

Get It While It's Hot

When my client came to see me, I knew it was the worst of all worlds as he had a .17 BAC (Blood Alcohol Content) on the Intoxilyzer, and he was said to have refused. In North Carolina, the state is required to prove that you have two breath samples within .02 of each other to get the breath test in, with one exception. If you get a test and then refuse, the state can use both the number you blew and your refusal against you. My client told me that he had blown several times, and that he would have kept blowing all night if necessary. But after seven tests, the policeman got impatient and shut the test down and took him to the magistrate. The magistrate then asked the officer “was this a test or a refusal?” The officer said, “I could not get a sample, but wait here and I will fix this.” He then went back without my client, booted up the Intoxilyzer machine and printed a refusal ticket. When he returned, the magistrate accepted that and charged my client. When I this I knew I had to act fast. First, I got the DVD of the Intoxilyzer room and took it to the magistrate to remind her of the situation. Magistrates are the lowest level of judges in our system, and they see many people every shift. I wanted to refresh her memory before it was gone. So I met her within a couple of days and showed her the video and got her to remember that the defendant said to her “I am not refusing”, and that turned out to be the critical moment. At the DMV hearing, I argued that my client did not refuse and won the hearing, in large part because of the magistrate's testimony. When the case came to trial, the magistrate testified again, and the judge excluded the breath test result and found my client not guilty.