

# NORTH DAKOTA IMPAIRED DRIVING Newsletter

## Welcome to the Impaired Driving Newsletter for North Dakota 2023, Volume 2; Issue 4:

In the last issue of the North Dakota Impaired Driving Newsletter we said goodbye to our Traffic Safety Resource Prosecutor (TSRP), Kristi Pettit Venhuizen, but it was not goodbye forever. Although we will no longer know her as the North Dakota TSRP, we have the distinct pleasure of knowing her now as the Honorable Judge Kristi Pettit Venhuizen, serving in the Northeast Central Judicial District. Please congratulate her honor the next time you see her. A definite loss on our side of the bar, but a significant gain on the bench. One less judge to educate on impaired driving issues!

We did not want this newsletter that Sandy Wilson and the new Judge started to be discontinued, so a rag tag group of two will attempt to carry the weight for this issue. NDDOT's Highway Safety Office is working diligently to find a replacement for the TSRP position and has assured said rag tag group that the newsletter assignment is temporary. We will do our best to bring you relevant content.

In that vein, we have pulled together a summary of the 2023 top four major trends in impaired driving. They are in no particular order:

- Legalization of Marijuana
- Multi-substance Impaired Driving
- Warrantless Blood Draws
- Sentencing & the Changing Judicial Response.

Also included are a list of upcoming training and events along with a training resource listing. As always, feel free to share the information in this newsletter with your colleagues. Thank you for continuing the good fight. We wish you peace on your hearts this holiday season.

## Volume 2, Issue 4

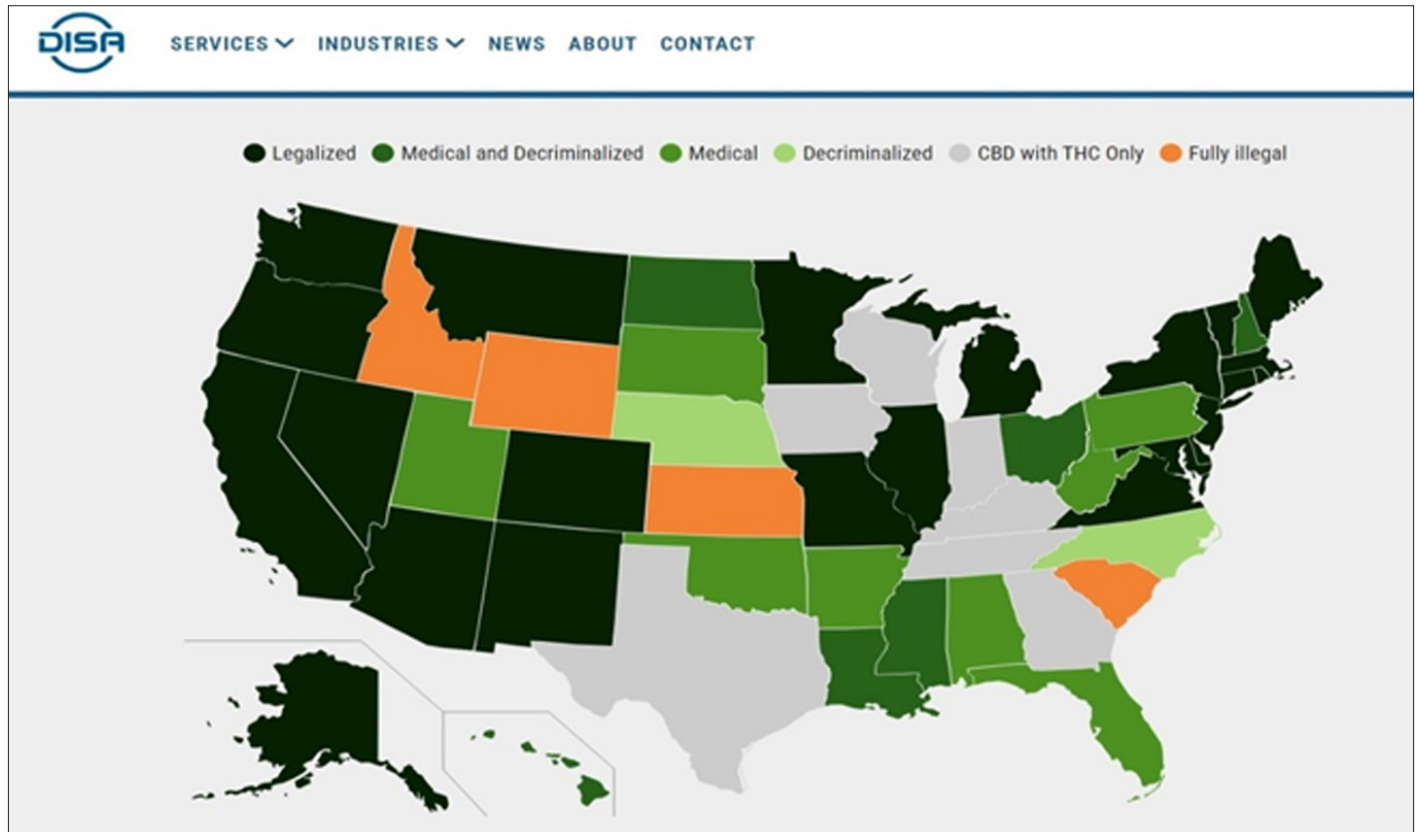
Welcome to the Quarterly North Dakota Impaired Driving Newsletter.

This resource will provide training information, drug and alcohol trends, legal updates, toxicology, and more to keep you informed.

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## Legalization: An Update

Pot, weed, dope, grass, and herb are some old-school basic terms. Chances are, the first time you heard marijuana slang it was one of these five words, but all five refer to the same thing – cannabis. Cannabis is a plant that has been used for its intoxicating effects for at least a century in the United States and even longer in other cultures. More than 100 different cannabinoids have been identified in cannabis. The primary intoxicating cannabinoid in cannabis is delta-9-tetrahydrocannabinol (THC). Cannabis continues to be one of the major themes in the media, our courtrooms, treatment courts, and in impaired driving over the past year and shows no signs of burning out.



The above map was last updated October 30, 2023. A fuller size and interactive version can be found at [MARIJUANA LEGALITY BY STATE- Updated Oct 30, 2023 | DISA](#). On November 7, 2023, Ohio voters approved Issue 2, legalizing cannabis for adults. More than half of Americans now live in a legal cannabis state! In Missouri, it is a constitutional right to use and possess cannabis. Although the last two ballot initiatives have been defeated in North Dakota, with medicinal and decriminalization already in place, legalization seems just on the horizon. On May 30, 2023, Minnesota became the 23rd legalization state when Gov. Tim Walz (D) signed HF 100 into law. Legal possession and cultivation took effect on August 1, 2023. Adults 21 and older can now:

- Possess up to two ounces of cannabis, eight grams of concentrate, and edibles with up to 800 milligrams of THC
- Give away the above amounts of cannabis to other adults 21+
- Possess up to two pounds of cannabis at home
- Cultivate up to eight plants (four of which may be flowering) at their primary residence or in the curtilage, as long as it is out of public view and in an enclosed, locked space
- Use cannabis at a private residence or on private property unless the owner prohibits doing so.

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## Legalization (continued)

Smoking and vaping are prohibited in multifamily housing, such as apartments, and there is an “open package” law that carries possible jail time. The new law includes automatic expungement for low-level cannabis offenses. It creates a Cannabis Expungement Board to determine if certain cannabis felonies should be vacated, charges should be dismissed, and records should be expunged, or if the person should be resentenced to a lesser offense.

Cannabis sales are already legal on some of Minnesota’s Indian Reservations with widespread legal sales expected in early 2025. The new law will include a variety of license types, including retailers, cultivators, transporters, events, microbusinesses, mezzo businesses, and delivery services. Regulators will decide how many licenses to issue and will reserve at least 20% of points for those with social equity status. The law imposes a 10% retail tax, plus the standard 6.5% sales tax and local taxes. Medical cannabis is tax-exempt. HF 100 establishes grant funds, which include funding to help applicants with start-up and training and for substance abuse disorder treatment and prevention.

The new law also keeps hemp-derived THC products legal, while imposing taxes and regulations. It allows the two existing types of medical cannabis businesses to continue operating and to sell limited amounts of cannabis for adult use. The State Office of Cannabis Management has already launched a website [Minnesota Office of Cannabis Management | State of Minnesota — Office of Cannabis Management](#) with more information about the law and implementation.

Conversation about the harms and potential benefits of cannabis use, as well as the most appropriate legal status and regulatory structure to govern its use, has intensified nationwide. There is much to be learned from the other states that have already passed laws, and I hope our lawmakers are paying attention. I think most of us would agree that, should North Dakota continue to move toward legalization, we do so within a strong public health-based regulatory framework that minimizes the already known harms related to legalization.

## With Regard to Impaired Driving

The laws regarding cannabis continue to evolve. In addition to legalizing and decriminalizing cannabis, states are enacting and modifying statutes addressing impaired driving for drugs (driving under the influence of drugs or DUID), including operating a vehicle with cannabis in a driver’s system. One of the persistent problems in DUID enforcement is that the presence of drugs does not necessarily mean the person is impaired. In addition, there are limitations to drug testing and technology, as well as difficulty in determining impairment from a drug test result.

While there is a blood alcohol content (BAC) for alcohol, there is no BAC for THC. Research has not yet established what impairment, if any, results from various levels of other drugs such as cannabis. To convict a driver of a DUID, a majority of states require the prosecution to prove the driver is actually impaired. However, 12 states have a zero-tolerance law, meaning operating a vehicle with any amount of THC in the system is unlawful. Also, five states have specific per se limits at which a driver is considered impaired.

For an up-to-date status of state laws, see the National Center of State Legislatures website at: <https://www.ncsl.org>. Under the general heading of transportation, there is a great deal of information about pending and enacted state legislation and an overview of marijuana-impaired driving laws in various states. <https://www.ncsl.org/transportation/drugged-driving-marijuana-impaired-driving>.

*\*adapted from an article that previously ran in Directions: The Newsletter of the Judicial Resource Center on Drug-Impaired Driving. Authored by my friend and colleague Earl G. Penrod, Senior Judge, Indiana Judicial Outreach Liaison, and Judge in Residence, National Judicial College.*



# Multi-Substance Impaired Driving

Trooper Tarek Chase, NDHP; DRE/SFST State-Wide Coordinator

Multi-substance impaired driving, or what most law enforcement officers know as polydrug use, has been a hot topic for many years. In this article, I'll discuss the prevalence of polydrug use in combination with driving as well as current polydrug trends.

Since January 2023, more than 20,000 drug influence evaluations have been conducted by Drug Recognition Experts (DREs) across the United States. Of those evaluations, in almost half (44%), the driver was identified to have more than one impairing substance in their body. It should be no surprise that the most prevalent drug categories were central nervous system (CNS) stimulants, narcotic analgesics, and cannabis. CNS stimulants have been a favorite drug of abuse by users because of the euphoric effects, increased energy, and increased confidence levels. DREs opined that CNS stimulants were present in 51% of subjects evaluated. Law enforcement, along with the public, has been aware of the "opioid epidemic" for the last several years so it makes sense that narcotic analgesics make up a large percentage (34%) of all drug influence evaluations. Then, with approximately half of the states in the United States allowing recreational cannabis, DREs identified cannabis (39%) as one of the impairing substances during 2023 drug influence evaluations.

Data from Insurance Institute for Highway Safety (IIHS) and National Survey on Drug Use and Health (NSDUH) illustrate the growing concern of cannabis use in combination with alcohol among drivers. This concern seems to stem from the decriminalizing, legal medical use, and/or recreational use of cannabis across many states. Surveys show an increase of cannabis/alcohol combination use, especially in states with legalized recreational cannabis. Again, this information should come as no surprise to law enforcement officers but it's good that the data coincides with what is being taught during Standardized Field Sobriety Testing (SFST)/Advanced Roadside Impaired Driving Enforcement

(ARIDE)/DRE courses. During the three main impaired driving training courses (SFST Basic, ARIDE, DRE), officers are taught that popular "mixers" among drugs users are alcohol and cannabis, either used together or in combination with other drugs. Now, with more and more states either decriminalizing or legalizing recreational use of cannabis, it's likely we will continue to see an increased prevalence among drivers and polydrug use.

Aside from the previously mentioned CNS stimulants, narcotic analgesics, cannabis, and alcohol polydrug use, several other drugs are trending as popular "mixers." Officers should become more familiar with kratom, tianeptine, xylazine, fentanyl, diphenhydramine (aka Benadryl), gabapentin, delta-8 and delta-10 THC, and isotonitazene. More detailed information on these substances can be found at [Police1](#), [Police Chief Magazine](#), [Tall Cop Says Stop](#), [WebMD](#), [IACP](#), [Erowid](#), and the [North Dakota State's Attorney's Association TSRP](#) webpage.





# Warrantless Blood Draws

Trooper Tarek Chase, NDHP; DRE/SFST State-Wide Coordinator

Being able to collect a chemical sample from a driver believed to be under the influence of alcohol and/or other drugs can be a very important step in the DUI or DUID process. And when it comes to chemical tests, blood samples are the “gold standard” for identifying alcohol and/or drugs (with the exception of cannabis in North Dakota). But collecting a blood sample can be tricky depending on the situation.

As a review, I’d like to briefly speak about some of the major cases related to warrantless blood draws in the United States. This information was discussed in a recent training from the National Judicial College by Judge Neil Axel of Columbia, MD. Four cases were referenced in this training. Three of the cases related to exigent circumstances (*Schmerber v. California*, *Missouri v. McNeely*, and *Mitchell v. Wisconsin*) and one related to implied consent/incident to arrest (*Birchfield v. North Dakota*).

*Schmerber v. California* (1966) – The Court held that a forced blood draw did not violate *Schmerber’s* Fifth Amendment right against self-incrimination. The Court also ruled that the involuntary, warrantless blood sample taken from *Schmerber* was justified under the Fourth Amendment’s exigent circumstances exception, referencing natural dissipation of alcohol in the blood, and a warrant was not required.

*Missouri v. McNeely* (2013) – “The Supreme Court held that the Fourth Amendment’s protection against warrantless searches applies to blood alcohol tests unless specific exigent circumstances exist.” The Court continued by clarifying that the natural metabolism of alcohol in the bloodstream is not a “per se” exigency that would always justify warrantless blood tests of individuals suspected of driving under the influence of alcohol. Each case must be considered based on its individual facts.

*Mitchell v. Wisconsin* (2019) – The Court held that exigent circumstances exist when natural dissipation is combined with other pressing police duties, further stating “Both conditions are met when a suspect is unconscious”. The Court also stated “such test must be prompt because it is a biological certainty that alcohol dissipates from the

bloodstream literally disappearing by the minute...BACs serve important purpose to enforce DUI laws that save lives”. That being said, the Court also makes it clear that “this Court has inferred that a warrant must generally be secured to comply with the Fourth Amendment...the warrant requirement is subject to certain reasonable exceptions”.

*Birchfield v. North Dakota* – The Court held that “motorists may not be criminally punished for refusing a blood test, based on implied consent statutes”. The Court continued that “the Fourth Amendment permits warrantless breath tests incident to arrest...blood tests, however, are significantly more intrusive, therefore the Fourth Amendment does not permit a warrantless blood test incident to arrest”. The good news is that law enforcement can ask for consent to search as it relates to requesting a blood test during a DUI investigation (after arrest of course). *Florida v. Bostick* (1991) states “Consent to search, voluntarily given, is an exception to both state and federal warrant requirements” when referencing consent under the Fourth Amendment. But *State v. Simpson* (1996) clarifies by stating “Constitutional consent must be unequivocal, specific, intelligently given, and uncontaminated by duress or coercion”.

In summary, keeping in mind that officers must follow the guidance from their local prosecutor offices, North Dakota State Law allows law enforcement to conduct a DUI investigation, in most cases, using the following basic guidelines as it relates to post-arrest:

- After the officer determines that probable cause exists to arrest the driver for DUI, the officer places the driver under arrest for DUI.
- The officer reads the Miranda Warning to the driver.
- The officer reads the North Dakota Implied Consent Advisory for a chemical test to the driver.
- If a chemical breath test is requested by the officer and if the driver consents to the test, a chemical breath test is administered.
- If the driver’s BAC is over .08, a Report and Notice form is completed.

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# Sentencing & the Changing Judicial Response

Judge John Grinsteiner, (retired) SJOL for North Dakota

The research supports what I think we intuitively already knew, that there is an opportunity to be seized with every interaction.

“An encounter with the criminal justice system provides a valuable opportunity to intervene in an individual’s life by identifying the clinical needs of substance abusers and then confronting them with the consequences of their own drug and alcohol use.” Responding to Substance Abuse: The Role We All Play, 1999.

Approximately two-thirds of the people who enter the criminal justice system simply self-correct and are not seen again. This is obviously a good thing; however, one-third remains and these are the people who unfortunately become repeat offenders. While accountability is still a key factor, we know that we can’t arrest or incarcerate our way out of this dilemma. Instead, we have to adjust our approach. Before we can create a solution, we should make sure we have identified the problem. The two-thirds who self-correct are not the problem, the system seems to work for them. The problem then would seem to be the one-third who reoffend. A good question to ask might be how can we identify the one-third before they recidivate?



One avenue can be through proper screenings and assessments, ideally before sentencing happens, so that the judge can have as many pieces to the puzzle as possible before crafting a sentence for that individual with referrals to address his or her specific needs. Since the establishment of treatment courts, which have been very effective (see Impaired Driving Solutions- All Rise for descriptions and examples), there is an ever-increasing view of the judge as a problem solver. While most judicial officers embrace this role, many challenges remain, including obtaining enough information to make an informed decision, identifying who is at high risk, determining what intervention/treatment is appropriate, and finally, imposing a sentence that will most likely lead to success.

However, it does not begin nor end with the judge. All of the professionals working in the criminal justice system should be viewed as problem solvers. We all should be working to identify those likely to reoffend. We all should be working to get them properly screened and assessed with referrals to services that are needed. We all should monitor for compliance with close supervision and we all should assume an active role in incentivizing good behavior and holding people accountable. This requires better coordination and understanding all along the system from education to law enforcement; to prosecution and defense; to courts; to supervision and corrections; to treatment providers; and back again.

Our communities, families, and the people that we serve are too important to simply do it the way we have always done it. My hope is that all of us begin to see that there is an opportunity to be seized with every interaction. Until next time, be safe out there.

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## Blood Draws (continued)

- If the driver refuses to provide a breath sample, the officer reads the refusal portion on the Implied Consent Advisory for a chemical test.
- No search warrant is required.
- If a chemical blood or urine test is requested by the officer and the driver consents to the test, a chemical blood or urine test is administered without delay, no search warrant is required.
- If the driver refuses to provide a blood or urine sample, a search warrant must be secured first.
- After the search warrant is secured, the search warrant is presented to the driver and then the officer reads the refusal portion of the North Dakota Implied Consent Advisory for a chemical test.

## Upcoming Training and Events

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### ARIDE Classes

- New Town: December 6-7, 2023

Contact Trp. Tarek Chase with questions

### Intoxilyzer Trainings

- December 7-8, 2023
- December 18-19, 2023
- January 11-12, 2024
- January 22-23, 2024
- February 1-2, 2024
- February 12-13, 2024

Contact Anna Narehood at the State Crime Lab with questions

### DRE/SFST Instructor In-service

December 18-19, 2023

Holiday Inn, Bismarck, ND

Contact Trp. Tarek Chase with questions

### DRE School

- Week 1: January 8-12, 2024
- Week 2: January 16-19, 2024

Bismarck Police Department

Contact Trp. Tarek Chase with questions

### Lifesavers Conference

April 7-9, 2024

Denver, Colorado

<https://lifesaversconference.org/future-conferences/>

### All Rise

May 22-25, 2024

Anaheim, California

<https://allriseconference.org/about-rise/>

### IACP Impaired Driving and Traffic Safety (IDTS) Conference

August 16-18, 2024

Washington, D.C.

<https://www.theiacp.org/IDTSconference>

### Governors Highway Safety Association (GHSA)

September 7-11, 2024

Indianapolis, Indiana

<https://www.ghsa.org/events/Annual-Meetings/2024>

## Training Resources

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TSRP Webpage • [www.ndsaa.org](http://www.ndsaa.org)

User Name: tsrp • Password: tsrp

This website was developed to provide those invested in traffic safety with a warehouse for current information, training opportunities, case law updates, related resources, interesting and relevant news articles, etc., so we can continue to focus on our goal of making North Dakota's roadways safe. Following is a list of items available.

- Impaired Driving Training Materials & Manuals
- Memo Library
- Impaired Driving Training Video Library
- SFST Training Videos
- The Two Beer Manual and latest case law updates
- Webinars



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