

HIGHWAY TO JUSTICE

SUMMER 2023

From The ABA with support from the National Highway Traffic Safety Administration

PROGRESS MADE WITH NHTSA'S TRAFFIC SAFETY PARTNERS

*By Caroline Cash and Linda Fisher
Highway Safety Specialists, Impaired Driving Division,
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Over the last forty years, the National Highway Traffic Safety Administration has worked with many traffic safety partners to reduce the number of deaths in impaired-driving crashes. As State laws lowered blood alcohol concentrations (BACs) as the standard for impairment, relationships with stakeholders in the criminal justice system, especially judges, helped reduce the number of fatal and serious injury crashes each year. For this, we are grateful.

Over the past ten years, however, new challenges emerged for NHTSA and its partners - a pandemic that resulted in increased alcohol and drug use, ease of access to alcoholic drinks through cocktails-to-go and delivery services, the evolving state of cannabis legalization across the country—all of which resulted in big steps in the wrong direction for the efforts to end impaired driving. Many States have scrambled to address increased alcohol and drug impaired driving and to prepare for the many challenges of cannabis legalization and to share NHTSA's Drug-Impaired Driving campaign message: *"If you feel different, you drive different."*

Impaired driving continues to be a significant public health and safety problem in the United States. In 2021 there were 13,384 fatalities in motor vehicle traffic crashes in which at least one driver was alcohol-impaired. This represented 31 percent of all traffic fatalities in the United States for the year.¹ Additionally, significant increases in drugged driving occurred recently, especially driving under the influence of delta-9-tetrahydrocannabinol (THC), the active ingredient in cannabis.² During the pandemic, fatal crashes involving drivers impaired by both alcohol and other drugs increased.³

NHTSA continually works with judicial and other traffic safety stakeholders to help reduce impaired driving. Some examples of traffic safety programs NHTSA supports in the ongoing effort to save lives on our Nation's roads include:

- The Judicial Outreach Liaison (JOL) and Judicial Fellows program consists of two National Judicial Fellows plus Regional and State JOLs throughout the country. While remaining independent and impartial, JOLs and Judicial Fellows are resources for the judiciary and other members of the highway safety community. Their work takes the form of peer-to-peer judicial education, court case interpretations, guidance, and liaison between the judiciary and the highway safety community. JOLs and Judicial Fellows supplement and support ongoing efforts by judicial educators around the country to channel essential information to judges in important areas including evidence-based sentencing practices for at-risk populations, DUI treatment courts, and reliable substance use and mental health assessments.⁴
- The National District Attorneys Association's National Traffic Law Center (NTLC) represents a resource benefiting all participants in the justice system. The mission of NTLC includes improving the quality of justice in traffic safety adjudications by increasing awareness of highway safety issues through the compilation, creation and distribution of legal and technical information, and by providing training and reference services.⁵
- The Traffic Safety Resource Prosecutors serve as specially trained attorneys who possess extensive experience prosecuting the range of impaired-driving offenses, from first-time impaired-driver criminal cases to the worst offenses, impaired-driving cases that kill or seriously injure people. TSRPs provide statewide resources on traffic safety issues as well as critically important training.

NHTSA also sponsors State Program Assessments in many subject areas, including impaired driving. Assessments, performed by a team of subject matter experts, review current practices and provide feedback and recommendations on how States can enhance and improve impaired driving prevention based on the NHTSA Uniform Guidelines for State Highway Safety Programs.⁶

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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. Kate Huffman at ohiojohuffman@gmail.com with a copy to the staff liaison, lisa.yoon@americanbar.org. Please contact Ms. Yoon for editorial guidelines.

The deadline for submission of articles for the Fall 2023 issue is August 30, 2022.

Under the Bipartisan Infrastructure Law (Pub. L. 117–58), NHTSA helps States conduct stakeholder roundtables to bring new partners into the conversation surrounding public safety. New legislative requirements under the Act provide States opportunity to conduct more long-term planning through triennial highway safety plans in lieu of the annual plans used for decades. States must now conduct public participation and engagement activities during the highway safety planning process with emphasis on underserved communities and communities over-represented in the data. NHTSA encourages strong collaboration between the judicial community and State highway safety offices to assist with planning and implementation of their highway safety programs.

The NHTSA Office of Behavioral Safety Research studies behaviors and attitudes in highway safety, focusing on drivers, passengers, pedestrians, and motorcyclists. This research aides in the development and refining of *Countermeasures That Work* to deter unsafe driving behaviors and promote safe alternatives.⁷ The National Center for Statistics and Analysis produces a range of analytical and statistical support to NHTSA and the highway safety community at large, evaluating the data to create resources to understand challenges and dangerous driving trends around the country.⁸

NHTSA remains steadfast in its mission to save lives, prevent injuries, and reduce vehicle-related crashes by combatting impaired driving. Driving under the influence of alcohol or other drugs leads to preventable crashes and deaths. According to *The Economic and Societal Impact of Motor Vehicle Crashes*,⁹ alcohol involvement in fatal crashes declined from 60 percent of all traffic fatalities in 1982 to roughly 39 percent in 2019, and illegal intoxication (a BAC of .08 g/dL or greater) declined from 53 percent to 33 percent over the same period. While these declines are encouraging, alcohol remains a significant factor in motor vehicle crashes. In 2019 some 85% of all fatalities from alcohol-involved crashes occurred where a driver had a BAC of .08 or higher. Almost every person in the United States has been affected by an impaired driver in one way or another. NHTSA continues to work with its valuable judicial partners to develop programs that reduce crashes and save lives.

Endnotes:

1. National Highway Traffic Safety Administration, *2021 Traffic Safety Facts*, available at <https://crashstats.nhtsa.dot.gov/>
2. T. Kelley-Baker, A. Berning, A. Ramirez, J.H. Lacey, K. Carr, G. Waehrer and R. Compton, *2013-2014 National Roadside Study of Alcohol and Drug use by Drivers: Drug Results*, National Highway Traffic Safety Administration (May, 2017), available at <https://www.nhtsa.gov/behavioral-research/2013-14-national-roadside-study-alcohol-and-drug-use-drivers#2013-14-national-roadside-study-of-alcohol-and-drug-use-by-drivers>; T. Joye, K. Rocher, J. Deglon, J. Sidibe, B. Favrat, M. Augsburg, and A. Thomas, *Driving Under the Influence of Drugs: A Single Parallel Monitoring-Based Quantification Approach on Whole Blood*, 8 *Frontiers in Chemistry* 626 (2020).
3. F.D. Thomas, J. Darrah, L. Graham, A. Berning, R. Blomberg, K. Finstad, C. Griggs, M.Crandall, C. Schulman, R. Kozar, J. Lai, N. Mohr, J. Chenoweth, K. Cunningham, K. Babu, J. Dorfman, J. Van Heukelom, J. Ehsani, J. Fell and C. Moore, *Drug Prevalence Among Seriously or Fatally Injured Road Users*, National Highway Traffic Safety Administration (December, 2022), available at https://www.nhtsa.gov/sites/nhtsa.gov/files/2022-12/Alcohol-Drug-Prevalence-Among-Road-Users-Report_112922-tag.pdf.
4. *Judicial Outreach Liaison and Judicial Fellows Program*, American Bar Association, for more information go to <https://www.americanbar.org/groups/judicial/jolprogram/>
5. For more information on the National Traffic Law Center visit <https://ndaa.org/programs/ntlrc/>
6. For more information on Safety Program Assessments visit <https://www.nhtsa.gov/highway-safety-grants-program/safety-program-assessment>
7. National Highway Traffic Safety Administration, *NHTSA Studies Vehicle Safety and Driver Behavior to Reduce Vehicle Crashes*, available at <https://www.nhtsa.gov/research>
8. <https://www.nhtsa.gov/research-data/national-center-statistics-and-analysis-ncea>
9. L. Blincoc, T. Miller, J.S. Wang, D. Swedler, T. Coughlin, B. Lawrence, F. Guo, S. Klauer and T. Dingus, *The Economic and Society Impact of Motor Vehicles Crashes, 2019*, National Highway Traffic Safety Administration, available at <https://crashstats.nhtsa.dot.gov/Api/Public/ViewPublication/813403>

THE CONTINUING SAGA OF *STATE OF NEW JERSEY V. OLENOWSKI* AND THE ADMISSIBILITY OF DRUG RECOGNITION EXPERT TESTIMONY

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

In separate incidents in February and August 2015, Michael Olenowski was arrested for impaired driving and submitted to drug influence evaluations by specially trained police officers known as drug recognition experts (DRE).¹ In 2016, he was convicted of both offenses following trials during which drug recognition experts testified that Olenowski was driving under the influence of a central nervous system depressant, a sympathetic nervous system stimulant and alcohol in the first case, and under the influence of a central nervous system stimulant and depressant in the second case. His convictions were affirmed by the New Jersey Appellate Division in an unreported decision. The New Jersey Supreme Court granted certification in order to determine if and under what circumstances testimony of a certified DRE may be admissible at trial.

As in Mr. Olenowski's cases, the investigation, prosecution, and trial of drug-impaired driving cases raise a number of issues for judicial determination including the admissibility of scientific and opinion evidence relating to a driver's impairment. In jurisdictions without a *per se* statute, or where blood is not drawn for testing, opinion testimony from a DRE may be an important part of the trial evidence presented to the court. Evidence from a DRE, when combined with all the facts, circumstances, observations, driving behavior, toxicology results, and admissions, assist the trier of fact in determining whether a driver operated a motor vehicle while impaired by drugs. No single piece of evidence results in a determination of impairment, and the judge or jury must weigh all of the evidence in its deliberations.

In use for the last half-century, all fifty States, the District of Columbia, Canada, and several other countries around the world utilize the DRE program. Approximately twenty States have judicially accepted DRE testimony as either scientifically reliable under the expert standards set in *Frye* or *Daubert*, or admissible under State Rules of Evidence as non-scientific evidence based upon specialized knowledge.² In *Chitwood v. State*, for example, the Wisconsin Supreme Court found that drug recognition expert testimony has been the subject of several published studies and peer reviews, thereby demonstrating the sufficient validity of the methodology for reliably identifying an individual's impairment by drugs. As such, the *Chitwood* Court sanctioned DRE testimony, noting that "every court to have considered the issue has concluded that testimony based upon the DRE protocol is admissible into evidence."³ Maine courts may admit DRE testimony based upon a specific statutory authorization, while the North Carolina Rules of Evidence specifically sanction the admissibility of DRE testimony.

Following briefing and arguments in *State v. Olenowski*, the New Jersey Supreme Court on November 18, 2019 appointed Judge Joseph F. Lisa as a Special Master to hear testimony and consider whether DRE testimony has achieved general acceptance within the relevant scientific community and therefore satisfies the reliability standard for admissibility in New Jersey.⁴

Following forty-two days of testimony, and a two and a half year delay occasioned by the COVID epidemic, Judge Lisa issued his 332 page report.⁵ In that report, Judge Lisa concluded that DRE evidence should be admissible in New Jersey under the *Frye* standard. Based on all of the evidence presented, Judge Lisa noted the reliability of DRE testimony and that:

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Dates to Remember

July

Impaired Driving

Drug-Impaired Driving

Buzzed Driving is Drunk Driving

Drive Sober or Get Pulled Over

Ride Sober or Get Pulled Over

If You Feel Different, You Drive Different. Drive High,
Get a DUI



July 10–31

Speed Campaign

THE CONTINUING SAGA OF STATE OF NEW JERSEY V. OLENOWSKI AND THE ADMISSIBILITY OF DRUG RECOGNITION EXPERT TESTIMONY

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- the DRE protocol replicates generally accepted medical practices for identifying the presence of impairing drugs and their likely identity through a toxidrome recognition process;
- the DRE matrix comports with matrices designed for this purpose and generally accepted and used in the medical field; and
- the training DREs receive compares favorably to that received by medical technicians and DREs are thus enabled to reliably apply the protocol.

In his report, Judge Lisa recognized that specially trained police officers who serve as drug recognition experts can be, and are adequately trained in even those aspects of the protocol that are “scientifically based.” As Judge Lisa noted, “laypersons - not just police officers - are routinely trained to reliably make assessments and perform medical tasks.”

While the Special Master was contemplating issues referred to him, the New Jersey Supreme Court was in the midst of reconsidering its legal standard for admissibility of expert testimony in trials, and in 2018 abandoned the State’s long-held *Frye* standard of admissibility and adopted a *Daubert*-type standard for admissibility of expert testimony in all civil proceedings.⁶ Then five years later, *State v. Olenowski* became an appellate opportunity to similarly adopt the *Daubert*-type standard in criminal cases. When the case was referred to the Special Master, however, the *Frye* standard remained the guiding principle for considering expert testimony in New Jersey, and the Special Master applied the *Frye* analysis in his deliberations. Therefore, the *Olenowski* case has taken on heightened importance as the New Jersey Supreme Court considers not only whether DRE testimony meets either the *Frye* or *Daubert* test, but which standard should apply to the admissibility of expert opinion testimony in all criminal cases.

Ultimately, when considering the *Olenowski* Special Master’s report, the New Jersey Supreme Court extended its adoption of a *Daubert*-type standard to criminal cases as well as in civil cases.⁷ Since the Special Master did not consider the *Daubert* test of admissibility, the case was referred back to the Special Master to “assess the reliability and admissibility of DRE in the first instance under the [*Daubert*-type]

standard adopted here. In his discretion, Judge Lisa may rule on the basis of the existing record, or ask for and accept additional evidence, briefing, and argument from the parties and amici.”⁸

Although the result of Judge Lisa’s ultimate decision may be moot as to Mr. Olenowski, who passed away during the pendency of his cases, the effect of the move to a *Daubert* analysis now applies to criminal proceedings in New Jersey, including the admissibility of drug recognition expert testimony. Whether the twelve-step DRE protocol meets standards of admissibility under New Jersey law still remains unresolved. More to follow when the *Olenowski* court so determines.⁹

Endnotes:

1. A drug recognition expert is a specially trained police officer who is certified as proficient in administering a 12-step protocol under the Drug Evaluation and Classification Program. This protocol is a standardized, systematic procedure to examine a suspect under arrest for drug-impaired driving. The drug recognition expert then applies their specialized training and experience to conclude whether their observations fit established indicia of impairment by particular classes of drugs.
2. A *Frye* standard requires a proponent of novel scientific evidence to demonstrate its general acceptance in the relevant scientific community. In those States that have adopted a *Daubert* standard, generally the Court has a gatekeeping function to examine the reliability of the expert evidence based on a non-exhaustive list of factors.
3. 369 Wis.2d 132, 879 N.W.2d 786 (2016). The trial court had denied Mr. Olenowski’s request to hold a hearing under *Frye* to assess admissibility, so the Court did not have a “full and complete record” from which to make an appellate determination.
4. 247 N.J. 242 (2019).
5. <https://www.njcourts.gov/sites/default/files/public/notable-cases/smfr.pdf>
6. *In Re Accutane Litig.*, 234 N.J. 340 (2018).
7. 253 N.J. 133, 155 (2023).
8. *Id.* The Court also noted that at oral argument the parties and amici represented that the current record before the Special Master is complete and can be evaluated under a *Daubert*-type standard without additional evidence.
9. As we continue to await further judicial decisions from New Jersey, it is worth noting that Michigan also has an appellate case working its way through the judicial system on the drug recognition protocol. In *People v. Bowden*, __ N.W.2d __, 2022 WL 16859166 (2022) the Michigan Court of Appeals held the prosecution had failed to meet its burden to show that the DRE protocol had been validated as a reliable method to demonstrate a person’s level of impairment, or the degree to which a person’s driving abilities could be diminished by any given level of marijuana. The State filed an application for leave to appeal to the Michigan Supreme Court and that application is currently pending as of the writing of this article.

To learn more about judicial outreach in your State and Region, please contact one of the following:

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Regional Judicial Outreach Liaisons:

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Motor vehicle crashes occurring in the United States profoundly impact the lives of those involved as well as bystanders, and result in injuries, fatalities, and significant and diverse economic cost. In late 2022 NHTSA released its comprehensive data-driven report entitled *The Economic and Societal Impact of Motor Vehicle Crashes, 2019*.¹ While the encyclopedic report spans almost three hundred pages, the staggering cost of motor vehicle crashes in 2019 detailed in the reported findings can be summarized in the following data:

- Approximately 14.2 million motor vehicle crashes occurred in 2019.
- The total economic cost of motor vehicle crashes topped \$340 billion (2.6% of U.S. gross domestic product) resulting from 36,500 fatalities, 4.5 million non-fatal injuries, and 23 million damaged vehicles.
- The economic cost of crashes includes medical care, lost productivity, legal and court costs, insurance administrative costs, workplace costs, congestion impacts (travel delay, excess fuel consumption and pollution), and property damage.
- Total property damage costs for all crash types totaled \$115.3 billion and accounted for 34% of all economic costs; lost workplace, market and household productivity made up an additional 32% of the total cost.
- To put the economic cost in perspective, the approximately \$340 billion cost of crashes in 2019 equates to \$1,035 on average for every adult and child living in the United States.
- The lifetime economic cost to society for each fatality equals \$1.6 million, over 90% of which is attributable to lost workplace and household productivity as well as legal costs.
- The economic cost associated with each critically injured survivor amounts to an average of \$979,000, of which medical costs and lost productivity account for 81% of the total figure.
- “Those not directly involved in crashes pay for roughly three-quarters of all crash costs, primarily through insurance premiums, taxes and congestion related costs.” Approximately 9% of all motor vehicle crash costs are paid from public revenues. Private insurers pay approximately 54% of all costs. Individuals involved in crashes bear approximately 23% of the cost, while third parties such as uninvolved motorists delayed in traffic, charities, and health care providers pay about 14%.
- Alcohol-involved crashes resulted in 14,219 fatalities, 497,000 non-fatal injuries, and \$68.9 billion in economic costs in 2019, equaling 20% of all crash costs.
- Crashes involving drivers or nonoccupants with blood alcohol concentrations (BAC) of .08 or higher accounted for 84% of the total economic cost of all alcohol-involved crashes.
- Speed-related crashes in 2019 resulted in 10,192 fatalities, 498,000 non-fatal injuries, damage to 1.7 million vehicles and \$46.4 billion in financial cost.
- Speed-related crashes represented 28% of all fatalities and cost an average of \$141 for every person in the United States.

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THE COST OF MOTOR VEHICLE CRASHES

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- Distracted driving resulted in 10,546 fatalities in 2019 and generated 98.2 billion in economic cost.

While the data appears discouraging, NHTSA and its partners in traffic safety continue to encourage policies and initiatives to address behaviors that will result in fewer crashes, including, among others, campaigns to highlight the dangers of impaired, speed-related and distracted driving as well as effective court room strategies including judicial peer to peer education, screening and assessment, and DWI Courts.

Endnotes:

1. L. Blincoe, T. Miller, J.S. Wang, D. Swedler, T. Coughlin, B. Lawrence, F. Guo, S. Klauer and T. Dingus, *The Economic and Society Impact of Motor Vehicle Crashes, 2019 (Revised)* National Highway Traffic Safety Administration

EVIDENTIARY ORAL FLUID TESTING: EXPLORATION OF A TIME-TESTED ANALYSIS TO ADDRESS DRUG IMPAIRED DRIVING

By: Erin Reed

Assistant Policy Director, Public Safety, Office of Ohio Governor Mike DeWine
Staff Lieutenant Chris Kinn, Ohio State Highway Patrol
Columbus, Ohio

The smell of anti-freeze, oil, and airbag deployment greeted me as I exited my vehicle. That's how I knew this was a bad crash. The expression on the faces of the volunteer firefighters who worked frantically to free the people inside the mangled car confirmed that at least one person's life was already claimed. This crash, as it turns out, was one of a long line of preventable crashes—caused by an impaired driver—that I have seen in my two decades with the Ohio State Highway Patrol.

—Staff Lieutenant Chris Kinn, Ohio State Highway Patrol

A reality of today's billowing opioid crisis is that more drug use leads to more drug-impaired drivers. A 2021 report of the National Institute on Drug Abuse concluded that 11.7 million people aged 16 and over admitted to driving under the influence of just a select number of drugs within the past year.¹ Accurately and efficiently identifying impairing substances produces not just evidence for a criminal trial but can inform policy that reduces recidivism through appropriate recovery programs. In other words, impaired driving is preventable.

The collection and analysis of biological specimens provides challenges though. As a result of the analysis in *Birchfield v. North Dakota*² and its progeny, the invasive nature of a blood draw requires that the warrant requirement must be satisfied.³ The warrant process can delay specimen collection which allows for further metabolism of drugs, and amounting to an increased risk of lost evidence. Collection of urine can be unpalatable and requires same gender observation. Criticism of urine as evidence abounds, particularly since it represents a waste product. The need for timely drug tests, therefore, demands the use of efficient specimen collection with reliable findings.

Oral fluid represents one alternative matrix to the use of urine for impairment assessment. Before including oral fluid as part of a State's solution to drug-impaired driving, a necessary step includes further understanding of how it can be forensically examined. This article

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Contact Info continued

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The American Bar Association Judicial Division's Judicial Outreach Liaison and Judicial Fellows Program is producing a new publication: *The Tribal Traffic Safety Bulletin*. This newsletter will be shared twice a year, and will feature pieces written by Judicial Outreach Liaisons, Judicial Fellows, judges, and other program stakeholders. The newsletter will be focusing on highway safety matters in native lands. The Judicial Outreach Liaison and Judicial Fellows program is producing this newsletter because of the increased interest in impaired driving, seatbelt use, and motor carrier safety issues on native lands. We are excited to share this new way for our team to communicate news and other information to our valued partners and stakeholders on this topic.

If you are interested in being on the listserv, please reach out to ABA Project Manager, Lisa Yoon at lisa.yoon@americanbar.org

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EVIDENTIARY ORAL FLUID TESTING: EXPLORATION OF A TIME-TESTED ANALYSIS TO ADDRESS DRUG IMPAIRED DRIVING continued from page 6

illustrates that the use of oral fluid to detect drugs is well documented in peer-reviewed literature. Documented methods have been applied to the detection of drugs both inside and outside the criminal justice system. Finally, the analysis of oral fluids can be completed using established scientific instrumentation already familiar to most courts.

Non-Invasive and Minimal Risk of Tampering

Oral fluid has gained significant attention over the past two decades as an alternative biological matrix for detecting drugs, which can be attributed in part to the ease of collection. Collection can be as simple as placing an absorbent pad under the tongue and allowing the device to naturally collect oral fluid.

The ease of collection lends itself to convenient observation and eliminates the need for gender-specific collection. The collecting agent mitigates the risk of adulterating an oral fluid sample by confirming the absence of objects in the mouth, followed by a ten-minute observation period. Resulting from the non-invasive nature of oral fluid sample collection, the risk of infection to the donor remains lower than with blood collection.

Use for Presumptive and Evidentiary Analyses

A large body of peer-reviewed literature supports the use of oral fluid as a specimen for accurately measuring the presence of drugs.⁴ Oral fluid can be reliably analyzed for the presence of drugs even when the drugs were not administered orally, smoked or otherwise passed through the donor's mouth.

Two primary types of oral fluid tests exist—roadside and evidentiary tests. An analogy can be drawn between roadside tests and portable breath tests (PBTs). Both roadside tests and PBTs are less precise than the more sophisticated testing completed in controlled environments. Both roadside oral fluid tests and PBTs aid in determining whether sufficient probable cause exists for an arrest. Law enforcement in both Michigan and Indiana, as well as other jurisdictions, utilize oral fluid roadside testing devices.

In contrast, collection of evidentiary tests from suspects occurs after an arrest.⁵ After placing the specimen in a sealed and labeled container, the collector dates and initials the vial. Analysis of the specimen occurs at a forensic laboratory. With respect to analytical methods, evidence of oral fluid as an acceptable matrix for testing dates back as far as 150 years ago when the first experiments to measure analytes in saliva were conducted. By the 1970's interest arose for the use of oral fluid for therapeutic drug monitoring. At the same time, some of the earliest articles related to the use of the now commonplace immunoassay for the detection of drugs included both urine and oral fluid as sample matrices⁶

Forensic laboratories employ the same well-understood analytical instruments used to measure drugs in blood and urine to detect drugs in oral fluid. Using the same time-tested instruments common to forensic toxicology labs around the world allows for a clear understanding of error rates and overall accuracy. Remarkably, the analysis of evidentiary oral fluid proves less expensive than urine tests used by many labs. Oral fluid evaluation serves as a more likely detector of parent compounds than urine. In some cases, presence of parent compounds may indicate more recent consumption.

Successfully Implementation in a Wide Variety of Toxicology Applications

Although the collection of oral fluid by law enforcement remains relatively recent, the use of oral fluid to detect drugs is not new. Indeed, the large body of evidence available led the U.S. Substance Abuse and Mental Health Services Administration (SAMHSA) to authorize the use of oral fluid for federally regulated drug testing programs.⁷

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EVIDENTIARY ORAL FLUID TESTING: EXPLORATION OF A TIME-TESTED ANALYSIS TO ADDRESS DRUG IMPAIRED DRIVING continued from page 7

In clinical applications—such as substance abuse treatment and emergency department testing—the use of presumptive oral fluid tests can inform next steps in treatment. Sufficiently promising data about presumptive oral fluid testing in the arena of drug-impaired driving led the National Transportation Safety Board (NTSB) to recognize the role oral fluid can play in “better detection of drug-impaired drivers.”⁸

Moreover, for over a decade some state courts have admitted the results from the analysis of evidentiary oral fluid samples for presence of drugs. In Ohio alone, at least one private toxicology lab routinely works with local agencies to analyze oral fluid samples for the presence of drugs. During 2022, courts in seventeen Ohio counties admitted the testimony of analysts from the lab.⁹

Finally, the Alabama Department of Forensic Science operates the nation’s first statewide program to collect and analyze evidentiary oral fluid to detect drug-impaired drivers. Successfully operated since 2018, the Alabama program’s analysis includes both roadside and evidentiary oral fluid collection.¹⁰ The laboratory’s five years of operation can serve as a roadmap for those states interested in advancing the detection of drug-impaired drivers within their borders.

Conclusion

The proliferation of drug-impaired driving warrants a swifter confirmation of drug use. Oral fluid for the detection of drugs may be new for most law enforcement in the United States, but the method of detection has an established peer-reviewed history of acceptance in measuring the presence of drug analytes. Robust and reliable scientific support for the use of oral fluid in drug analysis led to its use in a wide variety of toxicological application and admissibility in various courts across the United States.

Endnotes:

1. National Institute on Drug Abuse, *Drugged Driving*, citing Substance Abuse and Mental Health Services Administration, 2021 National Survey of Drug Use and Health, available at <https://nida.nih.gov/research-topics/drugged-driving>.
2. 577 U.S. 1045 (2016).
3. To the authors’ knowledge no court has ruled on the whether the collection of oral fluids post arrest and without a warrant violates the Fourth Amendment. Nonetheless, many acknowledge similarities between evidentiary oral fluid collection and the collection of DNA buccal swabs, which the Supreme Court held does not require a warrant as it includes, “‘virtually no risk, trauma, or pain,’ . . . [and] does not increase the indignity already attendant to normal incidents of arrest.” *Maryland v. King*, 569 U.S. 435, 464 (2013) (quoting *Schmerber v. California*, 384 U.S. 757, 771 (1966)).
4. See e.g., L. Kadehjian, *Legal Issues in Oral Fluid Testing*, 150 *For. Sci. International* 151, 154 (2005).
5. Notably, roadside tests generally do not allow for the same sample to be submitted for evidentiary analysis. Therefore, in most circumstances where both a roadside and evidentiary test are being completed, two samples must be collected.
6. R. Leute, E.F. Ullman, and A. Goldstein, *Spin Immunoassay of Opiate Narcotics in Urine and Saliva*, 221 *JAMA* 1231 (1972).
7. *Mandatory Guidelines for Federal Workplace Drug Testing Programs Using Oral Fluid*, Substance Abuse and Mental Health Services Administration, Department of Health and Human Services, 84 FR 57554, effective 1-1-020.
8. NTSB, 2021–2022 Most wanted list, Prevent alcohol—and other drug-impaired driving, available at <https://www.nts.gov/Advocacy/mwl/Pages/mwl-21-22/mwl-hs-03.aspx>.
9. Counties identified by the private lab include Allen, Athens, Clinton, Greene, Harrison, Holmes, Knox, Lake, Licking, Lorain, Marion, Medina, Richland, Scioto, Summit, Union, and Warren.
10. M. Cason, *New Alabama Law Increases Use of Saliva Tests to Catch Drug-Impaired Drivers*, *Advance Local*, May 30, 2023, available at <https://www.al.com/news/2021/05/new-alabama-law-increases-use-of-saliva-tests-to-catch-drug-impaired-drivers.html#:~:text=The%20new%20law%20gives%20oral,driving%20privileges%20for%20three%20months>.

The ABA Judicial Outreach Liaison (JOL) Program

The ABA Judicial Outreach Liaison (JOL) Program began in 1998 as part of the ABA Judicial Division’s outreach efforts to provide trial judges with access to current and evidence-based practices that would assist them in their work on the bench. The program consists of two National Judicial Fellows and Regional and State Judicial Outreach Liaisons (JOLs) throughout the country. Judicial Fellows and JOLs are active or retired judges who work to improve the administration of justice in impaired driving and other traffic safety matters through education, communication, community outreach activities and collegial and ethical collaboration with judges, and traffic safety stakeholders, locally, regionally, and nationally. While remaining independent and impartial, the JOLs and Judicial Fellows serve as a resource for the judiciary and other members of the highway safety community. This assistance takes the form of peer to-peer judicial education, court case interpretations, guidance, and acting as a liaison between the judiciary and the highway safety community. The JOLs and Judicial Fellows help supplement and support on-going efforts by judicial educators around the country to provide essential information to judges in a number of important areas including evidence based sentencing practices for at-risk populations, DUI Treatment Courts, and reliable substance use and mental health assessments. Through the work of the American Bar Association JOL Program, judges throughout the country can gain a broader foundational understanding of the issues that they face in handling their fast-paced traffic related dockets. Currently 32 active and retired judges serve as JOLs and Judicial Fellows around the country, covering 47 of the 50 States, the District of Columbia, Native Nations, Puerto Rico, the U.S. Virgin Islands, Guam, American Samoa and the Commonwealth of the North Mariana Islands. This program is supported by a grant from the National Highway Traffic Safety Administration.

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As Bob Dylan sang in 1964, "the times they are a changing."

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Impaired Driving Case Essentials

Nov 13–16, 2023 — Reno, NV (This course is offered at no cost to eligible participants. Please contact the registrar's office for eligibility.)

This course provides you with an overview of sentencing practices and evidence-based options for impaired driving traffic offenses including those committed by younger drivers, older drivers, and hardcore DUI defendants. After this course, you will be able to analyze circumstances providing a legal basis for stops, searches, seizures, arrests, and the admissibility of testimonial or physical evidence.

Register here: [Impaired Driving Case Essentials - The National Judicial College \(judges.org\)](https://judges.org)

DON'T FORGET

Resources for responding to the COVID-19 pandemic:

- **SAMHSA's Guidance for Medication-Assisted Treatment (MAT) Opioid Treatment Programs**
<https://www.samhsa.gov/medication-assisted-treatment>
- **Up-to-Date Information for the Substance Use Disorder Treatment field from SAMHSA**
<https://www.samhsa.gov/>
- **Centers for Disease Control and Prevention**
<https://www.cdc.gov/>

Valuable resources for traffic court judges can be found at:

- **National Highway Traffic Safety Administration**
<https://www.nhtsa.gov/>
- **American Bar Association/Judicial Division/NCSCJ**
https://www.americanbar.org/groups/judicial/conferences/specialized_court_judges/

- **Highway to Justice - Archives**
www.americanbar.org/groups/judicial/publications/judicial_division_record_home/highway-to-justice/
- **National Judicial College**
www.judges.org
- **Governors Highway Safety Association: Alcohol Impaired Driving**
www.ghsa.org/issues/alcohol-impaired-driving
- **AAA Foundation for Traffic Safety**
www.aaafoundation.org/
- **National Center for State Courts**
<https://www.ncsc.org/>
- **National Center for DWI Courts**
<https://www.dwicourts.org/>