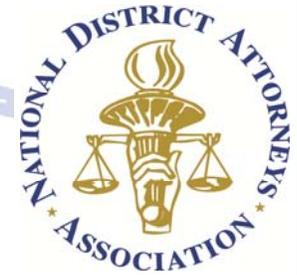




# Between the Lines



Digital Prosecutor Course  
February 19-22, 2018,  
San Antonio, TX

## Vehicular Assault— Causing Unintended Injury with a Motor Vehicle

Volume 26, Issue 1  
January 2018

The NDAA's Digital Prosecutor course is designed to assist the prosecution team in understanding and utilizing technology in investigation and trial, as well as learning how suspects are using technology. This 4 day course will address both general technology practices and substantive areas of law and offer a hands-on lab to incorporate the lessons shared.

The many of us that embrace the mission of traffic safety often refer to statistics about lives lost on our roadways or lives saved by practices and innovations. We cite statistics that indicate that 30,000—40,000 people a year die due to traffic crashes. Sometimes, we compare that number to other deadly events like the 4,400 casualties in the Iraq War and 2,300 in the war in Afghanistan, or the 57,000 killed in Vietnam over the course of twenty years. We grieve the deaths of these soldiers and the twenty year total of 800,000 who died on our roadways over a comparable twenty years. Statistics remind us of the horrific grief those suffer who lose loved ones, who plan the funerals, and who experience sad, lonely holidays with an empty chair at the table. We struggle with solutions as it seems that drivers are more and more careless and distracted. There are more methods for drivers to drive impaired as drugs and medications affect concentration, sight, and judgment.

### Inside this issue:

Vehicular Assault	1-2
Cannabis Impairment	3-4
State Supreme Court	5-17
NTLC Efforts	18-20
TSRP News	21-23
Vehicular Assault Laws	24-28

In our rush to easy statistics, we sometimes forget those who are injured in vehicle crashes. It is as if those lucky ones do not count in the same way. More than 2.4 million people are injured in crashes every year. Many suffer for years or even decades. Millie Webb, an amazing traffic safety advocate, was a victim in a car when she suffered burns over 75 per cent of her body and multiple crushed and broken body parts. Rarely does a year go by in which she does not go through another difficult surgery. During the last forty-five years her life has been dedicated to preventing crashes that injure or kill and supporting victims as a long-time leader of MADD. She has inspired many with her story.

### Staff:

Nelson Bunn, NDAA Executive Director

Mark Ginter, NDAA Chief Operating Officer

Tom Kimball, NTLC Director

Many victims who suffer injuries cannot walk again, talk again, or control bodily functions. Their lives are incredibly difficult and many caretakers sacrifice their own lives to serve the needs of their injured loved one.

### Senior Attorneys:

M. Kimberly Brown  
Romana Lavalas  
Pete Grady

Our Senior Attorney, Pete Grady, has worked to compile the laws of our states concerning what many states refer to as vehicular assault. As he explains, vehicular assault laws are necessary to enhance the penalty for unintentionally hurting someone while driving under the influence. It is important that we view these laws, understand them, and think about them. What is the appropriate penalty for an impaired driver who leaves a child in a wheelchair for the rest of his or her life?

### Staff Attorneys:

Tiffany Watson  
Sam Pellegrino  
Jeanine Howard

Metria Hernandez, Project Coordinator

## Vehicular Assault— Causing Unintended Injury with a Motor Vehicle

By: Pete Grady, Senior Attorney

The crime of “assault” requires proof that a defendant intended to cause pain or injury to another person. If a defendant charged with assault was intoxicated or otherwise impaired when the assault occurred, there must be proof that despite the impairment, the defendant was still able to form the “intent” necessary to commit the crime. Generally speaking, the requirement of intentional conduct is what distinguishes criminal behavior from the non-criminal, “negligent” or “unreasonable” behavior, the province of the civil courts.

If a person driving a motor vehicle intentionally tries to hurt another person while driving, an “assault” charge is appropriate. It might be possible to charge the driver with assault with a deadly weapon or dangerous instrument.

When the driver is under the influence of alcohol or drugs, it may be difficult to prove that any resulting injuries were intended by the driver. The Oklahoma Court of Criminal Appeals described the issue as follows: “Drunk driving is an inexcusable crime. When it results in injuries but not death, it is only logical that a prosecutor would seek a higher conviction than driving while under the influence of an intoxicating beverage. . .” (and, in the absence of a statute which specifically deals with such a situation) “. . . a logical place to turn was assault and battery with a dangerous weapon.” *Luther v. State*, 746 P.2d 1159 (Okla. Crim. App., 1987).

“But ‘intent to do bodily harm’ must be proved to convict a person of assault and battery with a dangerous weapon. That created a problem. It would be highly questionable to assert that a drunk driver, by the mere act of driving a car, had the intent to use his vehicle in such a manner.” *Id.*

To address this gap in the law and provide a means to increase punishment for an impaired driver who injures someone, some states have passed so-called “vehicular assault” statutes. These statutes generally provide that a driver who injures someone while violating the state DUI law will face increased punishment for the offense even in the absence of any intent to cause an injury.

On pages 24-28 of this newsletter, there is a list of state DWI statutes that increase the punishment for causing injury and statutes which increase punishment for causing injury by some other driving offense, typically “reckless driving”.

We hope the review of these laws will be helpful to you and help you dedicate your efforts to stopping impaired

### DRUGGED DRIVING VIDEO SERIES NOW AVAILABLE

With funding from AAA and the assistance of the National Judicial College, the National Traffic Law Center has produced a series of ten roll-call type videos concerning drugged driving. Each video is less than 15 minutes in length. Topics include qualifying a DRE as an expert, defending against attacks, toxicology, the use of field sobriety tests to determine impairment by drugs and more. The videos can be found on our website at:

[www.ndaa.org/ntlc\\_druggeddriving.html](http://www.ndaa.org/ntlc_druggeddriving.html)

# IMPAIRMENT FROM CANNABIS

In order to assist prosecutors and others to develop a better understanding of what signs of impairment are displayed by cannabis impaired drivers, our friends in Colorado developed this handy pocket guide. This one is reprinted with permission. Thank you, TSRP Jen Knudsen.

## Cannabis Impairment Quick Assessment

Document Observations of MENTAL & PHYSICAL Impairment

EYES	MUSCLES	ODOR
<b>Conjunctiva Tissue</b> (looks like pink eye in both eyes), <b>Lack of Convergence</b> , Dilated <b>Pupils</b> , <b>No HGN</b> (when cannabis alone).	<b>Tremors</b> Observed in extremities, upper torso, & eyelids (closed eyes).	<b>Smell</b> Burnt marijuana, additive flavor for vaping, & maybe for edibles.

**Indica:** Produces a 'stoned' feeling. Physically and mentally relaxing. Centered on the body. Enhances sensations of taste, touch, & sound.

**Sativa:** Produces the 'high' feeling (energetic). Less overpowering than the Indica 'stone.' Less likely to produce drowsiness. High described as: cerebral, energetic, creative, giggly & or psychedelic.

**Psycho-Physical Tests:** Generally slow performance; muscle tremors, especially in legs & arms.

**Information processing:** Likely diminished. May forget certain parts of instructions. Likened to attention deficit disorder, cognitive impairment.

**Modified Romberg:** Distorted internal clock. Eyelid Tremors.

<b>Impairment Peak:</b> 0-30 mins	Impairment may last up to 24 hours, without awareness effects.
<b>High Experience:</b> 2-3 hours	

ONSET OF EFFECTS DIFFERS DEPENDING ON MANNER OF INGESTION

**Delta-9-THC** - The main psychoactive substance found in marijuana.

**11-Hydroxy-THC** - The main psychoactive metabolite of THC formed in the body after consumption. Delta-9 + Hydroxy = Impairment

**11-nor-9- Carboxy- HC** - The main secondary metabolite of THC formed after consumption. Not active, but indicates historical use.

**Cannabinoids** - Group of active compounds found in marijuana.

**Cannabidiol (CBD)** - Non-psychoactive (a/k/a not impairing) cannabinoid.

**Cannabinol (CBN)** - THC metabolite (10% as psychoactive as THC).

**Measurement of Uncertainty** - Best estimate of how far a quantity might be from "true value."

**CO Permissible Inference 5 ng/mL** - If at time of driving, driver had 5 ng/mL delta-9 in whole blood, jury may infer defendant was DUI. CO does not have a per se law (statutory assignment of a blood concentration above which is an offense to drive)!

**Titrate** - Continuously measure & adjust the balance of [a substance].

### INTERNET RESOURCES

[www.wsp.wa.gov/breathtest/dredocs.php](http://www.wsp.wa.gov/breathtest/dredocs.php) (NHTSA/IACP Manuals)

[www.ndaajustice.org/ntlc\\_home.html](http://www.ndaajustice.org/ntlc_home.html) (Nat'l Traffic Law Center)

[www.nih.gov/research-training](http://www.nih.gov/research-training) (Research)

[www.decp.org](http://www.decp.org) (Int'l Drug Eval. & Classification Program)

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8/16 Edition



## State Supreme Court Decisions

### READING BETWEEN THE LINES

**LITIGATION** is the bread and butter of lawyers in every state and district. Issues determined in two states, whether they are adjacent or distant, are sometimes resolved in the same way, sometimes in opposite ways and often somewhere in between. In the field of traffic safety, the same issues tend to be raised across the country. In order to keep our prosecutors, law enforcement officers, judges and other interested parties informed, we have expanded our newsletter to capture the decisions of State Supreme Courts for your perusal. In order to accomplish this task, we asked Traffic Safety Resource Prosecutors (TSRPs) to send us short synopsis of their various traffic safety related Supreme Court decisions. These decisions were issued between July 1, 2017 and December 31, 2017. The contact information for these TSRPs follows:

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## State Supreme Court Decisions

### READING BETWEEN THE LINES

**Florida:** Submitted by Vin Petty

*Presley v. State*, 227 So.3d 95 (FL 2017).

In *Presley v. State*, the Florida Supreme Court resolved a conflict between the Florida First District Court of Appeal and the Florida Fourth District Court of Appeal regarding the standard required for the detention of passengers during a traffic stop. In so doing, the Florida Supreme Court definitively held that “law enforcement officers may, as a matter of course, detain the passengers of a vehicle for the reasonable duration of a traffic stop without violating the Fourth Amendment.” 227 So.3d at 96.

In coming to this conclusion, the Florida Supreme Court embarked on a thorough discussion of United States Supreme Court Cases regarding detentions at traffic stops, starting with *Pennsylvania v. Mimms*, 434 U.S. 106 (1977) and continuing through one of the most recent cases on the subject, *Rodriguez v. United States*, — U.S. — , 135 S.Ct. 1609 (2015). At the conclusion of that thorough discussion, the Florida Supreme Court recognized that the common thread throughout these cases was that “the ‘legitimate and weighty interest’ in officer safety during a traffic stop outweighs the intrusion upon a passenger’s liberty interest and permits an officer to exercise ‘unquestioned command of the situation.’” *Presley*, at 106 (internal citations omitted). However, it also recognized that such situational command was limited to a reasonable time frame based upon *Rodriguez* and explained that the duration of a passengers’ detention must be for a “limited period of time because it allows law enforcement officers to safely do their job—accomplishing the ‘mission’ of the stop—and not be at risk due to potential violence from passengers or other vehicles on the roadway.” *Presley*, 227 So. 3d at 107.

Thus, in Florida it is now clear that a law enforcement officer may not only detain the driver of a vehicle at the scene of a lawful traffic stop for a reasonable period, he or she may also detain any passengers within that vehicle for the same reasonable period.

**PROTECT  
YOUR BEADS.  
DON'T DRIVE DRUNK THIS MARDI GRAS.**

buzzed  
driving is  
drunk  
driving  
designate a sober driver

## State Supreme Court Decisions

### READING BETWEEN THE LINES

**Georgia:** Submitted by Gilbert A. Crosby

*Olevik v. State*, 2017 Ga. LEXIS 898 (GA 2017).

Officer stopped defendant for traffic violations. Upon making contact with the defendant, officer observed signs of intoxication and conducted an investigation, concluding defendant was impaired. Implied Consent is read, defendant gives consent, and takes a breath test, with a lower result of .113. Police did nothing intimidating or coercive during this encounter. The defendant files a motion to suppress, claiming that the implied consent statute is unconstitutional, both on its face and as applied to this defendant, because the language of the statute violates the defendant's protections against self-incrimination. The trial court denies the motion to suppress. The Supreme Court of Georgia takes up the constitutional issue.

**HOLDING:** Affirmed (with a caveat)

The Supreme Court ultimately held that Georgia's Implied Consent statute does not, by itself, compel a defendant to incriminate themselves – therefore, this defendant's breath test was properly admitted. While the Court makes suggestions about changes to implied consent, they do not hold that any part of the warning is improper, and the warning should continue to be given as read. The argument that now flows is that this decision means that refusals are inadmissible, which is at best premature. Prosecutors should be prepared to argue that the right to refuse the test does not include the right to be free of the license and evidentiary consequences of refusal, as expressly condoned in the *Birchfield* decision and elsewhere.

*Spencer v. State*, 805 S.E.2d 886 (GA 2017).

During a DUI investigation, officer conducted the HGN test, observing 4/6 clues. At trial, he testified pursuant to his training that 4/6 generally indicates a BAC of at least .08 or more. Defense objected, and the trial court overruled the objection, based on case law that had previously favored allowing testimony that HGN was over a specific amount, so long as the officer did not testify to a specific BAC. Defendant appealed, and the Court of Appeals affirmed the decision of the trial court. Supreme Court grants certiorari.

**HOLDING:** Reversed

The Supreme Court held that previous case law affirming the admissibility of HGN only allowed officers to testify that 4/6 clues was indicative of impairment, not of any specific BAC, or even a BAC above a specific level. An additional *Harper* hearing would be required to allow an officer to correlate HGN clues to any level of BAC, rather than testifying as to impairment. There was no specific discussion of how thoroughly officers could explain the evidence of impairment shown by HGN.

## State Supreme Court Decisions

### READING BETWEEN THE LINES

**Massachusetts:** Submitted by Andrea Nardone

*Commonwealth v. Camblin*  
Supreme Judicial Court Massachusetts  
December 8, 2017  
(Evidence/Breath Test)

The Supreme Judicial Court affirmed the lower court judge's finding that the breathalyzer instrument, the Alcotest 7110, satisfies the *Daubert-Lanigan* standard for the admissibility of scientific evidence, concluding that there was no abuse of discretion and affirming the denial of the defendant's motion to exclude the breath test results.

*Commonwealth v. Gerhardt*  
Supreme Judicial Court  
September 19, 2017  
(Evidentiary Issues/Marijuana Impairment)

The fact that marijuana can cause impairment of an individual's driving skills is within the common experience and knowledge of jurors, therefore, a police officer may testify as a lay witness to a defendant's performance on field sobriety tests to the extent they are relevant to skills required to operate a motor vehicle safely. However, in order for a police officer to testify to the correlation between marijuana impairment and a defendant's performance of field sobriety testing, that officer must be qualified as an expert witness.

NOTE: The term 'roadside assessments' should be used in lieu of 'field sobriety testing' in a marijuana impairment case. "[A]n officer may not testify that a defendant "passed" or "failed" any FST, as this language improperly implies that the FST is a definitive test of marijuana use or impairment."

#### *Gerhardt* Mania?

To respond to the *Gerhardt* challenge, The Commonwealth of Massachusetts chose Michelle R. King, Assistant District Attorney Appeals Unit Worcester County District Attorney's Office to argue the case before the Massachusetts Supreme Court. Ms. King spent numerous hours preparing for this challenge. She continues to have a deep commitment to traffic safety.

The decision that followed required an immediate response, so that law enforcement officers could change their procedures and language as the ink dried. With permission from the Office of Worcester County District Attorney Joseph D. Early, Jr. we are reprinting the advisory on the next page that he sent to his police departments as soon as the decision was entered.

NTLC note: This case is only precedent in Massachusetts and many courts have come to contrary positions about the need for officers to be expert witnesses in order to testify about signs of impairment concerning marijuana impairment and field sobriety tests. On pages 3-4 of this issue, the Colorado marijuana impaired driving pocket cards have been reproduced for the benefit of all. The National Traffic Law Center maintains a compilation of the national statutes and case decisions regarding the use of standardized field sobriety tests to determine impairment. All NTLC compilations are available upon request.

## *State Supreme Court Decisions*

### READING BETWEEN THE LINES

When a decision from a Supreme Court requires that new practices by law enforcement begin immediately, the officers cannot comply unless someone informs them immediately. In Massachusetts this happened when the Gerhardt case was released. District Attorney, Joseph D. Early, Jr. of the Worcester Trial Court issued this memo that crossed the Commonwealth faster than Paul Revere's horse permitting officers to adjust to the decision of the Court.

COMMONWEALTH OF MASSACHUSETTS  
Office of District Attorney Joseph D. Early, Jr.  
Worcester Trial Court  
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Recently, the Supreme Judicial Court of Massachusetts decided Commonwealth v. Gerhardt, SJC-11967. The Court determined that a police officer may testify, as a lay witness, to the officer's observations of the driver's performance on "roadside assessments," including the Walk and Turn (WAT) and One-Legged-Stand (OLS), tests historically used roadside to test for alcohol impairment. The officer cannot, however, testify as to the effects of marijuana consumption on the individual or its effects or on that individual's driving performance.

Highlights: In the context of QUI-marijuana, FSTs must be called "Roadside Assessments." This means that going forward, all police reports and in-court testimony MUST use this language. The officer can ask the driver to perform "Roadside Assessments", which can include the WAT, OLS, Romberg Balance Test, Finger-to-Nose, or any other test that assesses similar functions (i.e. balance, coordination, divided attention).

As with an OUI-alcohol case, the roadside officer can also testify to any personal observations of the driver, such as: Erratic driving or moving violations, the driver's appearance, the driver's behavior inside the vehicle and while exiting the vehicle, and the odor of fresh or burnt marijuana.

The roadside officer can testify as to the purpose of each roadside assessment. For example, the OLS assessment allows him/her to observe the defendant's ability to properly maintain balance, checks for divided attention, etc. Officers can testify to performance observations that they look for during the "Roadside Assessment."

Prosecutors will ask only basic questions about the officer's training and experience so that there is no testimony to suggest that he/she is an expert in this area, or that the "roadside assessments" are scientific tests. Drug Experts are NOT necessary for a prosecution of OUI-marijuana. They MAY be used to testify as to the link between marijuana consumption and impairment and performance on roadside assessments and impairment. Officers MUST NOT testify that the driver "Passed" or "Failed" the "Roadside Assessment" or that the driver appeared "high" or appeared to be "under the influence of marijuana" or offer any opinion as to the driver's sobriety as it relates to Marijuana.

Writing a police report that includes the language "roadside assessment" and not FSTs, does not use the word "test", and does not state whether the driver "passed" or "failed" is critical. In addition, observations of any erratic operation (lane violations, failure to stop in a timely manner etc.), along with observations that may link that operation to marijuana, bloodshot eyes, slow, deliberate speech, delayed response, marijuana in the car, odor of marijuana, or admission to marijuana use is very important in a successful prosecution.

## State Supreme Court Decisions

### READING BETWEEN THE LINES

**Nebraska:** Submitted by Ed Vierk

*State v. Rivera*, 901 N.W.2d 272 (NE 2017).

Petition for further review from Court of Appeals, Chief Judge Moore, Judge Riedmann and Judge Bishop, on appeal thereto from the District Court for Lancaster County, Judge Andrew R. Jacobsen on appeal from the County Court. Affirmed, per Justice Cassel (author). Kimberly A. Klein for the State.

**NATURE OF THE CASE:** Rivera was convicted of one count of DUI and was sentenced to two years probation, 30 days in jail, and a \$1,000 fine. Rivera appealed his conviction to the district court, where it was affirmed. Rivera appealed, arguing that the county court erred when it overruled his motion to suppress. The Court of Appeals affirmed, applying the “community caretaking” exception. On a petition for further review, the Supreme Court affirmed, but for different reasons. The Court found that the police-citizen encounter was not a seizure subject to Fourth Amendment protection.

**FACTS:** Two Nebraska Game and Parks Commission officers stopped to investigate a potential incident involving two groups of people on opposite sides of the road in the Branched Oak State Recreation Area. One officer parked the patrol truck on the paved roadway towards the right side. A vehicle driven by Rivera approached from behind. The vehicle briefly stopped directly behind the patrol truck and then drove off the paved roadway onto the grass on the right-hand side of the road. As the vehicle slowly passed the patrol truck on the right, one officer testified that he became worried about the safety of the people standing near the edge of the roadway ahead of the vehicle. The officer exited the patrol truck and walked around the front of it, towards the approaching vehicle. The other vehicle stopped when it was even with the patrol truck, approximately 15 to 20 feet away from the group of pedestrians.

Rivera testified that he stopped because he saw the officer’s hand in the air near his head and he was under the impression that the officer wanted him to stop, although the officer said he did not recall making any gestures. At no point in time did the officer activate the lights or siren on his patrol truck, block the vehicle from passing, or display his firearm. The officer approached the vehicle and made contact with Rivera. The officer told Rivera that if he waited a few minutes, he would move his patrol truck. He did not ever tell Rivera that he was not free to go. Upon making contact with him, the officer observed that Rivera had bloodshot, watery eyes, and slurred speech. When asked if he had been drinking, Rivera admitted that he had been. The officer then initiated a DUI investigation, which resulted in Rivera’s arrest. Rivera was charged with one count of driving under the influence, second offense, over .15. Rivera filed a motion to suppress and a hearing on the motion was held. The county court overruled Rivera’s motion and, subsequent to a stipulated trial, found him guilty of the charge. Rivera then appealed his conviction to the district court, alleging that the county court erred in overruling his motion to suppress. The district court affirmed Rivera’s conviction. Rivera appealed. The Court of Appeals affirmed and the Supreme Court granted a petition for further review.

## State Supreme Court Decisions

### READING BETWEEN THE LINES

Nebraska continued...

ANALYSIS: The Court of Appeals applied the “community caretaker” exception to the warrant requirement, holding that the district court’s finding that there was a group of people in front of Rivera’s truck and the truck, even moving slowly, posed a threat to the pedestrians was not clear error.

The Supreme Court instead first analyzed whether the police-citizen encounter was a seizure subject to Fourth Amendment protection. The Court held that it was not, holding that Rivera voluntarily stopped his vehicle and the trial court implicitly found that the police officer made no gesture to make Rivera stop his vehicle. This finding was not in clear error, which is the standard of review for historical facts in Fourth Amendment cases. Therefore, the police-citizen encounter began as a “tier one” encounter and escalated to a “tier two” encounter after the officer approached Rivera and observed signs of impairment to warrant a DUI investigation. Because no seizure occurred, it was not necessary to resort to the community caretaking exception, the Court held.

*State v. Hoerle*, 901 N.W.2d 327 (NE 2017).

NATURE OF THE CASE: A jury convicted Hoerle of DUI one day before the U.S. Supreme Court’s decision in *Birchfield*. He moved for a new trial, arguing that it was error to admit the results of his warrantless blood draw. The district court overruled the motion and Hoerle appealed. The Court held that the good faith exception can apply to pre-Birchfield warrantless blood draws and affirmed the conviction.

FACTS: A motorist called 911 after witnessing Hoerle wreck his motorcycle. An officer responding to the scene observed signs of impairment and Hoerle admitted drinking alcohol. Based on the result of a preliminary breath test, the officer determined that he needed Hoerle to submit to a chemical test. A phlebotomist at a hospital obtained blood from Hoerle at the officer’s request.

A jury convicted Hoerle of DUI and after an enhancement hearing, the district court found him guilty of DUI with two prior convictions. The next day, the U.S. Supreme Court released its decision in *Birchfield*. Hoerle filed a motion for new trial, which the district court overruled. Hoerle appealed.

ANALYSIS: The Court began with a brief review of *Birchfield*, focusing on the Supreme Court’s discussion of consent. The Court concluded that *Birchfield* does not make categorically invalid a warrantless blood draw based on actual consent when a driver is incorrectly advised that the driver is required to submit to such a test or will face criminal penalties for a refusal. Rather, a court must consider the totality of the circumstances to determine whether a driver’s consent to a blood test was freely and voluntarily given.

But the Court declined to do a full consent analysis in this case. Rather, the Court decided that the good faith exception to the exclusionary rule can apply to pre-*Birchfield* warrantless blood draws. In this case, there would be no deterrent value in suppressing the results of Hoerle’s blood test, so the good faith exception applied.

## State Supreme Court Decisions

### READING BETWEEN THE LINES

**North Dakota:** Submitted by Kristi Venhuizen

*State v. Von Ruden*, 900 N.W.2d 58 (ND 2017).

**FACTS:** Defendant was arrested for DUI. The defendant moved to suppress evidence of the breath test records and requested an evidentiary hearing claiming the officer did not follow the approved method in administering the breath test. The parties waived an evidentiary hearing and agreed to have the district court rule based on a stipulated record. The court ultimately denied defendant's motion to suppress. Defendant entered a conditional plea and appealed the district court's order.

**ISSUE #1:** Whether the officer administered the Intoxilyzer breath test according to the approved method?

**HOLDING:** Yes. Defendant argued the officer manually aborted the first test sequence after receiving a deficient sample, the officer denied him the opportunity to provide a second sample during the first test sequence, and the officer did not follow the approved method when he failed to wait twenty minutes between the first and second test sequences. North Dakota Century Code § 39-20-07(5) governs admissibility of an Intoxilyzer test stating the results must be received in evidence when it is shown that the sample was properly obtained, the test was fairly administered, and if the test is shown to have been performed according to methods and devices approved by the director. Fair administration may be established by proof that the approved method has been scrupulously followed. The State argued manually aborting the first test sequence before obtaining the second sample does not invalidate the results of the subsequent test sequence. The State only relied on the second test sequence which, when reviewed independently of the first aborted test, was administered in accordance with the approved method. The Court concluded, based on the facts presented, the officer's decision to manually abort the first test sequence could not have affected the results of the second independent test sequence administered less than five minutes later. Defendant's approach would require hyper technical compliance which is not required. Defendant argues the officer failed to wait twenty minutes between the first and second test sequence. The Court concluded the approved method is silent regarding an officer's ability to perform a subsequent test sequence after manually aborting the initial test sequence based on the receipt of a deficient sample, or how long the officer must wait before starting a subsequent test sequence. The Court found that while the officer may not have waited twenty minutes between the first and second test sequences, the officer did ascertain the defendant did not have anything to eat, drink, or smoke twenty minutes before administering the second test sequence and scrupulously followed the approved method.

**ISSUE #2:** Whether the officer deprived the defendant of his limited statutory right to counsel?

**HOLDING:** No. An arrested person who asks to speak with an attorney before taking a chemical test must be given reasonable opportunity to do so if it does not materially interfere with the test administration. Defendant argued the officer failed to provide him a reasonable opportunity to speak with an attorney in between the first and second "blows." The record shows defendant did not ask to speak with an attorney prior to submitting to a chemical test. Furthermore, the record reflects a time period of approximately seven minutes between the first "blow" and the second "blow." While an arrestee has the right to consult an attorney, it is not an unlimited right. The officer must provide the arrestee a reasonable opportunity to speak with an attorney, but that opportunity must not materially interfere with the test administration. Allowing an arrestee to stop the test prior to submitting the second sample in a test sequence would invalidate the entire test sequence and materially interfere with the test administration. The district court's judgment is affirmed.

## State Supreme Court Decisions

### READING BETWEEN THE LINES

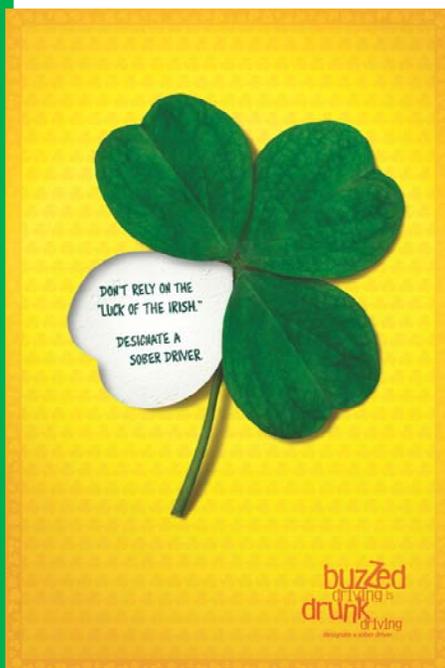
North Dakota continued...

*State v. Helm*, 901 N.W.2d 57 (ND 2017).

**FACTS:** Defendant's vehicle was stopped for operating without headlights. Defendant was ultimately arrested for DUI. The officer asked the defendant to submit to a warrantless urine test and defendant refused. The defendant was charged with DUI and Refusal. The district court granted defendant's motion to dismiss the results of the warrantless urine test holding it is like a warrantless blood test under *Birchfield v. North Dakota*, 136 S.Ct. 2160 (2016), and the defendant could not be criminally liable for refusing the warrantless urine test. The State appealed.

**ISSUE:** Whether a warrantless urine test should be treated like a warrantless blood test under *Birchfield v. North Dakota*?

**HOLDING:** Yes. Unreasonable searches and seizures conducted outside the judicial process without a warrant are per se unreasonable subject only to a few explicitly established and well delineated exceptions to the warrant requirement. The exception at issue in this case is search incident to a lawful arrest. The Court compared this case to *Birchfield*. The United States Supreme Court analyzed two different types of chemical tests by assessing the degree to which the tests intruded upon an individual's privacy and the degree to which the tests are needed for the promotion of legitimate governmental interests. In analyzing the blood and breath tests upon individual privacy, the Supreme Court considered three factors: (1) the extent of the physical intrusion upon the individual to obtain the evidence; (2) the extent to which the evidence could be preserved to provide additional, unrelated private information; and (3) the extent to which participation in the search would enhance the embarrassment of the arrest. The Supreme Court concluded blood tests can be preserved and reveal other private information beyond a blood alcohol reading and because they pierce the skin, they are more intrusive. The North Dakota Supreme Court relied on a post-*Birchfield* Minnesota case that held warrantless urine tests are not permissible as a search incident to a valid arrest of a suspected drunk driver. The basis being that urine tests implicate the same privacy concerns and potential for abuse with the retention of the sample as blood tests. The Court held urine tests are similar to blood tests and an individual cannot be prosecuted for refusing to submit to a warrantless urine test. The motion to dismiss is affirmed.



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## State Supreme Court Decisions

### READING BETWEEN THE LINES

North Dakota continued...

*State v. Maryland*, 2017 ND 244 (ND 2017).

**FACTS:** An officer was dispatched to a residence to respond to a domestic disturbance call. Arriving at the residence, the officer observed the defendant with an armload of clothes approach a parked vehicle in the driveway of the residence. The defendant opened the driver's door, put the clothes on the front passenger seat, entered the vehicle, and sat in the driver's seat. After investigation, the defendant was charged with Actual Physical Control, a class C felony as it was the defendant's fourth offense within fifteen years. While discussing jury instructions, defendant and his counsel agreed the prior convictions would not be disclosed to the jury and if convicted, it would be treated as a fourth offense. The defendant was found guilty of APC. The defendant appealed.

**ISSUE #1:** Whether the court erred in failing to include prior convictions as an element of the crime on the jury instructions?

**HOLDING:** No. Objections to jury instructions in criminal proceedings are governed by N.D.R.Crim.P. 30. Defendant not only failed to object to the jury instructions excluding a jury determination on whether defendant had previous convictions under section N.D.C.C. § 39-08-01, he requested and stipulated to the exclusion. In light of the stipulation, it would have been reversible error to provide an instruction requiring a jury determination on prior convictions. Therefore, defendant failed to preserve the issue for appeal. Defendant requested the exclusion of his prior convictions from jury determination, and under these circumstances, the exclusion does not constitute obvious error.

**ISSUE #2:** Whether a private driveway is a public or private area to which the public has a right of access for vehicular use under N.D.C.C. § 39-08-01(1)?

**HOLDING:** Yes. North Dakota Century Code § 39-08-01(1) provides "a person may not drive or be in actual physical control of any vehicle upon a highway or upon public or private areas to which the public has a right of access for vehicular use in this state." The Court considered N.D.C.C. § 39-08-01(1) with N.D.C.C. § 39-10-01 which states the provisions of Title 39 of the North Dakota Century Code, or equivalent ordinance, apply upon highways and elsewhere. The Court has previously held the term "elsewhere" extends the scope of both driving and actual physical control offenses under N.D.C.C. § 39-08-01 to private property. See *Wiederholt v. N.D. Dep't of Transp.*, 462 N.W.2d 445 (N.D. 1990)(citing *State v. Novak*, 338 N.W.2d 637 (N.D. 1983)). As such, the private driveway upon which defendant was located was within the scope of N.D.C.C. § 39-08-01. Defendant relied on a definition of a private driveway as being accessible by the owner but not other persons in N.D.C.C. § 39-01-01(64). The Court interpreted the statutes to give each meaning without rendering the others useless and the definition of private driveway does not conflict with N.D.C.C. § 39-08-01. To the extent the parking lot is open to the general public for use in patronizing the business of the owner or that a private driveway or farmyard is open to the general public for purposes of visiting, making deliveries, or otherwise interacting with the owner of the private driveway, illustrates the meaning of a "public . . . right of access." Whether defendant's driveway is a private area to which the public has a right to access is a question of fact and the jury could conclude it was commonly used by the public for deliveries, solicitations, and similar activities. The judgment is affirmed.

## State Supreme Court Decisions

### READING BETWEEN THE LINES

**Rhode Island:** Submitted by John Corrigan

*State v. Peters*, 172 A.3d 156 (RI 2017).

On August 7, 2014, while intoxicated, the defendant, Luke P. Peters (defendant), was a rear-seat passenger of a moving motor vehicle when he suddenly leaped forward, grabbed the steering wheel, and violently turned it, causing the vehicle to veer off the road and a crash to ensue. The defendant was charged with assault with a dangerous weapon in violation of G.L. 1956 § 11-5-2 (count 1); driving under the influence of liquor resulting in serious bodily injury in violation of G.L. 1956 § 31-27-2.6 (count 2); driving so as to endanger resulting in serious bodily injury in violation of § 31-27-1.2 (count 3); driving as to endanger resulting in nonserious bodily injury in violation of § 31-27-1.2 (count 4); contributing to the delinquency of a minor in violation of G.L. 1956 § 11-9-4 (count 5); and driving with a revoked license in violation of G.L. 1956 § 31-11-18 (count 6). The defendant filed a motion to dismiss pursuant to Rule 9.1 of the Superior Court Rules of Criminal Procedure. The trial justice granted defendant's motion holding that there was a lack of probable cause to charge defendant as an "operator" or "driver" of a motor vehicle. The state appealed, asserting that the trial justice erred when he determined that defendant was not operating or driving the motor vehicle.

This appeal solely rested on the precise question of whether the terms "operating" or "driving," under §§ 31-27-1.2, 31-27-2.6 and 31-11-18, can encompass a passenger in a moving motor vehicle who suddenly seizes the wheel from the driver and steers the vehicle. The Supreme Court held G.L. 1956 § 31-1-17 (c) provides for two types of operators: drivers and those persons who are in actual physical control of a vehicle. The Supreme Court concluded that the defendant's actions placed him in the realm of being an "operator" of a moving vehicle under chapter 27 of title 31. Accordingly, the Supreme Court vacated the judgment of the Superior Court.

**Vermont:** Submitted by Heather Brochu

*State v. Allis*, 2017 VT 96 (VT 2017).

Full court published opinion. Driving while under the influence, first offense, reversed. The officers here entered the defendant's home without either an explicit request for permission to enter, or an explicit grant of such permission, but neither is required for a lawful entry. Consent can result from conduct which would be understood by a reasonable person as conveying consent.

The burden is on the State to demonstrate that consent was given. The facts as found by the trial court do not support its conclusion that there was an implied consent to enter the house. The police knocked on the door and asked for the defendant. The defendant's girlfriend said she would see if he was there. A few minutes later she opened the door and made a "there he is" gesture towards the defendant. The police at first spoke to him from outside, but then entered the house. The girlfriend's gesture is given no weight because it is so ambiguous that it does not support the position of either party. Therefore, all evidence obtained subsequent to the entry of the house is suppressed. Eaton dissents: The issue is whether the girlfriend's gesture would be understood by a reasonable person as an invitation to enter the house. A finding by the trial court that it would be so understood was a reasonable inference for the court to make. Therefore, the trial court's implied finding that the gesture was reasonably understandable as an invitation to enter should be affirmed. Even if this finding were clearly erroneous, the matter should be remanded for the trial court to make an explicit finding about the meaning of the gesture.

## State Supreme Court Decisions

### READING BETWEEN THE LINES

**Washington:** Submitted by Moses Garcia

*State v. Salgado-Mendoza*, 403 P.3d 45 (WA 2017).

In *State v. Salgado-Mendoza*, the State Supreme Court affirmed the trial court decision to allow the state's forensic scientist to testify at the breath test trial even though the name of the scientist was not disclosed by the prosecution until the day of trial. The prosecutor explained she provided all the information she had to the defense, when she had it, but still could not know who would be available from the lab until the day of testimony.

The defense did not complain about the failure until the day of trial. Each court that reviewed the case concluded the failure to provide the name of the expert witness prior to the day of trial was prosecutorial misconduct in that it failed to comply with the court rules for expert witness disclosure. However, while the trial court concluded that five months of preparation on an alcohol case, where the expected testimony was not unique and no prejudice was shown—did not warrant suppressing the testimony of the forensic scientist.

Both the Superior Court and the Appeals Court disagreed, concluding the defense was prejudiced and ordered retrial.

The State Supreme Court disagreed, concluding the defense had not shown prejudice by demanding a continuance, and in light of the specific and uncontested findings of the trial court. In this case, the forensic scientist provided general background information on alcohol and testing. This information is typically offered in DUI cases, rarely challenged, and varies little between witnesses. The DUI defense attorney was experienced and never made a request to interview the witness or offer any basis for suppression other than procedural noncompliance. Under these circumstances, the State Supreme Court concluded the trial court did not manifestly abuse its discretion. Prosecutors are expected to diligently pursue the names of expert witnesses, maintain documentation showing their efforts, and promptly advise the trial court if unable to comply with the court rules. Ultimately, the trial court has great discretion when, and under what circumstances, it sanctions late disclosure of an expert witness.

## State Supreme Court Decisions

### READING BETWEEN THE LINES

**Wisconsin:** Submitted by Tara M. Jenswold

*State v. Brar*, 376 Wis. 2d 685 (WI 2017).

Decision: The Wisconsin Supreme Court determined that Brar voluntarily consented to a blood test under the Implied Consent statute, and affirmed his conviction for OWI.

Factual Context: Brar was lawfully arrested for OWI. He was transported to the police department for the reading of the Informing the Accused Form. The contact between the police and Brar was memorialized via videotape. The officer read the form and asked Brar whether he would submit to a blood test. Brar was chatty but not particularly responsive; he mentioned that he is not a bad person and hadn't hurt anybody, and expressed some confusion over the purpose of the blood test. The officer was businesslike but fair and asked Brar repeatedly whether he would submit or refuse the test. Ultimately Brar clearly said, "of course," followed by a few words which were garbled in the tape but testified to by the officer as being something akin to Brar not wanting to lose his license. The officer took this as submission and Brar was taken to get the blood test. As he and the officer were leaving to get the blood test, Brar questioned out loud if a warrant was needed for the blood test but the officer, understanding that a warrant is only necessary if there is a refusal, said no.

This case provides both a majority mandate and a plurality opinion.

The Mandate: Five of the justices felt that Brar consented to the test when he said "of course" and that the trial court was not clearly erroneous when it held that Brar consented. These five justices also felt the consent was voluntary, because the officer followed the statutory requirements of implied consent. They found that the officer's statement that he did not need a warrant was accurate and not misleading under the circumstances.

Two of the justices dissented, reasoning that Brar had in fact refused the test, and the trial court's holding to the contrary was clearly erroneous. These two justices felt that even if Brar did consent, his consent was coerced by the false information provided by the officer that a warrant was not necessary.

The Plurality: The plurality opinion penned by Chief Justice Roggensack, and joined by Justices Ziegler and Gableman, first affirmed the basic principle of the mandate: Brar submitted to the test under the implied consent statute. From there, the plurality opinion examined when consent occurs in the OWI context, finding that consent is implied by procuring a driver's license and/or by driving. The opinion stressed that this implied consent is as strong as any other consent, for Fourth Amendment purposes. The opinion explained that the reading of the form is not a request for actual consent, but rather is done to see whether the subject will reaffirm the consent he or she has already given, or whether he or she will refuse and face sanctions. The court succinctly captured the importance of the implied consent conveyed by license and/or driving when it wrote, "Lest there be any doubt, consent by conduct or implication is constitutionally sufficient consent under the Fourth Amendment."

One justice, Rebecca Bradley, voted for the mandate but felt no need to engage in a legal debate over when consent actually occurs, since in this case there was a straightforward reading of the form and consent to the test.

One justice, Daniel Kelly, chastised the plurality for diving into unnecessary waters, however commented strongly on what he viewed to be the unfair nature of using implied consent given in the past as "real-time" consent for a blood test. But Justice Kelly did find that Brar consented in this case.

Two justices, Ann Walsh Bradley and Shirley Abrahamson, dissented from the mandate and also opined that the "actual consent" occurs when the form is read and is not derived from any implications of prior conduct. They also concluded that Brar did not consent.

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## The Work of the NTLC

In addition to publications, the NTLC is often involved in training courses. Our staff often attends conferences at which they learn and pass on information to others. Recently, Tiffany Watson, Staff Attorney attended her first TSRP conducted conference. Here were her thoughts:

The Prosecuting the Drug Impaired Driver Training in Hamilton, New Jersey is a one day course geared towards prosecutors, with an emphasis on New Jersey State DUI laws and practices. The main overall objective of the program is to highlight common issues and challenges faced when prosecuting cases involving driving under the influence of drugs and to give prosecutors the tools to combat these challenges. The training is broken into three separate sections: (1) The Drug Recognition Expert (“DRE”) Program; (2) Forensic Toxicology; and (3) Legal Considerations of Prosecuting the Drug-Impaired Driver.

The session on The DRE Program was very informative. The session was three hours long and involved a very in depth look at the program beginning with how the program developed, the training process of police officers to become DREs, the process DREs undertake when conducting an evaluation on a suspected drug impaired driver, and the seven drug categories. This session taught me how beneficial the DRE program is for DUI-Drug prosecutions. One piece of information I found to be very interesting was that in New Jersey, during an officer’s DRE training, he/she performs practice evaluations on live, drug-addicted subjects in the community. In exchange for the participant’s willingness to be evaluated, they receive a gift card to McDonald’s, a shower, and access to substance abuse counseling—services that, otherwise, might be hard for the individual to come by, due to substance addiction.

The second session on Forensic Toxicology was also very helpful. This session discussed the scope of a forensic toxicologist’s testimony in court and how biological samples are tested after they are obtained during the Drug Influence Evaluations conducted by DREs. One key item of information during this session was how important it is for the DRE to provide as many details as possible about the observations made during the Drug Influence Evaluations. This is important because a forensic toxicologist cannot testify to actual impairment of the charged driver; he or she can only state that the known effects of the substance(s) found in the defendant’s biological sample are consistent with the observations made during the Drug Influence Evaluations. Such a connection is pivotal to a conviction in these kinds of cases.

The third session on Legal Considerations of Prosecuting the Drug-Impaired Driver was both informative and helpful. This session covered important case law, legal and practical issues involved with prosecuting these types of cases and arguments to overcome common challenges. Though the case law was New Jersey specific, it was still very helpful because the issues addressed by New Jersey courts are common issues faced by DUI prosecutors across the country. One takeaway I found to be very beneficial was the discussion on arguments to overcome challenges to the DRE program. Based on this discussion, I learned that it is common for defense attorneys to argue that the DRE program is nothing but “Voodoo Science,” which lacks proper scientific bases and reliability. However, New Jersey courts (though mainly in unpublished cases) have accepted DRE testimony as expert testimony sufficient to sustain the prosecution’s burden.

This course was planned and conducted by Traffic Safety Resource Prosecutor, Robyn Mitchell. It was obvious from how well the course was conducted that a lot of time and effort went into the planning of the course and the audience benefitted from the speakers extensive knowledge, experience and dedication.

Our staff often attends conferences and meetings at which they learn to pass on information to others. Recently, NTLC Director, Tom Kimball, participated in a meeting of the Drugged Driving Committee of the Institute of Behavior and Health.

Rich Romer of AAA discussed the recent report on Distracted Driving Research. The study concerned cognitive distraction. Cognitive distraction is difficult to track, but accounts for 26% to 50% of crashes depending on the source. **Two or more seconds in which a driver has eyes off the road doubles the crash risk of the driver.** Cognitive Distraction is defined in three categories: Eyes off the road, Hands off the wheel and Mind off of driving. Eyes leave the road to view roadside billboards, groom in the mirror or gawk at a crash scene as examples. Hands come off the wheel for personal grooming, reading, reaching for objects, attending to passengers or pets and texting, eating, drinking, using a handheld cell phone, manipulating vehicle instruments or changing CDs. They can also come off the wheel when talking, using voice activations features, using a hands free phone or even while daydreaming. The Mind off of driving occurs during any distracting activity.

Cognitive Distraction has been measured. In the study, AAA looked at a variety of distractions. Here are some conclusions:

- All cell phone use impairs driving ability;
- Cognitive distraction is a risk even when using a hands free phone;
- Speech based in-vehicle distractions rated the MOST cognitively distracting.

For anyone who ever rode with Tom and heard him fuss at Siri, this study proves she truly did want Tom to crash and die. (Never again, Siri...never again!) All age groups show impairment with voice with systems, but older adults find voice based systems more difficult. It can take up to 27 seconds for the impairing effects of cognitive distraction to subside once the driver stops interacting with these technologies. AAA is continuing its research concerning tasks, modes and systems. Navigation systems are rated as more distracting than texting.



**AAA recommends that a driver set a destination and forget it, when using a navigation system.**

Set the destination before pulling out and leave it alone until arriving. On average, it takes 40 seconds for drivers to program their system.

Gary Reisfield, who's background is in addiction and pain management, stated that the idea of using cannabis (particularly smoked cannabis) for pain is misguided – and often used in addition to, rather than instead, of opioids. He has seen a combination of opioids and cannabinoids. He has been examining increased cannabis use for pain management in a population of poly-pharmaceutically

perverse individuals. However, as the number of ingested drugs increases, the resulting impairment is additive. Gary said about half of all deaths involve other drugs in Florida including alcohol, benzodiazepines and cocaine.

A further discussion included the frustration that there are not a lot of DRE evaluations conducted. The issue of having more call outs for evaluators is complex and involves many entities, but the average number of evaluations per DRE in a year is about three. The need for more evaluations is obvious by the number of crashes involving drugged driving.

### National Traffic Law Center Announces New Publication on Commercial Driver's Licenses

On October 3, NDAA's National Traffic Law Center released its newest monograph entitled, "**Commercial Drivers' Licenses: A Prosecutor's Guide to the Basics of Commercial Motor Vehicle Licensing and Violations (Second Edition)**". This publication gives a general overview of the issues surrounding commercial motor vehicle enforcement and the complex federal regulations that govern this topic. It was written in collaboration with the Federal Motor Carrier Safety Administration (FMCSA), law enforcement, Traffic Safety Resource Prosecutors (TSRPs) and other traffic safety professionals.

Visit our [publications section](#) to find this and other NTLC publications.

## BIG RIGS AND KINETIC ENERGY

During the first quarter of 2018, we will release a new monograph concerning Crash Reconstruction of Commercial Vehicles by John Kwasnoski. Watch our website.

**Did you know 13 means 65?** An 80,000 pound big rig going 13 mph has the kinetic energy of a 3,200 pound car going 65 mph. When the commercial vehicle hits a car, there is a reason the result is not just a fender bender.

## FMCSA Roadshow Recap By Romana Lavalas, Senior Attorney

Throughout the summer and fall of 2017, the Federal Motor Carrier Safety Administration (FMCSA) held a series of regional "Roadshow" meetings in an effort to seek input from its field staff and to connect with the FMCSA's State Partners and the trucking industry. Each meeting was a multiday event, held in four states across the country representing each of the regional Service Centers (Eastern, Midwestern, Southern and Western) of the FMCSA.

The format of each meeting was fairly uniform. The morning sessions were open to the public, which included either industry professionals, representatives from academia and/or the press. The afternoon sessions were limited to FMCSA staff and their partners or grantees. FMCSA's Deputy Administrator, Daphne Jefferson, and Chief Legal Counsel, Randi Hutchinson each offered introductory remarks as representatives from the FMCSA Leadership. Introductions were followed by sessions on the new Electronic Logging Device (ELD) rule, traffic enforcement and grants. The final session was an open forum and listening session for attendees with the Deputy Administrator.

As a panelist during the traffic enforcement sessions, I emphasized the resources of the NTLC and our charge to educate prosecutors, law enforcement and judges about CDL issues. This appearance was also an opportunity to highlight NTLC's written CDL resources, such as the second edition of the CDL monograph and CDL Quick Reference Guide.

During the period between the third and fourth road shows, the FMCSA experienced a changing of the guard at the helm of the organization. Deputy Administrator, Daphne Jefferson, retired on November 3, 2017. She was replaced by Cathy Gautreaux, a Louisiana native with a background in both law enforcement and the trucking industry. Although Gautreaux's appearance at the Southern Roadshow was one of her first official duties after taking on the position of Deputy Administrator, the uniformity of the Roadshow format made her transition seamless. Due to positive feedback the roadshows received, it is likely that FMCSA will continue to make the regional meetings a regular practice.

Mark Your Calendars for these Spring Training Dates

CT	Basic Instructor Development	January 22-26
CT	Basic Instructor Development	February 5-9
FL	Basic DUI Trial Preparation	January 9
FL	Prosecuting Drugged Driver	January 15-16
GA	Prosecutor/LEI DUI Training	January 11
GA	Pros/Leo Drug Impaired Driver	January 12
GA	Pros/LEO Drug Impaired Driving	January 28
GA	Pros/LEO DUI	February 8
GA	Pros/LEO Drug Impaired Driving	February 9
GA	Basics of DUI	March 21-23
ID	IPAA Winter Conference	February 7-9
ID	Law Enforcement Phlebotomy	March 23-25
MA	Crash Reconstruction	January 8-9
MA	OUI Trial Advocacy	Spring 2018
MA	Sobriety Checkpoints	February 2018
MI	Cops in Court	January 18
MI	Nuts and Bolts OWI Investigation	February 22
MI	OWI Drug Forfeiture	March 8
MI	Lethal Weapon	April 18-19
MI	P.A.A.M. Basic Training	May 4-17
MI	Prosecuting the Drugged Driver	June 7
MI	Visual Trial School	June 1
MI	Cops in Court	July 19
MI	Nuts and Bolts OWI Investigation	August 15
MI	Cops in Court	September 13
MI	Marijuana and Driving	September 27
MO	Cops in Court	January 4
MO	Cops in Court	January 16
MO	Traffic Stops and Vehicle Searches	January 18
MO	Traffic Stops and Vehicle Searches	January 23
MO	DWI Boot Camp	January 25
MO	Law Enforcement Blood Draws	February 7
MO	Traffic Stops and Vehicle Searches	February 12
MO	Traffic Stops and Vehicle Searches	February 20-21
MO	DWI Boot Camp	March 7
MO	Traffic Stops and Vehicle Searches	March 9
NC	Prosecuting Drugged Driver	January 29– Feb 2
NC	Nuts and Bolts of Drug Impaired	February 16
NC	Jury Selection	March 7-9
OR	Traffic Safety Conference	February 6-7
OR	Protecting Lives; Saving Futures	March 12-15
TN	Cops in Court	January 10
TN	Cops in Court	February 6
TN	Protecting Lives; Saving Futures	March 6-7
TN	Cops in Court	February 6
TN	Protecting Lives; Saving Futures	March 6-7

Mark Your Calendars for these Spring Training Dates

TX	Drugged Driving	January 17
TX	Drugged Driving	January 19
TX	Drugged Driving	January 31
TX	Drugged Driving	February 1
TX	Drugged Driving	February 21
TX	Drugged Driving	February 23
TX	Drugged Driving	March 2
TX	E.C.T.	March 14
TX	Drugged Driving	March 16
TX	E.C.T.	March 23
TX	E.C.T.	March 28
WA	Prosecutor CLE's	February 23
WV	Highway To Enforcement	May 23-25

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# **The Governors Highway Safety Association's Annual Meeting Brings New Innovations to Old Challenges**

**By: Barry Williams, TSRP**

**(condensed from the TN DUI News)**

The annual GHSA conference brings together the State Highway Safety Offices and traffic safety professionals along with related vendors to share their innovations and ideas for a safer future for everyone who uses a public road.

The opening keynote speaker was U.S. Department of Transportation Secretary Elaine L. Chao, who emphasized the continuing role of the U.S. Department of Transportation in saving lives by discussing the policies and future of the Department. The ability to formulate strategies of success for the various agencies that operate under those policies allowed the audience to understand the complexities of the Department of Transportation's interactions with the safety advocacy agencies within the various states.

For those of us that rely on grant funding, it was a reminder of just how interconnected our relationship truly is to the goal of bringing deaths on highways to zero. The goal is worthy, but the logistical complexities would be overwhelming if not for a federal oversight agency such as what the Department of Transportation provides. Safety was the spark that started the heart beating in the innovative and fascinating autonomous vehicle (AV) industry's presentation by Waymo's Director of Safety, Ron Medford. He provided an in-depth analysis of current self-driving technologies and the development of a new, creative mind-set in the AV industry that may one day replace human drivers. Perhaps, in the not so distant future we may see drivers replaced by computer controlled vehicles. The so-called self-driving car may in fact be right around the corner as both Waymo and Google have been able to chart over three million miles driven in the last few years alone, purely by self-driven vehicles. This has included the complex and intricate necessities of being able to make the myriad of decisions that human drivers take for granted. Those of us in the DUI/ Drugged Driver enforcement fields may see an end to traffic deaths related to drugs and alcohol. This technology also has the added benefit of allowing disabled or elderly citizens that were prevented from driving, to once again be able to experience mobility like any other current driver.

Perhaps one of the most impressive aspects of this new technology is the systematic acquisition of vast stores of data that the computers can access through shared connections and the "experiences" of other self-driving cars that have been operating since around 2005 in the United States. California, for example, has had every North-South highway driven for years by self-driving vehicles with their human overlords sitting in the back, enjoying a drive down the coastal highways of San Francisco and San Diego. One of the most significant aspects of this whole presentation was in witnessing what may well be the very definition of "driver" changing before our eyes.

Another one of the most relevant workshops for purposes of drugged driver and DUI enforcement was the round-table and panel discussions on marijuana legalization for recreational and medical purposes. The most alarming prospect of the marijuana legalization push has been in the sheer number of states where marijuana will be on the legislative agenda in 2018 and 2019. If this push continues unabated, we very well could see almost half of the states in the United States having some form of marijuana use permitted after 2019. If the sixteen or so states pass their currently proposed legislation, it would add these sixteen new states to the nine states and the District of Columbia that already have recreational and medical use legalized.

Amy Miles, the Forensic Toxicology Section Director for the Wisconsin State Laboratory of Hygiene at the University of Wisconsin School of Medicine and Public Health, led a discussion with the panel of experts that brought new concerns as to the scope of marijuana testing available within the various states. Unfortunately for all of us, we do not have many options for detecting marijuana in a defendant's system. That may well change in the future, as we get closer to developing oral fluid testing programs. Oral fluid is a very effective way of finding marijuana use by testing the saliva of an individual. It has been in use in California as well as other states for a number of years.

## TRAFFIC SAFETY RESOURCE PROSECUTOR NEWS

Congratulations to the Idaho TSRP, Jared Olson, who was named a winner of the Kevin A. Quinlan Award by the Foundation for Advancing Alcohol Responsibility in recognition of his outstanding leadership and commitment to saving lives and improving traffic safety.

Congratulations to the Washington TSRP, Courtney Popp, for her outstanding contribution in teaching national volunteers and leaders of the Mothers Against Drunk Driving in their fall conference in Arlington, VA.

Congratulations to the Colorado TSRP, Jennifer Knudsen, who has been involved in a series of AAA drugged driving trainings around the country throughout 2017. Regional meetings bring together a variety of people concerned with the issue. Jennifer teaches and brings in other TSRP's to assist.

Congratulations to Bob Stokes of Kentucky, who served as the Kentucky TSRP for a decade and has recently been named the Kentucky Prosecutor Coordinator.

Congratulations to Beth Barnes of Arizona, who was appointed to the technical advisory panel (TAP) of the International Association of Chiefs of Police.

Deena Ryerson, Ashley Schluck and Beth Barnes gave presentations to the national Drug Recognition and Classification conference at National Harbor, MD.

Deena also presented to the American Bar Association's Traffic Safety Committee.

Bill Lemons (Minnesota), Ashley Schluck (Wyoming), Jennifer Cifaldi (Illinois), Ken Stecker (Michigan), and Dave Daggert (Maryland), assisted the Justice Management Institute with participation in their e-warrant study and recommendations.

Melissa Shear (District of Columbia) and Sarah Garner (North Carolina) helped the National Highway Traffic Safety Administration (NHTSA) build a new on line toxicology course.

Sarah Garner (North Carolina), Deena Ryerson (Oregon), and Beth Barnes (Arizona), assisted NHSTA in revising the Prosecuting the Drugged Driver course.

A warm welcome to the newest TSRPs. In the last quarter, several states retained prosecutors to serve in the role of TSRP. They include: Brenda Hans of Connecticut; Barzalai Axelrod of Delaware; Tom Lockridge of Kentucky; Mary Tanner Richter of New York; Heather Brochou of Vermont; Miriam Norman of Washington; Katie McNulty of Washington; and Nicole Cofer of West Virginia.

## “Vehicular Assault”— Driving Under the Influence and Causing Injury

### State Statutes and Operative Language

#### Alabama

- Assault—First Degree: while DUI “causes serious injury to the person of another.” Code of Ala. §13A-6-20(a)(5).
- Driving under the influence: increased penalty if, on first conviction, “someone else beside the offender was injured.” Code of Ala. §32-5A-191(e).

#### Arkansas

- Battery in the second degree: “recklessly causes serious physical injury to another person. . .” while DUI. A.C.A. §5-13-202(3).

#### California

- Causing bodily injury while driving under the influence: while DUI, a person may not “do any act forbidden by law, or neglect any duty imposed by law. . . which act or neglect proximately causes bodily injury” to someone other than the driver. Cal Veh Code §23153(a).

#### Colorado

- Vehicular assault: if DUI is the proximate cause of serious bodily injury to another, “this is a strict liability crime.” C.R.S. §18-3-205(b)(I). Also, the legal use of one or more drugs “under the laws of this state” is not a defense. C.R.S. §18-3-205(b)(II).

#### Connecticut

- Assault in the second degree with a motor vehicle—Class D felony: causing “serious physical injury to another person” while DUI if the injury is “a consequence of the effect of such liquor or drug.” Conn. Gen. Stat. §53a-60d(a).

#### Delaware

- Vehicular assault in the second degree—Class A misdemeanor: “negligent driving or operation” while DUI causing “physical injury to another person.” 11 Del.C. §628A(1).
- Vehicular assault in the first degree—Class F felony: “negligent driving or operation” while DUI causing “serious physical injury to another person.” 11 Del.C. §629.

#### Georgia

- Serious injury by vehicle: by reckless driving or DUI causing “bodily harm to another” (including loss of a bodily member, serious disfigurement, or organic brain injury). O.C.G.A. §40-6-394.

#### Idaho

- Aggravated driving while under the influence of alcohol, drugs or any other intoxicating substances: DUI causing “great bodily harm, permanent disability or permanent disfigurement” to another. Idaho Code §18-8006.

#### Indiana

- Causing serious bodily injury when operating motor vehicle: causing serious bodily injury while OWI. Burns Ind. Code Ann. §9-30-5-4(a)(3). Separate offense for each person injured. Burns Ind. Code Ann. §9-30-5-4(b).

#### Iowa

- Homicide or serious injury by vehicle: unintentionally causing a serious injury by DUI. Iowa Code §707.6A(4).

## “Vehicular Assault”— Driving Under the Influence and Causing Injury

### State Statutes and Operative Language

#### Kansas

- Battery: aggravated battery; battery against a law enforcement officer; aggravated battery against a law enforcement officer; battery against a school employee; battery against a mental health employee; while committing DUI, “great bodily harm” or disfigurement results from the DUI, or when these results “can” result from the DUI. K.S.A. §21-5413

#### Kentucky

- Operating motor vehicle with alcohol concentration of or above 0.08, or of or above 0.02 for persons under age twenty-one, or while under the influence of alcohol, a controlled substance, or other substance which impairs driving ability prohibited—Admissibility of alcohol concentration test results—Presumption—Penalties—Aggravating circumstances: among the aggravating circumstances is whether the DUI “causes an accident resulting in death or serious injury.” KRS §189A.010(11).

#### Louisiana

- Vehicular negligent injuring: “inflicting of any injury” while DUI. La.R.S. §14:39.1(A).
- First degree vehicular negligent injuring: inflicting “serious bodily injury” while DUI. La.R.S. §14:39.2(A).

#### Maryland

- Life-threatening injury by motor vehicle or vessel while under the influence of alcohol and related crimes: causing a “life-threatening injury” to another as a result of “negligently driving, operating, or controlling” a vehicle while DUI. Md. CRIMINAL LAW Code Ann. §3-211(c-f).

#### Massachusetts

- Causing Serious Bodily Injury by Driving While Under Influence of Liquor or Drugs; Imprisonment and Fine; Minimum Sentence; Definition of “Serious Bodily Injury”; Revocation of License: ALM GL ch. 90 §24L: penalty for a DUI defendant operating “recklessly or negligently” so that “the lives or safety of the public might be endangered”, and who causes serious bodily injury

#### Michigan

- Operating motor vehicle while intoxicated; “operating while intoxicated” defined; operating motor vehicle when visibly impaired; penalties for causing death or serious impairment of a bodily function; operation of motor vehicle by persons less than 21 years of age; requirements; controlled substance; costs; enhanced sentence; guilty plea or nolo contendere; establishment of prior conviction; special verdict; public record; burden of proving religious service or ceremony; ignition interlock device; definitions; prior conviction; violations arising out of same transaction: comprehensive DUI statute which includes enhanced penalties for causing death or serious impairment of a bodily function. MCLS §257.625.

#### Mississippi

- Operating a vehicle while under influence of alcohol or other drugs; penalties; zero tolerance for minors; DUI test refusal; aggravated DUI, DUI child endangerment; expunction; nonadjudication: “aggravated DUI” if, while DUI, the person “in a negligent manner causes the death of another or mutilates, disfigures, permanently disables or destroys the tongue, eye, lip, nose or any other limb, organ or member of another. . . .” Miss. Code Ann. §63-11-30(5).

## “Vehicular Assault”— Driving Under the Influence and Causing Injury

### State Statutes and Operative Language

#### Missouri

- Driving while intoxicated—sentencing restrictions: DUI penalties enhanced if, while DUI and acting with “criminal negligence” and among other circumstances, the defendant causes physical injury to another, serious physical injury to another or physical injury to an officer or other emergency worker, death to another or serious physical injury to an officer or other emergency worker. §577.010 R.S.Mo..

#### Montana

- Negligent vehicular assault—penalty: while DUI a defendant causes “bodily injury to another”; penalties enhanced if the defendant causes “serious bodily injury to another.” 45-5-205, MCA.

#### Nebraska

- Driving under influence of alcoholic liquor or drugs; serious bodily injury; violation; penalty: DUI and causing “serious bodily injury to another person or an unborn child of a pregnant woman”; offense is “separate and distinct” from any other offense arising out of the facts. R.R.S.Neb §60-6, 198(1).

#### Nevada

- Penalty if death or substantial bodily harm results; segregation of offender; plea bargaining restricted; suspension of sentence and probation prohibited; affirmative defense; exception; aggravating factor: penalty for DUI increased if the defendant “does any act or neglects any duty imposed by law” which proximately causes death or “substantial bodily harm” to another person. Nev.Rev.Stat.Ann. §484C.430(f).

#### New Hampshire

- Aggravated Driving While Intoxicated: DUI defendant causes a collision resulting in serious bodily injury to another. RSA 265-A:3.

#### New Jersey

- Assault: statute includes a series of offenses identified as “assault by auto or vessel” for causing “bodily injury” or “serious bodily injury” while DUI; the offense is also committed by a person who aggressively “purposely drives” at another and “bodily injury” results. N.J.Stat. §2C:12-1. The DUI statute is incorporated by reference at N.J.Stat. § 2C:12-1(c)(3); the actual cite to the New Jersey DUI statute is N.J.Stat. § 39:4-50.

#### New Mexico

- Driving under the influence of intoxicating liquor or drugs; aggravated driving under the influence of intoxicating liquor or drugs; penalties: one alternative for aggravated DUI is when bodily injury is caused to a person “as a result of” the DUI. N.M.Stat.Ann. §66-8-102(D).

#### New York

- Vehicular assault in the second degree: causing serious physical injury while DUI. NY CLS Penal §120.03.
- Vehicular assault in the first degree: causing serious physical injury while committing a second or subsequent DUI, with an alcohol concentration of 0.18 or more, while license suspended for DUI or test refusal, when a child of 15 or younger is a passenger and suffers a serious physical injury, or when more than one person suffers a serious physical injury. NY CLS Penal §120.04.

#### North Carolina

- Felony and misdemeanor death by vehicle; felony serious injury by vehicle; aggravated offenses; repeat felony death by vehicle: causing serious injury while DUI, which is “aggravated” if the defendant had a prior DUI. N.C.Gen.Stat. §20-141.4.

## “Vehicular Assault”— Driving Under the Influence and Causing Injury

### State Statutes and Operative Language

#### North Dakota

- Special punishment for causing injury or death while operating a vehicle under the influence of alcohol: statute covers DUI causing death and “substantial bodily or serious bodily injury to another individual.” N.D.Cent.Code, §39-08-01.2(2).

#### Ohio

- Aggravated vehicular assault; vehicular assault: causing serious physical injury while DUI; offense is aggravated if the defendant had a prior conviction under the section, had three or more prior DUIs, or had a prior conviction for a “traffic-related homicide, manslaughter, or assault offense.” ORC Ann. §2903.08(2).

#### Oklahoma

- Personal Injury Accidents—Charging with Violation of Provisions: involvement in a “personal injury accident” while DUI; penalty is enhanced if “great bodily injury” is inflicted upon another. 47 Okl.St. tit. 47 §11-904.

#### Oregon

- Assault in the first degree: “intentionally, knowingly or recklessly” causing serious physical injury to another while DUI, if the defendant has three or more prior DUIs or was previously convicted of this offense or an offense resulting in death caused by the defendant while driving a motor vehicle. ORS §163.185(d).

#### Pennsylvania

- Aggravated assault by vehicle while driving under the influence: “negligently” causing serious bodily injury to another while DUI. 75 Pa.C.S. §3735.1(a).

#### Rhode Island

- Driving under the influence of liquor or drugs, resulting in serious bodily injury: causing serious bodily injury to another while DUI. R.I.Gen.Laws §31-27-2.6.

#### South Carolina

- Offense of felony driving under the influence; penalties; “great bodily injury” defined: causing great bodily injury while DUI and while doing an “act forbidden by law” or neglecting a “duty imposed by law.” S.C. Code Ann. §56-5-2945.

#### South Dakota

- Vehicular battery: while DUI and while operating “in a negligent manner” “but without design to effect serious bodily injury” causes serious bodily injury to another. S.D. Codified Laws §22-18-36.

#### Tennessee

- Vehicular assault: while DUI and as the proximate result of the DUI a defendant “recklessly” causes serious bodily injury to another; penalty enhanced for prior alcohol related offenses (including prior DUIs). Tenn. Code Ann. §39-13-106.
- Aggravated vehicular assault: persons who commit vehicular assault with two or more prior DUIs or who, with one prior DUI, committed this offense with an alcohol concentration of .020 or above. Tenn. Code Ann. §39-13-115(b).

## Vehicular Assault”— Driving Under the Influence and Causing Injury

### State Statutes and Operative Language

#### Texas

- Intoxication Assault: causing serious bodily injury to another while DUI by reason of that intoxication but “by mistake or accident.” Tex.Penal Code §49.07.
- Enhanced Offenses and Penalties: penalty for “intoxication assault” and other offenses enhanced if prior DUIs, intoxication assault, or intoxication manslaughter convictions. Tex.Penal Code §49.09.

#### Utah

- Penalties for driving under the influence violations: DUI penalties enhanced if bodily injury or serious bodily injury was inflicted upon another “as a proximate result of having operated the vehicle in a negligent manner.” Utah Code Ann. §41-6a-503(2)(a).

#### Vermont

- Penalties: DUI penalties enhanced if death or serious bodily injury result from the DUI; multiple prosecutions possible if more than one victim, and penalties enhanced if the defendant had two or more prior DUIs. 23 V.S.A. §1210.

#### Virginia

- Maiming, etc., of another resulting from driving while intoxicated: DUI “in a manner so gross, wanton and culpable as to show a reckless disregard for human life” and unintentionally causing serious bodily injury to another. Va.Code Ann. §18.2-51.4(A).

#### Washington

- Vehicular assault—Penalty: causing “substantial bodily harm to another” while DUI. Rev.Code Wash. (ARCW) §46.61.522.

#### West Virginia

- Driving under influence of alcohol, controlled substances or drugs; penalties: penalties for DUI as well as DUI causing death, DUI causing “serious bodily injury,” and DUI causing “bodily injury.” W.Va. Code §17C-5-2(c).

#### Wisconsin

- Operating under influence of intoxicant or other drug: statute includes enhanced penalty for causing injury to another person while DUI. Wis.Stat. §346.63(2).
- Injury by intoxicated use of a vehicle: DUI causing great bodily harm. Wis.Stat. §940.25.

#### Wyoming

- Driving or having control of vehicle while under influence of intoxicating liquor or controlled substances; penalties: includes enhanced penalty for DUI causing serious bodily injury. Wyo.Stat. §31-5-233.