E25 Reliability of the Drug Recognition Exam: Admissions by the Suspect Increase the Chances of Getting It Right

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After attending this presentation, attendees will be able to recognize the limitations of the Drug Influence Evaluation (DIE) conducted by law enforcement, compare the methods of administering the Horizontal Gaze Nystagmus (HGN) Test and the test for the Romberg Sign between physician's and law enforcement officers, and contrast the reliability of the DIE when the suspect has and has not admitted to prior drug use.

The presentation will impact on the forensic science community by demonstrating the lack of reliability of DIE testing and how the results of urine drug testing are misused by prosecution witnesses to confuse prior use with current impairment.

When suspects stopped by police did not admit to prior drug use, the incidence of correct or partially correct conclusions (regarding the drug or class of drugs allegedly consumed by the suspect) reached by so-called "Drug Recognition Experts" (DREs) decreased from 87% to 66% and the incidence of incorrect conclusions increased from 13% to 34%. The Drug Influence Evaluation tests ("DIE") conducted by DREs lack reliability and reproducibility in the field. Medical doctors correctly identify drugs in patients only 47% of the time (Brett, 1988) and were incorrect 40% of the time (Teitelbaum, 1977). Medical tests like Horizontal Gaze Nystagmus (HGN) and the test for the Romberg sign are administered by police and DREs in such a way as to elicit a positive response. In two studies, based on standardized Field sobriety tests, police consistently rated sober people as impaired (Tharp et al, 1981; Cole and Nowaczyk, 1994). Unprincipled prosecution witnesses portray

positive results for inactive substances in urine to the jury, as evidence of impairment, rather than evidence of prior exposure. Sanctions for intentional prosecutorial misconduct are generally lacking (Davis, 2009, 2010). Public counsel lack experience to cross-examine such experts and adequate funds to retain qualified experts to assist counsel may not be available, leading to the deprivation of citizens' due process constitutional rights as set forth in *Ake v. Oklahoma*, 470 U.S. 68 (1986).

Williams v. State, 710 So.2d 24 (Fla. 3d DCA, 1998) was an appeal by defendant Frederick Williams of his conviction for Driving Under the Influence of Drugs (DUID). Williams was stopped at a field sobriety checkpoint. After failing a series of field sobriety tests, a breath test registered a Blood Alcohol Concentration (BAC) of 0.07%, an amount under the legal threshold for intoxication in Florida. A Drug Influence Evaluation test ("DIE") conducted by a DRE, without knowledge of Mr. Williams' prior drinking experience, led the officer to conclude the defendant was under the influence of cocaine and cannabis. Williams was arrested for DUID. A urine sample subsequently tested positive for inactive marijuana and cocaine metabolites.

At trial, over the objection of the defendant, the State was allowed to introduce the results of the DIE. The defendant moved to exclude the evidence under *Frye v. United States*, 293 F. 1013 (DC Cir. 1923) arguing that the scientific evidence generated by the DIE was not generally accepted in the relevant scientific community, and that admitting the testimony of a minimally trained officer referred to as a DRE misled the jury and prejudiced the defendant. The court ruled that the DIE protocol was not scientific, *Frye* did not apply, and the tests were easily understood by the jury. The appeal failed.

To prove its claim of unreliability, the defendant subpoenaed in all of the DRE examinations conducted during the prior year in Dade County. The data were first separated into two distinct groups: (1) suspects who had admitted to drug use (often this included the drug(s); and, (2) suspects who had not admitted drug use. In 110 cases out of 114 arrests, a urine drug test also was performed. When suspects did not admit prior drug use, the incidence of correct or partially correct conclusions decreased from 87% to 66% (24%) and the incidence of incorrect conclusions increased from 13% to 34% (160% increase). The drop in accuracy from suspects who admitted to a drug in comparison to those who did not was statistically significant $X^2(2)$ 8.07 = p<.05.

Unfortunately, material potentially exculpable, scientific evidence regarding the fact that urine drug tests cannot be used to infer impairment, only to demonstrate prior exposure (Benjamin, ToxTalk, March 2010), and that up to 10% of the population may suffer from HGN as a result of an inner ear infection, vertigo, labyrinthitis, or water in the ear never reached the jury. Moreover, urine tests for THC and cocaine detect only the non-psychoactive metabolites of these drugs, THC acid and benzoylecgonine (BE). Testimony regarding the presence of metabolites in the urine should be limited or suppressed pursuant to FRE

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403 or risk misleading the jury, confusing prior use with current impairment, and unduly prejudicing the jury.
Reliability, Credibility, Disingenuous

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