

2024 • Issue 2

from the desk of the **SJOL**

JUDGE JOHN W. GRINSTEINER (RETIRED)



Welcome to the JOL Newsletter for North Dakota 2024, Issue 2:

Spring in North Dakota is always a bit of a wild ride. You often have the heater on in the car on the way to work and then run the air conditioner during the ride home. The snow is finally gone and the flowers and trees are starting to bloom. Things are fresh and new. Speaking of new, I am using this quarter's newsletter to introduce you to the North Dakota Oral Fluid Pilot Program.


Driving under the influence (DUI) of drugs appears to be a factor in an increasing number of impaired-driving crashes. The National Highway Traffic Safety Administration (NHTSA) found drug use among fatally injured drivers who were tested rose from 25% in 2007 to 42% in 2016, and marijuana (the flower form of cannabis) presence doubled in this time frame.

In the last couple of issues of the newsletter, cannabis had taken center stage. You may remember reading in the first quarter of this year about testing challenges and that there is no blood alcohol concentration (BAC) standard for THC. While BAC is an accurate measurement of alcohol impairment of driving, the presence of THC, the active ingredient in cannabis, in the driver's body has not been shown to be a reliable measure of cannabis impairment of driving.

The main reasons for the disconnect between THC blood concentration and impairment is that THC impairment occurs in the brain, not the blood, and the chemical nature of THC causes it to move throughout the body in a complex manner. Because THC in the blood can be from both past use as well as recent use, it is not possible to differentiate between the two. In short, blood concentrations of THC and its metabolites are not sufficient alone to prove impairment.

Testimony about additional signs of impairment is necessary. This can come in the form of witness testimony and evidence regarding driving abnormalities, standardized field sobriety tests (SFSTs), and drug recognition expert (DRE) evaluations.

Current methods of testing for THC or any other impairing substance includes blood, urine, breath testing, and oral fluids. Blood analysis is considered the "gold

continued on pg. 2 

As the State's JOL, John brings you access to current and evidence-based practices that will assist you in your work and help promote more effective outcomes in impaired driving and other traffic related cases. With the help of the ABA's Judicial Division and its partnerships with various organizations (NHTSA, National Judicial College, NCSC, AllRise), John works to provide education, training, and technical assistance to judges and court staff throughout ND.

Issue highlights

- 3** North Dakota's Oral Fluid Pilot Program
- 5** North Dakota 2024 Fatal Crash Statistics
- 5** DRE Protocol and Detection
- 7** State of New Jersey v. Olenowski: A Long Winding Road
- 10** Recent Court Opinions of Note
- 11** Useful Resources and Links
- 12** Upcoming Trainings / Events / Webinars

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standard” of drug and alcohol testing. However, it requires a warrant (*Birchfield vs. North Dakota*) and taking the driver to a facility where blood can be drawn. On average, two or more hours elapse between the traffic stop and the specimen collection. Because drugs are metabolized by the body relatively quickly, this can cause the loss of critical evidence. As states and law enforcement agencies explore avenues to remedy these issues, the use of oral fluids to detect drugs is gaining popularity. While oral fluid testing has a short detection window, it is relatively quick to administer, is not invasive, and can be done on the roadside shortly after law enforcement makes the traffic stop. Oral fluid roadside screening devices test the saliva of an individual for the presence of specific drugs. A positive result indicates drug presence above a certain cut-off level and not a quantifiable drug level. It also indicates relatively recent drug use.

However, note that a positive result obtained through a screening device is preliminary and requires further testing to establish impairment. We already use this type of testing for alcohol with preliminary breath tests (PBTs). The oral fluid roadside screening tests is a tool for law enforcement to develop probable cause and decide when to pursue laboratory-based confirmation testing or call a DRE.

Several states have statutes authorizing some form of oral fluid specimen use—other terms used include saliva and other bodily substances—in DUI cases. In addition, many states are making moves to combat drugged impaired driving. As a result of North Dakota’s Oral Fluid Pilot Program, it is anticipated that our state will be doing the same, with a likely bill to include oral fluid as a screening method for law enforcement to use to identify if a driver has drugs in their body.

More on the pilot program, feasibility study, process and purpose a little later on. I appreciate the feedback I have been getting from you on the newsletter topics. Using this quarterly publication has been working better than flooding your email inboxes with information on trends. Keep reaching out and I will do my best to get you the information and answers you are looking for. Don’t hesitate to print the newsletters out, toss them on your desk, and get to them when you can. I am always willing to have a conversation about things you see now or later.

Following up on the last two-part series on cannabis, I wanted to bring you something on detection/testing and the issues that can found there (possible pun intended). In this issue of the newsletter you will find information on oral fluid detection and the pilot program in our state. There is some information on DRE detection and an update on the famous Olenowski case out of New Jersey dealing with DRE testimony. Finally, the crash board, case law, and resources listings are found toward the end. While the rest of the year’s topics have not been finalized, pretrial services and sentencing are two topic areas that continue to evolve. I hope the spring and summer months get you outside and that you get to see at least one sunrise or sunset each week. Peace on your hearts! JWG

**Reference: Bloch, Samantha (updated May 10, 2021) [“States Explore Oral Fluid Testing to Combat Impaired Driving”](#) National Conference of State Legislatures (nsl.org). ▪*

North Dakota's Oral Fluid Pilot Program

Judge John Grinsteiner (retired)
SJOL for North Dakota

Jaclyn Andersen, Research Support Specialist
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Allow me to start with some early context. In 2020, North Dakota was one of four states selected for best practices to be part of an Impaired Driving Learning Collaboration supported by the National Governors Association (NGA). The goal was to strengthen and leverage data strategies to reduce drunk and drugged driving-related injuries and fatalities. In the fall of 2020, four learning sessions were held early in the spring of 2021. These sessions featured a demonstration of an oral fluid screening for drug impairment. Members from ND Department of Transportation, ND Office of the Governor, ND Highway Patrol, ND Department of Health, ND Attorney General's Crime Laboratory, and the ND Association of Counties all participated in the learning sessions and the Oral Fluid Pilot Program (OFPP) was born.

Remember, an oral fluid screening device would primarily be used when an officer identifies an impaired driver, the standardized field sobriety tests show signs of impairment, and the PBT screening device shows low or no BAC. The oral fluid screening device will help determine probable cause for the officer to proceed with an arrest and further evidential testing. The particular device chosen by the committee for its identified specifics in performance and reliability was the SoToxa, manufactured by Abbott. [SoToxa™ Mobile Test System | Abbott Toxicology](#)



image source: Abbott


After the device was chosen, a feasibility study was conducted from January 2022 to July 2023 in which DREs administered an oral fluid test to drivers who volunteered to take the oral fluid test after a DRE evaluation. Drivers who volunteered to provide an oral fluid sample were arrested for impaired driving before agreeing to provide the sample so as not to interfere with those DUI investigations. After collecting oral fluid samples from the volunteers, DREs submitted case files to NDSU Upper Great Plains Transportation Institute (UGPTI) via a secured portal.

To ensure all necessary data points were collected, DREs were to include as many relevant documents as were available along with the case report, SoToxa test result print out, and signed consent form. The documents included citations, DRE Evaluation & Face Sheet forms, search warrants, etc. Each submitted case file was assigned a non-identifiable ID number before transcription.

In the beginning, sample collection was proving more difficult than expected. To explore this, DREs also submitted refusal cases, where potential participants could explain their reasoning for refusal. As you might have guessed, in most instances the reason was simply not wanting to participate. In the end, 55 cases were collected by 16 DREs and 10 agencies with the assistance of 41 arresting officers from 15 agencies throughout North Dakota.

A number of event details, such as participant demographics, event date and time, reason for traffic stop, and type of citation issued were explored. Of the 55 collected samples, 60% came from males, 85% from White/Caucasian, and 38% from participants 30-39 years old.

During 2022, 32 samples were collected, and 23 in 2023 (ending in July). Most samples were collected from participants who were stopped between 9 p.m. and midnight (27%), followed by those who were stopped between noon to 3 p.m. (22%). Details regarding event timing were added in order to track the time elapsed between the initial traffic stop, arrival of DRE, DRE evaluation, and time of blood and saliva collection. While the majority of both blood and saliva collection occurred 2 to 3 hours after the traffic stop, a handful occurred after more than 4 hours.

continued on pg. 4 

Reasons for traffic stops were categorized by type, with the most frequent reason being observed or reported as reckless, erratic, or exhibition driving, occurring in 23% of cases. This was followed by issues with vehicle lights (i.e. failure to use or malfunctioning head/tail lights and turn signals) in 15%, and speeding in 10% of cases. Of traffic stops, 61% resulted in the issuance of a citation for DUI- Drugs (1st offense or unspecified). The most frequently occurring additional citations were for Driving Under Suspension/ Revocation (22%), and Possession of Marijuana (11%).

The initial list of 23 data fields evolved and expanded to 54 as more records were transcribed. With added fields, user-admitted information regarding substance, amount, and time of use could provide context in analyzing test results. For example, when blood work proved a false negative SoToxa test result for Cannabis, it was found that the user orally consumed cannabis oil, which would not be captured by the oral fluid test.

Because the sample collection was being done by DREs, there was also DRE evaluation information available for comparison. Most DRE evaluations or incident/case reports included which substance(s) were suspected to be used by participants. These were determined by each DRE's experience, expertise, and participant admission. Based on these DRE evaluations, the relative accuracy of DREs could be measured, both overall and by substance type. In general, the SoToxa device accurately identified approximately 91% of possible outcomes, while the DREs accurately identified 86%.

Of the samples, 49 were then tested through the ND State Toxicology Laboratory or a third-party test. Among the samples collected, at least one drug was detected in 82% of the cases during the feasibility study. Drugs positively detected include:

1. CNS stimulant (cocaine) - 2 identified (4%)
2. Narcotic – opiate- 1 identified (4%)
3. CNS Stimulant – MAMP & MDMA- 22 identified (40%)
4. Cannabis - 26 identified (48%)
5. Benzodiazepines – 7 identified (13%)
6. CNS stimulant (amphetamine) – 31 identified (56%)

The study demonstrated that drivers on our roadways are using more impairing substances than just alcohol. This confirmed suspicion and what law enforcement was reporting. More concerning is that 55% of the samples for the study had polysubstance use identified, where two or more drugs, including alcohol, are found in the driver's system.

This isn't your father's impaired driving. The conclusions from the pilot program show how the increase of impairment risk and prevalence of impairment in general, demonstrates the need for law enforcement officers to have an additional tool to identify drug-impaired driving.

What's next? The pilot project transitioned into a pilot program and the SoToxa devices will be placed with the ARIDE and Standardized Field Sobriety Testing (SFST) Trained Officers so they can continue administering tests in the field. There will be continued collaboration between the Oral Fluid Committee and the Impaired Driving Task Force and the proactive education and outreach phase is beginning.

From a bench/courtroom perspective, I think judges can expect to see the addition of oral fluid test as a non-evidentiary preliminary screening method for probable cause that law enforcement uses to identify if a driver has drugs in their body. This test, combined with evidence/testimony about additional signs of impairment, will lead to better DUI investigations and cases. ■

North Dakota 2024 Fatal Crash Statistics as of 5/9/2024



Fatalities: 18

Crashes: 18

Operators Tested Positive BAC: 5

Operators Tested Negative BAC: 4

Operators Not Tested: 1

Fatalities from Alcohol Crashes: 5

No Seat belt (for seat belt eligible vehicles) 5

Speed-related fatalities: 3

Pedestrian fatalities: 0

Motorcycle fatalities: 1

Fatal Crash Involved Lane Departure: 13

Fatal Crash Involved a Younger Driver(s) 14-20 years old: 2

Fatal Crash Involved an Older Driver(s) 65+ years old: 7

Fatal Crash Involved a Train: 0

Fatal Crash Involved a Commercial Motor Vehicle(s): 8

Holiday Fatalities: 0

For a full look at the Fatal Crash Stat Board and how the numbers compare to 2023 and 2022, visit: [2024 Fatality Spreadsheet.xlsx \(nd.gov\)](#). It should be noted that there are currently 8 crashes that are under investigation and not yet categorized. Click to view the [NDDOT 2022 Crash Summary](#).

DRE Protocol and Detection

Judge John Grinsteiner (retired) • SJOL for North Dakota

A driver is stopped for crossing the center and fog lines. Once at the vehicle, the officer notices signs of possible impairment with the driver, including red, watery eyes, droopy eyelids, and slow reactions to the officer's instructions. However, there is no odor of alcohol, nor does the officer see any indications of open containers within the vehicle. After administering the standard field sobriety tests (SFST), the officer suspects something other than alcohol is the likely impairing substance. The driver consents and submits to a preliminary breath test (PBT) and the test yields a BAC of zero percent. Still suspicious and believing there is probable cause to arrest the driver for impaired driving, because of clues on the SFSTs and the other indications, the officer knows that it is time to call in a Drug Recognition Expert (DRE).

The DRE protocol is a standardized and systematic method of examining a Driving Under the Influence of Drugs (DUID) suspect to determine the following: (1) whether or not the suspect is impaired; if so, (2) whether the impairment relates to drugs or a medical condition; and if drugs, (3) what category

or combination of categories of drugs are the likely cause of the impairment. The process is systematic because it is based on a complete set of observable signs and symptoms that are known to be reliable indicators of drug impairment. The DRE evaluation is standardized because it is to be conducted the same way, by every drug recognition expert, for every suspect whenever possible.

The DREs utilize a 12-step process to assess DUID suspects:

1. Breath Alcohol Test

The arresting officer reviews the subject's breath alcohol concentration (BAC) test results and determines if the subject's apparent impairment is consistent with the subject's BAC. If the impairment is not explained by the BAC, the officer requests a DRE evaluation.

continued on pg. 6 

2. Interview of the Arresting Officer

The DRE begins the investigation by reviewing the BAC test results and discussing the circumstances of the arrest with the arresting officer. The DRE asks about the subject's behavior, appearance, and driving.

3. Preliminary Examination and First Pulse

The DRE conducts a preliminary examination, in large part, to ascertain whether the subject may be suffering from an injury or other condition unrelated to drugs. Accordingly, the DRE asks the subject a series of standard questions relating to the subject's health and recent ingestion of food, alcohol, and drugs, including prescribed medications. The DRE observes the subject's attitude, coordination, speech, breath and face. The DRE also determines if the subject's pupils are of equal size and if the subject's eyes can follow a moving stimulus and track equally. The DRE also looks for horizontal gaze nystagmus (HGN) and takes the subject's pulse for the first of three times. If the DRE believes that the subject may be suffering from a significant medical condition, the DRE will seek medical assistance immediately. If the DRE believes that the subject's condition is drug-related, the evaluation continues.

4. Eye Examination

The DRE examines the subject for HGN, vertical gaze nystagmus (VGN), and a lack of convergence.

5. Divided Attention Psychophysical Tests

The DRE administers four psychophysical tests: the Modified Romberg Balance, the Walk and Turn, the One Leg Stand, and the Finger to Nose test.

6. Vital Signs and Second Pulse

The DRE takes the subject's blood pressure, temperature, and pulse.

7. Dark Room Examinations

The DRE estimates the subject's pupil sizes under three different lighting conditions with a measuring device called a pupilometer. The device will assist the DRE in determining whether the subject's pupils are dilated, constricted, or normal.

8. Examination for Muscle Tone

The DRE examines the subject's skeletal muscle tone. Certain categories of drugs may cause the muscles to become rigid. Other categories may cause the muscles to become very loose and flaccid.

9. Check for Injection Sites and Third Pulse

The DRE examines the subject for injection sites, which may indicate recent use of certain types of drugs. The DRE also takes the subject's pulse for the third and final time.

10. Subject's Statements and Other Observations

The DRE typically reads *Miranda*, if not done so previously, and asks the subject a series of questions regarding the subject's drug use.

11. Analysis and Opinions of the Evaluator

Based on the totality of the evaluation, the DRE forms an opinion as to whether or not the subject is impaired. If the DRE determines that the subject is impaired, the DRE will indicate what category or categories of drugs may have contributed to the subject's impairment.

12. Toxicological Examination

The toxicological examination is a chemical test or tests that provide additional scientific, admissible evidence to support the DRE's opinion.

*Source: International Association of Chiefs of Police (IACP) [12 Step Process | International Association of Chiefs of Police](#) (theiacp.org).

States differ in how their courts treat testimony from Drug Recognition Experts ("DREs") and evidence concerning the Drug Evaluation and Classification Program (the "DEC"—sometimes referred to as "the protocol"). In analyzing whether DRE testimony and DEC evidence should be admitted at trial, most states examine the two most prominent federal cases on the admission of scientific evidence, *Frye v. United States*, 54 App. D. C. 46, 47, 293 F. 1013, 1014 (1923) and *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993) and apply lessons from either or both cases to state law. No matter the analysis, state criminal cases are not bound

continued on pg. 7 

by non-constitutional federal cases like Frye and Daubert. Therefore, states generally tie the ultimate issue of admission of the DRE and/or DEC evidence to their own respective rules governing admission of opinion evidence. These rules include not only analysis of “scientific” evidence and “expert opinion” testimony, but also include rules governing “lay opinion” testimony. North Dakota is no different.

Note that although many states do have established case law, North Dakota does not have a published case on the issue of DRE admissibility. If you have had a case where you allowed or denied DRE testimony, I would love to hear about it. No judgment either way, I am most interested in your reasoning. We know cases frequently turn on the facts and more importantly, the proper or sometimes failed presentation of them. Give me a call or send me a note when you have time. ■

STATE OF NEW JERSEY V. OLENOWSKI: A Long Winding Road

Honorable Neil Edward Axel Senior Judge, District Court of Maryland Columbia, Maryland

Almost exactly three years before the ink dried on the New Jersey Supreme Court decision in *State v. Olenowski*, (1) the named defendant, Michael Olenowski, passed away. His name, however, will live on in New Jersey jurisprudence as his appellate case will be synonymous with both the adoption of a Daubert-type standard for the admissibility of expert evidence in criminal cases, and with the Court’s definitive ruling on drug recognition expert testimony in drug impaired driving cases.

A History of the Case


As noted in my earlier article on this case, (2) in separate incidents in February and August 2015, Michael Olenowski was arrested for impaired driving and submitted to drug influence evaluations by specially trained police officers known as drug recognition experts (DRE). (3)

In 2016, he was convicted of both offenses following trials in which the DREs testified that he was driving under the influence of particular categories of drugs. His convictions were affirmed by the New Jersey Appellate Division in an unreported decision in 2018. The New Jersey Supreme Court granted certification to determine if, and under what circumstances, testimony of a certified DRE may be admissible at trial.

Numerous states around the country have judicially accepted DRE testimony as either scientifically reliable under the expert witness standards set forth in Frye or Daubert, or admissible under state Rules of Evidence as non-scientific evidence based upon specialized knowledge. (4) Prior to *Olenowski*, the New Jersey appellate courts had not ruled on the issue, but because the trial court record was inadequate to evaluate the validity of the DRE evidence, in November 2019, the Court appointed Judge Joseph F. Lisa as a Special Master to hear testimony and consider whether DRE testimony has achieved general acceptance within the relevant scientific community and therefore satisfies the reliability standard for admissibility in New Jersey. (5)

Following forty-two days of testimony, and a two-and-a-half-year delay occasioned by the COVID epidemic, Judge Lisa issued his 332-page report. (6) Based on all of the evidence presented, Judge Lisa concluded that DRE testimony was reliable, and thus admissible in New Jersey under its Frye standard.

While Mr. Olenowski’s cases were making their way through the appellate process, the New Jersey Supreme Court was in the midst of reconsidering its legal standard for admissibility of expert testimony, and in 2018 abandoned the State’s long-held Frye

continued on pg. 8 

standard of admissibility to adopt a Daubert-type standard for admissibility in all civil proceedings. (7) Then five years later, *State v. Olenowski* became an appellate opportunity to consider the Daubert standard in criminal cases. When considering the Special Master’s report, the New Jersey Supreme Court, adopted a Daubert-type standard in criminal cases. (8) Since the Special Master had not considered the Daubert test of admissibility, the case was referred back to the Special Master to “assess the reliability and admissibility of DRE under the Court’s newly adopted standard.

On remand, Judge Lisa reconsidered the evidence and arguments presented, and on April 13, 2023, issued a 57-page supplemental report concluding that DRE testimony is reliable and admissible under the methodology-based Daubert-Accutane standard now applicable to criminal and quasi-criminal cases in New Jersey.

The Ultimate Holding

Ultimately in November, 2023, the Supreme Court of New Jersey, in a 6-2 decision held that DRE evidence is sufficiently reliable under the newly adopted Daubert-type standard, and is admissible, but with the following limitations:

1. The DRE may opine only that the evaluation is “consistent with” the driver’s ingestion or usage of drugs, and not that impairment was caused by such drugs.
2. If the State fails to make a reasonable attempt to obtain a toxicology report without a persuasive justification, the DRE opinion testimony must be excluded.
3. The defense must be afforded a fair opportunity to impeach the DRE and present competing proofs.
4. The adoption of model instructions to guide juries about DRE evidence should be considered.

The Court noted that although not perfect, “the DRE protocol is a useful tool that can be helpful to the trier of fact in the search for truth.” (9)

The Court’s Limitations and the Holding’s Impact

Although some may disagree as to its impact, the decision re-affirms the reliability of the DRE protocol as probative evidence that should be considered along with all the available evidence in determining whether a driver was operating a vehicle while impaired or under the influence of a drug. As noted by the Court:

For many years, the DRE protocol has been widely and regularly used across the country and abroad. No state has discontinued it, and no state’s highest court has nullified it. The protocol has been studied multiple times and periodically revised and enhanced. When DRE evidence is presented in courts far and wide, defense attorneys have had repeated opportunities to impeach it on cross-examination and to counter it with competing expert opinion that may be critical of the methodology. Although it has imperfections, the protocol has stood the test of time in its widespread acceptance. (10)

Accordingly, in New Jersey, drug recognition experts may opine that the results of the protocol are consistent with a driver’s use of one or more identified drug categories. Although a DRE will not be permitted to testify as to the cause of driver’s impairment, evidence from a DRE, when combined with all the facts, circumstances, observations, driving behavior, toxicology results, and admissions, assist the trier of fact in determining whether a driver was operating a motor vehicle while impaired by drugs.

Requiring the State to “make a reasonable attempt to obtain a toxicology report based on a blood or urine sample” places an affirmative duty on the State that is already a part of the DRE 12-step protocol. Fourth Amendment considerations will continue to be at play, requiring express consent, exigent circumstances, or a search warrant to obtain blood or urine samples. Unlike other Fourth Amendment considerations, however, if the State does not make a reasonable attempt to obtain blood or urine, the DRE opinion testimony may be excluded. Requiring a toxicology

screen might raise certain arguments, and additional motions to suppress where any number of circumstances could explain the absence of a toxicology report.

The long and winding road of the Olenowski case has now led to yet another reported appellate decision permitting the use of drug recognition expert testimony at trial in drug-impaired driving cases. As always, testimony from a DRE, when considered along with all the evidence presented, can assist triers of fact in determining guilt or innocence in drug-impaired driving cases. ■

*The article was originally published in the Spring 2024 issue of the Highway to Justice newsletter, by the American Bar Association. Honorable Neil Edward Axel, Senior Judge, District Court of Maryland, Columbia, Maryland, State of New Jersey v. Olenowski: A Long and Winding Road Link to HTJ: [Spring 2024 Highway to Justice](#) (americanbar.org). It is reprinted here with the permission of the ABA Judicial Division and the author.

Endnotes

1. 255 N.J. 529, 304 A.3d 598 (2023).
2. N. Axel, The Continuing Saga of State of New Jersey v. Olenowski and the Admissibility of Drug Recognition Expert Testimony, Highway to Justice (Summer 2023), to be found at: https://www.americanbar.org/content/dam/aba/publications/judicial_division_record/2023sumhwtj.pdf.
3. A drug recognition expert is a specially trained police officer who is certified as proficient in administering a 12-step protocol under the Drug Evaluation and Classification Program (DECP). This protocol is a standardized, systematic procedure to examine a suspect under arrest for drug-impaired driving. The drug recognition expert then applies their specialized training and experience to conclude whether their observations fit established indicia of impairment by particular classes of drugs. DRE testimony has been in use for the last halfcentury, and all fifty States, the District of Columbia, Canada, and several other countries around the world utilize DRE evaluations in assessing whether one is under the influence of drugs.
4. See e.g. State v. Aleman, 145 N.M. 79 (N.M. Ct. App. 2008); Williams v. State, 710 So. 2d 24 (Fla. Dist. Ct. App. 1998); State v. Layman, 953 P.2d 782 (Utah Ct. App. 1998); Mace v. State, 328 Ark. 536 (1997); United States v. Everett, 972 F. Supp. 1313 (D. Nev. 1997); State v. Klawitter, 518 N.W.2d 577 (Minn. 1994); State v. Baity, 140 Wash.2d 1 (2000) (en banc); People v. Quinn, 153 Misc.2d 139, 580 N.Y.S.2d 818, 826 (Dist. Ct. 1991), rev'd on other grounds, 158 Misc.2d 1015, 607 N.Y.S.2d 534 (App. Div. 1993); State v. Chitwood, 369 Wis.2d 132 (Wis. Ct. App. 2016); State v. Daly, 278 Neb. 903 (2009); State v. Rambo, 250 Or.App. 186 (2012); Poole v. State, 249 Ga.App. 409 (2001); State v. Kanamu, 107 Haw. 268 (2005); Burton v. State, 300 S.W.3d 126 (KY 2009); Everitt v. State, 407 S.W.3d 259 (Ct.App.Tex. 2013). Additionally, Maine and North Carolina statutorily allow for the admissibility of DRE testimony.
5. 247 N.J. 242 (2019).
6. <https://www.njcourts.gov/sites/default/files/public/notable-cases/smfr.pdf>
7. In Re Accutane Litig., 234 N.J. 340 (2018).
8. 253 N.J. 133, 155 (2023).
9. 255 N.J. at 616, 304 A.3d at 649.
10. 255 N.J. at 605, 304 at 642-43.

Recent Court Opinions of Note

("A little late-night reading") – Alexander J. Bott, UND School of Law

The court opinions are a special contribution of my friend and colleague Earl G. Penrod, Senior Judge, Indiana Judicial Outreach Liaison, and Judge in Residence, National Judicial College

Exigent Circumstances Justify Warrantless Blood Draw in *State v. Davis*

The Tennessee Court of Appeals upheld the trial court's denial of the Defendant's Motion to Suppress the blood test result that was obtained without a warrant based on exigent circumstances. The trial judge had noted for the record several factors he considered in finding exigent circumstances, and the Court of Appeals determined that those factors were supported by the record and justified the warrantless search. The arresting officer was the sole officer at the scene and after waiting for the tow truck and conducting an inventory search, the officer transported the defendant to jail, where the officer learned that the intoximeter was not working; the defendant refused to consent to a blood draw. The officer began preparing paperwork to obtain a search warrant and called the judge five times but received no answer. The officer contacted the District Attorney's Office for advice and because it would take at least an hour each way to drive to a different judge in another county, the District Attorney opined that exigent circumstances supported a warrantless blood draw; the Court of Appeals agreed.

State v. Davis, 2023 Tenn. Crim. App. LEXIS 451 (November 6, 2023)

Obtaining Search Warrant In lieu of Statutory Implied Consent Procedure

The Iowa Supreme Court reversed the trial court's granting of a Motion to Suppress and held that the police did NOT violate the defendant's constitutional rights by obtaining a search warrant to obtain a bodily specimen. The Supreme Court rejected the defendant's claim that an officer is limited to proceeding under the statutory implied consent procedure when investigating an impaired driving case. The Supreme Court reiterated that the implied consent law is not the exclusive means by which the State may obtain blood test evidence from a defendant in an OWI (DUI) proceeding.

State v. Laub, 2024 Iowa Sup. LEXIS 17 (2024 WL 500644) (decided February 9, 2024)

Useful Resources and Links

1. Impaired Driving Solutions – A Division of All Rise (formerly NADCP)

Uplifting communities by delivering curated solutions to eliminate impaired driving.

Impaired Driving Solutions leads a comprehensive approach to solve one of the greatest threats to public safety in the U.S. by implementing evidence-based and promising legal and clinical interventions.

Formerly known as the National Center for DWI Courts, Impaired Driving Solutions partners with federal agencies, state highway safety offices, and leaders in the private sector to provide cutting-edge training and targeted support to communities to implement, expand, and improve impaired driving treatment court programs (i.e., DWI courts) and other interventions that provide treatment and accountability based on research-driven best practices.

Click here for access: [Impaired Driving Solutions – All Rise](#)

2. The National Judicial College (NJC)

The NJC serves state trial court judges, administrative law judges, limited jurisdiction judges, military judges, tribal judges, even commissioners of licensing bodies.

Click here for access: [The National Judicial College | NJC \(judges.org\)](#)

3. ABA Publication Tribal Traffic Safety Bulletin

The Tribal Traffic Safety Bulletin is produced by the ABA Judicial Division through a project funded by a grant from the National Highway Traffic Safety Administration. This newsletter will be shared twice a year, and will feature pieces written by Judicial Outreach Liaisons, Judicial Fellows, judges, and other program stakeholders. The newsletter will be focusing on highway safety matters in native lands.

Click here for access: [Tribal Traffic Safety Bulletin \(americanbar.org\)](#)

4. ABA Publication Highway to Justice

Highway to Justice is produced through a joint project with the American Bar Association Judicial Division and the National Highway Traffic Safety Administration. This complimentary publication is designed to be a source for updates on national traffic safety news.

Click here for all issues: [Highway to Justice \(americanbar.org\)](#)

Upcoming Trainings/Events/Webinars

*This is not an exhaustive list and is geared toward impaired driving

September 7-11, 2024

[Governors Highway Safety Association \(GHSA\) Annual Meeting](#) to be held in Indianapolis, Indiana. Registration is open.

September 27-29, 2024

[2024 National Interdisciplinary Cannabis Symposium](#) to be held at the New York Law School, New York, New York. Registration is open.

November 18-20, 2024

National Alliance to Stop Impaired Driving (NASID) Conference 2024 to be held in Arlington, Virginia. [NASID Conference 2024 - National Alliance to Stop Impaired Driving](#). Registration is open.

2024 National Judicial College Courses

They are still working on details for some of courses, but registration is open for most of our 2024 courses. Check [online calendar](#) to see everything happening at the NJC.

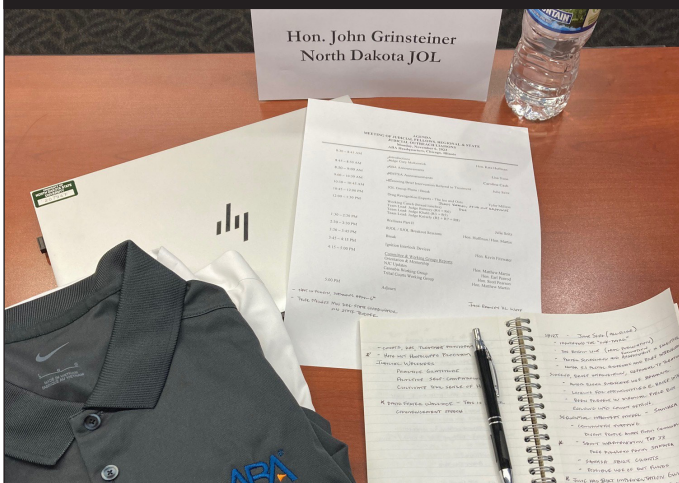
That National Judicial College (NJC) Recorded Webinars and Programs on impaired driving issues going back to 2018 can be found here: [Webinars & Programs | Traffic Resources](#)

2024 NJC Traffic Programs – Webinar Series

- June 5, 2024** A Culture of Quality in Impaired Driving Cases: Due Process and Guilty Pleas
For more info use this link: [A Culture of Quality in Impaired Driving Cases: Due Process and Guilty Pleas–The National Judicial College \(judges.org\)](#). Registration is free: [NJC Registration \(judges.org\)](#)
- Aug. 7, 2024** Harnessing Technology to Monitor Substance Use in Impaired Driving Cases – **DETAILS TO FOLLOW**
- Dec. 4, 2024** Impaired Driving in 2024: Where Are We? – **DETAILS TO FOLLOW**

UNSUBSCRIBE

STAY TUNED!



This quarter's issue follows up the two-part series on cannabis with information on detection. I have introduced you to the North Dakota Oral Fluid Pilot Program and given you some other information on detection that goes beyond what we frequently see in alcohol detection. I stand as a resource for each of you, so don't hesitate to reach out. If you have an issue that is somehow connected to impaired driving, I'll do my best to help. If it's not, I'm still happy to listen and help if I can. I know how isolating the position can be at times, so you have a friend in me. I hope to bring you value and some informative articles in my upcoming issues of the newsletter. Until next time, peace on your heart and strength for your fight, no matter how big or small!

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