

DEATH BY 1,000 CUTS:

AN OVERVIEW OF DEFENSE ANALYSIS IN DUI CASES

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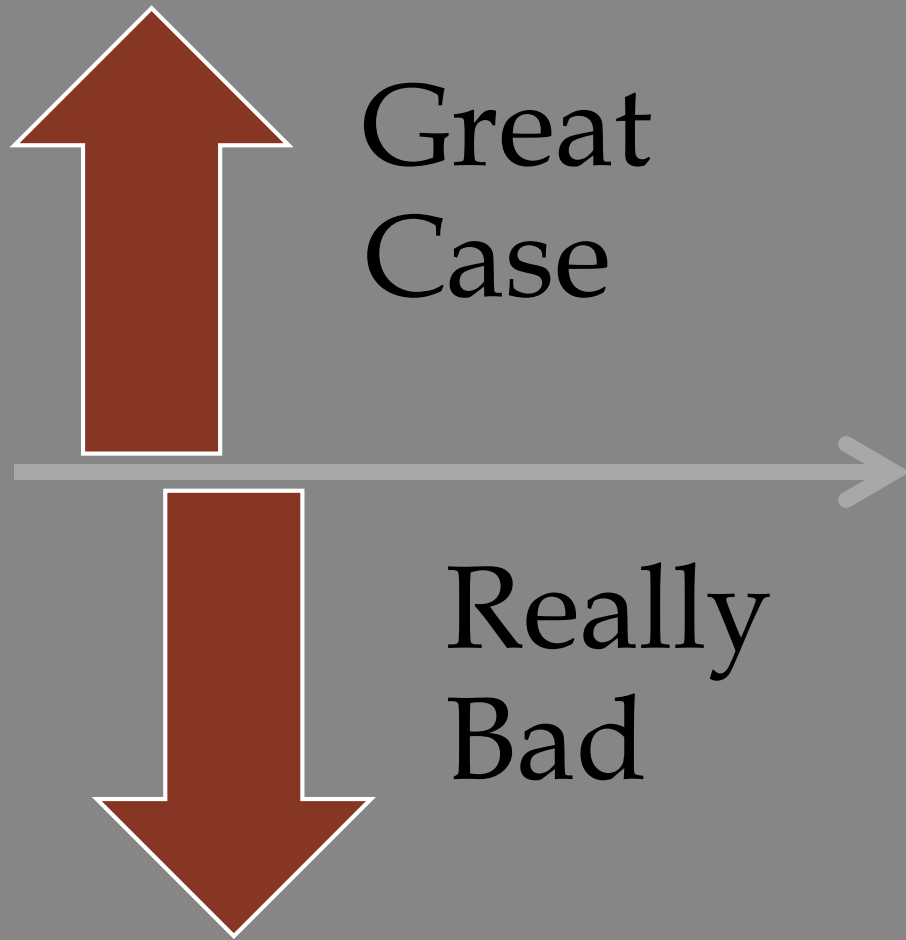
DISCLAIMER





POWER

In the Middle



Great
Case

Really
Bad

The most difficult
cases to evaluate.

WHY IS THAT?



Incomplete police reports



Police did not ask the right questions



Juror belief/concerns – Box of Chocolates Rule



Witness credibility/dynamics/relationships

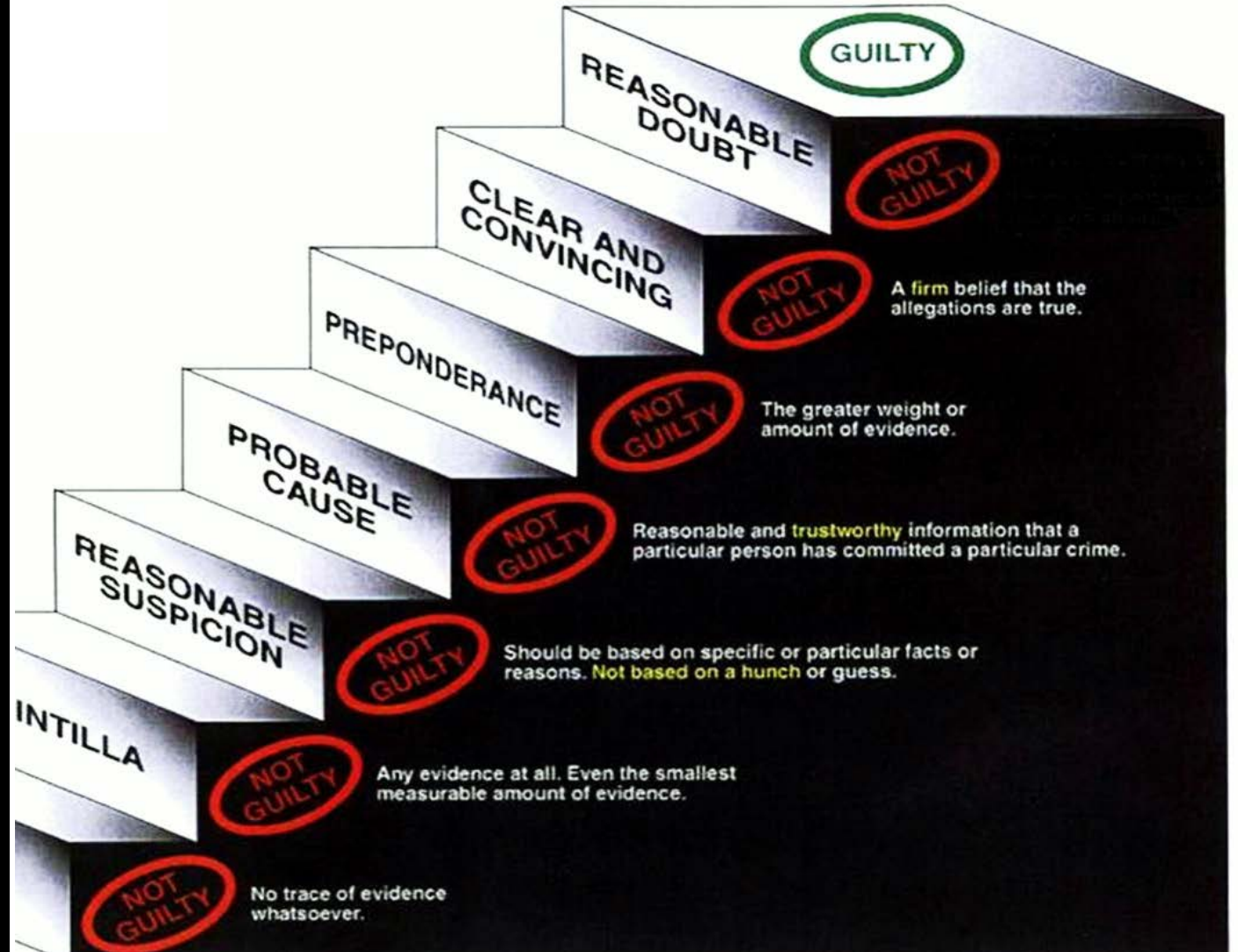


What is it you don't know?



You find out more about your case.

Additional witnesses
Forensic evidence
Legal rulings by the judge



[Law enforcement] must be dedicated to making the criminal trial a procedure for the ascertainment of the true facts surrounding the commission of the crime.

United States v. Wade, 388 U.S. 218, 256-58, 87 S. Ct. 1926, 1947-48, 18 L. Ed. 2d 1149 (1967)



[The prosecutor's] obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done...

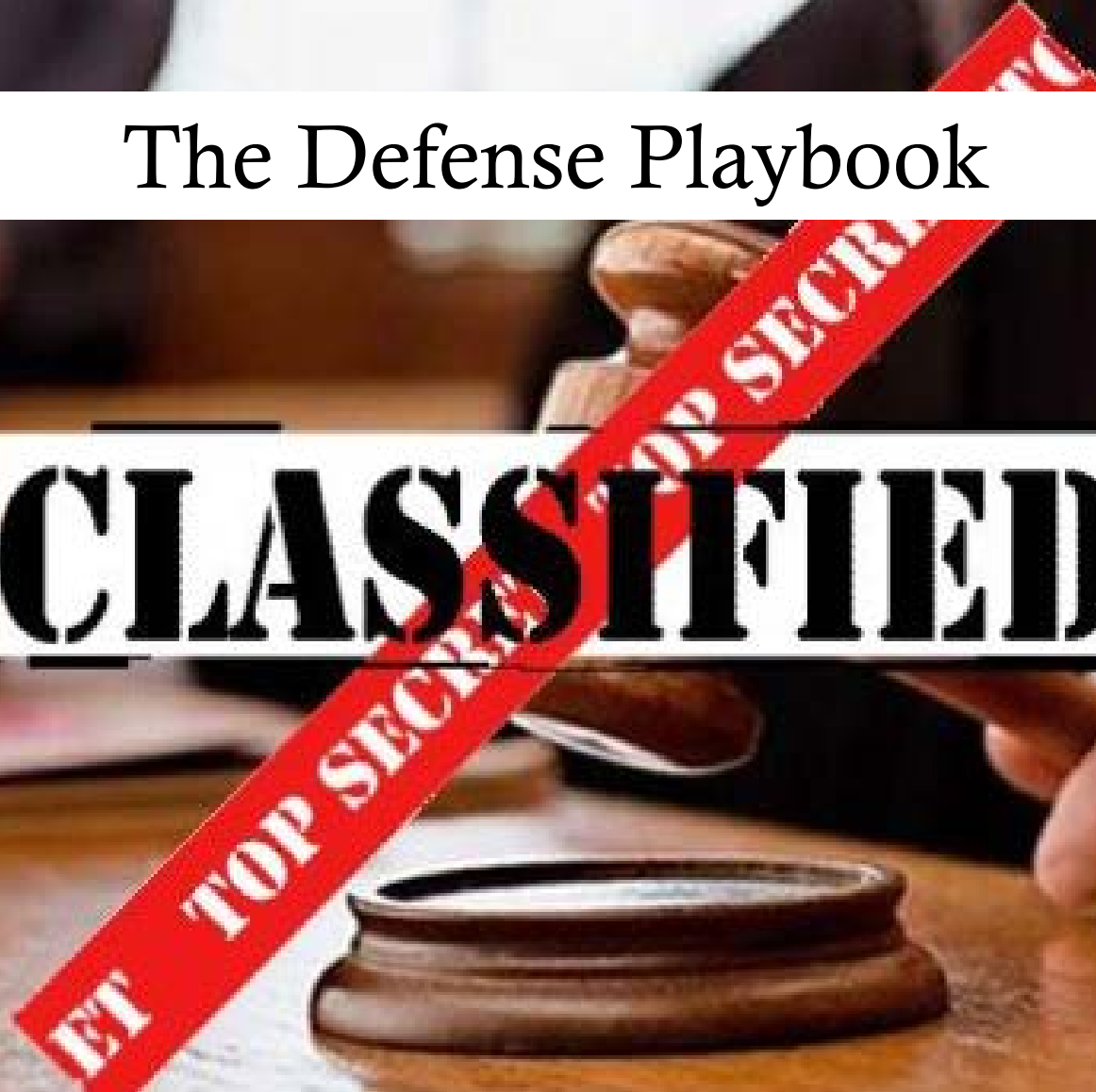
United States v. Wade, 388 U.S. 218, 256-58, 87 S. Ct. 1926, 1947-48, 18 L. Ed. 2d 1149 (1967)





The Defense Playbook

CLASSIFIED

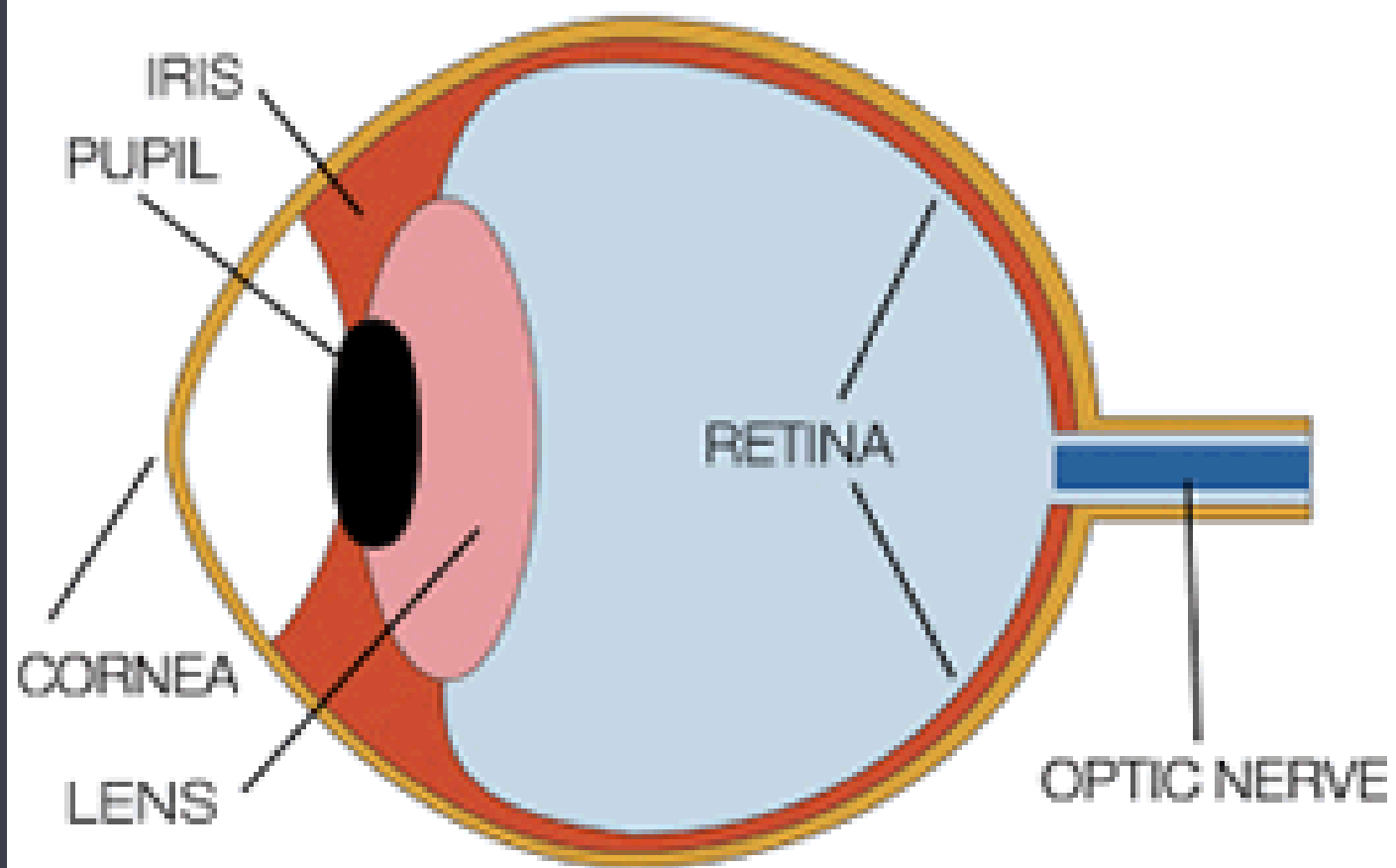


99

If you're having husband problems I feel bad
for you son,



I got 99 tigers, fed my husband to one.



The duty imposed on the
most honorable defense
counsel, in many
instances has little, if
any, relation to the
search for truth

United States v. Wade, 388 U.S. 218, 256-58, 87 S. Ct.
1926, 1947-48, 18 L. Ed. 2d 1149 (1967)




You have a
problem with
your case...



The image is a vertical composition split diagonally from the top-left to the bottom-right by a thick white line. The left half features wispy, translucent blue and white smoke rising against a black background. The right half features bright orange and yellow flames against a black background. Two white rectangular boxes with black text are overlaid on the image.

ADVOCACY

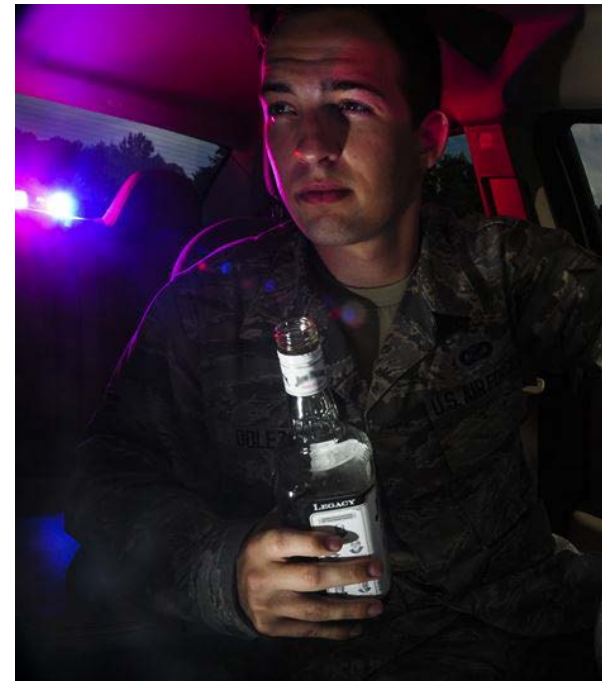
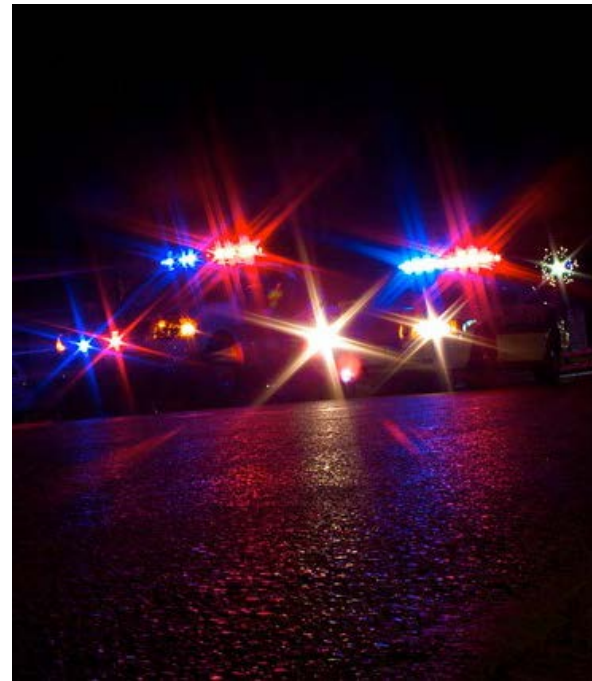
SUBSTANCE

- 
- “Evidence offered to support a fact in issue...”
 - FRE 702 Qualifications
 - Reliability
 - Admissibility

- Courtroom Drama
- Cross Examination
- Protocol
- “Death By 1000 Cuts”

The ~~Three~~ Four Phases of a DUI Arrest

- ◆ Vehicle in Motion
- ◆ Personal Contact
- ◆ Pre-Arrest Screening
- ◆ DRE/Chemical Testing



“FRAMING” THE DUI

- ◆ **Every DUI arrest is a linear process**
 - ◆ **Vehicle In Motion**
 - ◆ **Personal Contact**
 - ◆ **Pre- Arrest Screening**
 - ◆ **SFSTs (PBT)**
 - ◆ **Chemical Testing**
 - ◆ **Jail**
- ◆ **Each time frame is a “highlighter” moment for defense challenges/cross examination questions**

“SOFT” AREAS



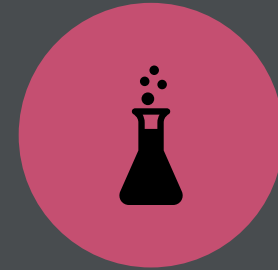
**TRAFFIC
VIOLATION**



SFST



DRE



**CHEMICAL
TESTING**

DUI DEFENSE “TRINITY”

- **Suppress**
- **Substitute**
- **Ignore**



SUPPRESS

- **Suppress**

- Keep it out if you can –
- If they can't hear it,
they can't consider it
- Tool to create a record
for cross





SUBSTITUTE

- **Substitute**
 - **Reasonable Doubt**
 - **Cross exam for Alternate Explanations/Concessions**

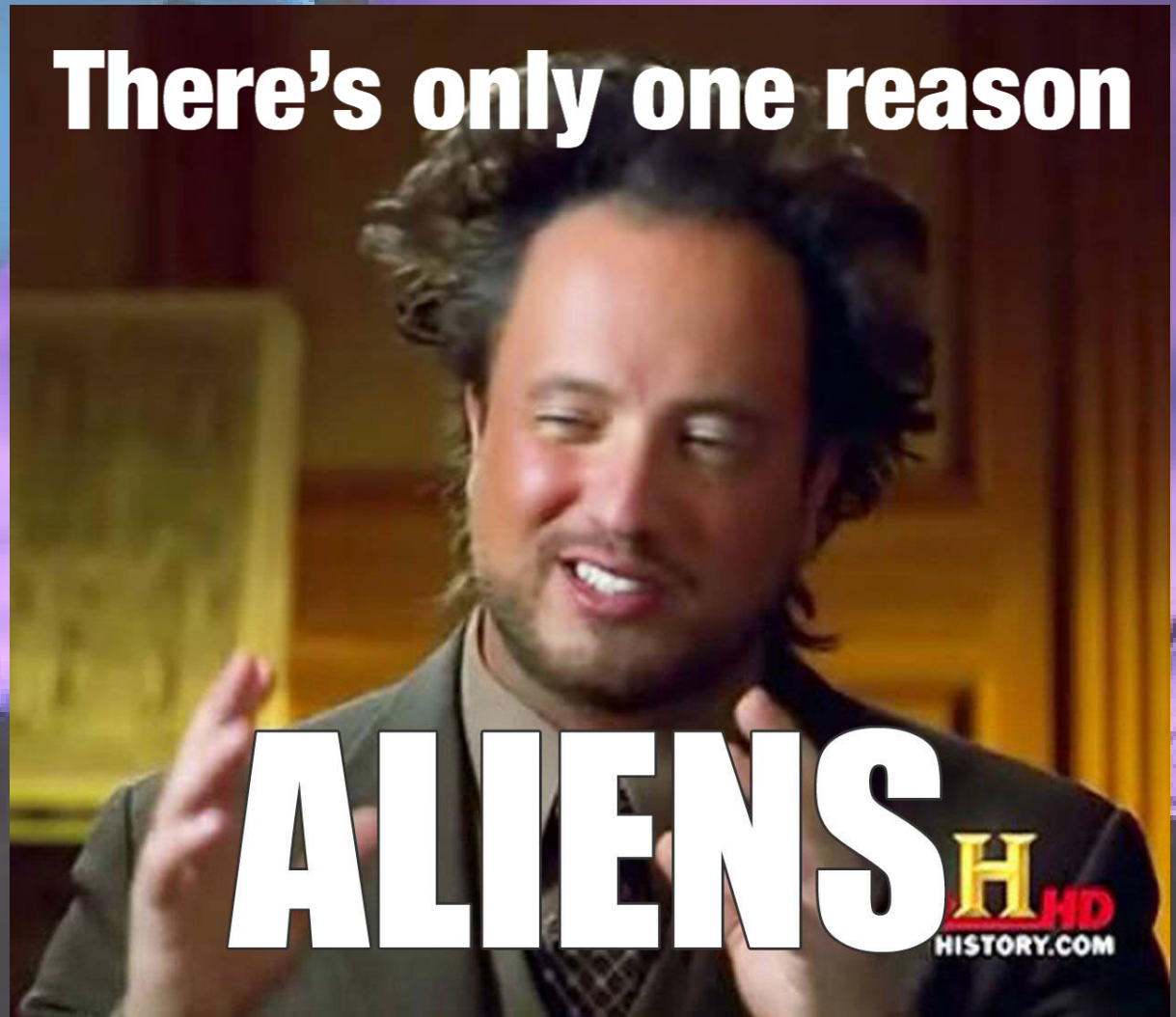








There's only one reason



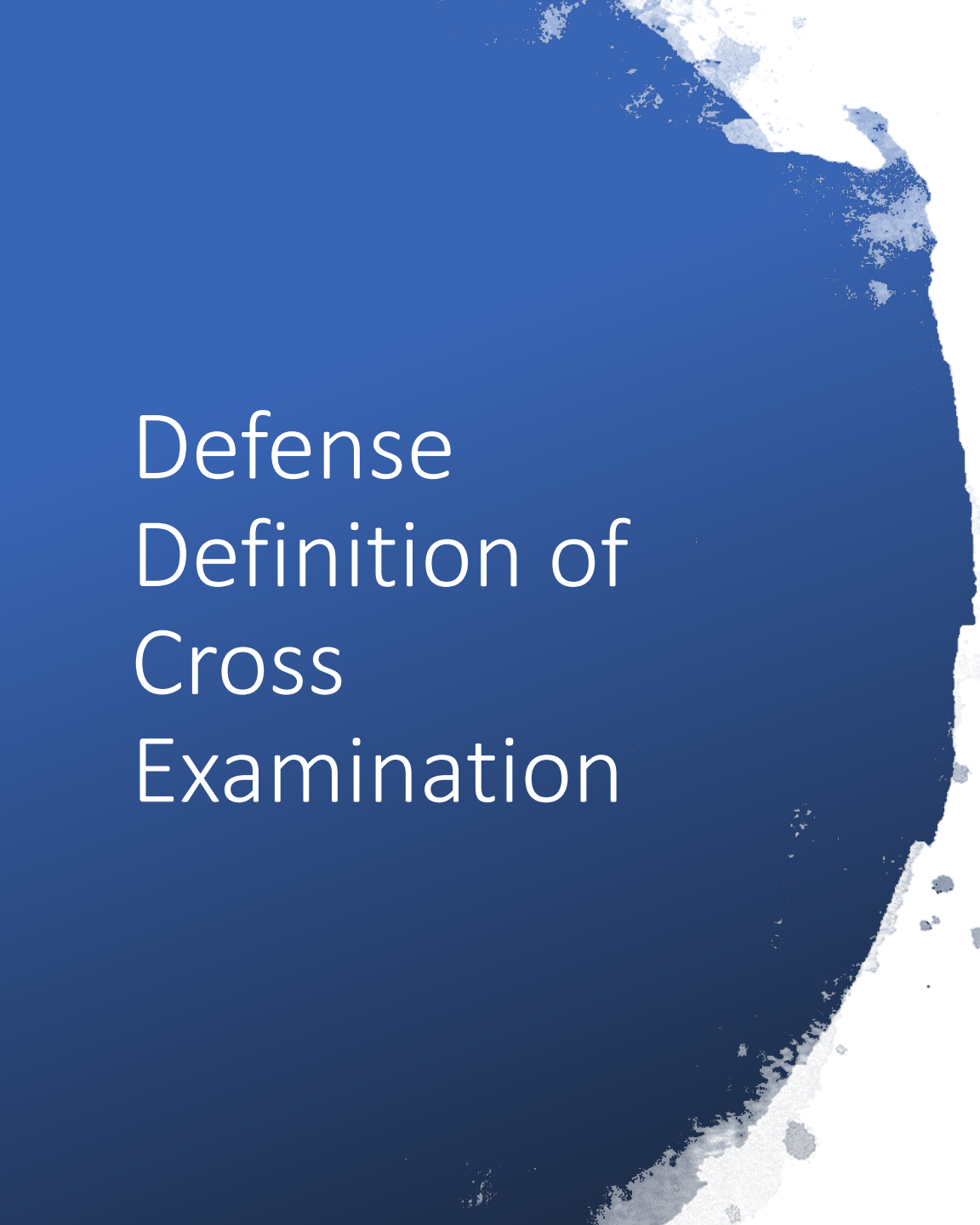
ALIENS

H **HD**
HISTORY.COM

SUBSTITUTE 2a

Focus on the good stuff





Defense Definition of Cross Examination

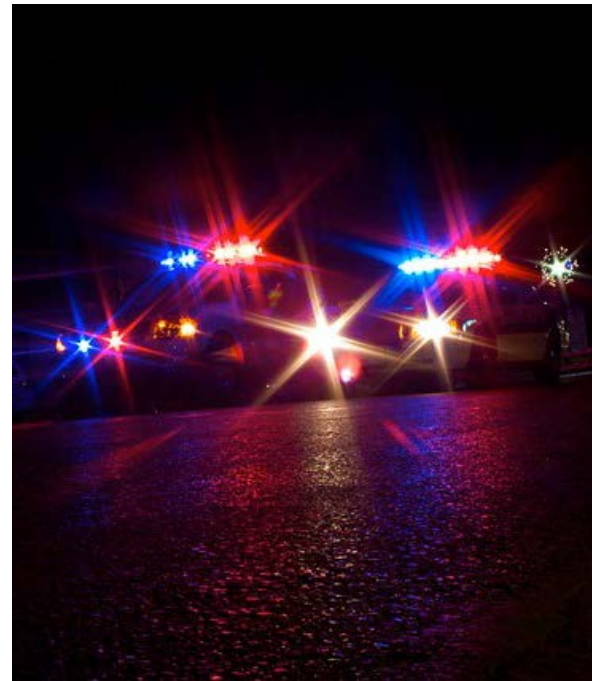
30 minutes or so of
me testifying,
occasionally being
interrupted by the
witness with a
“yes” or “no”
answer...

Officer, could you be wrong?

WHY NOT ?

The ~~Three~~ Four Phases of a DUI Arrest

- ◆ Vehicle in Motion
- ◆ Personal Contact
- ◆ Pre-Arrest Screening
- ◆ DRE/Chemical Testing



VEHICLE IN MOTION



You hear:

SPEEDING

Defense thinks:

SPEEDING

Speeding doesn't directly
equal impairment

Did the defendant:

- Immediately slow down?
- Swerve?
- Weave?
- Strike the curb?
- Drift?
- Straddle a lane line?
- Attempt to flee?
- Do anything that directly
relates to bad driving?



PERSONAL CONTACT

You hear:

Admitted to
drinking

Bloodshot
eyes

Odor of
Alcoholic
Bev

Admitted to
drinking/drugs

Defense thinks:

So, what?

What else?

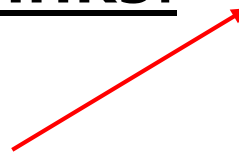
It's not illegal to drink
and drive.

*What evidence do you
have to show?*

Allergies

*Law anticipates social
drinking*

*Never seen what normal
looks like*





**“Well, I had a couple beers —
just four or five beers.”**



PRE-ARREST SCREENING

You hear:

Performed poorly
(aka failed)
Standardized
Field Sobriety
Tests

Defense thinks:

Where's my manual?
Feeding Frenzy.

Who really failed here –
the cop or my client?

Did the OFFICER:

- Understand the scientific basis for the tests?
- Recite the standardized instructions verbatim to the manual?
- Follow every standardized step?
- Use the standardized clues?
- Rule out EVERY SINGLE POSSIBLE thing that might mimic impairment?

Standardized Field Sobriety Tests

IT IS NECESSARY TO EMPHASIZE THIS VALIDATION APPLIES ONLY WHEN:

- o **THE TESTS ARE ADMINISTERED IN THE PRESCRIBED, STANDARDIZED MANNER**
- o **THE STANDARDIZED CLUES ARE USED TO ASSESS THE SUSPECT'S PERFORMANCE**
- o **THE STANDARDIZED CRITERIA ARE EMPLOYED TO INTERPRET THAT PERFORMANCE.**

IF ANY ONE OF THE STANDARDIZED FIELD SOBRIETY TEST ELEMENTS IS CHANGED, THE VALIDITY IS COMPROMISED.

At end of the test, examine each factor and determine how many clues have been recorded. Remember, each clue may appear several times, but still only constitutes one clue.

Walk and Turn

Officers should be reminded of the rigid standards the scientific community must follow in order to validate laboratory research (i.e., the development of psychophysical test for DWI detection) and the differences between validated testing and standardized testing. Officers administering SFSTs at roadside are expected: 1) to be reasonable and prudent in their decision to test; and 2) not to deviate from the SFST administrative instructions described later in this course.

- Walking stage

The Instructions Stage divides the subject's attention between a balancing task (standing while maintaining the heel to toe position) and an information processing task (listening to and remembering instructions).

In the Instructions Stage, the subject must stand with their feet in a heel to toe position, keep their arms at their sides, and listen to the instructions.

Demonstrate stance.

Walk and Turn

- Validated by NHTSA
- 68% accurate detecting ≥ 0.10 BAC
- Do NOT deviate from SFST instructions
- Two stages:

1. Instructions Stage

The rigid standards the scientific community must follow in order to validate laboratory research (i.e., the development of psychophysical test for DWI detection) and the differences between validated testing and standardized testing. Officers administering SFSTs at roadside are expected: 1) to be reasonable and prudent in their decision to test; and 2) not to deviate from the SFST administrative instructions described later in this course.

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Walk and Turn is a divided attention test consisting of two stages:

- Instructions stage
- Walking stage

The procedures outlined in this guide describe how the SFSTs are to be administered under ideal conditions. We recognize that the SFSTs will not always be administered under ideal conditions in the field because such conditions will not always exist. Even when administered under less than ideal conditions, they will serve as useful indicators of impairment. Slight variations from the ideal, i.e., the inability to find a perfectly smooth surface at roadside, do not necessarily make the SFSTs invalid.



A man in a dark suit and red tie is standing and shouting with his mouth wide open and one hand raised in a 'stop' gesture. He is leaning over a wooden bench. A woman in a blue suit is sitting on the other side of the bench, looking at him. The background shows a courtroom with wood paneling, a judge's bench, and several people seated at desks. A speech bubble is superimposed over the scene, containing the text: "Isn't it true SFST's are just for alcohol?!?!".

Isn't it true SFST's are
just for alcohol?!?!

Although original validation studies were developed to determine reliable indicators of a drivers BAC, this does not mean they were not also indicative of **IMPAIRMENT**

Definition of SFST's in 2018 Manual

There are three SFSTs, namely HGN, WAT and OLS. Based on a series of controlled laboratory studies, scientifically validated clues of **alcohol** impairment have been identified for each of these three test. They are the only SFST's for which validated clues have been identified.



SFST's Detect IMPAIRMENT

SFST's

...
“scientifically
validated clues
of
IMPAIRMENT
have been
identified for
each of these
three tests.....”
ARIDE 2018

Divided Attention Test

Requires the
subject to
focus on
mental and
physical
tasks at the
same time.
Ex.'s = WAT
& OLS

Used to Assess

Information
Processing
Memory
Judgment
Balance
Reactions
Vision
Muscle
Control
Coordination

Needed For:

Steering
Acceleration
Braking
React
appropriately to
traffic
Etc.

“Know and recognize typical clues of alcohol and/or other drug impairment that may be seen during administration of SFST’s”

“Alcohol is a CNS depressant”....

“Under the influence of many drugs, a person’s ability to divide attention becomes impaired.”

“Some of the most significant evidence from all three phases of DWI detection can be related directly to the effects of alcohol/ or other drugs on divided attention ability.”

“Alcohol and many drugs reduce a person’s ability to divide attention.”



Other Studies..... Marijuana

“The consumption of THC does impair performance on the SFST’s.”

The Evaluation of the sensitivity of the SFST’s to detect impairment due to marijuana intoxication;
Papafotiou, Carter Stough 2004

“The field sobriety tests proved to be sensitive to impairment by marijuana. When multiple tests re used in conjunction with one another, the officer can be certain they are making a correct decision to arrest.”

A 2 Year Study of THC Concentrations in Drivers: Examining Driving and Field Sobriety Test Performance,
Declues, Perez, Figueroa

Other Studies..... Other Drugs

“These findings provide support for the use of SFST as a screening tool for law enforcement to identify impairment in persons who have used CNS stimulants, CNS depressants, cannabis, or narcotic analgesics.”

An Examination of the Validity of the SFST in Detecting Drug Impairment Using Data from the DEC program; Porath, Beirness

Arrest Decision

Totality of
Circumstances





OCCAM'S RAZOR

When faced with **two opposing explanations** for *the same set of evidence*, our minds will naturally prefer the explanation that makes **the fewest assumptions**.



- Jurors know things
- Focus on sensory observations
- Driver's demeanor and attitude
- Bring your story into focus



DRE

To date, the medical community does not recognize the medical validity of the DRE exam in determining intoxication, yet the exam is used in courtrooms across the country as evidence anyway.



DRE ATTACKS

Manuals	Attack with the manuals
Training	Attack the training
Matrix	Attack the matrix
Validation	Attack the “validation”
Norms	Attack the “norms”
Tolerance	Attack with “tolerance”
Qualitative	Attack with “Qualitative Results”

OPINION



Percentage of
correct evaluation
calls

Error rate =
reasonable
doubt



Affected by drugs does not
mean driving behavior
affected



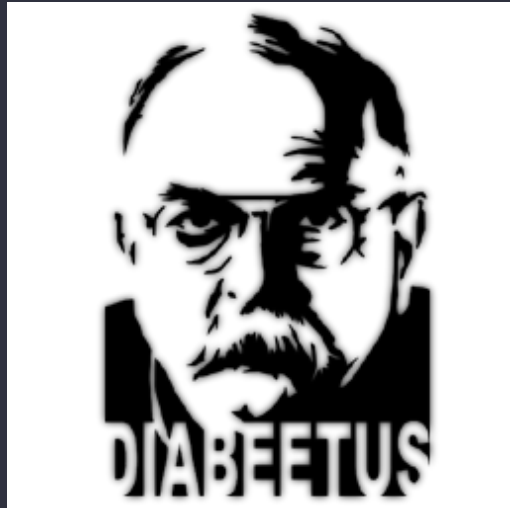
No toxicology result means
can't confirm DRE opinion

CHEMICAL TESTS

Phase Four - Chemical Testing

- ◆ **Most chemical test challenges will be an effort to prevent admission not undermine the science...**
- ◆ **Based upon:**
 - ◆ **Some failure in administrative rules**
 - ◆ **Some officer/timing error**
 - ◆ **Some printing error/paperwork defect**
- ◆ **Admissibility vs. Weight**

BREATH TESTING ISSUES



Diabetes

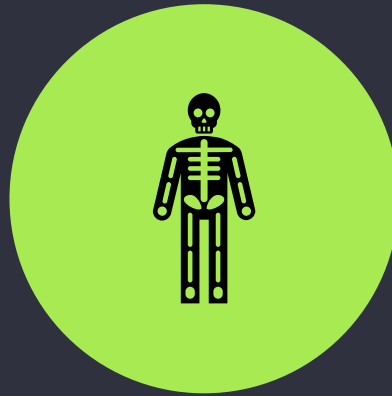


GERD

BLOOD TEST ISSUES



EXPIRED KIT



GRAY STOPPERED
TUBES – INVERSION



CANDIDA
ALBICANS

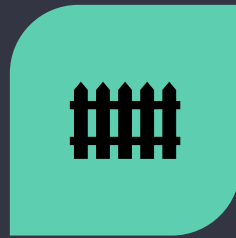
FINAL METHOD



LISTEN



VERIFY



FRAME



WEATHER



REINFORCE

#1 - Listen:

Take Notes

Ask Questions



VERIFY

#2

Multiple interpretations of evidence

Ask the “dumb” questions

Everything is related

Only one *SIMPLE* version of truth



#3 FRAME

CRIMINAL JURY INSTRUCTIONS AND COMMENTARY

2018 Edition



#4 WEATHER



IGNORE

If it hurts you,
it only needs to
be said once





#5 REINFORCE



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