HIGHWAY TO JUSTICE

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# WHY DRUG-IMPAIRED DRIVERS BELONG IN DWI COURT

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The warning signs are everywhere. Screaming from the headlines, TV ads and billboards: "Don't drink and drive!" The dangers of getting behind the wheel after a few drinks are well known. But drunk driving is just one part of the overall problem of impaired driving, which remains one of the most present threats to our safety every day. Impairment doesn't just happen when we drink alcohol: It can come from taking any substance with psychoactive properties, including illicit drugs as well as prescription and even over-the-counter medications.

**The Rise of Drug-Impaired Driving**

Drug-impaired driving isn't a new issue, but it has come into greater focus in recent years due to the increasing number of states that have legalized marijuana: Thirty states have legalized medical use, and nine states and Washington, D.C. have legalized both medical and recreational use. Drugged driving is finding its way into the evening news and morning headlines owing to the opioid crisis sweeping large swaths of the country, as a growing number of Americans get high and sometimes even overdose behind the wheel of their vehicle.

The true scale of the problem is difficult to gauge due to significant data limitations (e.g., variability in testing rates, lack of standardized testing protocols, inability to infer impairment from drug presence alone). But what we do know is deeply concerning and demands our urgent attention. In 2016, the National Highway Traffic Safety Administration Fatality Analysis Reporting System found a 16 percent increase from 2006 in fatally injured drivers testing positive for drugs other than alcohol.

Even more troubling? Users of legal and illegal drugs alike frequently combine them with alcohol and other drugs, exponentially increasing their impairment and the likelihood of a dangerous crash should the users attempt to drive. In fact, new data released by the state of Washington's Traffic Safety Commission identify polysubstance impairment as the most common type of impairment found among drivers involved in fatal crashes. In 2016, 50.5 percent of drivers killed in a crash tested positive for two or more drugs, and 40.7 percent were found to have alcohol in their system. In fact, among drivers in fatal crashes between 2008 and 2016 who tested positive for alcohol or drugs, 44 percent tested positive for two or more substances, with alcohol and THC being the most frequent combination.

**What Can DWI Courts Do?**

Impaired driving is a complex issue that requires a comprehensive response. While far too many Americans still lose their lives to the completely preventable tragedy that is alcohol-impaired driving—10,874 in 2017 alone—the United States has been successful over the past three decades in drastically reducing that number through effective legislation, increased enforcement, stepped-up education campaigns, changing societal norms and a greater recognition of the need for addiction treatment. To ensure a downward trend, and to address the increasing problem of drug-impaired driving, we must enhance and expand proven interventions. And no intervention has more evidence to support its effectiveness for repeat impaired drivers than DWI court.

DWI courts are uniquely positioned to have one of the greatest impacts on drug-impaired driving in our communities because they specialize in targeting and treating the population that poses the greatest threat to our safety: repeat and/or high blood alcohol content–impaired drivers with a substance use disorder. For these high-risk, high-need individuals, DWI courts not only address their substance use disorder, they provide the structure and accountability to change the behavior that attends it.

You may wonder, if the root of the problem is drug addiction, wouldn't these clients best be served by a drug treatment court instead of a DWI court? The answer is no. Repeat impaired drivers are different from clients in adult drug treatment courts not just in their criminal charges, but in many other important ways, including demographically and behaviorally.

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ABA AMERICAN BAR ASSOCIATION
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**We would like to hear from other judges. If you have an article that you would like to share with your colleagues, please feel free to submit it for inclusion in the next edition of *Highway to Justice*.**

**To submit an article, please send it to the editor, Hon. Neil E. Axel at neilaxel49@gmail.com with a copy to the staff liaison, tori.wible@americanbar.org. Please contact Ms. Wible for editorial guidelines.**

**The deadline for submission of articles for the Spring issue is February 26, 2020.**

# WHY DRUG-IMPAIRED DRIVERS BELONG IN DWI COURT

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To qualify for DWI court, a person must exhibit two behaviors: using a psychoactive substance and driving a motor vehicle. While these two actions are distinct, the high-risk, high-need DWI court population drives frequently and habitually after using, and the relationship between these two behaviors must be understood and addressed to effectively treat the client.

It doesn't matter whether the substance is alcohol, drugs or, most likely, a combination. DWI court practitioners—over others—are best equipped with the knowledge and tools to provide treatment and accountability to repeat impaired drivers in a way that balances public health and public safety.

*This article was originally featured in All Rise, the magazine of the National Association of Drug Court Professionals. It is reprinted with permission.*

**About the Authors**

Erin Holmes is the Vice President and technical writer for criminal justice programs at the Foundation for Advancing Alcohol Responsibility (Responsibility.org) in Arlington, Virginia. Prior to joining the Foundation in 2014, she was a research scientist at the Traffic Injury Research Foundation in Ottawa, Canada. Responsibility.org partners with individuals and organizations at the national and local levels to help guide a lifetime of conversations about alcohol responsibility around the country. It has lead efforts to reduce underaged drinking, and efforts to eliminate impaired driving through prevention efforts, the promotion of DWI Courts nationally, and the development of evidence-based sentencing practices for convicted impaired drivers. These initiatives have included the development of the Computerized Assessment and Referral System (CARS) screening and assessment tool designed for use at the sentencing of impaired drivers in order to more effectively assess the mental health and addiction treatment needs of the offender so to reduce recidivism. For more information about the Foundation, go to Responsibility.org.

Jim Eberspacher is the Director of the National Center for DWI Courts (NCDC). Prior to joining NCDC in 2014, he was the state treatment court coordinator for the Minnesota Judicial Branch. The National Center for DWI Courts is dedicated to reducing impaired-driving recidivism nationwide by addressing the root problem: addiction. NCDC partners with federal agencies and corporate sponsors to provide cutting-edge training and technical assistance to communities to implement, expand and improve DWI court programs that provide treatment and accountability based on research-driven best practices. Established in 2007, NCDC is a division of the National Association of Drug Court Professionals, a 501(c)3 non-profit organization based in Alexandria, Virginia. For more information about the National Center for DWI Courts, go to www.dwicourts.org.

# TRAFFIC SAFETY RESOURCE PROSECUTORS RESPOND TO NEW YORK TIMES ARTICLE ON BREATH TESTING EQUIPMENT AND IMPAIRED DRIVING INVESTIGATIONS

> *"Persons who repeatedly drive drunk present a greatly enhanced danger that they and others will be injured as a result. In addition, it has been estimated that the ratio of DUI incidents to DUI arrests is between 250 to 1 and 2,000 to 1." Begay v. U.S., 128 S Ct 1581, at 1593-4 (J. Alito dissenting opinion, 2008).*

On November 3, 2019, the New York Times published an article headlined *"These Machines Can Put You in Jail. Don't Trust Them."* This article disparages all breath testing instruments and demonstrates a failed understanding of impaired driving detection, investigation, and prosecution. The failures include: an inaccurate portrayal of the instruments used to help law enforcement officials do their jobs; an incomplete picture of the various tests performed by trained law enforcement officials following a traffic stop; and overreliance on paid defense "experts" whose testimony has been overruled in court rooms throughout the United States.

The article demonstrates a misunderstanding of how breath testing instruments work. Modern instruments rely on infrared and electro-chemical fuel cell technology, which is proven to be accurate and reliable. The instrument tests itself, and when used properly, will not allow a test that is unfair to the driver. Some States, including North Carolina, require two consecutive tests to ensure accuracy.

Particularly discouraging is the lack of attention to accuracy in the article. For example, the claim that manufacturers are hiding-the-ball on their software is a common and repeatedly disproven conspiracy theory spun by DWI defense attorneys. The article specifically claims Draeger, the manufacturer of the Alcotest 9510, was forced by courts to reveal its source code. That is simply not true. The facts are in published cases and filed court documents. Draeger voluntarily provided its source code in New Jersey, Massachusetts, and Washington State, under a protection order reviewed and approved by the State courts. Other manufacturers have similarly provided their source code with an appropriate protection order. In all the states where the defense examined the software, the court ultimately agreed the tests were admissible. In other words, after more than a decade of examining breath test software and a mountain of public funds, no court has excluded a breath test based on any software issue. Software challenges are simply a way for DWI defense attorneys to delay cases for years while thousands of DWI cases languish and eventually fade away, too stale to prosecute. Misstating the facts is an unfair way to reinforce a narrative.

Furthermore, it should be noted these tests — whose accuracy is the crux of the article — are performed after the driver has been arrested based on probable cause. An officer who offers an evidential breath test to a driver has already established evidence of impairment sufficient to support the arrest at roadside. The breath test simply confirms and corroborates the trained officer's observations that were gathered through a litany of roadside tests prior to the arrest and breath testing being offered. This reality represents another inaccuracy depicted in the article.

The authors repeatedly reference field sobriety tests, including a "counting test". At no point in their article do the authors reference the Standardized Field Sobriety Tests, which have been studied, evaluated, and approved over decades. These tests are invaluable in the investigative process and help ensure an officer is fully doing his or her job. Officers in all 50 States and the District of Columbia, as well as Canada, Germany, Australia, and the United Kingdom use this three-test battery in impaired driving investigation.

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## Dates to Remember

**February 2**
**Super Bowl LIV**
Fans Don't Let Fans Drive Drunk
IMPAIRED DRIVING
DRUG-IMPAIRED DRIVING
Drive Sober or Get Pulled Over
Buzzed Driving is Drunk Driving



**March 2 - 6**
**Vehicle Safety Recalls Week**

**March 9 - 11**
**2020 Traffic Court Seminar**
**New Orleans, LA**

**March 15 - 17**
**Lifesavers 2020 Conference**
**Tampa Convention Center**
**Tampa, Florida**

**March 17**
**St. Patrick's Day**
IMPAIRED DRIVING


**April - National Distracted Driving Awareness Month**
**Alcohol Awareness Month**

# TRAFFIC SAFETY RESOURCE PROSECUTORS RESPOND TO NEW YORK TIMES ARTICLE ON BREATH TESTING EQUIPMENT AND IMPAIRED DRIVING INVESTIGATIONS continued from page 3

Any officer investigating an impaired driving offense must be able to cross several hurdles. First, they must show reasonable, articulable reasons for the stop, should the vehicle be in motion. These reasons include traffic violations, equipment violations, or other indicators of impaired driving. Other cases, such as crashes and checking stations, do not involve this phase of detection. Once contact with the driver is made, the officer must develop probable cause for the arrest.

Probable cause is generally developed using the aforementioned Standardized Field Sobriety Tests (SFSTs). These tests are the Horizontal Gaze Nystagmus test, the Walk and Turn test, and the One Leg Stand test.

Horizontal Gaze Nystagmus (HGN) is the involuntary jerking of the eyes as they move side to side. This highly accurate test is predictive of the alcohol concentration of the individual when the drug of choice is alcohol. It is observed in individuals who have consumed central nervous system depressants, such as alcohol or Xanax; inhalants, such as Dust-Off; and dissociative anesthetics, such as Ketamine. HGN has been accepted as reliable by agencies such as the American Optometric Association and the ACLU. More importantly, the HGN test begins with the officer conducting a medical rule-out for conditions such as stroke and head injury.

Walk and Turn and One Leg Stand are divided attention tests, where the driver is instructed to perform simple tasks that involve both their physical and mental abilities. When performed in conjunction with HGN, this battery of tests are excellent measures of impairment and are used to establish probable cause before arrest. Studies show that when a trained officer requests and observes the performance of these tests, the accuracy of predicting impairment is over 90%.

Finally, the authors overly rely on "expert opinions" from Jan Semenoff and Tom Workman, who are both paid to testify nationwide on behalf of impaired drivers. Unlike prosecutors or law enforcement officers, their goal is to acquit—not because a defendant is innocent, but because these individuals get paid to do so.

It strikes one as a fundamental error to rely heavily on these "expert" opinions, while failing to quote law enforcement officers or prosecutors. Furthermore, the article makes no mention of a national group of Traffic Safety Resource Prosecutors (TSRPs), who would happily have shared their insights into how technology is improving our ability to effectively address impaired driving. These prosecutors are subject matter experts and are in almost every State as well as Puerto Rico. There is no reference to any interviews of TSRPs or an opportunity for them to rebut this flawed reporting. If the authors had time to consult over 100 people, a more balanced perspective would have included the contrary views of prosecutors and law enforcement.

Statistically there is no doubt that when a person is arrested for impaired driving it is not the first time they committed the crime. The most recent data from 2017 shows 29% of traffic fatalities involved driver alcohol use with an alcohol concentration of 0.08 or more. Note as well that although the authors refer to 0.08 as the "legal" limit, it is in fact the "illegal" limit at which an individual is most certainly impaired. This article is unbalanced and inaccurate. More importantly, the sensationalized headline may well result in the deaths of people, including those who choose to drive while impaired.

*This response was co-authored by the following Traffic Safety Resource Prosecutors from around the country: Sarah Garner (North Carolina); Scot Mattox (Maine); Ramsey Ross (Hawaii); Garett Berman (Florida); Kristi Pettit Venhuizen (North Dakota); Jennifer Cifaldi (Illinois); Jason Samuels (Georgia); Gilbert Crosby (Georgia); Holly Reese (Ohio); Shannon Bryant (Nevada); Isaac Avery (North Carolina); Mark Carpenter (Arkansas); Nicole Cofer (West Virginia); Mary Tanner-Richter (New York); Brenda Hans (Connecticut); Ashley Schweizer (New Mexico); Stacy Graczyk (Vermont); Heather Gray (Vermont); William Lindsey (Alabama); Tyson Skeen (Utah) and Jared Olson (Idaho).*

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# SUPREME COURT UPHOLDS WARRANTLESS BLOOD DRAW FROM UNCONSCIOUS IMPAIRED DRIVER UNDER EXIGENT CIRCUMSTANCES EXCEPTION TO WARRANT REQUIREMENT

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Early last year, the U.S. Supreme Court granted certiorari in a case that once again involved the circumstances under which police may legally obtain a sample of a suspected impaired driver's blood for evidentiary purposes without a warrant. The question continues to be of significant importance as law enforcement has had to rely upon the taking of blood from impaired driving suspects in order to test for the presence of drugs, and when a suspected drunk driver refuses to allow a non-invasive breath test. In this case, Gerald Mitchell appealed his convictions for operating while intoxicated and operating with a prohibited alcohol concentration, which were affirmed by the Supreme Court of Wisconsin in *State v. Mitchell*[1]. The Court granted certiorari on the question of "[w]hether a statute authorizing a blood draw from an unconscious motorist provides an exception to the Fourth Amendment warrant requirement."

After being arrested for drunk driving and while in route to the police station for secondary chemical testing, Mitchell became "lethargic", so the officer transported him to the hospital. On the way to the hospital, he became totally unconscious. The police officer requested hospital staff draw blood as evidence, which they did without a warrant. The Supreme Court of Wisconsin held that the warrantless blood draw was not an unreasonable search, and therefore no Fourth Amendment violation. The Court reasoned that

> Mitchell voluntarily consented to a blood draw by his conduct of driving on Wisconsin's roads and drinking to a point evidencing probable cause of intoxication. Further, through drinking to the point of unconsciousness, Mitchell forfeited all opportunity, including the statutory opportunity to withdraw his consent previously given; and therefore, § 343.305(3)(b) applied, which under the totality of circumstances reasonably permitted drawing Mitchell's blood.[2]

Accordingly, the Wisconsin Supreme Court held that Mitchell had consented to the taking of his blood and upheld the admissibility of the blood test result.

Although *certiorari* was granted on an issue related to implied consent, the Court decided the case based upon the exigent circumstances exception to the warrant requirement. In doing so, the Court looked at its earlier decisions in *Schmerber v. California*[3] and *Missouri v. McNeely*.[4] In *Schmerber*, the Court ruled that a police officer properly compelled a DUI subject to provide a warrantless blood sample because the officer "might reasonably have believed that he was confronted with an emergency, in which the delay necessary to obtain a warrant, under the circumstances, threatened 'the destruction of evidence.'"[5] In doing so, the Court recognized the presence of exigent circumstances since "the percentage of alcohol in the blood begins to diminish shortly after drinking stops, as the body functions to eliminate it from the system."[6]

Forty-seven years later in *Missouri v. McNeely*, however, the Court held that the natural dissipation of alcohol in one's blood did not create a *per se* exception to the Fourth

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# SUPREME COURT UPHOLDS WARRANTLESS BLOOD DRAW FROM UNCONSCIOUS IMPAIRED DRIVER UNDER EXIGENT CIRCUMSTANCES EXCEPTION TO WARRANT REQUIREMENT continued from page 5

Amendment's warrant requirement based on exigent circumstances. Instead, the Court left it to the trial courts to determine on a case-by-case basis when exigent circumstances exists.

In *Mitchell*, however, the Court in a plurality decision held that when a driver is unconscious and cannot be given a breath test, the exigent circumstances doctrine permits a warrantless blood test to prevent the imminent destruction of evidence caused by the rapidly dissipating blood-alcohol evidence.[7] In so holding, the Court noted that Mitchell's medical condition created the same type of urgency that the automobile accident created in Schmerber, and redefined exigency in impaired driving cases to exist

> when (1) BAC evidence is dissipating and (2) some other factor creates pressing health, safety, or law enforcement needs that would take priority over a warrant application. Both conditions are met when a drunk-driving suspect is unconscious, so *Schmerber* controls: With such suspects, too, a warrantless blood draw is lawful.

Justice Alito was joined by Chief Justice Roberts, and Justices Breyer and Kavanaugh with Justice Thomas providing the fifth vote by concurring in the judgment in a separate opinion. Justice Alito highlighted the role that BAC testing plays in impaired driving cases when he wrote:

> The importance of the needs served by BAC testing is hard to overstate. The bottom line is that BAC tests are needed for enforcing laws that save lives. The specifics, in short, are these: Highway safety is critical; it is served by laws that criminalize driving with a certain BAC level; and enforcing these legal BAC limits requires efficient testing to obtain BAC evidence, which naturally dissipates. So BAC tests are crucial links in a chain on which vital interests hang. And when a breath test is unavailable to advance those aims, a blood test becomes essential.[10]

Left unresolved at this point is the applicability of implied consent laws in light of conventional Fourth Amendment jurisprudence on the scope of the consent exception to the Fourth Amendment warrant requirement. Generally, implied consent laws around the country provide that a motorist implicitly agrees to submit to a blood or breath test by obtaining a driver's license and/or driving on the state's roadways. If a motorist, for example, elects to withdraw his or her consent and not agree to a blood test, although there may be administrative penalties for their decision, may the police still lawfully obtain a blood sample without a warrant? At this point, we know only the view of three of the Court's nine justices. Writing for Justices Ginsburg and Kagan, Justice Sotomayor dissented from the plurality decision, and noted that Wisconsin's implied consent law, "cannot itself create the actual and informed consent that the Fourth Amendment requires."[11]

1. 383 Wis.2d 192, 914 N.W.2d 151 (2018).
2. 383 Wis.2d at 226. Under Wisconsin's implied consent law, when one is incapable of withdrawing their implied consent to BAC testing, then they are presumed not to have done so.
3. 384 U.S. 757 (1966)
4. 569 U.S. 141 (2013)
5. 384 U.S. at 770.
6. *Id.*
7. *Mitchell v. Wisconsin*, 139 S.Ct. 2525 (2019).
8. *Id*. at 2537.
9. In his concurring opinion, Justice Thomas argued that the better approach would be to adopt the *per se* rule that he proposed in his dissenting opinion in *McNeely*.
10. *Id*. at 2535.
11. *Id*. at 2546.

# DON'T FORGET

**Valuable resources can be found at:**

- **National Highway Traffic Safety Administration**
  www.nhtsa.gov/risky-driving
- **American Bar Association/Judicial Division/NCSCJ**
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- **AAA Foundation for Traffic Safety**
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# NHTSA REPORTS LATEST DATA ON FATAL MOTOR VEHICLE CRASHES

According to the latest statistics from the Fatality Analysis Reporting System (FARS), there were 36,560 people killed on our roadways in motor vehicle traffic crashes in 2018, a 2.4% decrease from the earlier year. This decrease was present in almost all segments of the population with the exception of fatalities in crashes involving large trucks (9.8% increase) and those involving pedestrians (3.4% increase) and pedalcyclists (6.3% increase). Speeding-related fatalities decreased by 5.7%.

Alcohol-impaired driving fatalities decreased by 3.6% and represents the lowest percentage of overall fatalities since 1982. Alcohol-impaired driving fatalities still exceed 10,000 per year, however, and although nationally alcohol-impaired driving fatalities declined, 18 States and Puerto Rico showed increases ranging from 1.4% to 77.8%.

Over the past four decades, traffic fatalities have generally been on a downward trend due in part to increased seat belt use, public awareness, evidence-based sentencing practices in impaired driving cases, air bags and other in-vehicle safety features, and improved roadways. Despite this downturn, the percentage of pedestrian and pedalcyclist fatalities as a proportion of overall traffic fatalities increased from 14% to 20% over the past 9 years.

It should also be noted that the failure to use one's seat belt continues to be a significant contributing factor in fatalities. The recent statistics point out that of those occupants of passenger vehicles killed in 2018 who had known seatbelt use, 47% were unrestrained. At the same time, of those passenger vehicle occupants who survived fatal crashes in 2018, only 13% were unrestrained.

*For more information, a summary of the 2018 fatal motor vehicle crash statistics is contained in the Traffic Safety Facts Research Note (DOT HS 812 826) (October 2019) published by NHTSA which may be found at:* https://crashstats.nhtsa.dot.gov/Api/Public/ViewPublication/812826.

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