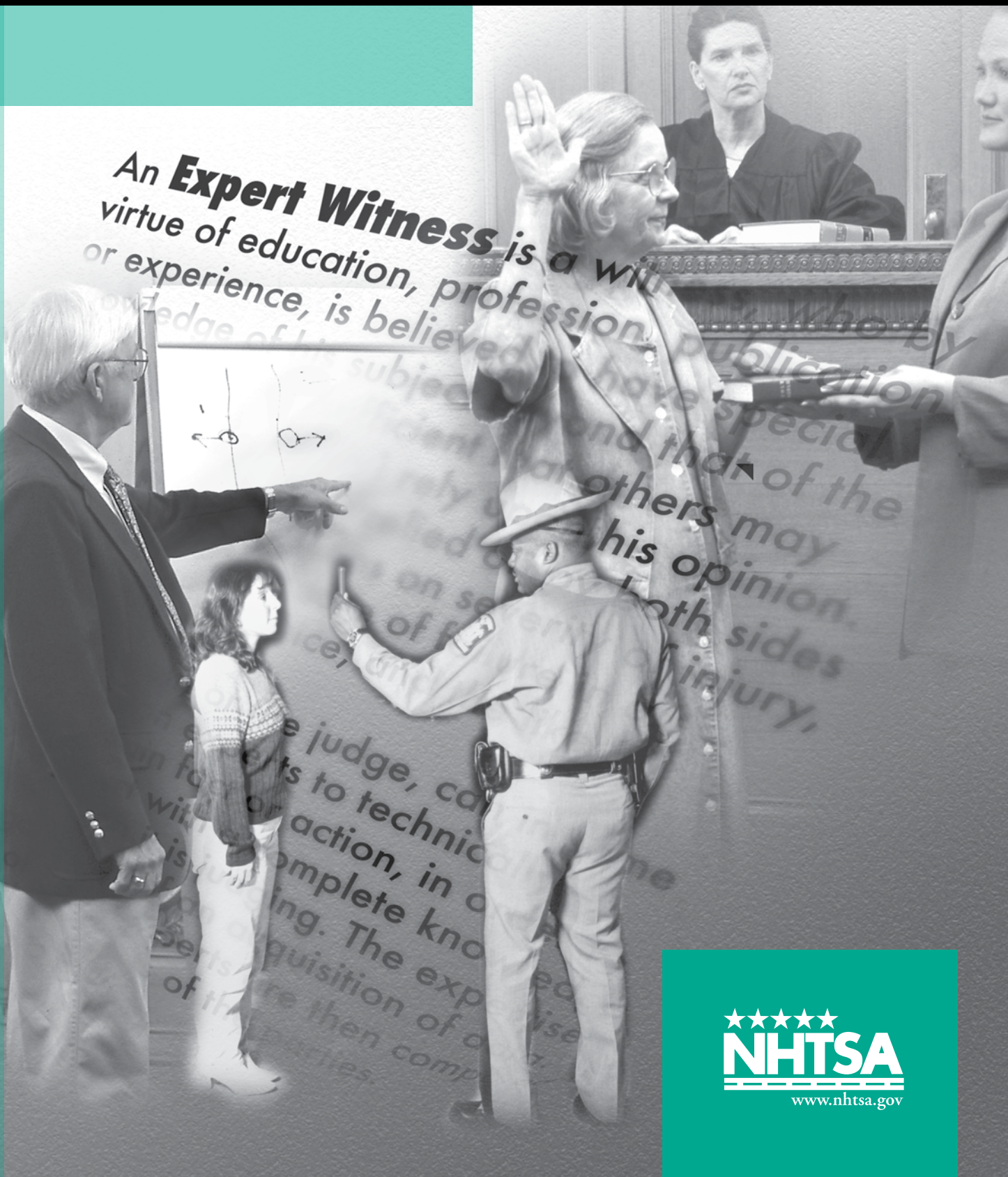
The Criminal Justice System: A Guide for Law Enforcement Officers and Expert Witnesses in Impaired Driving Cases



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The National Traffic Law Center is a program of the National District Attorneys Association. This document was prepared under Cooperative Agreement Number DTNH22-98-H-05881 from the U.S. Department of Transportation National Highway Traffic Safety Administration. Points of view or opinions in this document are those of the authors and do not necessarily represent the official position or policies of the Department of Transportation or the National District Attorneys Association.

Acknowledgments

While common in occurrence, the evidence needed to prove guilt in impaired-driving cases is complex, often requiring expert testimony to assist the trier-of-fact in determining what happened. As in any profession, those who work in it sometimes take for granted the complex nature of our legal system and presume others understand it as we do, which oftentimes is not the case. To fill that void, this publication provides an overview of the criminal justice system for people who will likely encounter it through their roles as expert witnesses.

This guide is the result of a collaborative effort on the part of the following: Debra Whitcomb, Director of Grant Programs and Development, National District Attorneys Association; Marcia Cunningham, Director, National District Attorneys Association's National Traffic Law Center; Joanne Michaels, Senior Attorney, National District Attorneys Association's National Traffic Law Center; L. R. "Bob" Jacob, of the Institute of Police Technology and Management (IPTM), Jacksonville, Florida; and George Dentes, former four-term District Attorney for Tompkins County, New York (1989-2005). Sadly, Mr. Dentes died unexpectedly on October 31, 2006, just steps away from his office at the New York Prosecutors Training Institute.

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Introduction

The criminal justice system is far more complex than most people understand—it entails more than a crime, an arrest, a trial, and either a conviction or an acquittal. You, the law enforcement officer or expert witness, through your profession, have been invited by a subpoena to testify. What does it all mean? How much time is it going to take? What will you be asked? Why do you have to be involved?

This publication will provide you some guidance as to what it means to be a witness, what you can likely expect, and the importance of your role. It also provides an overview of the complexities of the criminal justice system to help explain why you may be called to testify more than once, and asked the same questions on the same subject for the same case. It is intended as a guide to help answer some of your initial questions and concerns. Detailed answers may come from colleagues who have previously testified in court, as well as from the attorney who subpoenaed you to testify.

The Role of Law Enforcement Officers and Expert Witnesses in Impaired-Driving Cases

Prosecutors handling impaired-driving cases may decide to use one or more witnesses to prove their case. Each witness's testimony serves to prove some fact or element of the case against the defendant. Witnesses may include **Standardized Field Sobriety Test officers, drug recognition evaluators/experts, toxicologists, crash reconstructionists**, **optometrists,** and other **medical personnel.**

Never underestimate the value of your role in establishing a defendant's guilt based upon the totality of the evidence. Just as a puzzle with many pieces missing is difficult or impossible to put together, a jury (or judge) must find a defendant "not guilty" if important pieces of evidence are absent.

Generally speaking, only witnesses who have firsthand knowledge of the facts of a case are permitted to testify at trial. Their testimony is limited to their personal knowledge—what they heard or saw or personally know about the defendant or victim. Thus, the citizen who witnesses a crash and the first law enforcement officers on the scene have personal knowledge of the events leading to the criminal case and will likely be called to testify about what they saw and heard. Other law enforcement officers may have additional contact with the defendant during or after his arrest. Each of these witnesses has direct knowledge of some fact important to the criminal case.

The **expert witness**, on the other hand, is not required to have firsthand knowledge of the facts of the particular case, and in fact, often does not. Rather, the expert witness testifies to the *meaning* of the facts (gives an opinion). For example, assume there is a fire that destroys a house. The prosecution is arguing that the fire was deliberately set and was not the result of an accident. Burn patterns resulting from arson typically vary from those caused by an accident. Laboratory testing of evidence gathered at the scene may reveal that an accelerant was used to help start and spread the fire. The average person would not have the experience, training, or knowledge to understand the significance of burn patterns or the meaning of laboratory results. An arson expert would testify about these facts, and then state his or her opinion that the cause of the fire was "deliberate" and not accidental. The expert was not present when the fire started, yet his specialized training allows him to testify about the cause.

Who is an expert?

Federal Rule of Evidence (FRE) 702 states: "If scientific, technical, or other specialized knowledge will assist the trier-of-fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise."

Even States that have not adopted the FRE have usually adopted, either by statute or case law, rules similar to the FRE governing the qualification of expert witnesses.

Before qualifying any witness as an expert, the proponent must establish that the *evidence is beyond the knowledge of the average juror (or judge) and that expert testimony will assist the trier-of-fact in determining a fact at issue*.

Then, if the court agrees with the test as stated above, the proponent must establish that *this* witness has the requisite knowledge, skill, experience, training or education to offer an opinion on a fact of importance in this case.

It is possible for the court to agree that expert witness testimony would be helpful and therefore admissible, but then decide that the particular person a prosecutor or defense attorney has called as an expert witness is not, in fact, qualified as an expert. Perhaps the expert's credentials were exaggerated (the masters degree and doctorate on his curriculum vitae were from a diploma mill and not an accredited university) or the expert claims such a broad range of quasi-expertise that he is in fact a "jack of all trades and master of none."

Constitutional Principles

It is critically important to understand that in our criminal justice system, unlike many others around the world, the defendant is innocent until proven guilty. This foundational assumption is a core principle established by the United States Constitution. It underscores every aspect of a criminal case. A brief review of constitutional principles may be helpful in understanding how the protection of the rights of the accused sometimes places a burden on others. The intent of this review is to help you understand why you may be called to testify more than once on the same case.

United States Constitution—Bill of Rights

Fourth Amendment

> *The right of the people to be secure in their persons, houses, papers, and effects, against* ***unreasonable searches and seizures****, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.*

Fifth Amendment:

> *No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in*

> *jeopardy of life or limb;* ***nor shall be compelled in any criminal case to be a witness against himself****, nor be* ***deprived of life, liberty, or property, without due process of law****; nor shall private property be taken for public use, without just compensation.*

Sixth Amendment:

> *In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and* ***to have the assistance of counsel for his defense****.*

State Law / Preemption The United States Constitution is the supreme law of the land, and preempts (overrides or "erases") any inconsistent State or local law. So, no State or local government can ***diminish*** the rights guaranteed by the United States Constitution. On the other hand, every State is free to adopt laws that ***expand*** the rights of individuals (suspects/defendants) beyond those guaranteed by the United States Constitution. This is true for all 50 States.

We sometimes hear news reports of decisions of the United States Supreme Court stating that certain police actions have been upheld as constitutional. However, law enforcement and prosecutors, indeed the citizenry of each State, must realize that ***even though the police actions passed muster under the United States Constitution, they may still run afoul of a State law as interpreted by that State's courts*** and thus not be allowed by that State. On the other hand, ***if the United States Supreme Court issues a decision stating that a particular police action is unconstitutional under the United States Constitution, the decision is automatically binding on police everywhere***, even if some State court decision or statute purports to allow the police action.

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In light of the constitutional principles discussed above, it may be necessary for a witness to testify more than once in the same case. The following chart details the chronology of a criminal case and is provided to assist you in understanding why this may be necessary:

Stages of a Criminal Case

Chronology	Felony	Misdemeanor
Stop -Temporary detention of an individual for investigation. To be legal, a stop must be based on reasonable suspicion to believe the individual has committed, or is about to commit, some violation of the law. If the stop yields information to confirm the suspicion, the stop may escalate into an arrest.	X	X
Arrest - Taking a suspect into custody for the purpose of prosecution on a criminal charge. To be legal, an arrest must be based on *probable cause*—a belief that it is more likely than not that the suspect has committed an offense.	X	X
Booking -The process of officially recording an arrest. It typically includes (1) photographing the defendant (i.e., taking a "mug shot"), (2) fingerprinting the defendant, and (3) obtaining pedigree information (name, address, date of birth, etc.) from the defendant.	X	X
Arraignment - The initial appearance of the defendant in court to answer the charges in an accusatory instrument. At the arraignment, the judge (1) provides the defendant with a copy of the accusatory instrument, (2) advises the defendant of the right to counsel and arranges for counsel to be provided without cost if the defendant is indigent, and (3) considers the matter of bail.	X	X
Preliminary Hearing (Felony Hearing) - Generally speaking, a defendant who is arrested on a felony charge and held in jail has the right to an impartial testing of the evidence within a certain, relatively short time frame after arrest. *Experts may need to testify at this stage.*	X	

Grand Jury - A jury whose job is to determine if there is adequate evidence to charge a defendant with a crime. Not all States use the grand jury system. *Experts may need to testify at this stage.*	X	
Discovery - A pre-trial stage where the parties exchange information about the evidence and arguments they will offer at trial. In many States, the burden of supplying discovery information rests almost entirely upon the prosecution. This is because the presumption of innocence and the privilege against self-incrimination generally permit a defendant to remain silent throughout the prosecution.	X	X
Pre-Trial Motions & Hearings - A motion is a request by which a party (prosecution or defense) asks a judge to issue an order. For example, in criminal cases, pre-trial motions by defendants commonly include motions for dismissal of the indictment and for suppression of evidence. *Experts may need to testify at this stage*	X	X
Trial - A trial determines the question of the defendant's guilt. The verdict of the jury is either "guilty" or "not guilty" on each charge given to the jury for determination. *Experts involved in a case will testify at this stage*	X	X
Post-Conviction and Post-Judgment Motions Post-conviction and post-judgment motions are used to attack guilty findings. As part of these motions the defendant may seek an evidentiary hearing to bring to light facts not litigated during the trial.	X	X
Sentencing - The imposition of punishment by the judge following a conviction. The range of possible sentences depends on the level of the offense committed.	X	X
Appeal - A review by a higher court of the correctness of legal proceedings in a lower court. If the conviction is overturned on appeal, the case starts all over again – and witnesses may be called to testify at a new trial as if the previous trial never occurred.	X	X

Standardized Field Sobriety Test Officers[1]

Standardized Field Sobriety Tests (SFSTs) as promulgated by the International Association of Chiefs of Police (IACP) and the National Highway Traffic Safety Administration (NHTSA) are not generally well known or understood by most jurors. They are, however, routinely used by law enforcement officers in Driving While Impaired (DWI)[2]cases, and the arresting officer must be fully prepared to testify in court. Testimonial evidence in DWI cases is usually the only way to establish the fact that the accused was in fact the driver of the vehicle involved in the incident. The officer's observations may be the only source for establishing that the accused was impaired.

Pre-trial Preparation

Preparation for testimony **begins at the time of the incident** and requires:

1. Recognizing significant evidence and documenting it in the field notes:
   - Observations of or witnesses to vehicle operation
   - Signs and symptoms of impairment
   - Statements by the defendant
2. Compiling complete and accurate notes
3. Preparing a complete and accurate report

Preparation for testimony continues prior to trial by:

1. Reviewing the case file
2. Discussing the case with other officers who witnessed the arrest or otherwise assisted in it
3. Mentally organizing the elements of the offense and the evidence that supports it
4. Mentally organizing the testimony to convey observations clearly and convincingly to the jury and judge

Once an officer receives a subpoena or other notification of a trial date, the officer should:

1. Obtain and review all records and reports
2. Revisit the scene if appropriate
3. Compare notes with assisting officers

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[1] The authors of this guide would like to thank L.R. "Bob" Jacob of the Institute of Police Technology and Management (IPTM), Jacksonville, Florida for permission to reprint this material from IPTM's "DUI Case Preparation Manual for the Florida Law Enforcement Officer," 2001 edition. Any changes, errors or omissions from the original document are the responsibility of the authors of this guide.

[2] Driving While Impaired (DWI) is the term used throughout this publication to refer to driving while under the influence of alcohol and/or drugs. This term is intended to cover Operating Under the Influence, Driving Under the Influence, Driving While Intoxicated, or whatever language is used in your jurisdiction.

4. Discuss the details of the case and testimony with the prosecutor assigned to the case
5. Make sure the prosecutor has been given copies of everything required by the law in your jurisdiction prior to trial (which may include handwritten notes, photographs, etc.)

Guidelines for Testimony – What You Say and How You Say It

During direct testimony, the officer's responsibility is to present the facts of the case. *Keep in mind—the officer saw and smelled it and the judge and jury did not. The officer must paint a mental picture for the judge and jury.* In order to do that, the officer should:

1. Testify to what he observed using language geared for the lay person – in other words, don't use jargon, acronyms, or abbreviations;
2. Never guess at an answer – it's okay to say, "I don't know" if you don't know; and
3. Provide specific descriptive details concerning exactly what the suspect did or was not able to do and explain what these actions mean.

An officer's testimony should NOT include:

1. Testimony or evidence that has been excluded;
2. Exaggerated testimony; or
3. Testimony that can appear biased for or against the defendant.

Professional conduct during a trial is very important. Jurors focus on an officer's demeanor as well as the content of the testimony. Avoid becoming agitated or taking personal issue with defense tactics – just stick to the facts. *Remember: the minute you lose your temper, you lose your audience.*

Personal appearance also matters. If you are a uniformed officer, wearing your uniform to court is usually preferable to street clothes. If in civilian clothes, wear dress pants and jacket— with tie, if male.

PRACTICE POINT
QUESTIONS TO ANSWER

Answers to questions like these can aid you in DWI detection and in your testimony at trial.

Phase One:

What is the vehicle doing?
Do I have grounds to stop the vehicle?
How does the driver respond to my signal to stop?
How does the driver handle the vehicle during the stopping sequence?

Phase Two:

When I approach the vehicle, what do I see?
When I talk with the driver, what do I hear, see, and smell?
How does the driver respond to my questions?
Should I instruct the driver to get out of the vehicle?
How does the driver get out of the vehicle?
When the driver walks toward the side of the road, what do I see?

Phase Three:

Should I administer field sobriety tests to the driver?
How does the driver perform those tests?
What exactly did the driver do wrong when performing each test? What did he do right?
Do I have probable cause to arrest for DWI?
Should I administer a preliminary breath test?
What are the results of the preliminary breath test?

Law Enforcement Officer Responsibility

In each phase of detection, you must determine whether there is sufficient evidence to establish "reasonable suspicion" necessary to proceed to the next step in the detection process. It is always your duty to carry out whatever tasks are appropriate, to make sure that all relevant evidence of DWI is brought to light.

The most successful DWI detectors are those officers who:

-know what to look and listen for;
-have the skills to ask the right kinds of questions;
-choose and use the right kinds of tests;
-fully document all verbal, visual, and sensory observations; and,
-are motivated to apply their knowledge and skill whenever they contact someone who may be under the influence.

These officers are likely to make more arrests and help secure convictions.

Note-Taking Responsibility

A basic skill needed for DWI enforcement is the ability to graphically *describe* your observations. Just as detection is the process of collecting evidence, description largely is the process of *conveying* evidence. Your challenge is to communicate evidence to people who weren't there to see, hear, and smell the evidence themselves. Your tools are the words that make up your written report and verbal testimony. You must communicate with the supervisor, the prosecutor, the judge, the jury, and even with the defense attorney. You are trying to "paint a word picture" for these people, to develop a sharp mental image that allows them to "see" what you saw; "hear" what you heard, and "smell" what you smelled. Officers with the knowledge, skills, and motivation to select the most appropriate words for both written reports and courtroom testimony will communicate clearly and convincingly, making them more successful in DWI prosecution.

PRACTICE POINT
USE CLEAR AND CONVINCING LANGUAGE

Field notes are only as good as the information they contain. Reports must be clearly written and events accurately described if the reports are to have evidentiary value. One persistent problem with DWI incident reports is the use of vague language to describe conditions, events, and statements. When vague language is used, reports provide a murky picture of what happened. Clear and convincing field reports provide strong evidence in court.

Vague language	**Clear language**
Made an illegal left turn on Jefferson	From Main, turned left (northbound) onto Jefferson, which is one way southbound.
Drove erratically	Was weaving from side to side in his lane, and then he crossed center line twice and drove on right shoulder three times. All within two blocks.
Driver appeared drunk	Driver's eyes bloodshot; watery; gaze fixed; hands shaking. Strong odor of alcoholic beverage on driver's breath.
Vehicle stopped in unusual fashion	Vehicle struck, climbed curb; stopped on sidewalk.
Vehicle crossed the center line	Vehicle drifted completely into the opposing traffic lane.

DWI INVESTIGATION FIELD NOTES

One of the most critical tasks in the DWI enforcement process is the recognition and retention of facts and clues that establish reasonable suspicion to stop, investigate, and subsequently arrest persons suspected of driving or operating a vehicle while impaired. The evidence gathered during the detection process must establish the elements of the violation and must be documented to support successful prosecution of the violator. This evidence is largely sensory (sight, smell, hearing) in nature, and therefore is extremely short-lived.

You must be able to recognize and act on the facts and circumstances with which you are confronted. But you also must be able to recall those observations and describe them clearly and convincingly to secure a conviction. You may be inundated with evidence of DWI (i.e., sights, sounds, smells). You recognize this evidence, sometimes subconsciously, and on this evidence base your decisions to stop, investigate, and ultimately arrest.

The field notes provide the information necessary to complete required DWI report forms and assist you in preparing a written account of the incident. The field notes can also be used to refresh your memory if you are required to provide oral testimony.

One way to improve the effectiveness of your handwritten field notes is to use a structured note-taking guide. The guide makes it easy to record brief notes on each step of the detection process and ensures that vital evidence is documented.

NOTE-TAKING GUIDE

Remember that you must document those actions which gave you reasonable suspicion or probable cause to justify further investigation of a suspected DWI incident. When creating a form to accomplish this you may wish to consider the following format:

Section I provides space to record basic information describing the suspect, the vehicle, the location, and the date and time the incident occurred.

Section II provides space to record brief descriptions of the vehicle in motion (Detection Phase One), including initial observation of the vehicle in operation, and observation of the stopping sequence.

Section III provides space to record brief descriptions of the personal contact with the suspect (Detection Phase Two), including observation of the driver. *General observations* provide space to record the suspect's manner of speech, attitude, clothing, etc. Any physical evidence collected should also be noted in this section. It is also important to record all statements made by the defendant that relate to operation and intoxication (e.g., "I only had two beers" or "I was driving this car for the first time").

Section IV provides space to record the results of all field sobriety tests that were administered, and the results of the preliminary breath test (PBT) if such a test was given.

TRIAL TIPS

Courtroom Decorum

1. TELL THE TRUTH. Honesty is the best policy. Telling the truth requires that a witness testify accurately as to what he knows. If you tell the truth and are accurate, you have nothing to fear on cross-examination.

2. Condense your professional resume onto a 3x5 card and bring it to court with you each time you receive a subpoena. On it, include your P.O.S.T. certification dates,

classes taken as a law enforcement officer, and other special awards or permits you have. If a certification card was issued to you, bring that as well.

3. READ YOUR INCIDENT REPORT *before* you go to court. Go over the details in your mind so that you will have an independent recollection of the events of the arrest. DO NOT go to court and ask the prosecutor for a copy of your report. However, do ask, prior to court, if you cannot locate a copy of your report.

4. Dress neatly and professionally; leave sunglasses, flashlight, and other cumbersome equipment in your car before going into the courtroom, unless needed for a demonstration. Wear a coat and tie if you prefer and your agency allows it.

5. Do not guess the answer to any question. It is OKAY to say "I don't know" or "I can't remember" in response to questions. Do not give the impression that you are guessing the answer by prefacing your response with "I think" or "I believe." If you do not know the answer, it is okay to look at your report and refresh your memory. Always give definitive, positive, sure answers.

6. Listen carefully to the question asked. Do not begin your answer until the prosecutor (or defense attorney) has finished asking the question. Be sure you understand the question before you attempt to give an answer. If necessary, ask that the question be repeated or rephrased if you do not understand it.

7. Take your time. Do not feel pressured to give a quick answer. After a question is asked, there may be an objection; allow this to happen. When you hear the word "objection," stop testifying until told you can continue.

8. Answer the question that is asked, and then stop. DO NOT volunteer information not asked for, or you will risk causing a mistrial (the judge ending the trial before it has reached a verdict) or even an immediate acquittal. DO explain an answer, if you feel your answer might appear ambiguous to the jury. You are always permitted to explain your answer. Prior to your testimony, tell the prosecutor anything you feel he might not – but needs to – know.

9. Be serious in the courthouse. Jurors are aware that criminal prosecutions are serious business.

10. Speak clearly and loudly so that you can be easily heard.

11. At least occasionally, make eye contact with the jury when testifying (unless directed not to, as is the preference of some judges), even when the attorney asking the question is not standing near the box.

12. Always be courteous, even when the defense attorney is not. Control your temper, and never allow yourself to be drawn into an argument. Remember, the

best way to make a good impression with the jury is to be courteous and professional. You were just doing your job during the arrest, and you do not have a personal stake in the case.

13. Testify in straightforward language. Do not say "The perpetrator exited the vehicle" when in reality "the defendant got out of his car." The person on trial is never a "lady" or "gentleman," but is always "the defendant." Do not use military times without clarifying the time in layman's terms. Do not use call signals. Your testimony makes more sense to the jury when you speak the same language they do.

14. It is permissible and desirable to discuss the case with the prosecutor before trial. A defense attorney may ask this question; tell the truth. Obviously, a prosecutor will try to discuss the case with the witnesses before trial; be straightforward in answering this question.

15. A defense attorney will always ask whether you have an independent recollection of the case. That is, aside from your police report or other notes, do you remember the event? Any fact that you remember about the stop and/or arrest of the defendant would be sufficient to answer this question positively.

Specific DWI Trial Recommendations

1. Never give the numerical alco-sensor/PBT reading of the defendant when asked by the prosecutor. The answer to this question is whether the result was positive or not for the presence of alcohol. However, if the defense attorney asks you for the NUMERICAL reading, give it to him unless otherwise directed by the judge. It might be a good idea to ask the judge if it is okay to answer this before offering the number so as not to risk a mistrial.

2. Always demonstrate how you conducted field sobriety evaluations. If the prosecutor forgets to ask you to come off the witness stand to demonstrate, suggest that it will aid your testimony. Be certain, however, that you can do in court all the evaluations you asked the defendant to perform at the time of the arrest. Obviously, if you cannot do them, the jury will not expect the defendant to have done them properly.

3. Know the reasons for giving field sobriety evaluations:

- They are **divided attention tests**, designed to detect when a person is impaired by alcohol and/or drugs.
- They provide evidence of intoxication in case the defendant refuses to take a State-administered test under implied consent.
- They prevent an arbitrary decision to arrest and allow an officer to articulate the reasons for concluding a driver was DWI to someone not present at the scene.

4. You are not required to know anything about the Intoxilyzer 5000 or your jurisdiction's breath test instrument, its internal workings, or anything other than how to operate it and take a breath sample from a defendant. You are merely an operator of an instrument, and while you have been taught something about how the instrument works when you became certified as an operator, never testify to its internal workings, or the defense attorney will discredit you as someone who "thinks he knows it all." You know your cell phone works when you make and receive calls and could testify to its proper operation without knowing *how* it does what it does.

> NOTE: DO NOT bring the breathalyzer operator's manual to court, or the log, unless instructed to by the prosecutor. Discuss any subpoena to produce with the prosecutor before complying with the subpoena.

5. YOU MUST BE ABLE TO EXPLAIN AT TRIAL "INVALID SAMPLE" AND THE NEED FOR A SUBSEQUENT TEST. If you get an "Invalid Sample" the instrument has either detected residual mouth alcohol or the defendant has failed to give an adequate deep-lung air sample. You must restart the 15- or 20-minute waiting period and repeat the test, or, if allowed in your jurisdiction, **take the subject for a blood test**. Remember to write the blood drawer's name and title (doctor, nurse, etc.) on the police report. It is also a "best practice" to witness the blood draw yourself – this may allow the prosecutor to avoid having to call other hospital personnel as a witness. FOLLOW ALL PROCEDURES FOR COLLECTION AND CHAIN OF CUSTODY OF THE BLOOD KIT.

6. When testifying about field sobriety evaluations, remember to discuss the level of impairment of the defendant, not just the "numbers" or the conclusion that he "passed" or "failed." Generally, officers can testify to numerical scores on field sobriety tests, including Horizontal Gaze Nystagmus (HGN), and can testify to the level of impairment. Describe each of the tests you asked the defendant to perform and how he did, step by step. For example, on the Walk and Turn, you might testify, after describing the test, that the defendant put out his arms for balance, did not count properly by counting "one, two, four, four, five," and when putting one foot in front of the other, he failed seven out of nine times to touch heel-to-toe and then gave up doing the test. In many jurisdictions, based upon your specialized training and experience, you could say, after describing in detail the steps involved in the HGN test: "the defendant scored six out of a possible six clues on the HGN, and four clues is considered impaired." Thus, you would offer your opinion that he failed the tests and was intoxicated. **However, see number 8 below.**

7. If you are IACP/NHTSA-trained and testify as to the accuracy of the field sobriety tests, *it is best practice to stay away from discussing the numbers and their significance*! The numbers referenced in the various studies commissioned by NHTSA are wide open for misinterpretation. Follow the dictates below.

Law enforcement officers need to be aware that NHTSA has done validation studies, and the SFST is considered very useful in aiding the determination of whether or not a defendant is driving while intoxicated. However, the officer doesn't have to know the numbers, or care, because in *this* case, *this* defendant was impaired.

If the officer was unable to conduct any of the three standardized tests—for instance, because the defendant truly has a bad knee and thus can't do the One Leg Stand and Walk and Turn—the officer should be free to use other tests—reciting the alphabet from, say, D to M, counting in multiples of 10 from 20 to 100, or similar observations. While these are not the preferred tests based upon NHTSA's scientific studies, they can, nevertheless, provide evidence of intoxication, along with all of the other observations, to support a guilty verdict when the SFSTs are not practical or possible, and may be useful in addition to the SFSTs. Just be sure to note in your report why you used these tests and what the results were.

8. If the prosecutor files a proper *Motion in Limine* (a pre-trial request for a decision from the judge on a particular legal point), you might be allowed to testify only as to the *observations* you made on the field sobriety evaluations; you would not testify about the numbers of clues or whether the defendant "passed" or "failed" any tests. It is very important that you discuss this option with the prosecutor in advance of trial. You would only testify as to what you observed regarding the defendant's manifestations of intoxication and performance of the field sobriety evaluations. Thus, you would be testifying to the totality of the circumstances to explain why you made the arrest and why the defendant was in fact DWI.

Potential Pitfalls for Police Witnesses

Although police officers and other professionals peripherally involved with the criminal justice system should be by nature more cooperative and competent than civilian witnesses, it is wise to leave nothing to chance. Some frequently encountered pitfalls include: a) relying too much on notes and reports; b) arguing with defense counsel; c) appearing to be too invested in obtaining a conviction; d) offering unsolicited and improper conclusions and opinion testimony; e) being non-responsive to the point of adding gratuitous comments; f) using too much law enforcement jargon; g) being overly defensive when in error; h) relying too much on "we" type testimony instead of telling what they themselves did, or testifying to what they "usually" do as opposed to what they actually did in this case.

REMEMBER: In many impaired-driving cases, you will have a pretty solid suspicion that the defendant is impaired, and less safe to drive, within a matter of moments after your initial contact. Almost everyone has encountered the "falling down drunk" at least once; it doesn't take special skill to recognize it. However, it takes skill to **paint a detailed word picture** of the officer's observations, whether the defendant was falling down drunk or less so, to explain to the jury/judge that the sober individual sitting in the courtroom today was not in that condition on the date/time/location in question. The ability

to convey this information in a manner understandable to the jury is what makes the officer an "expert" witness even if not within the legal meaning of "expert witness."

DRUG EVALUATION and CLASSIFICATION TESTIMONY

In many jurisdictions, the DRE (Drug Recognition Evaluator/Expert) may be put forth as a "technical" expert, one with specialized knowledge whose testimony is based on observation, education, training, skill, and experience[3]. The DRE is not a doctor, pharmacologist, or toxicologist. Nonetheless, the DRE has specialized knowledge that will assist the trier-of-fact to understand the evidence. Just as an individual does not have to understand how a television works in order to determine that the set is working, the DRE does not need to know the scientific explanation of how drugs cause impairment to recognize impairment. Prosecutors handling drug-impaired-driving cases will find DRE testimony particularly helpful. For further details, see The *Drug Evaluation and Classification (DEC) Program* available for downloading at www.ndaa-apri.org/publications/apri/traffic_law.html.

In a typical alcohol-impaired-driving case, an officer may testify to many indicators of alcohol impairment observed during the investigation. The officer's testimony is based on observation, training, and experience in detecting impaired drivers even though the signs of impairment are based on scientific principles.

A driving under the influence of drugs (DWID) case comes before the court in the same manner as an alcohol-impaired-driving case. The arresting officer either comes upon an incident or makes a traffic stop because there is a traffic violation or reasonable suspicion to believe that the suspect is driving under the influence of an intoxicating substance. The initial investigation is conducted as any other impaired-driving case. Observations of impairment are made by the arresting officer in the course of the investigation.

The DRE usually becomes involved after the suspect takes a breath test and the results are inconsistant with the impairment the arresting officer observed. For example, the suspect was driving erratically and performed the SFSTs poorly but the breath test result is .02 BAC. Sometimes the arresting officer may suspect drug impairment at the outset from observations of drugs or drug paraphernalia on the suspect or in the car, with or without a subsequent breath test. And, sometimes the defendant volunteers that he has consumed something other than or in addition to alcohol. That admission, without more, is generally not enough to convict for drug-impaired driving.

The DRE is called in for three distinct purposes: *First,* the DRE establishes that the suspect's impairment is caused by a drug or drugs other than or in addition to alcohol, and rules out a medical condition or medical emergency.

[3] Drug Evaluation and Classification (DEC) is the State program, while a DRE is an officer that is a part of the DEC program.

Second, the DRE identifies and notes the category of drug consumed by the suspect, which is helpful to the toxicology laboratory in determining which substances to test for. The DRE does not identify a specific drug, such as cocaine, but rather the general category of drugs (*e.g.*, in the case of cocaine, a central nervous system stimulant). Just as the officer is not required to determine the type of alcohol or the brand of beer a suspect consumed in order to offer an opinion that an individual is driving under the influence of alcohol, the DRE is not required to identify the specific drug.

Third, at trial, the DRE will testify to all the signs and symptoms of impairment he or she observed and may be allowed to offer an opinion that the impairment is consistent with the drugs verified by the chemical test. Regardless of whether the DRE is allowed to offer such an opinion, the prosecutor will likely call on a toxicologist to further explain the connection between the signs of impairment observed by the DRE and the drug found by the toxicology lab.

In the drugged-driving case, at least one obvious factor is whether a drug or combination of drugs caused the impairment. Therefore, testimony on the signs and symptoms of drug impairment is critical to the fact finder's ability to determine (1) the person was impaired **and** (2) the impairment was the result of a substance other than, or in addition to, alcohol.

At trial, the prosecutor will ask about your general training and experience as a police officer prior to becoming a DRE. For example:

- Assignments related to drug enforcement as a narcotics officer
- Selection process for the traffic/DWI enforcement division
- Length of time assigned to traffic/DWI enforcement
- Specialized training for traffic/DWI enforcement
- Special recognition for work in DWI enforcement

You will be asked to discuss, if applicable:

- Training as an emergency medical technician, paramedic, or medical corpsman in the military; and/or
- Employment as a security officer in a jail, as a probation officer, or in a drug rehabilitation facility.

Finally, questions will concentrate on the education and training necessary to become a DRE officer. Questions may include the following:

- How were you selected for the program?
- How many other officers from the department were selected for DRE training?
- What does the pre-school involve?
- Does everyone who attends the pre-school become a DRE?
- How long is DRE school?

- How did you learn to take vital signs and who checked for accuracy?
- How many evaluations did you participate in as a student?
- Were these evaluations supervised?
- Is there a separate certification process after completion of the classroom work?[4]
- What is involved in becoming certified?
- Are you certified?
- By whom?
- Are you required to renew DRE certification?
- How often?

If you are a new or somewhat inexperienced DRE, the focus of the questions may be education and training, and perhaps your previous jobs and responsibilities, if applicable. If you are a more experienced officer, emphasis will likely be placed on actual skills and experience:

- How many times have you performed a drug influence evaluation?
- Were your results consistent with toxicology testing? (Explain)
- Do you arrest everyone for whom an evaluation was performed?

The manner in which you testify—the words you choose to convey the information and your courtroom decorum—will follow closely the discussion as outlined above for officers testifying about Standardized Field Sobriety Tests.

PRACTICE POINT
PRETRIAL PREPARATION

Prior to trial, be sure to discuss your conclusions with the arresting officer(s), the toxicologist, and the prosecutor. This is not for the purpose of "matching testimony" but rather to ensure that any unanswered questions or potential discrepancies are addressed beforehand.

[4] As a condition of DRE certification, the DRE must submit and maintain a resume (or a curriculum vitae) that documents the DRE's experience. Have this available for the prosecutor both prior to and at trial.

THE SCIENTIFIC EXPERTS:

Toxicologists, Crash Reconstructionists, Optometrists, and Other Medical Personnel

Scientifically-based evidence can be critically important in impaired driving cases. However, oftentimes the evidence is only as good as what is understood by the trier-of-fact (judges or jurors).

Jurors tend to come from all walks of life—school teachers, store clerks, factory workers, college professors, and stay-at-home parents. Even college students can end up on a jury.

The key to expert witness testimony is to make it *understandable* to those who need to absorb the meaning of what you are saying. Scientific testimony is, by its very nature, complex in both language and meaning. It is imperative that whenever possible you use a common, everyday word instead of the specialized language of your field. It is also imperative to illustrate the scientific concepts with simple analogies.

General Areas of Inquiry for Expert Witnesses

- You will be asked to explain your training and background, including memberships in professional organizations. Be prepared to discuss the requirements for membership—do you merely sign up and pay a fee or does the organization require some minimal qualifications? What qualifications are required? Do you have more than the minimum qualifications? If yes, don't hesitate to list them.
- Have you testified as an expert witness in other court cases? If yes, know how many, in what cities, and whether civil or criminal (for defense or prosecution).
- Have you written any articles? If yes, were they published?
- If published, were they peer-reviewed journals?
- Please explain what is meant by "peer-reviewed journal."

At this point the prosecutor will ask the court to accept you as an "expert witness," someone who is capable of giving an opinion about what happened in *this case* to help the fact finder (judge or jury).

The defense attorney may object to your being accepted as an expert witness and is entitled to ask questions of you—a process called *voir dire*—before the judge decides whether or not to allow you to testify as an expert. The defense attorney's questions will generally center on your professional experience and any bias you might have *for* the prosecution and *against* the defendant. Assuming you are then allowed to continue testifying, the prosecutor will ask you to briefly explain the work you did on *this case*.

TOXICOLOGISTS

The prosecutor will ask you what you did with the sample in this case:

- What was the condition of the blood/urine sample (explain the condition it was in when received—sealed, clearly labeled, no signs of tampering, etc.)?
- Did you follow established lab protocols—rules—when conducting the tests?
- Please provide a brief, non-scientific description of the lab instruments used.
- What were the results—cocaine, methamphetamine, etc. present?
- If urine, explain how long prior to the taking of the sample the drug was in the blood and thus affecting the person's brain.
- Explain the effects of the drug on a person (sleepy, hyper, hard to concentrate, slows reaction times, etc.).
- Explain the potential for wide variations in a drug's effect—new versus experienced user, amount taken (over what period of time), other drugs being used at the same time ("synergistic effect" 1 + 1 > 2), "going up" or "coming down" off the drug.
- Discuss the physical and mental abilities needed to safely drive a car.
- Discuss how the effects of the drug interfere with driving a car (e.g., delayed reaction time means the driver is slower to notice (even in split seconds) the light turning from green to red; and in that split second of not braking, the car has traveled further down the road.
- Are you able to give an opinion that on this date, at this time, this defendant was impaired by this drug to a degree that made him unable to drive safely?

The Need to Use Ordinary Language

Part of your job in testifying is to take a potentially complex or unfamiliar term and convert it into ordinary language. While you won't be testifying to a group of kindergarten children, it is helpful to think back to your late grade school/early high school days and the vocabulary you used at that time. Common toxicology terms defined in laymen's terms include:

Route of Administration - how the drug gets into the person's body

- Oral - taken by mouth; swallowed
- Inhalation - breathed in through nose and/or mouth
- Intravenous - injected with a needle, similar to getting a shot at the doctor's office
- Smoking - as with a cigarette, cigar, or pipe but perhaps in another form, such as a small glass tube open at both ends to suck smoke through one's mouth
- Intranasal – drug placed directly into the nose where it is absorbed by the skin inside the nose and breathed in deeply
- Dermal - through the skin, as with a patch used to quit smoking

Absorption - getting the drug into the body (following "route of administration")

Distribution - the movement of the drug throughout the body

Metabolism - the body's way of breaking down a complex substance into smaller pieces in an effort to get rid of it

Elimination - getting the drug or its smaller pieces out of the body through urine, feces, sweat, saliva, or breath

PRACTICE POINT
PLAIN LANGUAGE

The polysyllabic words used in toxicology have the potential to become mind-numbing to the non-toxicologist audience (pharmacokinetics, pharmacodynamics, epidemiological studies, methylenedioxymethamphetamine, tetrahydrocannabinol, etc.) This is not to suggest you can never use these words. However, when you use them, immediately explain their meanings in common, everyday language—and then try to limit repeating the words and substitute as much as possible common language to convey your message. Refrain from using several of these terms within a short statement:

Scientific

Studies conducted by some of our most renowned forensic toxicologists demonstrate the pharmacokinetics of methylenedioxymethamphetamine to be typically excreted 65% unchanged, with the principal metabolite being methylenedioxyamphetamine. Our epidemiological studies further show that the driving population and others are adversely affected by ingestion of MDMA, with symptoms including ataxia and diaphoresis, accompanied by psychomotor and memory dysfunction.

Plain Language

Scientific studies done by experts show that MDMA, a relatively common street drug—you may have heard of it as "ecstasy"—seems to make people feel more alert, even hyper. In reality, someone on MDMA will frequently be uncoordinated, restless, sweat heavily, have trouble controlling their movements, and be unable to think clearly. Obviously, a person in this condition is a risk to himself and others when driving.

Having thus painted a "word picture" of what a person on MDMA looks like, the toxicologist can now compare the picture of this uncoordinated individual to what a person *should* look and act like when driving.

The Science of Toxicology

"Alcohol is a drug, but not all drugs are alcohol."

When testifying about the effects of alcohol and/or other drugs on a person's ability to drive, it will be necessary to go into some detail about the physical and mental effects of the substance(s) involved. You may be asked about retrograde extrapolation, zero order kinetics, first order kinetics, pharmacodynamics, and a host of other complex (to the lay person) topics. It is safe to assume the average juror has no knowledge

whatsoever of these concepts, and therefore it is imperative to limit scientific jargon as much as possible.

PRACTICE POINT
USE ANALOGIES

When discussing a scientific principle, immediately follow it up with a simple analogy. Example:

Scientific principle: Alcohol is eliminated at a fixed or linear rate ("zero order kinetics"), thus enabling a toxicologist, in many circumstances, to perform retrograde extrapolation (use a math equation to determine someone's BAC a short period of time in the past, measured in hours, not days). However, the elimination rate of other drugs, depending upon their specific half-life (the period of time it takes the body to get rid of one-half of the substance) cannot be plotted on a straight line, but rather, is plotted on a curved line over time ("first order kinetics"). Drug pharmacodynamics—the processes of absorption, distribution, metabolism, and elimination—do not occur in set chronological fashion, one after the other, but rather, in combination with each other. Drug effects are also related to the timeline of drug use, will change over time, and may be further complicated by the presence of some active metabolites, which themselves will cause certain effects.

Simple analogy:[5] A baseball dropped by a 10-year-old sitting in a tree house, high above the ground, will fall straight down (alcohol *zero order* elimination). With practice, the child might even be able to reasonably predict how long the ball takes to hit the ground (alcohol retrograde). If that same 10-year-old then drops a maple leaf attached to an acorn, it should hit the ground at about the same time as the baseball (other drugs with *zero order* elimination). However, what would happen if he dropped only the leaf, without the acorn? It will drop much more slowly—as it is tossed and turned in the breeze—than the baseball or the leaf with the acorn. The leaf's size also changes during descent as pieces break off in the wind (changing drug half-life); this also causes its rate of descent to slow. Eventually the leaf gets to the ground, but not in a straight line nor in a predictable time frame (drug *first order* elimination).

CRASH RECONSTRUCTIONISTS

The physics and math used by crash reconstructionists can be some of the most confusing testimony any prosecutor will have to elicit and any juror will have to hear. Even before trial, a prosecutor handling a crash case that resulted in injuries or death will need to meet with the crash reconstructionist to learn what the police report means—Who was driving? What role did the driver(s) play in the crash? Were the EDRs ("Event Data Recorders" commonly referred to as "black boxes") recovered? If yes, what information did they yield? If no, get them to find out what information they contain. (This may require a search warrant.) Were there mechanical problems with any of the involved vehicles? If yes, should the owner have been aware of these problems? Have there been any recalls for manufacturer's defects? Was road design/condition a contributing factor?

[5] This analogy first appeared in *Drug Toxicology for Prosecutors: Targeting Hardcore Impaired Drivers*, Dr. Sarah Kerrigan, Ph.D. Published by the American Prosecutors Research Institute, October 2004 and available for downloading at http://www.ndaa-apri.org/publications/apri/traffic_law.html

Were traffic lights working properly? What was the weather like? What were the lighting conditions? What evidence has been secured to document the details (photos of the scene, the vehicles, and the victims; scale drawings; photographing in place and then securing crash debris)?

The variables are many and all need to be discussed between the police, prosecutor, and crash reconstructionist to determine appropriate criminal charges, if any, and how to proceed at trial.

If the case warrants criminal charges, what can the crash reconstructionist expect at trial? He or she will have to discuss the pre-impact, impact/engagement, and post-impact—the moments just before the crash, the dynamics of the crash, and the immediate results after the crash.[6]

At trial, after having gone through the general areas of inquiry for all expert witnesses (see above) and possibly having been questioned by the defense attorney, the prosecutor will ask you to explain what you did in this case:

- You were contacted by the prosecutor?
- Did you review the police report, including photographs, scale drawings, and statements?
- Did you visit the scene (evidence still present or no longer present)?
- Did you do scale drawings/calculations using accepted math formulas?
- What were the results of those calculations?

Notice what's missing from that list? *There is no need to go into great detail about specific calculations you did or the math and science of crash reconstruction*, at least not when answering the prosecutor's questions. However, be prepared to explain on cross examination—the questions asked by the defense attorney after you've answered the prosecutor's questions—the calculations you used and the laws of physics you relied on to reach your conclusions.

OPTOMETRISTS

Horizontal Gaze Nystagmus (HGN) and its application to impaired driving has been known for years. However, it is likely brand new to the juror hearing this testimony in an impaired-driving case. While we've all heard "the eyes are the windows to the soul," how many of us knew our eyes can provide strong evidence of impairment due to alcohol and some other drugs? That is the challenge faced by prosecutors and optometrists who need to convey this "novel" phenomenon to a jury—and sometimes a judge.

[6] For further details, see APRI's *Crash Reconstruction Basics for Prosecutors* authored by John Kwasnoski and available for downloading at http://www.ndaa-apri.org/publications/apri/traffic_law.html.

As with each of the other expert categories, the initial line of questioning will address your professional training, background and experience. The prosecutor will also want to know if you are familiar with any of the scientific studies done on HGN (and there are several). It is certainly a good idea to familiarize yourself with as many of these studies as possible.[7] Questions will then become specific to *your* knowledge of the HGN and, specifically, the protocol used by police:

- Where did you go to optometry school?
- Please briefly describe the curriculum.
- Do you have to be licensed?
- By whom?
- What's involved in getting a license? Are you now licensed?
- How long have you been licensed?
- Did any of your coursework or additional training include the effects of alcohol and other drugs on the central nervous system?
- Please describe that training.
- Do certain drugs have the potential to affect eye movements?
- Does alcohol have the potential to affect eye movements?
- Please briefly describe how alcohol affects eye movements.

You will be asked to explain in layman's terms the meaning and significance of lack of smooth pursuit, maximum deviation, angle of onset, and nystagmus. Simple analogies can be critically important: "Lack of smooth pursuit is similar to a car's windshield wiper dragging across a dry windshield—it catches a little along the way instead of moving in one smooth arc as it does on a wet windshield." Additional questions may include whether or not HGN is affected by contact lenses, poor eyesight, or lighting conditions ("Could the officer's flashlight shining in the defendant's eyes cause HGN? Or the flashing lights on top of the patrol car?").

You may also be asked to discuss the differences between HGN and other types of nystagmus—what causes them and how they differ in appearance. You will be asked about the use of HGN testing in your practice, and its use as a test employed by police:

- Are you familiar with the test used by police?
- Is it similar to anything you use in your practice? How is it similar? How is it different? Do these differences affect the results of the police test?
- In your opinion, is this a test which can be taught to and correctly used by police?

Finally, one very important question will be "Do you have an opinion as to whether the presence of HGN is a reliable indicator of the use of a central nervous system depressant, such as alcohol?" Having answered that question and a couple of follow up questions addressing the specific case, you will then be "turned over" to opposing

[7] For additional information on HGN scientific studies contact the National District Attorneys Association's National Traffic Law Center at trafficlaw@ndaa.org or phone: 703.549.4253

counsel to answer more questions. The area of attacks might include a potential for bias on your part, your familiarity with published studies attacking HGN, your unfamiliarity with the defendant in this case, and the claim that a certain percentage of the population has naturally occurring HGN. Always answer truthfully. REMEMBER: This case is not about HGN to the exclusion of all other indications of impairment. HGN is one factor to consider in the totality of all the evidence.

MEDICAL PERSONNEL

Some impaired-driving cases may include additional witnesses from the medical profession: emergency medical technicians (EMTs), nurses, doctors, or even medical examiners (MEs) and forensic pathologists. As with other expert witnesses, if called to testify, medical personnel will be asked to describe their professional training and experience before discussing the specifics of their role in this case.

EMTs, nurses, and doctors can all expect to describe their observations of the defendant and/or victim(s) at or near the time of the incident:

Defendant:

- What were his responses to your questions and directives—were they coherent and appropriate?
- What did he say and how did he say it (slurred, slow, rapid, difficult to understand due to speech pattern or rambling word choice)?
- Was there any indication of alcohol and/or drug ingestion? Provide details.
- Was there any indication of head trauma—pupil reaction, etc.?
- What was the defendant's physical appearance—injuries, lack of injuries, bleeding, vomiting, urinating on himself, neat or disheveled appearance, clothing appropriate/inappropriate for weather conditions?
- Was the defendant combative or cooperative?
- If there were injuries, please describe the degree and probable cause (e.g., head lacerations – due to striking the windshield – which required numerous stitches).

Injured Victim:

- What were his responses to your questions and directives—were they coherent and appropriate?
- If not, any indication of head trauma?
- What was the degree and probable cause of injuries (e.g., broken ribs due to impact with steering wheel)?
- What was the nature and extent of medical treatment, including prognosis?

The crime of vehicular assault may require a showing of the seriousness of the injuries sustained by the victim. In some States, the seriousness of the injury will directly

correlate to the seriousness of the charge against the defendant—a more seriously injured victim will result in a more serious charge against the defendant resulting in the possibility of a lengthier prison sentence if convicted.

It is important to meet with the prosecutor prior to testifying to discuss your knowledge and observations and to answer any questions you might have. You may have questions regarding the impact of HIPAA (Health Insurance and Portability and Accountability Act) which you can discuss with both your employer and the prosecutor.

MEDICAL EXAMINER/FORENSIC PATHOLOGIST

When a crash results in the death of a victim, the medical examiner's testimony will be crucial in the case against the defendant. It is imperative to discuss your findings with the prosecutor at the earliest possible time. The prosecutor will need to know the cause and manner of death—was it directly or indirectly the result of the crash? If criminal charges are lodged, you can expect to testify at both a preliminary stage (grand jury or preliminary hearing) as well as at trial. The prosecutor will ask you questions regarding the autopsy conducted on the victim of a crime and the cause and manner of death. Questions will address:

- Employment
- Official title
- Medical doctor licensed to practice in your State (and requirements)
- Educational background—undergraduate and medical school degrees from accredited college/university
- Residency
- Fellowships
- Board certifications—and requirements
- Definition of pathology
- Definition of autopsy
- Why autopsy was conducted
- Date/time/place when you conducted the autopsy of this victim
- How victim was positively identified
- Height and weight of victim at time of death
- What did your examination reveal as far as injuries to victim?
    - Exterior exam – evidence of trauma or natural disease
        - Lacerations
        - Contusions
        - Protruding bones
        - Scars
    - Interior exam – same purpose
        - Fractured
        - Ruptured
        - Severed
- Comparison of victim's hospital medical examination records to medical examiner's records

- As a result of your examination, were you able to determine, to a reasonable degree of medical certainty, the cause of death of the victim (who may have to be referred to by name and not "victim" in some jurisdictions)?

CROSS-EXAMINATION

It is beyond the scope of this publication to provide detailed information regarding cross-examination (i.e., questions asked by the opposing attorney, the one who did not invite you to participate in this case). However, there are some general areas that will likely be addressed:

- Your professional background and credentials, including education and experience (or lack thereof);
- Attacks on the depth of your knowledge—of the subject matter generally and the facts of this case specifically;
- Bias—"always" testifying for one side and "never" the other; and
- "You're being paid to be here today, aren't you?" implying that money is the motive to get you to say whatever the hiring attorney wants you to say.

The best way to handle cross-examination is the same way you handled the direct. Answer truthfully, don't get angry, don't get defensive, and if you don't understand a question, say so. If all else fails, remember: in the grand scheme of this case, while it might not seem like it to you, your honest testimony is important—to the defendant, to any victims, and to the integrity of the criminal justice system. Do the best you can. That's all anyone can ask of you.

Potential Pitfalls

Some frequently encountered pitfalls include: a) relying too much on notes and reports; b) arguing with defense counsel; c) appearing to be too invested in obtaining a conviction; d) offering unsolicited and improper conclusions and opinion testimony; e) being non-responsive to the point of adding gratuitous comments; f) using too much jargon; and g) being overly defensive when in error. Maintaining your composure and professionalism throughout this process is not always easy, but it is always important.

CONCLUSION

By its very nature, the criminal justice system can be time-consuming and frustrating for all involved, especially for victims and witnesses, whose participation is required and often not entirely voluntary. It is hoped that this guide has clarified some of these complexities and made the process a little less frustrating. For specific answers, it is best to speak directly with the prosecutor assigned to the case.

Glossary of Terms

Accusatory Instrument A legal document that accuses a defendant of one or more crimes. There are various types of accusatory instruments, including traffic tickets, complaints, informations, indictments, and superior court informations.

Acquittal A decision by the trier-of-fact (the judge if a non-jury trial, otherwise the jury) that there was not enough evidence beyond a reasonable doubt to decide that the defendant committed the crime(s) with which he or she was charged. It is not a finding of "innocence" although it could mean that the jury thinks the defendant did not commit the crime. On the other hand, an acquittal could mean the jury had *some* belief that defendant committed the crime, but it also had some doubts. For example, in an impaired-driving case, the jury may believe the defendant was driving the car, crossed the center line three times in less than a minute, and had some amount of alcohol in the hours before he or she drove. They might even believe that the driver was more tired than he or she should have been in order to drive with the highest degree of safety. However, the jury might have some doubts as to the prosecution's evidence that the defendant had five 12 ounce-beers in the hour leading up to the time defendant was stopped, and instead think maybe it was only two beers, as the defendant himself told the officer on the scene. Thus, the jury could conclude that while the driver might have had twelve beers, he might only have had two, and because they had reasonable doubt as to how much beer was consumed, they voted to acquit.

Appeal A review by a higher court of the correctness of legal proceedings in a lower court. Particulars of the legal proceedings may vary not only from State to State, but also between *jurisdictions* (the geographic region over which a particular criminal justice system—law enforcement, prosecutors, the courts, probation/parole—has authority) within a State. Generally speaking, *petit* trial level courts (town/city courts, district courts) conduct hearings and other legal proceedings for lesser offenses. The right to a jury trial at this level may or may not exist, depending upon an individual State's laws. Criminal or superior courts (sometimes called "circuit courts") conduct hearings, proceedings, and jury trials in the more serious cases known as "felonies." They generally have the right to review proceedings which have taken place in the lower court. Appellate courts review the trial proceedings of the felony criminal courts for the correctness of legal issues.

It is at trial that the prosecutor will offer evidence of guilt against the defendant in an effort to prove the defendant guilty *beyond a reasonable doubt*. If found guilty, the defendant will oftentimes appeal to a higher court, made up of one or more judges, to argue that errors of law occurred during the trial (e.g., the judge allowed evidence to be heard that should have been excluded because the police did not follow proper procedures in collecting it) and thus the guilty verdict should be *overturned* (thrown out).

Arraignment The initial appearance of the defendant in court to answer the charges in an accusatory instrument. At the arraignment, the judge (1) provides the defendant with a copy of the accusatory instrument, (2) advises the defendant of the right

to counsel and arranges for counsel to be provided without cost if the defendant is indigent, and (3) considers the matter of bail.

In the typical felony prosecution, the defendant will first be arraigned in a local criminal court, then, after the case moves to a superior court through a grand jury indictment or a waiver of indictment, the defendant will be arraigned in the superior court. Again, the specifics will vary between States.

Arrest Taking a suspect into custody for the purpose of prosecution on a criminal charge. To be legal, an arrest must be based on *probable cause*—a belief that it is more likely than not that the suspect has committed an offense.

An arrest may be made with or without an arrest warrant. In general, an arrest warrant is not necessary if the police officer can take the suspect into custody in a public place. If the suspect is in a private place such as a residence, the officer generally cannot enter the residence to make the arrest unless there is an arrest warrant reciting the residence as the suspect's address, or the officer obtains a search warrant for the residence, or someone in the residence voluntarily allows the police to enter. There are exceptions to this "do not enter" rule which are beyond the scope of this document.

Arrest Warrant A judge's written authorization to take an identified suspect into custody. To obtain an arrest warrant, a police officer must file papers with the court providing probable cause to believe that the individual has committed a crime.

An impartial judge will review the evidence and determine if it is more likely than not that the defendant committed the acts ("probable cause"). Once the warrant is signed by the judge, if the suspect cannot be found, an arrest warrant may be entered in the national computer system to alert the wanting agency if the suspect is stopped by another agency. One disadvantage to the police in getting an arrest warrant is that the filing of the papers with the court may trigger the suspect's right to counsel, so there can be *no questioning* of the suspect after arrest, unless an attorney is actually present and allows the suspect to be questioned. However, the "no questioning" rule is not a bar to using statements voluntarily made by the defendant. A defendant who starts chatting while sitting in the back of the patrol car—"I was driving, but you'll never prove I was drunk"—is in custody, but not being *questioned* and thus does not have a right to have his statements excluded at trial.

Bail A down payment of money to assure that the defendant will return to court when required. At the arraignment, the court will determine if bail is required, and if so will fix the amount and will order the defendant held in jail until bail can be posted, generally in the form of cash or a secured bond. If bail is posted, the defendant is released from jail and is allowed to remain at liberty pending the outcome of the prosecution. If the defendant fails to return to court, the bail is forfeited (turned over) to the State; if the defendant appears in court as required, the bail is returned to the party who posted it.

Instead of setting bail, the court may elect to order a defendant "released on recognizance," meaning the defendant is trusted to come back to court when required,

without any bail being set. This is common for lower level offenses committed by persons who live and/or work in the community.

Bill of Rights The first ten amendments to the United States Constitution. The Bill of Rights includes numerous rights specifically intended to benefit defendants in criminal prosecutions. Because the Constitution is the supreme law of the United States, no Federal, State, or local law can diminish those rights.

The Bill of Rights sets forth *rights*, but is silent concerning *remedies* for the violations of those rights. The United States Supreme Court has filled the gap by fashioning remedies through case law, including the remedy known as the *exclusionary rule* (discussed below).

Booking The process of officially recording an arrest. It typically includes (1) photographing the defendant (i.e., taking a "mug shot"); (2) fingerprinting the defendant; and (3) obtaining pedigree information (name, address, date of birth, etc.) from the defendant. Many lower level offenses (e.g., speeding tickets) do not require booking, and in those cases the defendant is simply issued a ticket to appear in court on a future date.

In some States, if an arrest ultimately results in a dismissal of the charges, or if the conviction is for an offense below the level of a crime, or if the defendant is under a certain age as determined by individual State law, the arrest records generated through the booking will be sealed, so the arrest will not result in a criminal record.

Count One Charge within an accusatory instrument. A single criminal incident commonly gives rise to multiple charges. For example, a defendant breaks into a home and steals the flat-panel TV, several gold bracelets, and three diamond rings. During the course of gathering up these items, he is confronted by the homeowner and punches her in the face. In addition to the burglary charge, additional charges might include damage to property (breaking the window to gain entry), theft of property, and assault/battery for hitting the homeowner.

***Daubert* Hearing** A pretrial hearing used in some jurisdictions to determine whether or not "scientific evidence" will be allowed at trial. Under this test, judges evaluate whether the evidence is both "relevant" and "reliable" in determining if it will be admissible at trial. This standard differs from *Frye* in that it does not mandate a showing that the evidence has been "generally accepted in the scientific community."

Deposition Witness testimony taken under oath in response to written *interrogatories* (a list of questions prepared in advance) or oral questions during the investigation or pretrial phase of a legal action.

Discovery A pretrial stage where the parties exchange information about the evidence and arguments they will offer at trial. In many States, the burden of supplying discovery information rests almost entirely upon the prosecution. This is because the presumption of innocence and the privilege against self-incrimination generally permit a defendant to remain silent throughout the prosecution.

One of the discovery items that the prosecution may be asked to supply is a "bill of particulars," which is a brief statement of the core facts of the case. A copy of the bill of particulars is filed with the court and is open to public inspection. Other discovery items, such as police reports and lab reports, are generally not filed with the court and simply pass between the attorneys.

Exclusionary Rule Simply stated, the exclusionary rule provides that evidence obtained through unconstitutional acts of law enforcement officers cannot be used to prove the defendant's guilt at trial. If the court determines, usually at a pre-trial hearing, that crucial evidence was gathered by law enforcement in an unconstitutional manner, the charges may be dismissed even though the evidence is reliable and, if it could be used, would prove that the defendant is guilty.

The rationale for the exclusionary rule is deterrence. The idea is that if law enforcement officers know that unconstitutional conduct will result in exclusion of evidence, they will not act unconstitutionally. Evidence that is excluded from the trial by application of the exclusionary rule is said to be *suppressed*.

Felony A crime generally punishable by more than one year in prison. However, a sentence may include no jail or prison time, depending upon the degree ("seriousness") of the charge and the defendant's prior criminal history, if any.

Frisk A quick search of an individual's external clothing to determine whether the individual is armed with any sort of dangerous implement—a gun, knife, box cutter, screwdriver, etc. A frisk is also known as a "pat down." Generally, a frisk is legal if the officer has reasonable suspicion to believe that the individual might be dangerous. The officer will need to articulate the basis for this belief in order for any evidence discovered as the result of the frisk to be admitted in subsequent criminal proceedings.

***Frye* Hearing** A pretrial hearing used in some jurisdictions wherein the court determines if the "scientific evidence" is "new or novel" and if so, whether the principle or technique has been "generally accepted" in the relevant scientific community. If not new or novel, the evidence may be admitted. If new or novel and not yet accepted by the relevant scientific community, the evidence will not be admitted at trial.

Grand Jury A jury that determine if there is adequate evidence to charge a defendant with a crime. Not all States use the grand jury system. Of those that do, some may require first-hand testimony from witnesses, including expert witnesses. Other States allow one person, such as an investigator employed by the prosecutor's office, to summarize the details of the case without the need of separate testimony from individual witnesses.

The following table contrasts a typical *grand jury* with a *trial jury* (again, some specifics, such as the number of jurors, will vary from State to State):

	Grand Jury	Trial Jury
What is determined?	whether to charge	whether to convict
Prosecution's burden of proof	probable cause	proof beyond a reasonable doubt
Number of jurors	23	12
Number of jurors who must be present to conduct business	16 of 23	12
Number of jurors the prosecution must convince	12	12
Product of a convinced jury	indictment	guilty verdict
Persons present	jurors, witness prosecutor, stenographer	jurors, witness prosecutor, stenographer defendant
Persons present (cont'd)	Defendant may be present, but only at a particularly designated time and with counsel of his choice	defense attorney, judge, court clerk , court attendants, spectators
Public access	closed to the public	open to the public

Incarceration The all-encompassing term for various forms of court-ordered confinement. There are several forms of incarceration that may be imposed upon defendants depending on the crimes they have committed. Local jails hold defendants who are not yet convicted but are being held in jail in lieu of bail, and also hold defendants who have been convicted and sentenced to terms of incarceration of one year or less. A State prison system holds inmates who are convicted of felonies and sentenced to terms of incarceration in excess of one year.

Indictment The accusatory instrument issued by a grand jury. It contains one or more charges against the defendant. Each charge is referred to as a count of the indictment.

Local Criminal Court ("district court") A city, town, or village court.

Misdemeanor A crime generally punishable by a maximum of up to one year in local jail.

Mistrial A judge may declare a mistrial—end the trial—for a number of reasons, including improperly admitted evidence (e.g., testifying about statements made by the defendant which were previously ruled inadmissible), misconduct by a juror (e.g., discussing the case outside of the courtroom), or a hung jury (jury cannot reach a verdict

during its deliberations due to lack of agreement). A mistrial generally means a retrial on the same subject.

Motion in Limine A request to the court, made before the start of a trial, asking the judge to make a decision on a legal matter. The judge's decision will impact how the case proceeds. Motions made by defense counsel could include Motion to Exclude Evidence (e.g., based on lack of reasonable suspicion for the stop and/or probable cause for arrest). The prosecution might request a court order for the production of the defendant's substance abuse treatment records.

Order A direction by a judge that something be done or not be done. For example, a judge may order evidence suppressed, which means the prosecution may not offer the evidence at trial. Or a judge may issue an "order of protection" commanding a defendant to have no contact with a victim.

Parole Supervision by a State parole officer of an inmate after his or her release from State prison. Contrast probation, which is supervision at the local level by a county *probation* officer (see *probation*, below).

Post-Conviction and Post-Judgment Motions Used to attack guilty findings. As part of these motions, the defendant may seek an evidentiary hearing to bring to light facts not litigated during the trial. For example, a defendant who is challenging the competence of his attorney may bring a post-judgment motion and request an evidentiary hearing to bring to light matters that transpired between attorney and client.

Preliminary Hearing (Felony Hearing) Generally speaking, a defendant who is arrested on a felony charge and held in jail has the right to an impartial testing of the evidence within a certain time frame after arrest. One way to test the evidence is to present the case to the grand jury. In States that do not use the grand jury system, and in rural areas where grand juries sit less frequently, it is more common to test the evidence at a preliminary hearing.

Defendants sometimes agree to waive their right to a preliminary hearing, for a variety of reasons, including a desire to avoid a public airing of the evidence or an agreement with the prosecution to waive the hearing in exchange for disclosure of information about the prosecution's case.

For lower level felonies, it is very common for defendants to be released on their own recognizance at arraignment, or to have posted bail by the time of the preliminary hearing. This removes the reason for holding the hearing—to test the evidence justifying detention—and so no hearing is held.

Pre-Trial Motions and Hearings A motion is a request by which a party (prosecution or defense) asks a judge to issue an order. For example, in criminal cases, pre-trial motions by defendants commonly include motions for dismissal of the indictment and for suppression of evidence.

Motions that are contested result in hearings. A hearing may simply be an argument by attorneys of legal issues, or it may be an evidentiary hearing at which witnesses testify. The most common pre-trial evidentiary hearing is a suppression hearing where the prosecution calls one or more police officers to testify about the manner in which evidence was obtained. If the prosecution fails to establish that the evidence was obtained in a manner consistent with the defendant's constitutional rights, the evidence will be suppressed.

Probable Cause (Reasonable Cause) A level of proof that is reached if a reasonable person would conclude that something is probably true. Probable cause is a higher level of proof than "reasonable suspicion," but a lesser level of proof than "proof beyond a reasonable doubt." (See each defined, below.)

The probable cause standard is referenced in the Fourth Amendment, and is a required hurdle at several stages of a prosecution. For example, a police officer may arrest a suspect only if the officer has probable cause to believe the suspect has committed a crime. Similarly, a grand jury may indict a defendant only if it finds probable cause to believe the defendant committed one or more crimes.

Some State statutes, such as in New York, commonly use the term "reasonable cause." That term is synonymous with probable cause and should not be confused with reasonable suspicion, which is a lesser level of suspicion.

Probation A sentence that entails supervision by a probation officer. Probation is possible in cases where the defendant is convicted of a crime that does not mandate incarceration in State prison. Accordingly, probation is a common sentence for defendants convicted of misdemeanors and lower level felonies with little or no criminal history.

It is possible to receive a sentence consisting of both local jail time plus probation. This is often referred to as a "split sentence." For example, a New York defendant convicted of a certain felonies may be sentenced to six months in jail plus a concurrent term of five years in probation. That means the defendant would first do his jail time and then, when released from jail, would be under the supervision of the probation department until the probation expired.

Probation is often confused with parole, which is supervision by a parole officer following an inmate's release from a State prison.

Proof Beyond a Reasonable Doubt A level of proof that is reached if a reasonable person would be firmly convinced that something is true. This is a higher level of proof than probable cause. A jury may not convict a defendant unless the jurors are convinced of guilt by proof beyond a reasonable doubt. The law does not require the prosecution to prove a defendant guilty beyond all possible doubt. On the other hand, a reasonable doubt is an honest doubt of the defendant's guilt for which a reason exists based upon the nature and quality of the evidence. It is an actual doubt, not an imaginary doubt.

Reasonable Suspicion A level of proof that is reached if a reasonable person would conclude that illegal activity is afoot. This is a lower level of proof than probable

cause. A police officer may not stop an individual unless the officer has a reasonable suspicion of illegal activity, and a police officer may not frisk an individual unless the officer has a reasonable suspicion that the individual may be dangerous to the officer or to others.

Release on Recognizance An order of the court allowing a defendant to be released without bail pending the outcome of the prosecution.

Sealing of Records If an arrest ultimately results in a dismissal of the charges, or if there is a conviction for an offense below the level of a crime, or if the defendant is under a certain age (which may vary from State to State, and also depends upon the level of the offense) the records of the case might be sealed, meaning the arrest would not result in a criminal record.

Generally speaking, sealed records are not accessible to the public, and are not accessible to the police or prosecutors except upon court order. There are some variations to this rule which go beyond the intent of this publication.

Search and Seizure The area of law dealing with the Fourth Amendment's guarantee that individuals shall be free from "unreasonable searches and seizures." A search or seizure occurs whenever the police invade an individual's reasonable expectation of privacy. Stops, frisks, and arrests are examples of police activity that constitute searches and seizures. Any police officer who conducts a search or seizure may be called on to justify his actions in court at a pre-trial hearing, and if he cannot, any evidence obtained through the search or seizure may be suppressed through application of the *exclusionary rule*.

Search Warrant A written order by a judge authorizing the police to search in a particular place for particular items. A search warrant is valid only if, before issuing the warrant, the judge is presented with facts establishing probable cause to believe the items to be seized will be found in the place to be searched. Typically, the application for the search warrant will consist of one or more sworn statements from knowledgeable persons.

Sentencing The imposition of punishment by the judge following a conviction. The range of possible sentences depends on the level of the offense committed. The most serious crimes (e.g., murder, forcible rape, and armed robbery) require sentences of incarceration in State prison. For lesser crimes, alternatives to incarceration (e.g., probation, community service, and fine) are usually permissible. Sentences may also include provisions for the benefit of the victim, including orders to pay restitution to the victim to defray monetary losses and orders of protection to keep the defendant from contacting or harassing the victim.

An "intermittent sentence" is another form of local jail sentence of one year or less, but instead of being continuously incarcerated, the defendant is in and out during the term of the sentence. This is sometimes called being sentenced to "weekends" because most commonly judges will order defendants to be in jail from Friday evening till Sunday night or Monday morning during the term of the sentence. This is most

commonly used when the judge believes the defendant deserves punishment, but wants to allow the defendant to continue to work at his or her job.

An "indeterminate sentence" is a State prison sentence with two numbers defining the term in years, a minimum and a maximum. The sentence is indeterminate in the sense that the parole board, not the judge, determines the defendant's release date. Examples of indeterminate sentences are sentences of 1 to 3 years, or 2 to 4 years, or 15 years to life.

Finally, a "determinate sentence" or "fixed sentence" is a State prison sentence having a single number of years. Examples are: 1.5 years, 6 years, or 15 years. The sentence is "determinate" in that no parole board is involved in making the release decision.

The term imposed by the sentencing judge can be misleading because in many States, as an inducement to good behavior while incarcerated, defendants can earn the right to be released earlier than their stated terms. These inducements include good time, merit time, conditional release, parole release, and other things.

If there are multiple sentences of imprisonment imposed upon a defendant, the sentences will run either "concurrently" or "consecutively." "Concurrently" means that all the sentences run at the same time and all are satisfied when the longest one is done. "Consecutively" means the sentences are served one at a time, so the sum of the terms is what governs. To make matters even more confusing, some of the sentences may be imposed to run concurrently to each other but consecutively to others. Depending on the circumstances, the choice of concurrent or consecutive may be dictated by statute, or may be left to the judge's discretion.

Stop Temporary detention of an individual for investigation. To be legal, a stop must be based on reasonable suspicion to believe the individual has committed, or is about to commit, some violation of the law. If the stop yields information to confirm the suspicion, the stop may escalate into an arrest.

For example, upon seeing a car weaving back and forth over the center line, an officer would have reasonable suspicion to believe the driver might be intoxicated. The officer could then stop the car, talk to the driver, and administer field sobriety tests. If that investigation confirms that the driver is intoxicated, the officer would then have probable cause to believe the driver was intoxicated and could lawfully arrest the driver for the crime of Driving While Intoxicated.

Suppression of Evidence A court ruling disallowing evidence due to unconstitutional conduct by law enforcement officers. Suppression of evidence means the court has invoked the exclusionary rule. Evidence may be reliable, yet still be suppressed because it was obtained in an illegal manner.

The evidence sought to be suppressed is usually either (1) an incriminating statement made to a police officer, (2) physical items of evidence seized by the police,

such as drugs or a gun, or (3) identification evidence such as lineup identification or an on-the-street show up identification.

Suspended Sentence A sentence in which the defendant could serve a maximum term of say, 10 years, but is allowed to serve far less time in jail in exchange for the opportunity to not engage in any further criminal conduct. If the defendant fails to abide by the directives of his release, his "suspended" sentence is reactivated, and he could serve the entire 10 years.

Trial A trial determines the question of the defendant's guilt. The verdict of the jury is either "guilty" or "not guilty" on each charge given to the jury for determination. The jury is instructed to find a defendant not guilty if the prosecution fails to prove the charge beyond a reasonable doubt. A verdict of not guilty is not a finding of innocence; rather, it is a finding that the charge is not proven beyond a reasonable doubt.

Generally, the stages of a trial are:

Jury selection
. Preliminary legal instructions by the court to the jury
Opening statement by the prosecutor
Opening statement by defense counsel
Presentation of prosecution evidence
Presentation of defense evidence (optional)
Presentation of prosecution rebuttal evidence (optional)
Summations by defense counsel and prosecutor
Legal instructions by the judge to the jury ("the charge" to the jury)
Jury deliberations
Verdict

In stage 3—the opening statement by the prosecutor—the prosecutor must set forth an outline of the evidence to be presented. This is a very good time for a spectator to hear a summary of the evidence, which may never have been stated in public before.

Warrant A written order by a judge authorizing the police to take some action. An arrest warrant authorizes the police to arrest someone, and a search warrant authorizes the police to search somewhere for something. The Fourth Amendment states that warrants may only be issued upon probable cause (also referred to as "reasonable cause").

DOT HS 810 707
February 2007

U.S. Department
of Transportation

**National Highway
Traffic Safety
Administration**