

Over the Limit, Under Arrest, Not Guilty – How to Try an OWI Case With a Bad Test Result

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1. Introduction

- a. Defenses that we're not covering—if this is your defense, you probably got it covered:
 - i. Not driving—someone else was driving, just sitting in the car, etc.
 - ii. Drinking after driving.
 - iii. Never on the highway.
 - iv. No test—refusal or test results suppressed.
- b. A series of mini-presentations.
- c. Additional homework may be required!
 - i. Annual Drunk Driving Defense Seminar – Elkhart Lake. This year, November 18–19!
 - ii. Wisconsin OWI Defense: The Law and Practice; Andrew Mishlove, James Nesci
 - iii. Garriott's Medicolegal Aspects of Alcohol
 - iv. EC-IR II training manual; open records.
 - v. FST Manuals; available online.

2. Why are trials a good idea in OWI cases?

- a. Look at the risk / reward:
 - i. Guidelines often dictate the penalties.
 - ii. Does the judge impose any trial penalty to speak of?
 - iii. Is the offer meaningfully any better than what you would get after a trial?
 - iv. Even if there is a meaningful offer or likely trial penalty, does that matter to the client?
 1. Mandatory Minimums.
 2. Status (criminal record for a second, felony record for a fourth).
 3. Lifetime revocation.
 4. Lifetime CDL disqualification.
 5. Loss of job, etc.
- b. Client's decision:
 - i. Not saying you twist their arm.
 - ii. But give them a real analysis of the risks and rewards.
 - iii. "You don't have a defense" is a good way to shut down the conversation.
 - iv. Instead—"if we're going to go to trial, this is how I would defend your case."

1. You're still going to be candid about their odds of success, but instead of coming across like you're not going to try, you're showing them that you have thought about their case and have a plan, even if it's a long shot.
3. The art of presenting a shadow defense.
 - a. Some of these defenses are technical or nuanced, and may have a hard time standing on their own two feet. So frequently, they work best as a cover for a shadow defense.
 - b. What is a shadow defense?
 - i. It's when you have something that seems to be unfair, or BS, but your lawyer-brain tells you "that isn't a defense." It might be the thing that your client is fixated on. So you overtly present a weak but "legitimate" defense to the jury while simultaneously presenting your strong "non-defense" in the shadows.
 - ii. OWI Examples:
 1. I made it home safe / I was almost home.
 2. I pulled over to sleep it off.
 3. I wasn't going to drive but...
 4. I wasn't actually impaired (especially RCS / 0.02 cases).
 5. Cops behaving badly.
 - c. Isn't this just jury nullification?
 - i. In my mind, there is a difference between a shadow defense and nullification. Nullification is an overt, principled stand—you want the jury to give a middle finger to the government. A shadow defense is covert and relies on there being legitimate, if weak, defense that provides cover for jury's verdict.
 - d. How do you present a shadow defense?
 - i. Job number one is to tell your client's story. You can't be faulted for laying out the facts of the case in opening and closing. So emphasize the facts that support your shadow defense. Tell a good story. Tell a story that leads to the conclusion that what happened to your client was unfair.
 - ii. When the jury already knows the story, give them the hook they need to support the not guilty verdict. Lay out your legal argument. With confidence.
 - iii. There doesn't need to be a connection between the two. The shadow defense makes the jury *want* to acquit. The cover defense gives them a *justification* for acquitting without "breaking the rules." In other words, the shadow defense makes the jury want to believe your cover defense.
 - iv. On the other hand, the more you can link the two, the better.
 - e. Why does this work?
 - i. We love good stories.
 - ii. Juries tend to come to court wanting to be fair to both sides.
 4. The Test is Wrong – Breath
 - a. Maintenance record issues:
 - i. What do maintenance records look like?
 - ii. Foundational issues—prosecutor's job to produce the records. Make sure they have them.
 - iii. You can get more records through open records request.

- iv. Issues to watch for: calibrated, instrument removed or relocated, new instrument installed, failed maintenance checks.
 - v. Records themselves can come in without a witness, so the prosecutor and officer may be unprepared to respond to cross examination on these issues.
- b. 20 Minute Observation issues:
- i. Always request body cam and intoximeter room camera—many departments have video and audio running in the intox room.
 - ii. Watch for the 20 minutes.
 - iii. Officer must check subject's mouth prior to starting, and the observation must be "close and attentive." Watch for interruptions, breaks in line of sight, etc.
 - iv. If a single officer, training materials say not to be doing paperwork or administrative tasks during 20 min.
 - 1. Open records request for EC-IR II training manual from DOT.
 - v. Officers are frequently not expecting to be attacked from this angle and haven't watched this portion of the video. Exploit this in cross—they will agree to ridiculous things only to be contradicted by the video.
- c. Medical issues:
- i. GERD
 - ii. Ketosis
 - iii. How to raise these at trial:
 - 1. With an expert.
 - 2. Without an expert.
- d. The plus/minus 0.02 trick.
5. The Test is Wrong – Blood
- a. Experts can be brought in, but let's talk about how to do this without an expert.
 - b. Warning—do your homework. These usually involve questioning an analyst; if you haven't used this defense before, odds are good that the person your questioning HAS testified about it before and will know what you're up to. Read transcripts, read manuals, read articles, etc.
 - c. Review everything, look for what might be a weakness.
 - i. Present as a reasonable doubt issue.
 - ii. The hospital analogy.
 - iii. Questions they can't answer.
 - d. Collection:
 - i. Generally, what are we looking for?
 - 1. Proper kit used?
 - 2. Expiration date?
 - 3. Vial contains the correct powder (preservative and anti-coagulant)?
 - 4. Non-alcoholic swab?
 - 5. Two vials?
 - 6. Full draw?
 - 7. Mix the sample by inversion?
 - ii. Is it on video?
 - 1. If so, you can look for actual errors in the process.

- iii. If not, does the person who drew the blood even remember doing it?
 1. That can be a defense on its own—State cannot establish that proper procedure was used.
 - iv. If they did something wrong, the basic formula is something like this: “You are trained to do X. X is important because if you don’t do X, then [explain reason why test result would be compromised]. You didn’t do X.”
 - v. If there is a lack of memory, you can exploit that by saying that all they have proved is that the blood draw technician knows how he or she is *supposed* to do it, not that they actually followed that procedure in this case.
 - vi. If the blood draw technician claims to remember the incident, and you have no proof they missed something, watch for lapses in their story, *don’t* cross on it, and raise it with the analyst later.
- e. Chain of custody.
- i. Look for how long it takes to get to lab, where it was stored.
 - ii. Typically not refrigerated until it gets to lab. Lab feels this is fine. Still a point to raise.
- f. At the lab.
- i. “Garbage in garbage out”—they can only test what they’re given.
 - ii. Look at the chromatograms and documentation from the lab. Easy things to look for:
 1. Funny extra peaks.
 2. Non-correlation.
 3. Any issues noted during that day’s testing on that machine.
 4. Handwritten notes often a red flag.
 5. Maintenance issues with diluter or machine either before or after test.
 - iii. Identify the parts of the process that involve human participation, human interpretation. Establish how many of these tests the analyst does per year and that they clearly don’t recall each and every step in each and every test.
 - iv. Identify how errors can result in bad test results.
 - v. Example: error in dilution could cause elevated test result.
 - vi. Potential sample mix-ups.
- g. Fermentation.
- i. Do homework on this!
 - ii. Basically—microscopic critters eat sugar (which is in blood) and poop alcohol. Same process by which alcohol is fermented.
 - iii. This can happen in blood.
 - iv. It shouldn’t happen when there is a properly vacuum-sealed tube that contains a preservative.
 - v. Issues that could impact the integrity of the seal (expired tubes) or the preservative (expired tubes, failure to mix properly, inadequate amount of preservative) could result in fermentation.
6. The Test is Wrong and I Don’t Know Why: Disconnect
- a. Works better the higher the test result is.
 - i. You want to lean HARD into all the stuff you usually want to minimize.

- ii. If your client passes any / all of the FSTs, you want to lean into how accurate those are for detecting impaired drivers.
 - iii. Pull from training materials or treatises to discuss how a high BAC impairs so many aspects of a person's functionality.
 - b. Basic argument: Disconnect between *behavior* and *test* result, the argument in a nutshell.
 - i. Officer conducted this investigation, looking for evidence of intoxication.
 - ii. [List all the evidence showing a lack of intoxication: good driving, coherent / cooperative demeanor, no issues with balance or coordination after the drop, good performance on FSTs, etc.]
 - iii. All this evidence suggests someone who is not intoxicated, who is capable of operating a motor vehicle safely.
 - iv. Then Tammie blows into this machine, and the machine spits out this number.
 - v. And this number, a 0.24 BAC, suggests that she's THREE TIMES the legal limit.
 - vi. Folks, that is just impossible! [Go through what we would expect to see if she was 3x the limit and compare to the evidence we actually have.]
 - vii. Either ALL of this other evidence in this case is wrong, or this machine spit out an incorrect number.
 - viii. [Clever argument of choice.]
 - ix. [Burden of proof.]
 - c. A twist / supplement: Compare the actual drinking history with the hypothetical drinking history that would be required to support the BAC:
 - i. [This is for when you have either some evidence of what the client actually drank (witnesses, ideally) and/or when you have an absurdly high BAC.]
 - ii. We know from Tammie's husband that they each had two Miller High Lifes with dinner before driving home. We know that Tammie went to dinner right from work, and she obviously wasn't drunk at work. None of this is in dispute. But they're saying her BAC was a 0.24.
 - iii. Now, according to [chart / witness], and considering the time that passed, a person of Tammie's size would have to have at least *twelve* drinks to get to a 0.24 at the time of the blood test.
 - iv. So issue number one—where is the proof beyond a reasonable doubt that Tammie had twelve drinks? That it was even *possible* for Tammie to have twelve drinks? Did she slam 10 when her husband got up to use the bathroom? [etc.]
 - v. Issue number two—use your common sense. If someone was in your house, and you watched them down 12 beers in an hour and 45 minutes, picture how they'd be acting. Would they be able to stand on one foot for 30 seconds, like Tammie did? [etc.]
 - d. Mix and Match
 - i. Giving a reason to doubt the reliability of the testing *process* combines well with providing a reason to doubt the *test result*. So combine concerns about the blood draw or concerns about the 20-minute observation period with a disconnect argument.
7. The Test is the Right Answer to the Wrong Question: Soft Curves
- a. A soft curve is just putting the burden of proof back where it belongs.

- i. Remember that you don't need to prove what the BAC was at the time of driving—the State does.
 - ii. When you push on a “hard curve” – either by calling an expert, or doing your own calculations – you are saying “I know the right answer” and assuming the risk that the State will poke holes in your “right answer.” You're assuming the burden.
- b. When is this a plausible defense?
 - i. When time of drinking, time of driving and time of test are not too far apart; and
 - ii. When your client is not too far over the limit; and
 - iii. When your client isn't obviously impaired during the traffic stop.
- c. What do you mean by “too far”?
 - i. Ideally, you want your time of *drinking* and the *test* to be no more than 90 minutes apart, but you can stretch that a bit. You certainly need your time of drinking and time of driving to be no more than 90 minutes apart.
 - 1. You will need to walk back your client's statements at the scene if they say they stopped drinking six hours ago!
 - ii. The curve is playing on the idea of un-absorbed alcohol in the system. The higher you are over the limit, the more drinks you have sloshing around in your belly. At some point it becomes unreasonable.
 - iii. Remember to take into account elimination at a rate of 0.015 / hour to make sure your story is plausible.
 - iv. Example on determining if it's a plausible curve:
 - 1. 180-pound man, who had a few beers earlier, stopped drinking for a couple hours, and then has a 2 oz shot of 100-proof liquor at 10:30. Is pulled over at 11:00. Does a breathalyzer at 11:30—result is a 0.09.
 - 2. First, account for elimination. If absorption wasn't an issue, and his body was just eliminating alcohol, what does that tell us? Using an average rate of 0.015 / hour, that means at the time he was pulled over he would have been around a 0.097—if absorption wasn't an issue.
 - 3. The 2 oz shot would “add” two “drinks” worth of alcohol to his system. One “drink” for a 180-pound man equates to +0.021 BAC when fully absorbed. So that shot accounts for 0.042 of his BAC.
 - 4. It can take alcohol anywhere from 30 to 90 minutes to fully absorb. He was driving 30 minutes after taking the shot. So it's likely that it was still absorbing. What percentage was absorbed? Nobody can know that.
 - 5. If we assume 50% of it was absorbed and 50% of it was not, we can subtract 0.021 off of the 0.097 number, getting us 0.076—under the limit.
 - a. Note that this 50% number is just totally made up—no expert is going to be able to tell you what percentage was absorbed at a specific point—there are way too many variables.
 - 6. Now, if his test result was 0.15, we'd need to establish that something like 0.08 worth of unabsorbed alcohol in his stomach at the time he was driving—that's about four shots *in the stomach*. When you consider that some percentage of the alcohol would already have been absorbed, it

would be like 6-10 shots that he took right before driving. It's sounding more and more implausible.

- v. *You don't need to get into all of this with the jury!* But you should know it, so you know you're not walking into a trap—you do not want to have your soft curve argument refuted by the State presenting a hard curve that shows your client is guilty!
 - d. A step-by-step guide to arguing a soft curve through cross examination:
 - i. Establish that the test (breath or blood) gives an accurate result *at the time of the test*. It's not calculating backwards.
 - ii. Note that the operative question for the jury is not what the BAC was at the time of the test, but at the time of driving. (Oops! The State wasted all this time answering the wrong question!)
 - iii. Establish that the witness does not *know* the BAC at the time of driving.
 - iv. Establish that it could have been higher or lower than the known test result.
 - v. Walk through the basic facts that your alcohol level rises as alcohol is absorbed and falls as it is processed.
 - 1. This can be scientific testimony, but it works fine as lay testimony too! It's super obvious when you break it down step by step. Anybody who has consumed alcohol is qualified to answer these questions.
 - vi. At this point, it depends somewhat on your facts and your witness.
 - 1. One option is just to say – you're not an expert / you can't testify as to whether it was rising or falling / you don't know if it was higher or lower.
 - 2. Or if it is an expert, you can say that the absorption rate is affected by lots of variables (X, Y, Z) and you don't know (X, Y, Z) so you can't tell us if it was higher or lower at the time of driving.
 - 3. Depending on the witness you may be able to get them to agree to certain facts about absorption or elimination—based on training manuals, articles, treatises, etc. But you may not need to.
 - vii. The closing argument in a nutshell—they have to prove beyond a reasonable doubt that Tammie was over the limit at 10:30 p.m. They have not done so. They have proven, and I will concede, that she was over the limit at 11:30 p.m. But—as their own witness testified—her BAC could have been the same, higher, or lower at 10:30, *and they have no clue* what it was. Now, let's look at the other evidence in the case... (and talk about how we know she was under the limit when she was driving).
 - 1. Either / or: either her BAC was rising, or it was falling.
8. Hard Curves
- a. Affirmatively telling the jury that you know what the BAC was.
 - i. Proceed with caution.
 - ii. Taking the burden is risky.
 - iii. Plus, this defense really requires some jury sympathy. The jury has to believe that your client was fully capable of driving safely *and* that they would have made it home just fine if the cop hadn't pulled them over.

- b. This is all based on a simple formula, which you should know inside out if you're doing OWI trials. It's not hard.
 - i. There are four variables for a simple calculation: (1) Sex, (2) Weight, (3) Number of Drinks, (4) BAC. If you know or assume three of the four, you can *always* calculate the missing variable.
 - 1. N.B., this is useful for things other than curve defenses.
 - ii. It gets more complicated with curves, because you're travelling back in time. When you go back in time, you have to account for the fact that alcohol is being eliminated. It's like you're fighting gravity.
 - 1. Elimination rate on *average* is 0.015 / hour. But rates vary from 0.010 to 0.025 / hour.
 - 2. If you're using the standard *Hinz* chart, you're probably stuck with an average rate. But any expert (yours or a State analyst) will almost certainly acknowledge the 0.010 to 0.025 range.
 - iii. You also have to figure out how fast the alcohol gets absorbed, but there are a ton of variables. Usually it's at least 30 minutes for absorption, can be up to 90 minutes.
- c. Options for presenting:
 - i. Your own expert:
 - 1. Pro: you know what they will say and can present it as you see fit.
 - 2. Pro: if the expert comes across well or the DA bungles the cross, your team is going to look like the professionals in the room.
 - 3. Danger: assuming the burden.
 - 4. Danger: looking like your client is trying to buy an acquittal.
 - 5. Danger: if your expert is a flake.
 - ii. Their lab analyst or chem test section technician:
 - 1. Pro: these witnesses will generally not fight you on a simple calculation.
 - 2. Pro: it's free!
 - 3. Pro: the State can't realistically discredit the witness.
 - 4. Danger: they may emphasize a range of possible results.
 - 5. Danger: they may try to spin things for the State (depends on the witness).
 - 6. Danger: you better make sure your calculations are correct.
 - iii. Yourself:
 - 1. Using chart, as permitted by *State v. Hinz*.
 - 2. Pro: it's free.
 - 3. Pro: it's flexible; you can do it with a witness or without a witness in closing.
 - 4. Danger: will the judge and/or DA stop you from doing it?
 - 5. Danger: can you lay a sufficient foundation?
 - 6. Danger: is the jury going to find you credible?

9. Affirmative Defenses

a. Coercion: § 939.46

- i. "A threat ... which causes the actor reasonably to believe that his or her act is the only means of preventing imminent death or great bodily harm to the actor or another and which causes him or her to so act is a defense[.]"

- ii. Limited to “most severe form of inducement”; must reasonably believe that you have no other alternatives. *State v. Keenan*, 2004 WI App 4, 268 Wis. 2d 761, 674 N.W.2d 570.
 - iii. Remember it is not judge’s place to weigh evidence and decide whether your client’s belief was reasonable—it’s a jury question.
 - iv. Once you get the instruction, it is the State’s burden to prove BRD that the defense doesn’t apply.
 - v. Common examples: fleeing a fight; abusive partner insists on a ride.
- b. Necessity: § 939.47
- i. “Pressure of natural physical forces which causes the actor reasonably to believe that his or her act is the only means of preventing ... imminent death or great bodily harm to the actor or another and which cause him or her to so act, is a defense[.]”
 - ii. What is a natural physical force? Must consider whether “the force” was set in motion by human conduct and whether “the force” can be controlled.
 - iii. Same as coercion—just need to present enough to get the instruction, and burden shifts to State to disprove.
 - iv. Common example: medical emergency or injury coupled with a reason why calling 911 isn’t an option.
- c. Entrapment
- i. Threshold question: was the defendant induced to commit the crime?
 - ii. If so, State must prove BRD either:
 - 1. That the inducement was not excessive, OR
 - 2. That the defendant was predisposed to commit the crime before being induced.
 - iii. Common example: officer orders person to move car, or to operate the controls in some fashion (i.e., turning off the ignition).
 - iv. Unpublished Example: *State v. Travis Peterson*, No. 2009AP14-CR (Wis. Ct. App. July 15, 2009).



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Blood Alcohol Errors Outline and Checklist

I. Pre-analysis Errors

A. Chain of Custody

- 1. ID of subject**
 - a) Confirm subject identification is correct**
 - b) Challenge any inconsistencies**
- 2. Labeling of blood tube**
 - a) Verify evidence label placed on blood tube correctly**
 - b) Check all information written on evidence label**
 - c) Check blood tube manufacturer's label for anticoagulant, preservative, expiration date**
 - d) Challenge any inconsistencies**
- 3. Labeling of evidence box**
 - a) Verify all information written on box is correct**
 - b) Check all evidence labels for placement**
 - c) Check expiration date**
 - d) Challenge any inconsistencies**
- 4. Associated paperwork prior to lab delivery**
 - a) Reconcile all information on paperwork with the blood tube and box**
 - b) Check paperwork for any other errors (rule out scriveners' errors)**
 - c) Challenge any inconsistencies**

B. Blood Sample Collection

- 1. Identify phlebotomist**
 - a) May be any health care professional with access to the subject**
 - b) May not meet Implied Consent requirement**
- 2. Elucidate all steps in blood sample collection by phlebotomist**
 - a) Subject identification may not have occurred**
 - b) Medical intervention may have been ongoing (I.V. fluids, medications, other resuscitative efforts)**
 - c) Strict sterile technique usually not followed**
- 3. Determine anatomic location of blood draw**
 - a) Non-trauma cases usually blood draw from arm**
 - b) Trauma cases often blood draw from femoral artery or vein**
 - c) Determine if blood sample is venous or arterial**
- 4. Check blood sample**
 - a) Make sure it is whole blood!**
 - b) Check blood volume in tube for short draw**
 - c) Determine water content of blood sample**

C. Blood Sample Storage

- 1. Determine time intervals from collection to LEO, LEO to lab, lab to analysis**
- 2. Determine environmental conditions for each time interval,**
 - a) especially temperatures above 4 degrees centigrade (39° F)**
- 3. Check for any other irregularities**

Blood Alcohol Errors Outline and Checklist (cont.)

II. Analysis Errors

A. Chain of Custody

- 1. Review all intra-laboratory chain of custody documents**
- 2. Depose analyst regarding blood sample identification throughout the analytical process- two people should be involved**
- 3. Challenge any inconsistencies**

B. Qualitative Analysis

- 1. Determine method of analysis - in order of increasing forensic reliability they are:**
 - a) Enzyme assay – least reliable!**
 - b) Direct injection GC packed single column FID**
 - c) Headspace GC packed single column FID**
 - d) Headspace GC capillary single column**
 - e) Direct injection GC packed dual column FID**
 - f) Headspace GC packed dual column FID**
 - g) Headspace GC capillary dual column FID –most common**
 - h) Headspace GC capillary column FID-Mass Spectrometry-most reliable**
- 2. Inspect all chromatograms- QC and Subject samples – should be:**
 - a) Flat baseline**
 - b) Symmetrical peaks**
 - c) Only three peaks – injection, ethanol, internal standard**
 - d) Except Negative control - should not contain ethanol!**
 - e) Stable retention times**
 - f) Consistent internal standard area counts**

C. Quantitative analysis

- 1. Inspect all chromatograms- QC and Subject samples – should be:**
 - a) Flat baseline**
 - b) Symmetrical peaks**
 - c) Only three peaks – injection peak, ethanol peak, internal standard peak**
 - d) Stable retention times**
 - e) Consistent internal standard area counts**
- 2. Check Calibration Curve!**
 - a) Check linearity**
- 3. Check all positive controls**
 - a) For quantitative result and variance**
 - b) Expiration date of control**
 - c) Inspect Levy-Jennings charts for previous six months**
- 4. Review FDLE and/or other proficiency test results previous six months**
 - a) Check for PASS/FAIL**
 - b) Any obvious quantitative bias (much higher than mean)**
- 5. Error and Uncertainty calculations**
 - a) FDLE labs are now reporting uncertainty with their reports**
 - b) Request and inspect their method of calculating uncertainty**
 - c) Determine if the lab has included ALL errors in the calculations**

Blood Alcohol Errors Outline and Checklist (cont.)

III. Post-analysis Errors

A. Chain of Custody

- 1. Inspect final report – reconcile against all other information**
- 2. Challenge any inconsistencies**

B. Consider re-testing of subject original blood sample

- 1. DNA if Subject identity in question**
- 2. Re-test for ethanol and other volatiles**
- 3. Gram Stain for microbes**
- 4. Culture for microbes**
- 5. DNA for microbes**