



### E14 Drug Recognition Experts are not Qualified to Testify as Experts and Should Only Testify as Fact Witnesses

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After attending this presentation, attendees will learn why Drug Recognition Experts (DREs) should testify only as fact witnesses and not as experts.

This presentation will impact the forensic science community by reviewing how the lack of scientific training and bias have allowed DREs to testify incorrectly about the effects of drugs in OUI-Drug cases.

**Background:** State prosecutors should be prosecuting meritorious cases and not oppressing or burdening citizens with cases that cannot be won in court. There is no way to meet your burden of proof in many cases, and large amounts of money and time are wasted in pursuit of “unwinnable cases.”

**Case Law:** The prevailing case law regarding OUI-Drug cases and the use of so-called Drug Recognition Experts (DREs) has stated that DRE examinations are not scientific and that they are well within the ability of a juror to understand (see *Williams v. State of Florida*, 710 So. 2d.24 (1998)). If they are not scientific, then the testimony DREs offer cannot come in under FRE 702 as “expert testimony” but only under 701 as testimony from a fact witness. Moreover, a Drug Recognition Expert (DRE) who never examined the defendant at the time of the alleged infraction cannot be smuggled into court as an expert witness and, accordingly, should never get to testify in the prosecution’s case.

DREs are employed as police officers and work in a para-military organizational structure. Their job descriptions state, “to support prosecution” not “to determine the truth.” They are inherently biased. Their testimony is intrinsically unreliable. Unlike the defense witness, the DRE cannot tell the state’s attorney that the data do not support the case because that would be insubordinate, and perhaps grounds for dismissal, despite the prospect for a subsequent civil suit for wrongful dismissal.

**An Example of an Unwinnable OUI-Prescription Drug Case:** One such case involved defendant ED who was stopped for crossing a road line. When her toxicology report came back, it was found to have been positive for a small amount of butalbital, a barbiturate found in common anti-migraine medications.

Unfortunately, butalbital has a half-life of 1.5 – 3.5 days. Based on generally accepted pharmacokinetic principles, it takes 6-10 half-lives to rid the body of a drug. This means that she could have taken the drug more than a month before she was stopped and still had a positive urine test on the day she was stopped, even though its pharmacologic effects on migraine relief and impairment last only a few hours.

The commonwealth in that case, enlisted the assistance of a DRE who had not conducted an assessment of the defendant at the time of the police stop. The state planned to have the DRE testify at trial that the defendant had been impaired, an opinion that could not be supported by the urine test results, and one to which the DRE was not percipient, as she had never met or assessed the defendant.

It is important that defense attorneys educate themselves about the pharmacologic properties of butalbital, and to assist with the preparation of a motion to suppress the urine test result and either strike the DRE or significantly limit her proposed testimony.

On the day of the motion hearing, the commonwealth reconsidered its position and agreed to let the defendant off with probation.

To this day, it is not known why the defendant did not drive in an acceptable manner, but it is believed that it had nothing to do with her prior use of the migraine medication.

**Drug Recognition Expert, Bias, Insufficient Scientific Training**