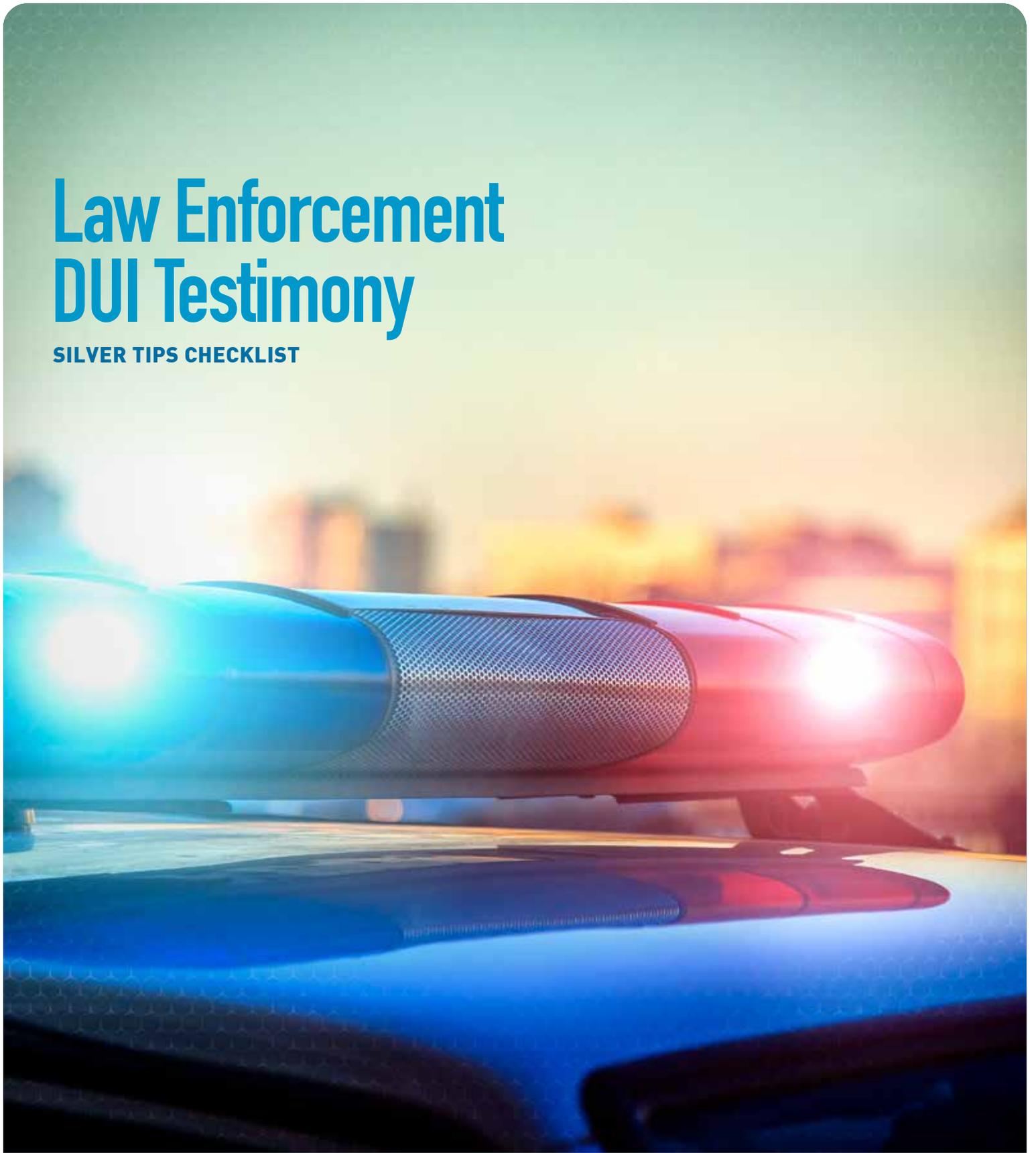


Law Enforcement DUI Testimony

SILVER TIPS CHECKLIST



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Maintain a Log of Stops and Arrests

Maintain a DUI Enforcement log for all suspected impaired driving stops. If you have not already prepared one, START TODAY! A form can be found in your [National Highway Traffic Safety Administration SFST Manual](#). Document your Wet and Green Lab experience as a student and/or instructor. Record every suspected DUI stop even if an arrest is not made. This information will allow you to give a specific number when asked by the prosecutor, *“What is the number of suspects you have arrested for impaired driving versus the total*

number you have stopped?” It will amount to your own validation study if you record the results of the Standard Field Sobriety Tests (SFSTs), any Blood Alcohol Concentration (BAC) obtained and any drugs that are suspected, discovered in a blood test or found in possession of the suspect. This is important in establishing your credibility and fairness. Be prepared to testify concerning the log. It will be a great resource!

DUI Investigations Behind the B Pillar Post

When safety and opportunity permit, the law enforcement officer should take every opportunity to question the suspect at the window of the vehicle while that suspect’s cooperation level is relatively high. To be most effective, the investigation should take place in a very friendly, non-threatening manner. Questioning should take place in a conversational context with open-ended questions. For example: *“Where were you drinking...? I know that place. Who was tending bar?”* Thereby allowing the suspect to correct you and provide the name of the actual bartender. Another example: *“You have a shoulder problem huh? What medication do you take for that?”*

This allows the suspect to fill in the blanks and tell the truth about what did or did not create any impairment that is present.

The areas of questioning should include:

- Do you know why I stopped you?
- Don’t be alarmed... (this helps to place the suspect at ease) I just want to make sure you don’t have any health issues that you need assistance with or are keeping you from safely driving tonight.
- Was there a reason for... (whatever driving behavior you observed)?
- Where are you coming from?
- Where are you going?
- Ask details about the size and type of drinks consumed to allow the suspect to provide information about what and how much they had to drink.
- Who were you with while you were there?
- Anything to eat? What? Where? When? What else?
- Occupation? Physical requirements of that occupation? What?
- Any injuries, illnesses, or medical conditions? This can be introduced in a conversational tone: *“How are you feeling? I just need to make sure you don’t have any physical injuries or ailments that would prevent you from safely driving.”*
- Are you being treated by any doctor for these conditions?
- Name of Doctor?
- Have you been prescribed any treatment? (Physical Therapy for example)
- Are you taking any medications for that problem?

- How many times a day?
- Let the suspect provide the drug information.
- Did you take any today? Indicate you just want to make sure the pain does not prevent them from driving or safely controlling the vehicle.
- When and how much?
- Ask to see the pill bottle?
- How are you feeling right now?
- How much have you had to drink tonight” (Better asked pointedly near the end of the conversation if not answered in the conversation.)
- What? (beer, wine, mixed drinks, etc.)
- What kind? (light, high gravity etc.)
- How big?
- How many? (Asked again for consistency and to draw out details).
- What else?
- What else...until s/he says no more.
- Where did you drink?
- Where else?
- How did you pay for it?
 - Looking for credit card receipts
 - Looking for bar receipts
- Once you are finished with the conversation you can close with, *“On a scale of 0 to 10 with 10 being very impaired and 0 being totally sober, where would you say you are right now?”*

Feel free to brainstorm and add to this list as you see fit. Change the order of the questions to make it work for you. Make it routine and you will be surprised at the information you will discover. Remember, you are searching for the truth. It is a conversation NOT an interrogation. Until you find probable cause this driver may be innocent of impaired driving. But even when you make a positive probable cause (PC) determination, the friendly, conversational tone should continue as long as officer safety allows.

Search

Under **Arizona vs. Gant**, it is likely a thorough search of the suspect's vehicle can only take place if you have probable cause that fruits or instrumentality of a crime are present, or the Fourth Amendment exceptions of consent or plain view exist. The pre-arrest conversation described above may lead to the required probable cause. Some of the useful and likely fruits and instrumentalities of the crime can be:

- Bar receipts indicating the number and types of beverages consumed.
- Credit card receipts showing establishments frequented and the amount of money spent. These also help establish a timeline.

- Cannabis and other drug paraphernalia;
- Open alcohol containers;
- Vomit;
- Pills and pill bottles; and,
- Prescription pads.

Remember, when drug-impaired driving is suspected, a Drug Recognition Expert (DRE), if available should be called to evaluate the driver AFTER you have completed your investigation.

Also, remember drug-impaired driving cases may lead to major drug investigations.

Trial Tips

Qualifying Law Enforcement Witnesses

All witnesses should be properly questioned at the start of their direct examination to establish credibility and expertise. Most of us are familiar with this relative to expert witnesses but it is especially true with arresting officers since they are the key witness in the impaired driving trial. Providing the jury with information relative to training and experience makes the arresting officer an expert in the eyes of the jury. Not all prosecutors will take the time to adequately qualify an officer. If this is the case, the law enforcement witness can take action to ensure adequate qualification. This is done by handing a copy of their resume or curriculum vitae (CV) to the prosecutor who will be trying the case while saying,

“Here is a copy of my resume.

I am prepared to testify to everything listed there to introduce me, to build my credibility and to personalize to the jury. I'm happy to go over that with you now if you would like.”

Resume/Curriculum Vitae

Witness qualification should include professional and non-professional background, occupations, hobbies, and volunteer work including military service, rank, ALL training not just impaired driving related training, and experience as well as education. This non-professional background personalizes the witness making them more likeable and therefore more credible. This is especially true relative to law enforcement witnesses where the jurors should see the individual behind the badge. To facilitate their proper qualification, officers should prepare a document called a *Curriculum Vitae (CV)* or *Resume*.

This document should include all of the items listed above and any other information that can be used by the prosecutor to introduce the officer to the jury including but not limited to:

Wet and Green lab participation, experience as an instructor, course descriptions, all in-service trainings and topics, time on the force, and duties. For DREs, include DRE pre-school, DRE school, evaluations in the presence of instructors, the knowledge exam, performing lifesaving/rule outs and their purpose, and all of their DRE training and experience before and since.

This document should be updated as new training is received and promotions are obtained. Consider this as part of your experience and qualifications for your search warrant affidavit.

Law enforcement should be encouraged to administer SFSTS in the standard format following the exact instructions of the [NHTSA SFST Manual](#).

This eliminates harmful defense cross-examination and ensures the successful prosecution of impaired drivers.

Officers should be encouraged to refer to their SFST manuals at least once a month to review the proper SFST procedures. This should also be done prior to going to court to testify. When possible, law enforcement should review the manual and read portions out loud. This will aid in retention and should definitely be done before trial to prepare for your testimony. Included in this preparation should be a review and reading of the police report to ensure retention and accuracy in testimony and in the recitation of technical terms.

NOTE

Jurisdictions should consider conducting [NHTSA SFST Refresher Manual](#) training. This could be done in conjunction with officer's recertification on breath alcohol testing instruments.

Remember: Even when administered in the wrong order the evaluation of the subject can still be valid.

Using Looping Questions and Answers When Establishing Reasonable Suspicion and/or Probable Cause

If the direct examination rushes through critical portions of the factual presentation, the jury may be under the impression the impaired driving incident only took a few seconds and as a result was not dangerous or the defendant was not impaired. To avoid this, prepare for direct with your trial prosecutor. Suggest repetition and looping questions which allow the jury to better remember and be able to envision what actually happened. This is particularly important regarding the arresting officer, their observations of driving and the evidence of impairment as well as the observations of the DRE during each stage of the evaluation. Listen carefully to all questions. Answer only the question, then stop and wait for the next question.

For example:

Q: What first drew your attention to the defendant's white Ford Mustang?

A: I saw it cross the centerline with its driver side tires.

Q: When you saw it cross the centerline with its driver side tires were you able to tell how far across the centerline those tires were?

A: Yes.

Q: How far across the centerline were the driver's side tires?

A: Approximately one foot.

Q: Were you able to tell how far the defendant's Mustang travelled with the tires over the centerline approximately one foot?

A: Yes.

Q: How far did the defendant's Mustang travel with the tires over the centerline approximately one foot?

A: Approximately two tenths of a mile.

This can be done before the dash cam video is shown if one exists. This allows the jury to see the picture in their mind's eye in a way that will be powerful and permanent.

Important Topics of DRE Testimony

Be prepared to lay an adequate foundation for DRE testimony beginning with officer qualifications and following with:

- Explanation of the drug matrix –
 - o why seven drug categories,
 - o how the matrix is used,
 - o the origin of the standards,
 - o provide an example of differing drug categories,
 - o explain how not all signs and symptoms are required to find impairment of a particular drug category,
 - o initial observations of the defendant,
 - o conversation with the arresting officer,
 - o medical rule out,
 - o explain the DRE is not only trying to determine if impairment is present, but is interested in the safety of the defendant.

Follow this again with lifesaving events initiated by the DRE on drug-impaired subjects. Accuracy rate (someone is going to ask the question, so you may as well introduce it in direct examination). Be prepared to explain on direct examination why the DRE's observations differ from the arresting officer. It is a common defense tactic to talk about the missing signs or symptoms as if the DRE is unable to offer an opinion. Be prepared to address this in direct examination. It is not uncommon. Do not forget the effect of homeostasis, which is one of the reasons for the discrepancy in the time between the arrest and the DRE's evaluation as well as polydrug use.

Remember to use the DRE to strengthen other parts of the case such as the stop and roadside SFSTs.

Do not forget to use visual aids when appropriate. When the DRE teaches them something it builds his/her credibility. Have the DRE demonstrate the use of a pupilometer and how blood pressure is taken. Prepare a chart listing the signs of impairment observed by the DRE, arresting officer and other witnesses and relate that to the findings. Use any videotape of SFSTs at roadside or during the DRE evaluation. Eye signs are some of the best evidence of impairment. Show the jury videos of the defendant's eye signs from a video eye sign recorder. Eyelid tremors, lack of convergence, and rebound dilation are dynamic visuals for the jury to see. Prepare a chart with the one step protocol and a chart with the seven drug categories.

The Relevance Reveal

The jury knows less about this case than anyone else in the courtroom. Therefore, the evidence should be presented via direct examination without presuming they understand the relevance of technical aspects of the case. This includes among other things SFSTs, ARIDE or the DRE evaluation. The prosecution is responsible for revealing that relevance. Without this “reveal” the defense is free to use the common defense tactic claiming that the SFSTs are just irrelevant. The defense will try to discredit the SFSTs and the jury’s perception. The prosecution must show the jury why they should care about the SFSTs. To do this, evidence must be presented from the arresting officer that explains that SFSTs are divided attention, psychophysical tasks and what those terms mean. The officer must then explain why the defendant driver’s performance on those divided attention, psychophysical tasks are important to him/her. The response of course is because driving is a divided attention, psychophysical task. When asked to explain, the officer details all of the tasks involved in driving that fit that definition. The prosecutor may want to write those tasks on a flip chart or on a presentation slide as the officer testifies (but not before). The officer concludes by stating something like, *“All of these driving tasks are divided attention psychophysical tasks as are the Field Sobriety Tests, I administered to the defendant.”* It will be at that moment that the jury understands their relevance and the ability of the defense to persuade the jury is lessened. In addition, the officer may be prepared to discuss the visual difficulties experienced by a driver with lack of convergence, dilated pupils during sunlight, constricted pupils in the dark and the effect of altered perception of time with certain Romberg test results.

Booking Photos

Arresting officers should provide the prosecutor with copies of booking photos and photos taken in the field when they depict the physical condition and appearance of the impaired defendant. Also consider a photocopy of the driver’s license or ID card to avoid identification hearings.

Be safe out there!

Author

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Derived from the DUI/DUID Silver Bullet Presentations

Summary Conclusion of Officer’s Direct Testimony

When ending the direct examination, the officer should be prepared to summarize the evidence supporting the charges filed. This takes some review and practice. For example:

Q: Did you form an opinion of whether the defendant could safely drive?

A: Yes.

Q: What is that opinion?

A: Based upon the defendant crossing the centerline with his driver side tires by over one foot twice and crossing the fog-line with his passenger side tires by approximately one foot once. Based upon the defendant’s taking nearly 20 seconds to respond to my blue lights and siren. Based upon the odor of intoxicants and marijuana coming from the defendant. Based upon his fumbling with his driver’s license when I asked him for it, his bloodshot, watery eyes, his slurred speech, his stumbling when he got out of his car, the...it was and is my opinion that he was under the influence of alcohol and THC, was impaired and could not safely drive.

No further questions. This allows the jury to hear a powerful summation from the officer leading them to conclude that the defendant was guilty of DUI.

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- ✓ Conclude with “All of these driving tasks are divided attention psychophysical tasks as are the Field Sobriety Tests, I administered to the defendant.”
 - ✓ Discuss the visual difficulties experienced by a driver with lack of convergence and dilated pupils
 - ✓ Discuss the effect of altered perception of time with certain Romberg test results.

Provide Booking Photos and Photocopy of the Driver's License or ID

Arresting officers should provide the prosecutor with copies of booking photos and photos taken in the field when they depict the physical condition and appearance of the impaired defendant.

Summary Conclusion of Officer's Direct Testimony

WHY Summarize the evidence to support the charges filed. This allows the jury to hear a powerful summation from the officer

- ✓ Be prepared to state your opinions on whether or not the defendant could drive safely.
- ✓ Back up your opinion by summarizing all of the evidence piece by piece.

QUESTIONS

Q: Did you form an opinion of whether the defendant could safely drive?

A: Yes

Q: What is that opinion?

Be safe out there!

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Derived from the DUI/DUID Silver Bullet Presentations

Law Enforcement DUI Testimony

SILVER TIPS CHECKLIST



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Print doubled sided.
Fold vertically then in half again.

Maintain a log of DUI stops and arrests for courtroom testimony

1

WHY It establishes your credibility and fairness

- ✓ Maintain a DUI Enforcement log for all suspected impaired driving stops.
- ✓ Use a simple form like the [NHTSA SFST Manual](#). Update it regularly.
- ✓ Include Wet and Green Lab trainings as a student and instructor.
- ✓ Record all DUI stops even if an arrest is not made to accurately recall prosecutor questions such as, **“What is the number of suspects you have arrested for impaired driving versus the total number you have stopped?”**
- ✓ Record Standard Field Sobriety Tests (SFST) results, PBT or roadside oral fluid test results, any BACs obtained, and any drugs suspected, discovered in a blood test, or found in possession of the suspect.

Engage in thorough but non-threatening conversations in your initial approach

WHY A friendly conversation promotes safety and can improve your investigation and the interaction

- ✓ When safety and opportunity permit question the suspect at the window of the vehicle.
- ✓ Be respectful and present in a friendly, non-threatening manner.
- ✓ Use a conversational context and tone.
- ✓ Use open-ended questions allowing the suspect to fill-in the blanks, and inform you of reasons for the driving behavior you witnessed.
- ✓ Add to this list of questions or change the order of the questions, and make it part of your routine.

REMEMBER

If you find probable cause to investigate further, the friendly, conversational tone should continue if officer safety allows.

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- ✓ Describe accuracy rate of the DRE evaluation.
- ✓ Ensure DRE testimony strengthens other parts of the case, such as the stop and roadside SFSTs.
- ✓ Explain why the DRE’s observations differ from the arresting officer.
- ✓ Explain missing signs or symptoms, including polydrug use and homeostasis, one reason for discrepancy in the time between the arrest and the DRE’s evaluation.
- ✓ Demonstrate the use of a pupilometer and how blood pressure is taken, heart rate and temperature.
- ✓ Use visual aids.
 - Chart listing the signs of impairment observed by the DRE, arresting officer, and witnesses.
 - Video of SFSTs at roadside or during the DRE evaluation.
 - Videos of defendant’s eye signs (Eyelid tremors, lack of convergence, and rebound dilation).
 - Chart with the 1-step protocol and a chart with the 7- drug categories.
 - Provide prosecutor with copies of booking photos and photos taken in the field depicting the physical condition and appearance of the impaired defendant.

The Relevance Reveal-Present evidence via direct examination to explain relevance of technical DUI case aspects.

WHY Most jurors will not understand the relevance unless it is clearly explained.

- ✓ Explain relevance of ARIDE and/or the DRE Evaluation.
- ✓ Prosecutor must make evidence relevant to case for jurors.
- ✓ Arresting officer should explain the terms in SFSTs (divided attention, psychophysical tasks).
- ✓ Explain why the defendant driver’s performance on those tasks is important and how they work together.
- ✓ Prosecutor should present tasks on a presentation slide as the officer testifies (but not before).

Use Looping Questions and Answers When Establishing Reasonable Suspicion and/or Probable Cause

5

WHY To allow the jury to better remember and understand your observations of driving and evidence of impairment and DRE observations.

- ✓ Prepare for direct examination with your trial prosecutor ahead of time.
- ✓ Suggest repetition and looping questions. Listen carefully to all questions.
- ✓ Answer only the question posed, then stop and wait for the next question.
- ✓ Answer questions while dash or body cam video (if available) is shown.

Lay the foundation for DRE testimony

WHY A majority of jurors do not know what a DRE is and the expertise they possess

- ✓ Begin with DRE officer qualifications.
- ✓ Explain the drug matrix –
 - why seven drug categories;
 - how the matrix is used;
 - the origin of the standards;
 - provide an example of differing drug categories;
 - explain that not all signs and symptoms are required to find impairment of a particular drug category;
 - initial observations of the defendant;
 - conversation with the arresting officer; and,
 - medical rule out.

Sample questions:

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- Do you know why I stopped you?
- Don't be alarmed...(this is added to place the suspect at ease) *I just want to make sure you don't have any health issues that you need assistance with or that are keeping you from safely driving tonight.*
- Do you have any injuries, illnesses, or medical conditions?
- Are you being treated by any doctor for these conditions? (Name of Doctor)
- Are you taking any medications for that problem?
- How many times a day? Did you take any today? When and how much?
- Was there a reason for... [whatever driving behavior you observed]?
- Where are you coming from?
- Have you been drinking alcohol?
- What size of drink? What type? How many?
- Who were you with while you were there?
- Did you have anything to eat? What? Where? When?
- What is your occupation? Physical requirements of that occupation?
- Are you being treated by any doctor for physically limiting conditions? (Name of Doctor)
- Are you taking any medications for that problem?
- How many times a day?
- "How much have you had to drink tonight?" What? (beer, whiskey, mixed drinks, etc.)
- What kind? (light, high gravity, etc.)
- How many? What else?
- On a scale of 0 to 10 with 0 being very impaired—0 being totally sober, where would you say you are right now?"

The Search Process

3

Look for instrumentalities of the crime

WHY Under [Arizona vs. Gant](#), a thorough search of the suspect's vehicle can only take place if probable cause has been established or Fourth Amendment exceptions of consent or plain view exist. The pre-arrest conversation described above may lead to the required probable cause.

Examples of instrumentalities of the crime:

- Bar receipts indicating the number and types of beverages consumed
- Credit card receipts indicating purchases made and establishing a timeline
- Open alcohol containers
- Cannabis and other drug paraphernalia
- Pills, pill bottles
- Prescription pads

EXPERT ADVICE

If drug-impaired driving is suspected, a DRE should be called in to evaluate the driver AFTER you have completed your investigation. Some cases may lead to larger drug investigations.

DUI Trial Tips—A Piece of Cake

4

Qualify Law Enforcement Witnesses

WHY Prosecutors who provide the jury with officer training and experience will demonstrate the arresting officer's expertise enhancing credibility.

- ✓ Properly question law enforcement witnesses at the start of their direct examination
- ✓ As a prosecutor, make time to adequately qualify an officer
- ✓ As a law enforcement witness, ensure adequate qualification by sharing your resume

Resumes should include:

- ✓ Professional and non-professional background, occupations, hobbies, and volunteer work.
- ✓ Military service and rank.
- ✓ All law enforcement training, experience, and education such as: Wet/green lab participation, instructor experience, course descriptions, all in-service trainings and topics, time on the force and duties
- ✓ DREs should include DRE pre-school, DRE school, evaluations in the presence of instructors, the knowledge exam, performing lifesaving/rule outs, their purpose, and all of their DRE training and experience before and since

Administer SFSTs In the Standard Format Following the Exact Instructions of the [NHTSA SFST Manual](#).

WHY This increases the likelihood of a successful prosecution for impaired driving cases.

- ✓ Refer to your SFST manual at least once a month to review the proper SFST procedures.

NOTE

Jurisdictions should consider conducting [NHTSA SFST Refresher Manual](#) training. This could be done in conjunction with breath alcohol testing recertification training