

Defending An Under-21 DUI Breath Test Case

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Why Would You Try An Under-21 Breath Test Case?

- A continuance until after the client turns 21 years of age is not a possibility.
- You are in a reasonable court.
- Pleading isn't an option.

Challenge for the Prosecution Early On

- Will the prosecution ever produce evidence that the Intoxilyzer 5000 in this case was tested for accuracy below .08?
- Has any Intoxilyzer 5000 been verified for accuracy below .08 in this state?

The Best Defense Is a Good Offense

- Use some of the customary issues about the unreliability of the Intoxilyzer, but make your theme focused:
- They cannot show accuracy below .08.

Jury Selection

- Sighting in the Rifle = Accuracy at 25 yards, doesn't tell me anything about accuracy at 100 yards.
- Look for jurors that work “quality-control” types of occupations.
- Children and, particularly, that have been charged with MIP.
- Prepare your client's appearance.

Use the Opening Statement to Layout Your Challenge



Cross-Examination of the Breath Test Operator and the State's Expert

- Primacy
- Recency

Establish Your Theme Early

Establish Your Theme Often



PRIMACY and RECENCY

Primacy

- Strong but Non-Confrontational
- Go for the Kill!
- Some type of Shock Value
- (Let them know things are about to be more worth listening to)

Recency

- The last thing jurors hear
- Timing of particular questions for impact

Fundamental Chapters

- Move away from the ordinary, generalized attack upon the breath test.



Breath Testing Chapter: Sample Pages

- Radio Frequency Interference (RFI)
- Blood v. Breath Test
- Conversion Ratio
- Diagnostics Mean Nothing

Radio Frequency Interference

- How do you communicate with your dispatcher
- About how big is this county
- Your radio is powerful enough to transmit a signal across that many miles
- There is a big tower at the police station that picks up your radio frequency
- Where were you (or the arresting officer) standing when the test was

Radio Frequency Interference

- Where was your radio
- Were there other officers with radios at the precinct
- Were other officers patrolling the county when this test was given
- At that time of night, there is pretty much constant radio communication
- What is RFI
- When something interferes, it means something has gone wrong?

Blood v. Breath

- You have a choice to request blood or breath
- Tell the jury what “BAC” stands for
- You have chosen a blood test in other cases
- But in this case you chose breath
- Tell the jury which is the most accurate
- Blood is considered the Gold Standard

Blood v. Breath

- Worked wrecks
- Assisted in taking the injured to the hospital
- Where does the hospital keep its Intoxilyzer
- Doctors need accuracy
- Life or Death decision

Conversion Ratio

- Breath testing requires a conversion to a reading as if it were a blood test
- Blood/Breath comparison is 1:1L/1:210L
- So when we hear about a breath test result it has been converted into what it would be if it were a blood test
- The sample chamber in the Intoxilyzer 5000 is only about 80 cubic centimeters

Conversion Ratio

- And the government captures that amount of breath, shines a light through the sample chamber and whatever light doesn't make it to the other end of that 80 cc chamber gives the machine a reading
- And then the machine does some internal math and converts that to 210 Liters of Breath
- Do you know how much 210 liters of breath is
- Its the about the same as a 55 gallon drum
- Its about the same as 105 Two liter bottles of Coke

Diagnostics mean nothing

- Don't know what is checked by diagnostics of intoxilyzer
- Don't know if every component is tested
- Don't test accuracy of intoxilyzer prior to test
- Don't run an interferent through the intox during diagnostics
- Don't know all of parts of intox
- Don't know what happens to intox if RFI plug is unplugged during diagnostics

Try Your Case:

You don't have to always
play by their rules.

Fundamental Chapters in the Under-21 Case

- Assumptions
- Where is the calibration check that shows the machine my client was tested on is accurate below .08?
- Internal components

Assumptions

- We don't want you to guess about anything.
- Agree that you should not guess about anything in a case.
- You rely on facts that you observe.
- Rely on facts that you collect.
- You don't make assumptions in the field.

Verification of Accuracy Below .08

- Bring in the test slips that show that the breath test machine in this case is accurate below .08?
- Because it is verified for accuracy at .08, it is accurate below .08.
- Assume it is accurate below .08.



Know Your Audience

...And our audience is always the jury.



Closing

- Presumption/Assumption: What presumption does the Judge instruct the jury to make?
- Presume/Assume the accuracy of the Intoxilyzer below .08?

Closing

- Analogize the lack of verification of accuracy of the Intox below .08 to things that are important to you will not trust to assumptions.

Closing

- Go back to jury selection.
- Quality control.



Closing



Closing



- Would you put her at risk based on an assumption?