

The Xylene Inhalant Defense: Does it pass the smell test?

Claim: "You see, I work construction, and I had worked all day with chemicals sealing a concrete slab. Inhaling all those fumes is why I failed field sobriety tests and why the breath machine showed my BAC as 0.19."

Reality: Xylene is a volatile, organic solvent and an intoxicant. Most prosecutors are familiar with the effects of toluene from paint huffing, and xylene is synonymous with methyltoluene. It is highly unlikely, but not impossible, that Xylene inhalation will cause observable impairment. Here's what you should know in determining if this defense is valid:



- Xylene is a central nervous depressant and has been shown to cause HGN.
- Xylene has a half life of only 30 to 60 minutes, rapidly clearing from the blood.
- A blood test can distinguish ethanol from xylene.
- A breath test's magnitude of response is optimized for ethanol (not xylene). While it is theoretically possible for xylene to influence the result of a breath alcohol test, any actual contribution should be very small, for example: xylene exposure alone should not produce a 0.08 result in a properly conducted test.

Be sure to ask:

- What other evidence of impairment exists?
- What was the blood alcohol content?
- Were other drugs or their metabolites present?
- What was the xylene concentration in the sealant?
- Has the defendant been chronically exposed to xylene?
- Was the work area well-ventilated?
- What amount of xylene was in the air?
- How long after exposure was the defendant arrested?
- What was the time delay in administering the test?
- How long was the deprivation period before the test was given?
- What instructions were given for the use of the product containing xylene?
- Were there warning labels?
- Were these warnings and instructions followed?

In the end, the probability of xylene contamination remains remote, and it is highly unlikely that a defendant could show he sustained a dose high enough to cause physical impairment. Jurors may be sympathetic to an accidental work-related impairment defense, but most DUI statutes do not require that prosecutors prove a driver intended to become impaired—only that he was. For more information on defenses, be sure to check out APRI's Special Topic Series: *Overcoming Impaired Driving Defenses* available on-line; click on [NTLC—Traffic Law](#).

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CDC Calls for Strong Prosecution of DUI & Child Seat Laws

The Centers for Disease Control and Prevention (CDC) is calling for stronger enforcement of impaired driving, child safety seat and safety belt laws. In a recent study, Child Passenger Deaths Involving Drinking Drivers—U.S., 1997-2002, the CDC found:

- Motor vehicle crashes are the leading cause of death for children 1 year old and over.
- 1 in 4 of these crash deaths involves a driver who consumed alcohol.
- 68% of children killed in alcohol-related crashes were riding in the same vehicle as the drinking driver.
- Children who died in alcohol-related crashes were less likely to be restrained than those who died in crashes without alcohol.
- 68% of drinking drivers survived the crashes.
- From 1997 to 2002, a total of 2,335 children were killed in crashes with a drinking driver.

In court, child safety seat violations are viewed on par with speeding tickets, and prosecutors seldom handle these cases. But, the CDC says that “stricter enforcement of restraint laws might substantially reduce the number of deaths of children.” In the February 6, 2004, issue of the CDC’s *Morbidity and Mortality Weekly Report*, the CDC calls for more roadside checkpoints in daylight hours “[b]ecause 60% of alcohol-related crashes involving child passenger deaths occurred during 6:00 am—9:00 pm.” To decrease child fatalities, CDC also asks for mandatory substance abuse assessment and treatment for people convicted of DUI.

Vigorous prosecution of child endangerment laws also provides prosecutors with an opportunity to prevent drinking or drugged drivers from transporting their children. For more information, go to www.cdc.gov/mmwr/, or contact APRI’s [National Traffic Law Center](#).

On Our Website:

Reconstruction “Bloopers”

Everyone makes mistakes, but how can a prosecutor catch common mistakes in reconstruction reports? Nationally recognized crash reconstructionist John Kwasnoski, author of APRI’s Special Topic Series: *Crash Reconstruction Basics for Prosecutors*, examines mistakes in trying to estimate speed from the slide to stop of a struck pedestrian. [Get details here](#).

Listerine PocketPaks Do Not Contain Alcohol

A woman sits on the stand and swears to the jury that during the 20-minute observation period before the breath test, she was worried about her bad breath. So, from inside her clothing, she slips out her Listerine PocketPak and uses a breath strip moments before taking the breathalyzer test. That’s why her test reading was above 0.08. Everyone knows how Listerine can skew a breath test, right?

In this scenario, there is only one problem for a defendant. According to Pfizer, Inc., the manufacturer of Listerine PocketPaks, the breath strips are sugar-free, calorie-free and alcohol-free. The absence of alcohol is pretty obvious from the label, too.

This issue came up in court recently for Florida prosecutors Jason Berger and Jennifer Pemberton, who demonstrated the truth to the jury in a powerful, in-court demonstration. The inspector for their breathalyzer placed two Listerine strips in his mouth and blew in the machine. Intoxilyzer results? 0.00. Jury results? Guilty.

Calendar of Events

April 7, 2004. World Health Day. The World Health Organization launches its theme for the year—Family Road Safety: Protect the Ones You Love.

May 9–14, 2004. The Robert F. Borkenstein Course on Alcohol and Highway Safety: Testing, Research and Litigation at Indiana University in Bloomington, Indiana. For more information, call 812-855-1783 or visit www.indiana.edu/~lawactn.

June 7–9, 2004. The 10th Annual IACP DRE Drugs, Alcohol & Impaired Driving Conference in Phoenix, Arizona. For more information visit www.2004dreconference.az.gov.

June 14–18, 2004. NDAA's Lethal Weapon: DUI Homicide Course at the Ernest F. Hollings National Advocacy Center in Columbia, SC. Application deadline is April 16, 2004. [Click here for course information.](#)