



THE GAUNTLET

A LAW JOURNAL FOR THE
OKLAHOMA CRIMINAL DEFENSE LAWYERS ASSOCIATION
SPRING 2005

TABLE OF CONTENTS

<i>Article</i>	<i>Contributor</i>	<i>Page</i>
The President's Page	Doug Parr	3
U.S. Supreme Court Decisions	Jonathan Grammar	5
Tenth Circuit Update	Barry Derryberry	8
Court of Criminal Appeals	Cari Brown	9
Unpublished Court of Criminal Appeals Opinions	Katrina Legler	10
Legislative Update	Mike Wilds	13
Nuggets of Gold Mined from the OCDLA Chatroom	Jessica Saffa	15
No Warrant Required for a "Forced" Blood Test	Mike Wilds	18
Insufficient Evidence	Gloyd McCoy	19
The Guth 2100 Simulator:		
The Phoenix raises from the Ashes	Charles Sifers	23
How to Save Your Client While Saving the Court Time	Inese A. Neiders	27
OHP Drug Interdiction Manual	William Widell	33

The Oklahoma Criminal Defense Lawyers Association (OCDLA) mails *The Gauntlet* to approximately five hundred (500) members, law schools, law libraries and law professors. The OCDLA also sponsors / cosponsors approximately seventy (70) hours of Continuing Legal Education (CLE) each year and publishes *My Little Green Book*. *The Gauntlet* is a peer-reviewed, refereed journal in that all articles are reviewed by members of the OCDLA prior to publication; However, the articles do not necessarily reflect the views of the Organization. Please send any comments regarding the publication to Mike Wilds, Editor, e-mail address wilds@nsuok.edu.

THE GUTH 2100 SIMULATOR:

The Phoenix Raises from the Ashes . . .

By

Charles L. Sifers

The Phoenix was a beautiful and mythical bird, believed to live in Arabia, which landed **ONLY** on the greatest of treasures. The Phoenix represents beauty and good luck. Every 500 years or so, as it felt it's end coming, the Phoenix would build a nest of aromatic woods, set it afire, and be consumed therein. From the pile of ashes, a new and strong Phoenix would arise.

In the DUI Defense world here in Oklahoma, we have seen a Phoenix.

In breath testing, the simulator is a device which sits to the right hand side of a breath testing machine. It sort of looks like a mason jar with a large metal top. It has a thermometer and a paddle that extends down from the top into the jar. When filled with simulator solution (water and a preset amount of alcohol), the paddle turns the solution and the solution is heated. It is the 3rd and 4th results on every breath test affidavit that your client brings you. The 3rd result is the "known value" or what is supposed to be in the solution. The 4th result is what the breath test device read that solution to be. A reading of plus or minus .01% of the known value is pronounced as an acceptable test.

This device is a required part of every breath test in Oklahoma. No breath test is admissible if such a "simulator solution" check is not done on **EVERY** test. Like the Intoxilyzer 5000-D OR any other breath testing machine, every simulator must be approved by Oklahoma's Board of Tests for Alcohol & Drug Influence for the test to be admissible. See Okla. Stat. tit. 47, §752, §756, & §759. If the simulator is **NOT** listed in the Rules of the Board of Tests as an approved device, any test given to our clients is inadmissible regarding the criminal case **AND** the revocation of his driver's license.

In 2003, after a hard-fought battle by Steve Fabian's office here in Oklahoma City, the Civil Court of Appeals ruled that any breath test using a simulator called the "Guth 2100" was inadmissible. See *Manning v. Oklahoma ex rel. Department of Public Safety*, 2003 OK CIV APP 57, 71 P3d 527; *McCown v. Oklahoma ex rel. Department of Public Safety*, 2003 OK CIV APP 66, 74 P3d 623. The Board of Tests for Alcohol and Drug Influence (BOT) had not, up to that point, approved this device for use in breath tests in the state, as required by statute (47 OS sec. 752, 756, & 759) and the APA. Consequently, 100's - if not 1,000's - of breath tests were suppressed and/or driver's licenses were returned to persons arrested for DUI. Many of us enjoyed the fruit of this labor.

After these cases were decided, the BOT got an rule passed and signed by the Governor to include this device - along with another simulator that had NOT been litigated, and very few of us ever heard of, called the Guth 210021 - in the Rule providing for approved simulator devices. See BOT Rule 40:25-1-3, 20 Ok Reg 2840. This rule became effective June 5, 2003. *Manning* and *McCown* were "dead".

Or so it appeared.

This rule was an emergency rule. As a result, it was only effective through July 14, 2004. See 75 OS sec 253. It was to die - AND DID CEASE TO HAVE ANY FORCE AND EFFECT - on July 15, 2004. See 75 OS sec 253(3)(a). The BOT had to re-submit it to make it permanent. Well, the BOT did do that and the Governor signed it May 26, 2004, with an effective date of July 11, 2004. However, when it was published in the Register, the Guth 2100 simulator was NO LONGER listed in this rule. The rule lists the Guth 210021 TWICE. The 2100 is completely missing. See BOT Rule 40:25-1-3, 21 Ok Reg 2656. Supposedly, the rule which the Governor signed on May 26, 2004, DID have the 2100 listed therein. However, that was NOT what was delivered to the Secretary of State by the BOT for publication. By statute, that which is PUBLISHED is governing, not what was INTENDED to be published. See 75 OS sec 250.7.

As a result, the Guth 2100 simulator has NOT been an approved device in breath testing in the State of Oklahoma since July 11, 2004. That's right, every breath test since that date and including the one being given to some poor client as I write this down this morning, is

inadmissible in any court and can not be used to revoke his license!!

Manning and *McCown* just rose from the ashes

This was discovered by this author by complete accident. On February 13, 2005, while putting together every single thing I could think of for Motions in Limine for a jury trial that started the next morning at 9:00am before Judge James Croy in Oklahoma County, I looked on-line at the specific rule on simulators. I could not believe what I read. I thought that it must be a typographical error on the Secretary of State's web page. This had to be wrong. We secured a certified copy of the Oklahoma Register in question the next morning, prior to the motions hearing, from the Secretary of State. It was not a typo. The Guth 2100 was NOT in the rule. I included this argument in my motion to suppress the breath test in that case (along with a few other reasons) and Judge Croy granted it.

This news spread quickly. Other attorneys began to re-assert this argument in licenses hearings AND motions to suppress. The Department of Public Safety threw in the towel. It is setting aside all Guth 2100 cases which were - and are - still in their hearing and appeal pipeline.¹ Hundreds - if not thousands - of licenses have - or will be - been returned. If you get a case walking through your door with one of these simulators listed on the affidavit, don't ask for a work permit. Request a hearing within fifteen days of the arrest.

The BOT reacted by removing these simulators and replacing them with others which are listed within the Rule. However, it is believed that the BOT does not have enough of these to go into every police department of jail in the State. Then the BOT really did something that is hard to understand

The BOT has argued that the Guth 210021 and the Guth 2100 simulators are the same devices. It claims that listing the 210021 in the Rule is listing the 2100. Guth Labs, the maker of these simulators, formerly called this device a 210021 up to 1999. However, from that point

¹ In an effort to clear the records of all persons (and restore their licenses) who did not enjoy this challenge, Fabian has filed a class action lawsuit. This lawsuit was filed at the end of March, 2005. Contact him if you want your clients to be a part of this class.

on, it was called the 2100. Every single one of these simulators owned by the State of Oklahoma was purchased after Guth Labs re-labeled this device as the 2100.² Each purchase order will show that. In an effort to "save" these simulators, the BOT had Guth Labs send it **REPLACEMENT** face plates for each of these devices! The BOT is currently replacing each of the 2100 face plates with 210021 face plates.

I guess if you want that Chevy to be a Cad, just change the labels on the side of the car!

This has yet to be litigated. Rest assured, it will

² In fact, there are ONLY 210021 simulators in the entire State of Oklahoma. One of these is in Steve Fabian's office. The other one is in the author's office.