. In addition, when the blood is tested for blood alcohol level they do not check to see if there is any sodium fluoride in the vial.

To determine how much preservative is in the blood vial, your defense attorney needs to have an independent laboratory analyze your sample. If the results from the independent laboratory show an insufficient amount in the sample, your attorney can attack the test result as being unreliable. Without an adequate amount of preservative, there is no assurance that the alcohol in the sample came from drinking. The alcohol may have fermented in the blood vial after the sample was obtained.

A fermentation defense can still be presented even if the results from the independent laboratory reveal a proper amount of preservative in the blood

sample. This is because fermentation can take place even with a proper amount of sodium fluoride if the sample is not promptly refrigerated.

2. Mixing of preservative and blood. The person who draws the blood should tip it upside down several times so that there is a homogeneous mix between whatever sodium fluoride preservative is in the vial along with the blood itself. Sometimes, this is done; however, often it is not.

3. Freezing or refrigeration of sample. Once the blood is taken, the vials must be either frozen or refrigerated. Freezing or refrigeration slows the fermentation process. However, most police agencies do not do this, as the blood is either put in an evidence locker or some other non-refrigerated holding area. Frequently, blood samples are not immediately refrigerated after they are obtained. The trunk of a squad car provides no refrigeration.

4. Prompt analysis of blood. The blood needs to be analyzed within 24 hours of the blood draw. In some places the blood sits a good month or longer before being analyzed. The longer the time from the date the blood sample is taken to the date of analysis of the blood sample, the more fermentation will have taken place, i.e., the more alcohol will be created in the vial that is totally unrelated to the alcohol you consumed.

Fermentation is a very effective defense in a blood test case. Fermentation can explain a blood alcohol of .20 or higher when the person's drinking pattern should have put him at a .03. If video shows that the person did reasonably well of field sobriety tests and did not appear intoxicated, then the defense is especially persuasive.

ADDITIONAL PROBLEMS WITH HOSPITAL BLOOD TESTS

Results not converted to whole blood. If your blood was tested at a hospital, the results may be artificially inflated. This is because blood tests run at forensic labs are performed on whole blood while blood tests run at hos-



pitals are performed on blood plasma or serum. Plasma and serum alcohol values are almost always higher than the alcohol values in the same sample of whole blood. To obtain a plasma sample,

whole blood is spun in a centrifuge. This causes the blood cells to separate from the rest of the sample leaving plasma. A serum sample is obtained by letting the blood clot. The serum is the remaining fluid portion of the sample.

Alcohol is water-soluble. Consequently, the concentration of alcohol in a person is highest wherever the water content is highest. Both serum and plasma have higher water content than whole blood.

To convert a serum or plasma blood value to a whole blood value, the serum or plasma value is divided by a whole blood value. If your blood was tested at a hospital lab and showed you were only slightly over the limit, the conversion may be enough to prove that you were actually under the limit.

False positives due to injuries. The kits used in the hospital labs for testing of blood plasma alcohol levels are prone to false positives. Depending on the kit used, substances in the blood can cause erroneous test results. The substance actually being measured with this type of testing is nicotinamide adenine dinucleotide (NADH). A given NADH level will tell the analyzer what the alcohol level is. However, other substances found in the blood can also convert to NADH during this same chemical reaction. A common interferent is lactic acid which can enter the blood due to muscle or organ injury or from fluids introduced via IV. Thus high levels of lactic acid can cause a falsely elevated alcohol level.

XI. TESTS DON'T MEASURE BAC AT TIME OF DRIVING



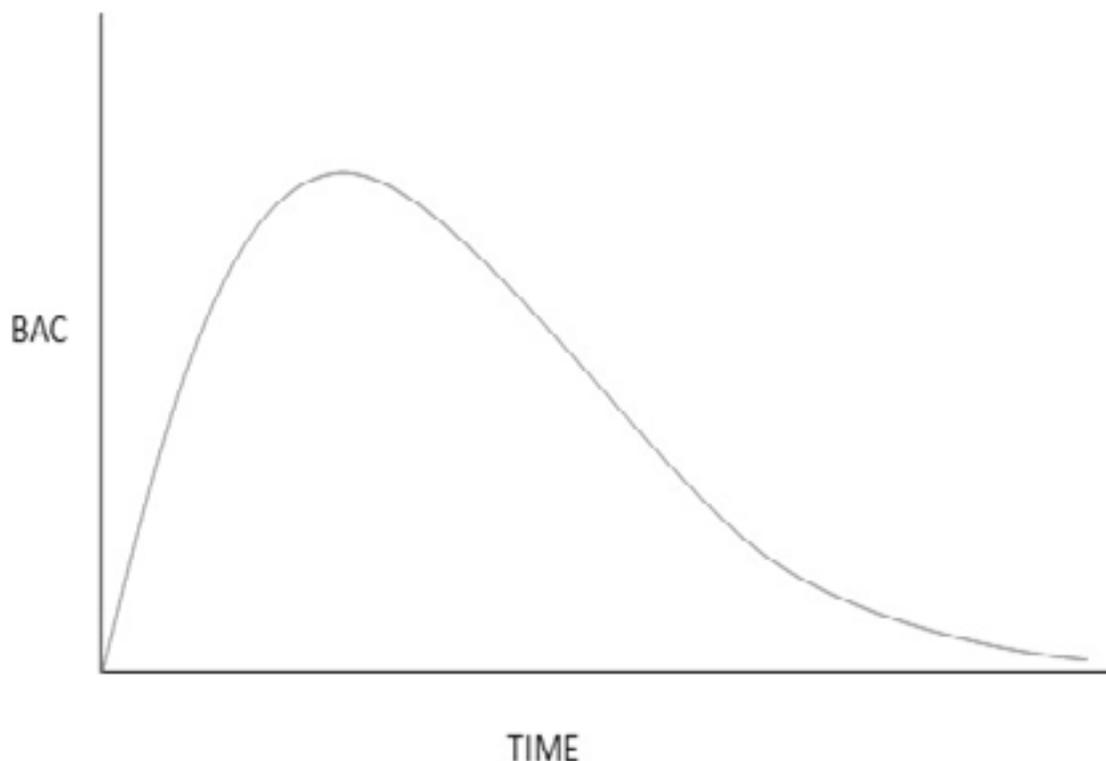
RISING ALCOHOL DEFENSE

DUI laws prohibit *driving* with a blood alcohol concentration (BAC) of .08 % or more. Typically, a breath or blood test is administered 20 or 30 minutes or more after driving. Breath and blood testing devices are not time machines. They do not accurately measure your BAC at the time of driving because your BAC is constantly changing depending on your rate of alcohol absorption and elimination.

In the right case, it is possible to show that the driver was under the legal limit while driving, even though the test results were .08 or higher. This is known as the rising alcohol defense.

ALCOHOL METABOLISM

After drinking alcohol, your BAC gradually rises as the alcohol is absorbed into your blood stream. Eventually, your BAC reaches a peak and begins to fall as the alcohol is metabolized and leaves your system. Below is a diagram of the alcohol curve illustrating this phenomenon.



If your BAC was rising when you were arrested, your test results will be higher than your BAC was when you were driving.

How long it takes for someone to reach peak absorption at the top of the alcohol curve depends on many factors including the person's weight and body composition; gender; quantity, time, and type of food eaten; type or proof of alcohol consumed; rate of drinking; and medications and drugs taken. Since it can take up to several hours for alcohol to be fully absorbed into the blood stream, an individual's BAC may continue to rise for a while after he or she is stopped and arrested. The closer in time the person finished drinking before the breath or blood test, the more likely he or she will be in the absorptive or rising state.

THE RIGHT CASE

As a general rule, the rising alcohol defense is most effective when your BAC is not much over the legal limit, you were arrested very soon after you finished drinking, and you performed well on any field sobriety tests.

THE RETROGRADE EXTRAPOLATION FORMULA

Scientists have developed a formula for calculating a person's BAC at an earlier time from the person's later test results. This process is called retrograde extrapolation. The formula uses the amount of alcohol consumed, the time when it was consumed, the blood alcohol concentration from your breath or blood test, and the time when the test was administered. Therefore, whether the rising alcohol defense is appropriate for your case, your DUI attorney will need to know what time you started to drink and when you stopped; how much you had to drink; what time you began to drive and when you stopped; and what time you provided a sample for testing.

XII. NO ONE SAW YOU DRIVE



In some jurisdictions, you can be convicted of DUI if you were in “physical control” of the vehicle. This usually means that you were in the driver’s seat with the keys in the ignition or nearby. But other jurisdictions require the prosecutor to prove you were driving.

Some DUI cases are won because the prosecutor has no proof that the defendant was driving. For example, the officer arrives at the scene of a single vehicle accident without ever observing the defendant driving. The defendant may be asleep in the car, unconscious, or outside the vehicle wandering around. The officer and the prosecutor may reach the conclusion that the defendant was driving, but that conclusion may be legally insufficient to support a conviction.

I hope this information has been helpful. If I can provide legal assistance, please contact me at: