DUI IS A COMPLEX AND INCREDIBLY UNIQUE CRIME

Driving Under the Influence or "DUI" is one of the most complex and unique crimes in the criminal justice system today. It is also the only crime that at one point or another, many of us have come close to committing. To make matters worse, many drivers also failed to realize it. Most people know when they're performing a criminal act. In fact, the very law itself requires that most crimes contain both a criminal act (actus reus) and a "criminal" intent as well (mens rea). Crime is, by definition, all about the "bad guys"(bankers excepted). Unfortunately, to be convicted of DUI, all you need to do is get in your car and later, even two hours later, produce a particular breath concentration. .08 grams of alcohol per 210 litres of breath to be exact. What you thought and your reason for driving, no matter what the circumstance, mean next to nothing. Worse, if someone is hurt or killed in an accident, the crime immediately becomes a serious felony called **Vehicular Homicide** or **Vehicular Assault.**

A TOUGH LAW AND A TOUGHER DEFINITON

Of course, society must draw a line in the sand, but it's the name of the crime and the method of prevention that makes things complicated, unproductive and uncertain. "Drunk Driving" or "Driving Under the Influence" as the government calls it, is probably the least accurate phrase to describe this crime. Ironically, it may also be the most ineffective way to prevent it. As a former prosecutor, many convictions came from my ability to convince juries the "Driving Under the Influence" is anything but "drunk."

DUI is one of the few crimes that enjoys the benefit of government advertising. We have all seen the signs on the freeway declaring .08 as "the legal limit." Yet, how do you know when your breath is .08? Oprah Winfrey, of all people, wondered the same and years ago, joined "girls night out" tugging along a cute state trooper to measure them at the bar. Over and over each shocked expression demonstrated our point. A society full of social drinking and a dramatically low limit create a lot of "mistakes."

But even the number .08 is misleading. In fact, in most states, there are two ways to commit the crime of DUI and only one of them requires the .08 reading. The other method, often used, is to prove your "ability to drive was impaired to **any** appreciable degree." Notice the word "any" in that phrase. It is that particular word, more than "any" other that brings out the lawyers. Does this mean you run a red light? Exceed the speed limit? Cross over the shoulder line when making a transition? Roll through a stop sign?

The answer is none of the above. This is left to the discretion of the arresting officer, charging prosecutor and ultimately, the individual juror. It is this legal structure that has produced over a dozen clients who have been charged with DUI while blowing below the legal limit and some as low as .05. Even worse, Your "ability to drive" can be "proven" without a single error on the road and may be left to nothing more than unusual roadside tests.

NEGLIGENT DRIVING IN THE FIRST DEGREE

And it gets worse. There are two more DUI like crimes they don't advertize. One is relatively unique and fewer states copy the design. "Negligent Driving in the First Degree" is a misdemeanor, punishable by jail, that requires alcohol and some form of "negligent driving." Once again, no one really knows what the phrase "negligent" means but worse, there is no level of alcohol required just some measurable amount. Once again, does this mean you roll through a stop and had a glass of wine? Ask ten jurors and you'll get ten answers, the law leaves it to them.

PHYSICAL CONTROL

Physical Control is punishable just like DUI but even more abstract. This crime does not require you to drive at all, just be in "physical control" of the car. What does this mean? What if you have parked the car to sleep it off? Does it matter where you park, if you leave on the heater? Unfortunately, over the last two decades, the courts have made it easier and easier to commit this crime to the point where you are guilty even if you are actually out of gas and out of the vehicle.

A STRANGE AND HYPOCRITICAL LAW

There is actually a "statutory" defense to the crime of Physical Control that requires you, before being contacted by police, to take your vehicle "Safely off the Roadway." Makes sense if we want to reward the good act but once again, the government has complicated things. Once again, your intentions mean very little. If another driver sees you and they obtain that witness, your good deed means nothing and they can charge you with DUI where you do **not** get the defense. This makes little sense, because under Physical Control, a driver can openly admit to the jury that he was DUI, but still got off the roadway, and the law commands the jury to honor the defense. That is, if no one saw him.

SEPERATION OF POWERS

DUI is extremely political and unlike many states, our judges are elected. As our courts have progressively whittled away at the definition of "safely off the roadway" they have openly admitted that these "drivers" should not really enjoy this defense since, moments

before, the were DUI anyways. Our courts have actually said this in their written opinions. There's one problem with that and it involves our three branches of government. No matter what the Court thinks of this law, as long as it is constitutional, they must honor it, along with its "defense." Our legislature has clearly invoked a law that rewards an individual who realizes their mistake, or at very minimum wonders if they are approaching .08, and takes their car off the road. It is no place for our courts to take that away from the citizens by reducing the phrase to nonsense.

MANDATORY JAIL

Washington has enacted some of the harshest criminal and administrative DUI penalties in the nation. Unlike most gross misdemeanors, the first time offender faces a variety of mandatory punishments including jail, substantial fines, loss of license, ignition interlock, alcohol assessments, victim panel participation, increased insurance rates, and some of the longest "probation periods" of any crime.

LOSING YOUR LICENSE

Having a DUI is like having **two** government prosecutors. Losing your license is the most significant and immediate consequence of DUI. Twenty days from the arrest, The Department of Licensing (DOL) will move to automatically suspend your license if you blow over the legal limit (.08) or refuse the breath test. This goes into effect sixty days from the arrest. DOL has nothing to do with the criminal prosecutor and acts on much less evidence. Unlike other states, a DOL suspension will stay in effect even if you are never charged with the crime or even acquitted at trial.

There are numerous reinstatement requirements and some paperwork needed depending on the crime. These include an alcohol assessment, completion of alcohol drug information school or the first 60 days of treatment if needed, proof of special insurance - an SR-22 Insurance Certificate, a $150 dollar reinstatement fee, driving examination if the suspension is 1 year or longer, and proof of an installed ignition interlock if the conviction is for DUI. Given the immediate and severe consequences, the Department has evolved a new form of restricted License called the IGNITION INTERLOCK LICENSE. In order to obtain it however, a driver must complete most of the same conditions needed for license reinstatement including installing the ignition interlock in their car.

DRIVING WHILE LICENSE SUSPENDED IN THE SECOND DEGREE

If caught driving on the suspended license, you will again face a gross misdemeanor punishable up to one year and a $5000 fine. If convicted while in this suspension status, your license will be suspended once again for an additional year.

A PERMANENT AND INTERNATIONAL RECORD

Very few attorneys, prosecutors or judges inform a driver that a Washington State DUI conviction is one of the only gross misdemeanors that you can never seal or expunge from your criminal record. In addition, rarely is the accused told that a DUI conviction will immediately disqualify them from entering Canada for at least five years.

THE IMPLIED CONSENT STATUTE

DUI law in Washington state, like many others, is based primarily on the Implied Consent Statute. Before 1969, a Washington driver had the absolute right to refuse the alcohol test without any criminal or license consequence. This new law however proclaimed that every driver is deemed to have agreed to take the test if requested by law enforcement. The purpose of the new law was to help motivate the driver to give up a sample. Originally, the law only provided a license penalty if the driver refused the test. Now there is a consequence for giving a sample above the legal limit (.08 for adults) as well. Under the current law, the officer is required to inform the driver of certain "rights" and consequences before requesting a sample. This is done by reading and providing a standardized form.

PROFOUND DEFECTS IN THESE WARNINGS

The limitations and misleading quality of these warnings have given rise to an ongoing legal debate. Originally, in 1969, these warnings were accurate and effective as they only punished the refuser's license and warned accordingly. As the law evolved however, Washington began to punish both scenarios. They also began to independently and administratively suspend the license of any driver who blew over the legal limit. In their current form, the warnings attempt to tell the driver that they will lose their license under two scenarios: (1) administratively if they blow above the limit or refuse or (2) criminally, if they are convicted in court regardless of the evidence.

Worse yet, if an individual refuses, they actually lose their license for two years in court not one as the form suggests. They must also serve additional jail time even though the form tells them it is their absolute statutory “right” to refuse a sample. Jail time for exercising a right. No other state currently does that. **The Law Office of David C. Mason** is currently mounting a constitutional challenge to this unique scenario.

THE DOL LICENSE SUSPENSION HEARING

Once an individual requests a hearing to contest their license suspension, a hearing is generally set within 60 days. The procedural rules for the hearing are located in RCW 46.20.308. The DOL hearing is dramatically different from the criminal trial. The police report and breath ticket are admissible without witnesses under very relaxed rules of evidence. The burden of proof is significantly lower than court and while the criminal trial may involve over one hundred issues, the DOL hearing is limited to five: whether the officer had probable cause, whether the person was placed under arrest, whether the officer followed limited procedures, whether the person's sample exceeded the legal limit, and whether the person refused. In a criminal trial, the state must concede that individual physiology and machine limitations limit the effect to measure the true human breath concentration. In contrast, DOL relies exclusively on the numbers printed on the breath ticket.

LEGAL AND POLITICAL CONTROVERSIES

Legal critics continue to challenge the structure and procedure of these unique hearings. Most administrative hearings must follow the Administrative Procedure Act. RCW 34.05. Under these rules, most hearings are run by an administrative law judge. In contrast, the DOL hearing is decided by an employee of DOL. Even worse, the hearing officer need not have **any** formal legal education or training. The officer acts as both prosecutor and judge. He can cross examine the driver; make objections to the evidence and even rule on his own motions. In a strange twist, he can also suspend his own procedural rules whenever he deems fit.

FIELD SOBRIETY TESTS

More than any other piece of evidence, the Field Sobriety Tests or FSTs are perhaps the most controversial and lacking in scientific validity. Nevertheless these "tests" provide some of the most crucial evidence in the criminal case. This is especially true if defense counsel is able to suppress the breath or blood test and keep the evidence from coming before the jury. The tests also generally provide the basis for “probable cause” to arrest the driver.

Like many police procedures, in the early days, law enforcement used a number of various tests and procedures at the DUI roadside. In the late 1970s, the National Traffic Safety Administration or NHTSA began a number of controversial studies to help standardize the methods. They also began to develop a regular uniform training and protocol in an attempt to make the "scoring" or evaluation consistent. As a result, the federal agency determined that only three tests contain any measure of reliability. These

are the (1) Horizontal Gaze Nystagmus, (2) the Walk and Turn and (3) the One-Leg Stand.

In the **HGN**, the driver is asked to follow an object, usually a pen light, as it is traced in front of them at a close distance. They are required to follow with their eyes while keeping their head still. The purpose of this test is to determine if the eyes fail to follow in a smooth pursuit and or begin a rapid, jerky movement prior to the object reaching 45 degrees from the center.

The **One-Leg Stand** is essentially a balance test. The driver is required to stand straight with his heels together and with his arms at this side. He is then asked to raise a leg approximately six inches from the ground and hold it for 30 seconds. The officer must look for swaying, arm usage, and whether the subject places their foot down before the time is up.

The **Walk and Turn** is by far the most complex and difficult of the tests. The driver is asked to walk nine steps in an absolutely straight line and absolutely heel to toe. He then must make an unusual pivot turn with his left foot and walk back in the same exact manner. The officer looks for balance, gaps in step, and the ability to follow direction exactly.

FST LIMITATIONS AND CRITICISMS

Washington courts have spoken very little regarding the scientific basis for this evidence. In part, most state courts have avoided the issue by declaring that these tests are only "partly scientific." Partly scientific, what a strange phrase. Once again, our government becomes the hypocrite while prosecutors and police present this evidence to jurors as if they are anything but "partly" scientific but instead tried and proven technical measures of alcohol impairment.

At their very basis, these tests presume that every sober driver, regardless of age, gender, or condition, will perform these tasks without error. This despite the fact that the government has never provided this data or a scientific sobriety baseline. These tests also presume that every officer will evaluate the individual under some standardized rubric. But once again, the government has failed to provide the tests to demonstrate this. In fact, most of the field validation studies performed by NHTSA involved officers who also observed a great deal of other evidence including portable breath tests, before making arrest decisions.

FSTs: A FEDERAL COURT RAISES SERIOUS QUESTIONS

Much of the case law throughout the fifty states have validated this evidence by merely citing one another's decisions without performing detailed hearings, tests, or examinations of their own. In 2002 however, a federal district court in Maryland held a substantial hearing and performed an unprecedented analysis of all five validation studies performed by NHTSA. US. v. Horn, 185 F. Supp.2d 530 (D.Md 2002). The court also

performed an exhaustive analysis and summary of state case law across the nation. It took testimony from a number of independent scientists who not only evaluated the government's methods but performed some studies of their own.

UNACCEPTABLE FORENSIC ERROR RATES AND LITTLE PEER REVIEW

The court came to a number of powerful conclusions. It found that these tests contain an unacceptably high forensic error rate even by NHTSA standards. While readily accepted by criminologists and law enforcement, the court found that the NHTSA studies suffer from an unacceptable lack of peer review in the scientific community. Once the court held these procedures up to light however, it concluded that these tests do not meet the scientific validity test required under Federal Evidence Rule 702.

In one dramatic example, once officers were asked to view and evaluate isolated FST performance without the benefit of breath tests, driving and other data, their ability to accurately determine evidence of intoxication faired no better than statistical chance. Problems persisted as the same individual's "standardized clues" were evaluated dramatically different by various officers.

Finally, while acknowledging that most states have simply avoided the issue by labelling these tests "unscientific," the court laughed at the idea that the government is not offering these tests under some cloak of "scientific credibility."

If you have been arrested for DUI and have questions or need assistance **PLEASE CALL OUR OFFICE FOR A FREE CONSULTATION,**