



# Challenges and Defenses III

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Responses to Common Challenges and Defenses in Impaired Driving Cases

August 2022

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# National Traffic Law Center

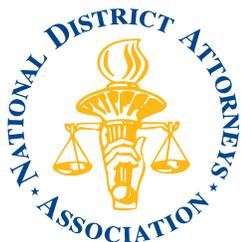
The National District Attorneys Association's National Traffic Law Center (NTLC) is a resource designed to benefit prosecutors, law enforcement, judges, and criminal justice professionals. The mission of NTLC is to improve the quality of justice in traffic safety adjudications by increasing the awareness of highway safety issues through the compilation, creation and dissemination of legal and technical information and by providing training and reference services.

When prosecutors deal with challenges to the use of breath test instruments, blood tests, horizontal gaze nystagmus, crash reconstruction, and other evidence, the NTLC can assist with technical and case law research. Likewise, when faced with inquiries from traffic safety professionals about getting impaired drivers off the road, the NTLC can provide research concerning the effectiveness of administrative license revocation, ignition interlock systems, sobriety checkpoints and much more.

The NTLC has a clearinghouse of resources including case law, research studies, training materials, trial documents, and a directory of expert professionals who work in the fields of crash reconstruction, toxicology, drug recognition, and many others. The information catalogued by the NTLC covers a wide range of topics with emphasis on impaired driving and vehicular homicide issues.

NTLC is a program of the National District Attorneys Association (NDAA). NDAA's mission is to be the voice of America's prosecutors and to support their efforts to protect the rights and safety of the people.

For additional information, contact NDAA or NTLC, 1400 Crystal Drive, Suite 330, Arlington, Virginia 22202, (phone) 703-549-9222, (fax) 703-836-3195, or visit [www.ndaa.org](http://www.ndaa.org).



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# Introduction

A 2020 study of seriously or fatally injured road users at five trauma centers in the United States found that 65% of drivers involved in serious injury and fatal crashes tested positive for at least one drug.<sup>1</sup> The detection and prosecution of impaired driving cases requires specialized knowledge and skill to combat the unique challenges and defenses presented. An officer or a prosecutor willing to take on this difficult task can keep impaired drivers off the roadways, thereby preventing deaths and injuries and positively impacting public safety.

Prosecutors are frequently challenged by impaired driving cases due to the complexity of the scientific evidence involved. New and/or inexperienced prosecutors often face a highly-trained and specialized defense bar that is well-versed in impaired driving case law and who use well-established tactics to defend their clients. An impaired<sup>2</sup> driving prosecutor must understand the science, law enforcement detection training, and terminology—knowledge and skills that were never taught in law school. To successfully prosecute an impaired driving case, a prosecutor will need to effectively examine expert witnesses—both for the State and the defense. This requires proper preparation to be effective. An impaired driving prosecutor will also need to develop skills to properly present these cases to jurors; jurors that may possibly be sympathetic to an impaired driving defendant.

To help prosecutors prepare for the difficult challenges and defenses presented in impaired driving cases, the National Traffic Law Center (NTLC) has previously published two monographs. *Overcoming Impaired Driving Defenses*,<sup>3</sup> published in 2003 thanks to a contribution from a charitable foundation, discusses such defense challenges as invalid traffic stops, arrests and *Miranda* issues, as well as common trial tactics of attacking the investigation, such as driving observations, personal contact, field sobriety tests and breath testing. *Challenges and Defenses II, Claims and Responses to Common Challenges and Defenses in Driving While Impaired Cases*,<sup>4</sup>

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<sup>1</sup> NHTSA Traffic Safety Facts, Research Note, “Update to Special Reports on Traffic Safety During the COVID-19 Public Health Emergency: Third Quarter Data,” January 2021, DOT HS 813 069.

<sup>2</sup> Whether impaired by alcohol, drugs, or polysubstance.

<sup>3</sup> Available by clicking on [Overcoming Impaired Driving Defenses](#) or by visiting NDAA’s Publications page and scrolling to Traffic Law Publications at [ndaa.org/resources/publications-videos/](https://ndaa.org/resources/publications-videos/).

<sup>4</sup> Available by clicking on [Challenges and Defenses II, Claims and Responses to Common Challenges and Defenses in Driving While Impaired Cases](#) or by visiting NDAA’s Publications page and scrolling to Traffic Law Publications at [ndaa.org/resources/publications-videos/](https://ndaa.org/resources/publications-videos/).

published in 2013 as part of a prior cooperative agreement with the National Highway Traffic Safety Administration, discusses defense challenges including prescription and over-the-counter medication DUIs, alternative explanations for impairment like diabetes and GERD, measurement of uncertainty, and issues surrounding blood draws and blood testing. These monographs are available for free and may be downloaded from the National District Attorneys Association Web site at [www.ndaa.org](http://www.ndaa.org).

Although many of the topics in this monograph also relate to alcohol-impaired driving, this monograph, *Challenges and Defenses III*, was developed to assist prosecutors and law enforcement in understanding the nature of the challenges often faced in impaired driving cases with a drug-impaired driver. It will assist prosecutors in formulating effective responses to these newer issues and include challenges relating to the toxicology witness, opinion, and report; an incomplete drug influence evaluation; recalled or expired equipment; driving proofs, or the lack thereof; and blood draws and search warrants. Additionally, this monograph discusses behavioral signs of impairment and the defense of alternative explanations relating to attention deficit-hyperactivity disorder, autism spectrum disorder, and auto-brewery. Lastly, this monograph provides suggestions to consider when faced with the unique challenge of choosing a jury in a drug-impaired driving case.

# Challenges relating to toxicology expert, opinion, and testimony

## The toxicologist

It is extremely important for a prosecutor handling a drug-impaired driving case to meet with the toxicologist pre-trial to understand the specific limitations in his/her testimony and to review together any questions or potential challenges to the toxicology. It is critical for a prosecutor to understand the types of testimony a toxicologist may offer at trial and what he/she may not.

A toxicologist may be an expert witness, possessing varying degrees of qualifications. A toxicologist may also be a fact witness; his/her testimony may be necessary to establish basic factors for trial, such as the work performed in the laboratory, scientific principles for the testing performed, information regarding the laboratory's quality assurance program, and chain of custody. Any toxicologist will be able to provide this basic level of testimony. Greater expertise will be required when result interpretation and opinions are necessary during trial. Not all toxicologists will meet this level of expert testimony.

Appropriate opinions and testimony by a toxicologist include the following:<sup>5</sup>

Opinion/Testimony	Level of expertise
Lab report, analytical work, limitations in testing (e.g., cutoffs, scope, etc.)	Basic—bench testing level knowledge, <sup>6</sup> on the job training
Qualify a reported concentration in the context of a case as relevant to a therapeutic range, supported by references, databases and/or other pertinent information	Intermediate—knowledge of testing procedures with added information/education on therapeutic ranges and drug uses. Continuing education and on the job training are sufficient.
Pharmacodynamics and pharmacokinetics of drugs or other chemicals	Advanced—continuing education specific to pharmacology or advanced degree in the field.

<sup>5</sup> The information in this table includes excerpts from the American Academy of Forensic Sciences *Guidelines for Opinions and Testimony in Forensic Toxicology*, ANSI/ASB Best Practice Recommendation 037, First Edition, 2019.

<sup>6</sup> Bench testing level knowledge means the toxicologist has knowledge of the procedures and practices performed in the laboratory to achieve toxicology results.

Opinion/Testimony	Level of expertise
Impact of the presence, absence and stability of drugs	Advanced—continuing education regarding drug stability and drug metabolism or advanced degree in the field
Impairment for the average individual, including effects consistent with the observations provided in hypotheticals and/or evidence	Advanced—continuing education regarding drug impairment, possibly by general class or advanced degree in the field.
Perform ethanol back extrapolation	Intermediate—less complex knowledge required than drugs other than alcohol. In-house training at the laboratory is sufficient.

Inappropriate opinions and testimony are also important to identify and understand. For example, a toxicologist should not opine as to the absolute cause of death of an individual. The forensic pathologist or Medical Examiner must make this determination. This does not prevent a toxicologist from testifying about the potential impact of any particular substance relative to the case. Behavioral intention or a specific degree of an individual's impairment is outside of the purview of a toxicologist's testimony. Calculations for drugs other than ethanol should not be performed; nor should the calculation of drug dose consumed based on a drug concentration on the laboratory report. Any interpretation of toxicology results must be presented in context of the case for the specific individual. Words or phrases such as "scientific certainty" or "reasonable degree of scientific certainty" should also not be permitted unless required by jurisdictional regulations.<sup>7</sup>

It may be intimidating for a prosecutor to introduce a toxicologist as an expert witness when faced with an opposing expert with advanced degrees and expertise. A toxicologist does not need to be a pharmacologist to possess the ability to testify as a witness in the areas of pharmacokinetics and pharmacodynamics. Continuing education opportunities, along with advanced degrees, exist that fulfill the need for education in this area. A prosecutor should solicit testimony relating to specific courses and workshops that pertain to pharmacology during direct examination and focus on the applicability of the continuing education and/or advanced degree to the specific casework at the laboratory.<sup>8</sup>

<sup>7</sup> [Guidelines for Opinions and Testimony in Forensic Toxicology, ANSI/ASB Best Practice Recommendation 037, First Edition, 2019.](#)

<sup>8</sup> A prosecutor may wish to review the NTLC's [Drug Toxicology for Prosecutors](#) monograph. Appendix 2 contains some sample predicate questions for a toxicologist. Although published in 2004, this monograph contains useful information for prosecutors. An updated version is currently being prepared and will be published Fall 2022. Additionally, a prosecutor may wish to review the NTLC's [The Criminal Justice System: A Guide for Law Enforcement Officers and Expert Witnesses in Impaired Driving Cases](#) monograph, published in February 2007.

Staffing retention is a common issue in forensic laboratories. This may create a challenge when the testing analyst a prosecutor subpoenas for trial is no longer employed by the laboratory. A substitute analyst is often needed to provide the necessary testimony in the absence of the original analyst. No analyst retains independent recollection of any given sample. A substitute analyst identified by the laboratory may be able to offer the same level of testimony as the original analyst and should also have access to all of the laboratory's records that may be required for trial. A prosecutor should keep in mind, an analyst no longer employed by the laboratory is unlikely to have access to laboratory records or documents and, therefore, may not be the appropriate witness for trial.

It is important for a prosecutor to be familiar with the rules in his/her jurisdiction regarding the use of substitute analysts. Generally, if the testifying analyst reviews the testing information and forms his/her own opinion, the use of a substitute analyst does not present a problem. This issue was addressed in *Bullcoming v. New Mexico*.<sup>9</sup> There, the principal evidence presented against the defendant in his trial for driving while intoxicated was "a forensic laboratory report certifying that [his] blood-alcohol concentration was well above the [legal] threshold."<sup>10</sup> Rather than the analyst who signed the certification, the State called another analyst who was familiar with the laboratory's testing procedures but had not observed nor participated in the actual test. The Court held that this did not satisfy Bullcoming's rights under the Confrontation Clause because the testifying analyst provided mere "surrogate testimony" without expressing any "'independent opinion' concerning Bullcoming's BAC."<sup>11</sup> Therefore, to satisfy the Confrontation Clause, the substitute analyst must not merely read from a lab report: the jury can do that on its own. Instead, the substitute analyst must review the testing methods, the results, and form an independent opinion.

The following areas are some of the basic ways a defendant will attack a toxicological expert and/or the toxicology results.

### Training and experience of the witness

In order to qualify a witness as an expert, a prosecutor must first establish a foundation for the witness's expertise. A prosecutor is strongly encouraged to spend time conversing with the analyst about his/her training and experience beyond the expert's curriculum vitae (CV). The CV will contain overarching information, but often does not reflect the amount of time and training the witness possesses. The toxicologist should be questioned as to the instruments and methods employed, from sample integrity and security through completed analysis. Asking questions beyond the basic "where did you go to school" will assist in revealing the competence of the witness in his/her field. Although

A prosecutor is strongly encouraged to spend time conversing with the analyst about his/her training and experience.

<sup>9</sup> *Bullcoming v. New Mexico*, 564 U.S. 647, 131 S. Ct. 2705 (2011).

<sup>10</sup> *Id.* at 651, 2709.

<sup>11</sup> *Id.* at 662, 2715–16.

attacking the witness on his/her training and experience is rarely how an attorney will defend the defendant, a thorough series of questions before tendering the witness as an expert will assist in combatting this possibility.

### Laboratory quality control and quality assurance

If a defendant is unable to attack the person (*e.g.*, the toxicologist or analyst), the defendant may try to attack the institution (*e.g.*, the laboratory). The toxicologist and the prosecutor need to be prepared for questions regarding Quality Control (QC) and Quality Assurance (QA). Quality control refers to the efforts and procedures the lab puts in place to ensure the quality and accuracy of results being collected using the methodologies chosen for any given test. Asking questions to allow the analyst to testify about the accuracy of the test and detailing the QC used to ensure the instrument was working properly are important when laying the foundation for the test results. Quality assurance addresses the actions necessary to provide confidence in all analytical results and the overall integrity of the operation of the laboratory. Laboratories will have an overarching QA plan, which will include good laboratory practices, chain of custody tracking, participation in proficiency testing, QC parameters and documentation, and the overall integrity of the results. A prosecutor should include these types of questions to elicit testimony about the routine QA policies and procedures everyone in the laboratory follows to ensure reliable results.

### Substitute analyst

As discussed above, the use of a substitute analyst may create issues. The issues are not insurmountable but do require that the prosecutor prepare with the toxicologist in advance of trial to make sure the correct questions are asked in court. The analyst should be able to say he/she reviewed the results and, based on his/her review and combined with his/her own expertise, formed an independent conclusion. Defense attorneys will try to suppress the results based on the Confrontation Clause. In most jurisdictions, the Rules of Evidence and case law will prevent suppression of lab results. Experts are allowed to form opinions based on data and testing performed by others. The key is an independent opinion.

### No drugs detected or detection of a drug within a therapeutic range

When the toxicology report from the laboratory indicates no drugs detected in the sample or the drug concentration is in the therapeutic range, a defendant may argue it equates to no impairment. The scope of testing at the laboratory, however, may not include all drugs at all concentrations, particularly Novel Psychoactive Substances (NPS). This issue typically arises when the defendant introduces evidence that the amount of the drug found in his/her system, or the lack of any drug detected, would not produce impairment. The defense is raised almost exclusively where the quantitative level of the drug measures near or below the minimum therapeutic dosage level or, in the event of a negative drug report, the absence of any drug detected. Many jurors may be under the

Experts are allowed to form opinions based on data and testing performed by others.

misconception a reported drug concentration which falls within the therapeutic range for that drug means the individual is not impaired and “safe” to operate a motor vehicle. The concept that drugs may cause impairment, even while taken therapeutically, may be outside their daily understanding of drugs and how they work. In addition, if a laboratory report indicates there are no drugs present, this could be due to the inability of the laboratory to detect all drugs in existence and at low concentrations.

To effectively combat this defense and the jurors’ lack of understanding, a prosecutor needs a working knowledge of any drug detected and its effects. A drug handbook, such as the *Physicians’ Desk Reference* (PDR),<sup>12</sup> NHTSA’s *Drugs and Human Performance Fact Sheets*,<sup>13</sup> or a similar publication can be a good source for this information. Likewise, a prosecutor should procure any available pharmacy literature, inserts and packaging that come with a prescription or over-the-counter (OTC) drugs.

If available, a prosecutor should speak with a toxicologist about the effects of the drug, what the quantitative amount means, and what the lab protocols were for testing. Understand the scope of testing and the limitations which may exist with the current testing workflows and instrumentation, such as cutoff limits and sensitivity for any given test. It is important to remember, toxicology does not measure impairment, it measures the amount of drug in the individual’s system at the time the blood was drawn. A prosecutor should review with the toxicologist whether the therapeutic, or even lower dosage, of the drug could have an impairing effect and what those effects may be. Also review the test results specific to the defendant and what, if any, impairing effect that amount may have. Some drugs, by their very nature and even when taken properly, can cause impairment for driving. For example, sleep aids taken at a therapeutic level cause sleep. Furthermore, many NPS are not detectable by many laboratories, which may lead to a false negative on a toxicology report. Many drugs lack stability in a drawn blood sample, a prosecutor should, therefore, review any issues that may exist due to the timing between the incident and blood draw and the testing performed by the laboratory. A person’s tolerance and history with a drug may affect the interpretation of a drug result; a prosecutor should consult with his/her toxicologist to find out what information is necessary to include this information in their opinion.

If possible, a prosecutor should involve a drug recognition expert (DRE) in the case. A DRE’s ability to describe drug impairment and driving behavior may significantly assist in the presentation of the prosecutor’s case. The information obtained from the toxicologist can be tied together with the DRE assessment and signs of impairment observed by the law enforcement officers and others. While the toxicologist cannot testify about the impairment of the individual in a

It is important to remember, toxicology does not measure impairment, it measures the amount of drug in the individual’s system at the time the blood was drawn.

<sup>12</sup> The *Physicians’ Desk Reference* is no longer available in print, but the drug information is available for free at [www.PDR.net](http://www.PDR.net).

<sup>13</sup> Couper, F.J. and Logan, B.K. *Drugs and Human Performance Fact Sheets*, April 2014 (Revised), National Highway Traffic Safety Administration, Washington, D.C., DOT HS 908 725.

case, he/she can put the toxicology results in context of the case. A negative drug result from the laboratory does not negate the opinion of impairment from the observations of the DRE.

There is a lack of scientific data which supports the claim that a particular concentration of any drug will cause impairment in every individual. Each case is unique and must be examined in context with all other evidence collected such as results from the Standardized Field Sobriety Tests (SFSTs), DRE evaluation, and other observations.

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# Challenges relating to an incomplete drug influence (DRE) protocol

Ideally, in a drug impaired driving investigation, a suspect consents to a full 12-step DRE or Drug Recognition Evaluation. There are many reasons why one or more steps may not be completed. Those reasons may include a suspect's refusal to cooperate, an inability to complete a step due to the suspect's condition, an inability to obtain a toxicology sample, or some of the steps are suppressed. Whatever the reason, special considerations need to be made before a prosecutor proceeds with an incomplete protocol case. In addition, there are several challenges the defense can raise when the protocol is not complete. It is important for a prosecutor to evaluate the evidence in the case and anticipate how to handle possible challenges.

In the situation of an incomplete protocol, a prosecutor should first consider the admissibility of the evidence. A prosecutor should also determine what, if any, restrictions are placed on the admissibility of the completed steps due to reasons such as the case law or statutes in his/her jurisdiction or a judge's ruling. In some states, a full 12-step protocol may be admissible as scientific evidence, but not when there are less than twelve steps completed. In other states, there may not be any case law or statutes addressing the issue of a complete versus incomplete protocol. When there is a challenge to the admissibility of the completed steps of an incomplete protocol, the court may require the prosecutor to lay a foundation to establish the admissibility of each of the completed steps. If needed, a prosecutor should become familiar with favorable case law in other states as a means to guide the court. The defense may argue in order for each step to be admitted, the state needs to lay a scientific foundation. In response, a prosecutor should explain to the court the step is neither new nor novel. For example, taking someone's pulse or blood pressure is neither new nor novel and, therefore, does not require the DRE to have specialized medical or scientific training or expertise to complete the step. Also, the trier of fact does not need a scientific expert to explain the concept of a person's pulse, blood pressure, or temperature being outside an average range. Ultimately, the prosecutor needs to take the time to go over each completed step and determine a basis for the admissibility of each.

Interpretation of the results of each completed step likely requires further foundation. Laying the foundation requires the prosecutor to prepare in advance of the court proceeding. Reliance on the DRE's training and experience is a fundamental basis of the foundation of admissibility. The prosecutor should review the DRE participant and instructor manuals<sup>14</sup> for each step administered and what the DRE student is taught. The prosecutor should also confer with the DRE in advance of any court proceeding to review the material taught to the DRE (*i.e.*, the DRE's training), the DRE's experience, and to ask the DRE questions relevant to the particular issue(s) being raised.

Many DREs may also have additional training (such as being an EMT), which provide them with knowledge and insight regarding drug impairment and how each indicator of drug impairment affects the safe operation of a vehicle. Every DRE is required to maintain a curriculum vitae ("CV"). The prosecutor should review the DRE's CV for trainings relevant to the particular case. The need to spend time to thoroughly review the DRE's education and certification process as well as the substantive material for the drug category(ies) to be discussed cannot be emphasized enough. A prosecutor may also want to reach out to his/her state traffic safety resource prosecutor and/or NTLC for additional assistance.<sup>15</sup>

Below are some challenges and possible responses<sup>16</sup> as it relates to an incomplete protocol:

### **If the whole protocol is not complete, none of the protocol is admissible**

This all-or-nothing defense assumes incorrectly the DRE's opinion is materially dependent on the results of each and every step. If the DRE can render an opinion with fewer than the twelve steps, the prosecutor should argue the lack of a completed protocol should go to the weight, not admissibility, of the DRE's opinion. Some steps are more significant than others, depending on the drug impairing the subject, because each drug category has different effects on the body.<sup>17</sup> Stimulants, for example, do not cause horizontal gaze nystagmus (HGN). Thus, the absence of an HGN test may not be material to the DRE's ultimate

Reliance on the DRE's training and experience is a fundamental basis of the foundation of admissibility.

<sup>14</sup> The DRE participant and instructor materials are publicly available at [www.nhtsa.gov/enforcement-justice-services/drug-evaluation-and-classification-program-advanced-roadside-impaired](http://www.nhtsa.gov/enforcement-justice-services/drug-evaluation-and-classification-program-advanced-roadside-impaired).

<sup>15</sup> A current list of [Traffic Safety Resource Prosecutors](#) and contact information is available on the NDAA website.

<sup>16</sup> For additional information on the common defense challenges to the DRE protocol, please refer to Section VIII of the NTLC's *Saving Lives and Preventing Crashes, The Drug Evaluation and Classification (DEC) Program* monograph published in 2018.

<sup>17</sup> Appendix 1 of NTLC's *Saving Lives and Preventing Crashes, The Drug Evaluation and Classification (DEC) Program* contains the 2018 DRE Drug Matrix—Indicators Consistent with Drug Categories.

opinion regarding stimulants. Likewise, if a person exhibits pinpoint pupils with little or no reaction to light, flaccid muscle tone, and slowed speech, the absence of psychophysical testing has less impact on the DRE's opinion regarding narcotic analgesics. In other words, each situation needs to be analyzed to determine if the missing information is material to the DRE's opinion. When the missing information is significant, the prosecutor should keep in mind the DRE may need to qualify the opinion. The prosecutor and DRE must discuss what evidence exists in support of the DRE's opinion and prepare to explain the basis for the opinion. Depending on the evidence and restrictions within the state, the DRE may also testify the observations of the subject "are consistent with" impairment from a specific drug category.

### **If all twelve steps are not completed, the DRE cannot testify as an "expert"**

The DRE is trained to follow a 12-step protocol and render an opinion that a person is under the influence of a specific drug category or combination of categories. This does not necessarily mean the DRE is unable to render *any* opinion unless all twelve steps are completed. Rather, the DRE opinion is determined on a case-by-case basis. The DRE can still be endorsed as an expert based on his/her training and experience. After he/she is endorsed, missing steps, as stated above, do not preclude DRE testimony. Instead, the argument should be that the missing steps go to the weight, not admissibility of the DRE opinion. If the person has ambulation issues, for example, the walk and turn and one leg stand tests may not be possible. However, the remainder of the steps in the protocol may provide sufficient information for the DRE to render an opinion. For instance, if the subject with ambulation issues also had pinpoint pupils with little or no reaction to direct light, a pulse under 60 beats per minute, and flaccid muscle tone, the DRE would likely conclude the person was under the influence of a narcotic analgesic. The reason for this is described in the DRE materials; only one drug category, narcotic analgesic, causes these indicators. Therefore, the results of the walk and turn and one leg stand are not material to reach the conclusion. Ultimately, it is a DRE's training and experience that supports his/her opinion.

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# Challenges relating to recalled or expired equipment

On occasion, a prosecutor may have to respond to a claim that a crucial piece of evidence in the case was subject to a recall notice or warning and, therefore, the case cannot proceed (*i.e.*, the case should be dismissed). The recall could relate to a vehicle, for example, and may be relevant in an impaired driving crash case. Another example of a recall with potential impact in an impaired driving case is the case of recalled blood sample tubes. Whatever the evidence the defendant claims is invalid due to a recall, a prosecutor needs to understand and appreciate the issues that may arise when an evidentiary item has been recalled.

## Verify evidence was subject to recall

Prior to taking any action in a case involving a defendant's claim of a recall, a prosecutor should first verify that a recall was, in fact, in place. Although uncommon, there have been instances in which a defendant has claimed a recall issue when no recall existed. It is crucial that a prosecutor independently verify any recall notice a defendant may allege.

## Vehicle recalls

If a defendant raises an issue relating to the recall of a vehicle, a prosecutor is easily able to verify the validity of the claim by simply checking with the National Highway Traffic Safety Administration (NHTSA). NHTSA makes this easy to do; a prosecutor can enter a vehicle identification number (VIN) or a vehicle's make and model into the NHTSA Recall Website.<sup>18</sup> By doing this, any formal recall will be revealed. A prosecutor may also use this webpage to search for safety issues and recalls of other various pieces of equipment such as tires or car seats. Even if a vehicle has no formal recall notice, this webpage will also provide information if a vehicle is subject to a "Manufacture Communication"—also called a "Technical Service Bulletin"—or a "Consumer Complaint."

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<sup>18</sup> [www.nhtsa.gov/recalls](http://www.nhtsa.gov/recalls)

A vehicle owner may not always know his/her recalled vehicle needs to be repaired. NHTSA's new search tool allows an individual to enter a VIN to quickly learn if a specific vehicle has not been repaired as part of a safety recall in the last 15 years. What this VIN search tool covers:

- Safety recalls that are incomplete on a vehicle;
- Safety recalls conducted over the past 15 calendar years; and
- Safety recalls conducted by major light auto automakers, including motorcycle manufacturers.<sup>19</sup>

A prosecutor should be aware of what this search tool does not cover:

- Completed safety recall information;
- Manufacturer customer service or other non-safety recall campaigns;
- International vehicles;
- Very recently announced safety recalls for which not all VINs have been identified;
- Safety recalls that are more than 15 years old (except where a manufacturer offers more coverage); and
- Safety recalls conducted by small vehicle manufacturers, including some ultra-luxury brands and specialty applications.<sup>20</sup>

A prosecutor should consult with a crash reconstruction expert to determine what, if any, potential impact a vehicle recall may have on a case. If a prosecutor does not have access to a crash reconstructionist, he/she should consult with his/her state Traffic Safety Resource Prosecutor (TSRP) and/or NTLC for recommendations on experts in this field.

### Recalls of other types of evidence

If a defendant alleges the recall of another type of evidence (*e.g.*, the tubes used in the collection of the defendant's blood following the arrest), the process becomes a bit more complicated. The prosecutor will need to determine the authenticity of any recall claim. A prosecutor should first start with the corporate manufacturer of the evidentiary item. Generally, any manufactured item regulated by the federal or a state government and is the subject of a recall, will be identified in a specific recall notice issued by the manufacturer. A prosecutor should carefully review the notice and contact the manufacturer via the contact information listed on the recall notice. If no such contact information is provided, a prosecutor should be

A prosecutor should consult with a crash reconstruction expert to determine what, if any, potential impact a vehicle recall may have on a case.

<sup>19</sup> [vinrcl.safercar.gov/vin/](http://vinrcl.safercar.gov/vin/)

<sup>20</sup> *Id.*

skeptical of the legitimacy of the defendant's claimed recall and attempt to contact the manufacturer's office of corporate counsel to verify and discuss the nature of the recall.

### Recall has no impact on case

If a defendant claims an issue of recall, and a prosecutor determines a recall did in fact exist, the prosecutor will have to ascertain whether the recall impacted the case. If the recall would have no impact on the case, a prosecutor should seek to file a motion in limine to prevent the introduction of such information.

If the recall allegation relates to other evidentiary items, the prosecutor is urged to consult with his/her state TSRP and/or NTLC for recommendations on subject matter experts to discuss the potential impacts of the recall.

### Special note re: recalls of blood test tube vials

In June 2019, one of the main manufacturers of blood test vials, BD, issued a recall regarding its Vacutainer® Fluoride Tubes for Blood Alcohol Determinations.<sup>21</sup> These tubes are the gray-top tubes traditionally contained within evidentiary blood kits. While a defendant may claim such a recall means the blood evidence in an impaired driving case is no longer admissible, a prosecutor should carefully evaluate the following steps prior to making any decisions about the evidence.

First, a prosecutor needs to carefully examine the evidence in his/her case to determine if any of the specifically identified recalled vials were actually used in the case. The prosecutor should check specific information on the blood vial in evidence—either from documentation, photographs or a personal examination of the vial—to check the manufacturer, lot number and expiration date. If the blood vial in evidence does not match the specific recalled lot, the prosecutor should consider filing a motion in limine to exclude the argument. In the case of the Vacutainer tubes, only a very small number of vials were distributed under the specific lot number and with a specific expiration date, thereby minimizing the likelihood the vial used in a given case was actually subjected to the recall.

Next, if a prosecutor discovers a specific lot was used in his/her case, the prosecutor is encouraged to reach out to his/her state TSRP and/or NTLC for recommendations on toxicology experts who could refute the claim. Scientific studies exist indicating the use of a recalled tube should have little to no impact on blood alcohol concentrations.<sup>22</sup>

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<sup>21</sup> In this case, the manufacturer issued the recall based on confirmation a lot of the tubes did not contain the additive preservative within the tube.

<sup>22</sup> See Rodda et al. "Inferences and Legal Considerations Following a Blood Collection Tube Recall," *Journal of Analytical Toxicology*, Feb. 13, 2021, 45 (2), pp. 211–214.

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# Challenges relating to driving proofs

Prior to participating in an impaired driving trial, it may not be unusual for the average juror to believe there will be an emphasis placed on the evidence of the defendant's bad driving. Sometimes, however, a law enforcement officer's attention is alerted to a vehicle for an equipment violation. It is only after the officer has contact with the driver that he observes evidence of the driver's impairment. Additionally, in most states, there is an alternate manner to prove an impaired driving case that does not involve observed driving at all. This alternate theory is proof the defendant was in "actual, physical control" of the vehicle. Under this theory, the prosecutor need not prove a suspect was driving, but that he/she was in actual, physical control of a vehicle. This theory of proof is typically found in cases in which a defendant is so impaired or intoxicated that he/she is unconscious in the driver's seat or elsewhere in the vehicle, "sleeping it off." While this is a sound legal theory upon which to proceed, it also presents a unique set of challenges a prosecutor should understand to be success at trial.<sup>23</sup>

## Lack of evidence of "bad" driving

Imagine a law enforcement officer performs a stop of a vehicle for an expired registration tag. After contacting the driver, the officer observes signs of impairment (e.g., odor of alcohol, odor of marijuana, etc.), which causes the officer to investigate the driver for impaired driving. The driver is arrested, charged, and now faces a trial. At trial, the defendant may try to argue he/she was not impaired, because there was no evidence of "bad driving."

A common challenge or defense in impaired driving cases involve the lack of observed "bad driving." Not every impaired driving case is going to have observations of "bad driving," such as weaving, excessive speeding, or a crash by the defendant. Although "bad driving" is great evidence of impaired driving, it is not essential for a successful prosecution. Many states have a jury instruction stating, in part, "The State does not need to prove how the defendant was driving.

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<sup>23</sup> A prosecutor should remember there are three phases of an impaired driving investigation. Any observations of "bad driving" are found in phase 1, but each investigation depends on the totality of the evidence. If the phase 1 evidence is limited (i.e., no bad driving), then prosecutors must focus on the other two phases. See NTLIC's [Investigation and Prosecution of Cannabis-Impaired Driving Cases](#) monograph, published in July 2020; See also NHTSA's [DWI Detection and Standardized Field Sobriety Testing \(SFST\)—Instructor Guide](#) (revised 02/2018).

However, you may consider [his] [her] manner of driving in deciding if [he] [she] was under the influence of alcohol.”<sup>24</sup>

It is important for a prosecutor to remember that “bad driving” is like motive in a criminal case. Motive is not an element in a criminal case just like “bad driving” is not an element in an impaired driving case. Usually, impaired driving requires proof of two things: (1) the defendant was operating<sup>25</sup> a motor vehicle; and (2) the defendant was impaired.<sup>26</sup> It is also important to note that although “bad driving” is indicative of impaired driving “at least 35 percent of the time[,]” this means approximately 65% of the time there may be no “bad driving.”<sup>27</sup>

### Actual physical control (defendant in vehicle)

In any impaired driving case involving actual, physical control, a prosecutor needs to properly prepare for the defendant’s inevitable appeal to juror sympathy, beginning with jury selection. Potential jurors are often surprised to learn a person can be convicted of impaired driving when he/she was not actually driving. A prosecutor should, therefore, employ questioning to determine whether such a potential juror can truly follow the law. A great way for a prosecutor to delve into this area is to start by using a simple “silly law” hypothetical, such as the “stolen pen” scenario.

Ladies and gentlemen, today we are going to ask you to follow the law. The judge will explain the law which applies to the case, and you will be required to follow it, regardless of your feelings about the law.

Does everyone understand that? Does everyone agree with me that you will follow the law that the judge will explain to you?

Okay, great. Now, I have an example for you. This pen that I am holding in my hand is not a pen that I bought myself. Instead, this is a pen that my office has provided me. And, let me explain to you that there is a law in place in this courthouse regarding office pens; it states that any office-provided pen may only be used in the courthouse and it cannot be removed from this courthouse. Removal of any office-provided pen is a crime, punishable by this court.

Does that law seem silly to any of you?

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<sup>24</sup> See, for example, Iowa Criminal Jury Instruction 2500.8 OWI—Method Of Operation (*emphasis added*); see also I.C.A. § 321J.2.

<sup>25</sup> Each state’s impaired driving statute has a specific definition of operation.

<sup>26</sup> In Iowa, for example, there are three alternatives to prove impairment: (1) BAC over .08 g/dL, (2) any amount of a substance as measured in the blood or urine; or (3) under the influence of drugs/alcohol. See I.C.A. § 321J.2. In Tennessee, a person is precluded from driving a motor vehicle while: (1) impaired; (2) over .08; or (3) a .04 violation for commercial motor vehicles. See T.C.A. § 55-10-401.

<sup>27</sup> *The Visual Detection of DWI Motorists*, U.S. Department of Transportation, National Highway Traffic Safety Administration; see also *DWI Detection and Standardized Field Sobriety Testing (SFST)—Instructor Guide* (revised 02/2018).

But, you understand that law?

Okay. Now, with that in mind, what if I told you that last night, I took this pen home with me; I simply decided to take it, and I used it at home last night to make notes for the trial we are now here for today.

What do you think of that? How many of you would be able to follow that law and convict me?

The use of that—or any other similar “silly law” hypothetical—should help the prosecutor to find jurors who can properly follow the law regardless of a personal opinion about the law. The prosecutor can then build upon the foundation established by the “silly law” hypothetical and use his/her jurisdiction’s jury instructions on actual, physical control to make further inquiry of a potential juror about whether he/she could follow the law and convict, even if a person had not been driving.

In addition to questioning during jury selection, a prosecutor should be prepared to address any potential juror sympathy through the presentation of evidence during the trial. Although it may be easy for a juror to think that a defendant did the “right thing” and pulled over instead of driving, this sentiment can be overcome through the presentation of evidence. A prosecutor should be cognizant of any evidence that shows the defendant was, in fact at some point, driving while under the influence. This can be demonstrated through evidence from video and/or photographs. Still images taken from a body-worn camera or dash-camera system can be used to demonstrate to the jury the extreme level of impairment that is often found in an actual, physical control case. If evidence of the heightened level of impairment can be properly presented to the jury, a prosecutor will have a much better chance of overcoming this defense claim.

### **Actual physical control (no witness to defendant in vehicle)**

In an impaired driving case, evidence may exist of the defendant driving the vehicle, commonly in the form of a law enforcement officer’s observations of the defendant driving or a lay witness involved in a crash with the defendant. Sometimes, however, there is no evidence of the defendant at the wheel of or inside the vehicle. This will require the prosecutor to prove the control using circumstantial evidence.

One of the key methods of proving actual physical control using circumstantial evidence involves the vehicle’s keys. A prosecutor should always verify where the keys were located when the officer initially contacted the defendant. If no one else is around and the defendant is in possession of the keys, it is a very strong indicator that the suspect had been driving. A prosecutor should be cautioned, however, to not simply use evidence of the keys unless there is evidence the keys found in the defendant’s possession could start the vehicle. This is easily demonstrated if the vehicle was running or if the keys were found in the ignition. If those are not the facts, it can also be demonstrated through a testifying officer that he/she tested the keys in the vehicle or by a tow operator indicating he/she was able to use the keys in towing the vehicle.

Finally, a prosecutor should be cautious about testimony that merely states “the car was running;” newer technologies frequently equip a vehicle with a push-to-start key fob and no longer use a key inserted into an ignition.

The vehicle registration is another strong piece of circumstantial evidence to prove actual physical control. If the vehicle is registered to the suspect, and nobody else is around, it is a strong indicator the defendant had been driving his/her own vehicle. When using this type of evidence, a prosecutor should obtain a certified copy of the vehicle registration from the state’s motor vehicle office to avoid any hearsay issues. With a certified copy of the registration, a prosecutor should not have any issue admitting this evidence under a hearsay exception. If relying on registration evidence, a prosecutor is encouraged to request it well in advance of trial since it may take several days or weeks to obtain.

Injuries also provide excellent circumstantial evidence of vehicle control. If an individual was driving and was involved in a vehicle crash, he/she may have injuries consistent with the positioning of his/her body in the vehicle. A prosecutor should discuss potential suspect injuries with the investigating law enforcement officers. Certain injuries are consistent with driving or being seated in the driver’s seat. Bruising that runs from a defendant’s left shoulder down to the right side of his/her torso likely indicate a driver’s seat belt; bruising on a defendant’s face or chest may be consistent with an impact to the steering wheel; and powder or burns on a defendant’s body or clothing may be consistent with airbag deployment. These types of observations can help a prosecutor to place a suspect behind the wheel. A prosecutor should not rely only on the law enforcement officer’s initial observations at the scene; a prosecutor should carefully review any photos taken of the suspect, especially booking photos. Often, injuries are not immediately apparent to the law enforcement officer on scene and only appear later. Routine booking photos of a suspect are sometimes taken much later, upon arrival at the jail, and may reveal bruising that was not initially apparent on scene. Finally, if the case is one in which blood was found inside the vehicle, a prosecutor may consider obtaining a search warrant both for the blood in the vehicle and for the suspect’s blood or a buccal swab and conduct forensic testing on the samples. This is best for a case in which the blood in the vehicle is clearly from the incident in question to refute any argument that the suspect’s DNA was in the vehicle from a prior occasion, especially if the vehicle is registered to the suspect.

Injuries also provide excellent circumstantial evidence of vehicle control.

### **Actual physical control (inoperability of vehicle)**

Yet another way in which actual physical control becomes an issue is when the vehicle is inoperable. In crash cases, the vehicle may impact another object, such as a tree or a guardrail, and become inoperable prior to law enforcement arrival on the scene. A prosecutor needs to be familiar with the specific law regarding inoperability in his/her jurisdiction. In some states, a defense of inoperability is permitted to a charge of impaired driving, but the defense is usually prohibited if the prosecutor can prove the defendant was driving the vehicle immediately prior to it becoming inoperable. Additionally, some jurisdictions may permit an actual physical control theory for impaired driving if the vehicle could be rendered operable using reasonable means. Typically, those jurisdictions do not require a prosecutor prove a vehicle is capable of immediate self-propelled mobility. Under this theory, some states permit a determination of actual physical control even in cases where a vehicle runs out of gas or has a dead battery as a suspect could easily obtain gas or have the vehicle jump-started. These legal theories are very state-specific, so a prosecutor is encouraged to be familiar with case law in his/her jurisdiction on the proof requirements for actual physical control.

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# Challenges relating to blood draws and search warrants<sup>28</sup>

Many drug-impaired driving cases rely on the results of a blood test to determine what the suspect may have in his/her body at the time of the blood draw. As a result, defendants frequently challenge the admissibility of the blood results for a variety of reasons. The following are common challenges a prosecutor may face in a drug-impaired driving case.

## Inadmissibility of blood evidence due to unconstitutional search

A blood draw is a search like any other Fourth Amendment search. For this reason, it may be taken pursuant to a search warrant based on probable cause or one of the accepted exceptions to the search warrant requirement. In impaired driving cases, exigent circumstances and voluntary consent are the two most common exceptions which apply in these circumstances.

The United States Supreme Court has held that, “Nothing prevents the police from seeking a warrant for a blood test when there is sufficient time to do so in the particular circumstances or from relying on the exigent circumstances exception to the warrant requirements when there is not.”<sup>29</sup> In order to secure a search warrant for blood in an impaired driving case, probable cause of impairment and operation of a vehicle must be established to the satisfaction of a judge. Although this may seem like more work on the front end of a case, having a judge sign off on probable cause for the search will likely lead to less litigation and defenses on the back end.

However, as noted in *Birchfield*, sometimes securing a warrant for a blood draw in a reasonable amount of time is not possible and officers must rely on exigent circumstances to justify a constitutional search. The Court has noted that, “Whether a warrantless blood test of a drunk-driving suspect is reasonable must be determined case by case based on the totality of the circumstances.”<sup>30</sup>

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<sup>28</sup> In addition to the topics covered in this section, please also see the challenges relating to recalled blood tubes in the previous section on challenges relating to recalled or expired equipment.

<sup>29</sup> *Birchfield v. North Dakota*, 136 S.Ct. 2160, 2184 (2016).

<sup>30</sup> *Missouri v. McNeely*, 133 S.Ct. 1552, 1563 (2013).

In order to stave off defenses of “unconstitutionality,” it is suggested that officers document probable cause of operation and impairment as thoroughly as they would have done for a search warrant. Additionally, they must thoroughly document all of the facts that comprised the “exigent circumstances” that precluded them from securing a warrant in a reasonable amount of time. Common exigent circumstances may involve crashes with injuries, treatment being administered, drivers being airlifted to other locations, etc. Sometimes it may not be feasible to secure a warrant before a driver goes into surgery, for example, or before other drugs are administered to treat injuries. Likewise, although it will likely depend on the jurisdiction, sometimes a judge cannot be reached to sign the warrant. Any time these or other exigent circumstances are present, they must be thoroughly documented in the police report. In the recent case of *Mitchell v. Wisconsin*, the United States Supreme Court indicated that if an impaired driver was unconscious or in a stupor which required medical treatment and which precluded a breath test, an officer may “almost always order a warrantless blood draw ... without offending the Fourth Amendment.”<sup>31</sup> However, even when the driver is unconscious, probable cause (*i.e.*, evidence of impairment and operation) and clearly articulated exigent circumstances must still be documented.

Finally, as with any other Fourth Amendment search, voluntary consent is a valid exception to the search warrant requirement. It is important to distinguish this from implied consent in the impaired driving context. The United States Supreme Court has indicated that implied consent is not necessarily voluntary consent and, therefore, a valid exception to the warrant requirement in terms of taking a blood draw. In the *Mitchell v. Wisconsin* case, the Court stated, “Our decisions have not rested on the idea that these laws (implied consent laws) do what their popular name might seem to suggest—that is, create actual consent to all the searches they authorize.”<sup>32</sup> The Court went on to resolve the case not based on implied consent, as the state of Wisconsin suggested, but on the basis of exigent circumstances. This indicates that in order to justify a blood draw based on consent, it must be knowing and voluntary consent. This will be determined based on the totality of the circumstances. Some factors to consider whether consent is voluntary include: age, education, mental state or intoxication of the person, and circumstances under which consent is given.<sup>33</sup> To this end, officers can do a number of things to document voluntary consent for a blood draw. An officer may want to record or video the interview, for example, and ask the driver questions like, “What does voluntary meant to you?” or, “What does consent mean to you?” The officer should then fully document the responses.

Ultimately, a search warrant which thoroughly documents probable cause for the search, or thoroughly documented exigent circumstances, or thoroughly documented voluntary consent will go a long way toward precluding any defenses of unconstitutionality of a blood draw.

Any time exigent circumstances are present, they must be thoroughly documented in the police report.

<sup>31</sup> See *Mitchell v. Wisconsin*, 139 S.Ct. 2525, 2533 (2019).

<sup>32</sup> *Id.* at 2533.

<sup>33</sup> See *Schneckloth v. Bustamonte*, 93 S.Ct. 2041, 2046 (1973).

### Inadmissibility of blood evidence due to use of unauthorized blood kit

A defendant may claim the blood draw is not admissible because it was not taken with the authorized blood kit. As with other types of evidence, a blood draw that was taken in a hospital or other medical setting and analyzed for medical purposes may be admissible if it was taken in a reliable manner and the chain of evidence can be established. This may be state specific, and state laws should be consulted to determine whether per se presumptions would be applicable under these circumstances.

A search warrant would likely be necessary in order to obtain hospital blood or hospital blood test results. This is permitted under the Health Insurance Portability and Accountability Act of 1996, otherwise known as HIPAA, as protected health information may be disclosed pursuant to “a court order or court ordered warrant.”<sup>34</sup>

Finally, tests performed on blood taken for medical purposes are likely performed on serum or plasma as opposed to whole blood. Whole blood is taken for forensic purposes and is what the blood kits are intended to store. Serum is the liquid that remains when blood is collected without an anti-coagulant and allowed to clot. Plasma is the liquid separated from whole blood treated with an anti-coagulant when the blood cells are removed. Because serum and plasma represent the water portion of blood, they will have a higher alcohol content than the whole blood from which they were derived. For this reason, serum and plasma results usually must be converted to whole blood results for impaired driving prosecution purposes.<sup>35</sup>

### Inadmissibility of blood evidence due to lack of refrigeration

A defendant may also claim the blood draw is not admissible because it was not refrigerated and/or the lack of refrigeration caused formation of ethanol or other drugs. Blood draw storage and transportation conditions as well as the requirements for it vary widely across jurisdictions which results in different standards and expectations for the refrigeration of blood samples. Luckily, science has shown that lack of refrigeration on alcohol positive blood samples does not cause ethanol levels to increase. This was true even when blood tubes were opened multiple times, allowing for the introduction of potential microorganisms.<sup>36</sup> Likewise, this held true both when alcohol positive samples

Science has shown that lack of refrigeration on alcohol positive blood samples does not cause ethanol levels to increase.

<sup>34</sup> 45 CFR 164.512(f)(1)(2)(A) provides guidance for the disclosure of protected health information.

<sup>35</sup> For additional information, please see NTLIC's *Alcohol Toxicology for Prosecutors* monograph published in 2003. Methods and examples of conversion from serum or plasma to whole blood can be found on pages 7–8.

<sup>36</sup> Vance, Carter, Carter, et al. (2015). “Comparison of immediate and delayed blood alcohol concentration testing.” *Journal of Analytical Toxicology*, 39(7) p. 16.

were left at room temperature and when they were subjected to varying levels of heat. One study subjected the blood tubes to “real life conditions,” (*i.e.*, they were stored in both the passenger compartment and trunk of a law enforcement patrol vehicle over a 78-day period) and it was found that “samples exposed to rather harsh conditions, *i.e.* high heat, will not cause an elevated alcohol concentration.”<sup>37</sup> If anything, levels of ethanol may actually decrease slightly, which benefits the defendant.

The stability of other drugs in blood can vary depending on many factors. Some drugs, like cannabinoids, can be relatively stable in unrefrigerated blood for long periods of time. Other drugs, like benzodiazepines, can degrade more quickly when unrefrigerated. Most drugs of abuse decrease over time when subjected to unrefrigerated conditions.<sup>38</sup> It is best for a prosecutor to consult with a toxicologist or lab analyst when questions about a specific sample or drug arise.

### Challenge relating to lack of cooperation of person performing blood draw

Less a defense in an impaired driving case, but a frequent challenge surrounds the cooperation—or the lack thereof—of hospital personnel who are resistant to perform a blood draw at the direction of a law enforcement officer. This is frequently a policy issue that must be addressed with hospital administration or its counsel. In some jurisdictions, it may be advantageous for prosecutors familiar with these issues to set up a meeting involving hospital administration, law enforcement agency counsel or administration, and perhaps the state TSRP to discuss what circumstances justify a blood draw in impaired driving cases (*i.e.*, search warrant, exigent circumstances, or voluntary consent). Many frontline health care workers are under the impression that a search warrant must be obtained to procure a blood draw in an impaired driving case. It may be helpful for the prosecutor to explain the nature of the “exigent circumstances” exception, explain this frequently arises in crash cases with injury(ies), and provide some examples of exigencies in an impaired driving cases, especially those referenced by the Supreme Court. Finally, if a state has liability limiting laws, it would also be helpful to identify the jurisdiction’s statute(s) which precludes liability for administration of a blood test at the request of law enforcement, or limits patient privilege for a blood test taken from someone who is under arrest for an offense related to the test.

It may be helpful for the prosecutor to explain the nature of the “exigent circumstances” exception, explain this frequently arises in crash cases with injury(ies), and provide some examples of exigencies in an impaired driving cases, especially those referenced by the Supreme Court.

<sup>37</sup> Glover. (2002). “The effect of heat on blood samples containing alcohol.” In *Proceedings of the 16th International Council on Alcohol, Drugs and Traffic Safety*, August 4–9, Montreal.

<sup>38</sup> Cooper, Negrusz. (2013). “Clarke’s analytical and forensic toxicology.” *Pharmaceutical Press*, pp. 345–354.

# Challenges relating to behavioral signs of impairment and defense of alternative explanations

Defendants often claim officers mistakenly attribute signs of a mental disorder, such as Attention Deficit Hyperactivity Disorder (ADHD) or an Autism Spectrum Disorder (ASD), or a medical condition such as Auto-Brewery Syndrome, instead as signs of alcohol or drug impairment. Often a prosecutor's motion to compel the defendant's medical records ends the claim. In cases where it does not, however, these common conditions are often misrepresented by the defense. Thus, understanding these disorders and conditions can help a prosecutor discern what behaviors are not reasonably linked to the disorder or condition and whether the facts support an impaired driving conviction.

## ADHD

ADHD is a mental disorder that affects about 2.5% of adults.<sup>39</sup> The cause of ADHD is unknown, though genetics, premature birth, smoking or alcohol use during pregnancy are suspected to play a role in whether a person has it.<sup>40</sup> A diagnosis is made after a doctor collects information from family, teachers, and others.<sup>41</sup> The doctor also conducts a medical evaluation, wherein other medical conditions are ruled out.<sup>42</sup> Symptoms include inattention, hyperactivity, and impulsivity.<sup>43</sup>

Because one of the symptoms is inattention, the disorder is used by defendants to explain poor performance on the Standardized Field Sobriety Tests (SFSTs). Not all SFST clues, however, can be linked to ADHD. A prosecutor should review the totality of the circumstances in his/her case to best explain to the trier of fact which clues and behaviors cannot be attributed to inattention.

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<sup>39</sup> What Is ADHD? ([psychiatry.org /patients-families/adhd/what-is-adhd](https://psychiatry.org/patients-families/adhd/what-is-adhd)) (citing Danielson, ML, et al., [Prevalence of Parent-Reported ADHD Diagnosis and Associated Treatment Among U.S. Children and Adolescents](#), 2016. *Journal of Clinical Child & Adolescent Psychology*, Volume 47, 2018–Issue 2; Simon V, Czobor P, Bálint S, et al.: [Prevalence and correlates of adult attention-deficit hyperactivity disorder: a meta-analysis](#). *Br J Psychiatry* 194(3):204–211, 2009) (March, 2022).

<sup>40</sup> *Id.*

<sup>41</sup> *Id.*

<sup>42</sup> *Id.*

<sup>43</sup> *Id.*

Also, ADHD alone can contribute to driving deficiencies.<sup>44</sup> At least one study indicates individuals with ADHD who consume alcohol, “could considerably compromise driving skills even at” less than 0.08 BAC.<sup>45</sup> If it is determined that an individual was exhibiting unsafe driving attributable only to ADHD, an assessment should be made whether that individual is safe to maintain a driver’s license. If a defendant is an unsafe driver due to his/her condition, he/she may surrender the driver’s license. If a defendant refuses to do so, the prosecutor should follow state guidelines for sharing information with the licensing authority regarding the defendant’s fitness to drive and maintain his/her license.

When reviewing the medical records, a prosecutor should also determine whether a defendant takes medication to treat this disorder. Stimulant medication is a treatment option for an individual with ADHD,<sup>46</sup> and may cause impairment. An analysis of whether the individual is impaired by medication should therefore also be conducted.

### Autism Spectrum Disorder

Autism Spectrum Disorder (ASD) is a developmental disability.<sup>47</sup> It impacts social, communication, and behavioral skills. “The learning, thinking, and problem-solving abilities of people with ASD can range from gifted to severely challenged.”<sup>48</sup> Autistic Disorder and Asperger Syndrome are two conditions included in the broader category of ASD.<sup>49</sup> A diagnosis of either is made by a medical professional.<sup>50</sup> Signs and symptoms include poor social, emotional, and communication skills, repetitive behaviors, and reluctance to alter daily activities.<sup>51</sup>

In impaired driving cases, a defendant may claim the officer mistook his/her inappropriate social behaviors while roadside for drug or alcohol impairment, instead of ASD. In this case, a review of the defendant’s medical records will indicate the specific condition, how it manifests historically, and the severity of the defendant’s condition. With that information, a prosecutor can compare it to the articulable facts supporting probable cause for the impaired driving charge. Often, very few impaired driving clues are consistent with a defendant’s ASD symptoms.

Often, very few impaired driving clues are consistent with a defendant’s ASD symptoms.

<sup>44</sup> *Simulated Driving Performance of Adults With ADHD: Comparisons with Alcohol Intoxication*, Weafer et al. at 17 (Jan., 2015).

<sup>45</sup> *Id.*

<sup>46</sup> Attention-Deficit/Hyperactivity Disorder, National Institute of Mental Health ([nih.gov/health/topics/attention-deficit-hyperactivity-disorder-adhd](https://www.nih.gov/health/topics/attention-deficit-hyperactivity-disorder-adhd)) (March, 2022).

<sup>47</sup> What is Autism Spectrum Disorder? ([www.cdc.gov/ncbddd/autism/facts.html](https://www.cdc.gov/ncbddd/autism/facts.html)) (March, 2022).

<sup>48</sup> *Id.*

<sup>49</sup> *Id.*

<sup>50</sup> *Id.*

<sup>51</sup> *Id.*

In cases where they are, a prosecutor should assess whether the totality of the circumstances still supports a finding of guilt and proceed accordingly. As with ADHD, if the unsafe driving behavior is attributable to the defendant's ASD, the prosecutor should determine whether the defendant's condition is such that he/she may no longer be safe to drive. As stated above, a defendant can surrender his/her license or the prosecutor may follow state laws regarding turning information about unsafe drivers into the state's licensing authority.

### Auto-Brewery Syndrome

Auto-Brewery Syndrome is an uncommon medical condition and understanding its effects on the body will allow a prosecutor to dispel the notion self-fermenting drivers are being wrongfully charged in impaired driving cases.

#### WHAT IS AUTO-BREWERY SYNDROME?<sup>52</sup>

Auto-Brewery Syndrome (also known as gut fermentation syndrome, endogenous ethanol fermentation or drunkenness disease) occurs because of yeast overgrowth in the gut, leading to ethanol being naturally produced in the body. It is a *rare* medical condition, and because it is rare, it should not be surprising most of the research is said to be anecdotal, unstudied, misdiagnosed, and underreported. This provides a perfect platform for a defense attorney to claim his/her client may be a victim of this rare, unstudied, underreported, and misdiagnosed malady. When diagnosed, it is treatable usually with antifungal medication, a low carbohydrate diet, and probiotics.

Research dates back to the 1960s on whether ethanol might be produced naturally in the body.<sup>53</sup> A number of studies were conducted in Japan where people suffering from gastritis or who had undergone gastrectomy were most likely to have this syndrome after eating carbohydrate-rich meals. It has been theorized East Asians (Japanese, Chinese, and Koreans) may be genetically predisposed to the intoxication effects of alcohol due to faulty alcohol dehydrogenases (ADH) and acetaldehyde dehydrogenase (ALDH) enzymes.

To reach the BrAC per se level of 0.08 the blood-ethanol concentration would be 80 mg/dl. (0.08 BAC = 80 mg/dl = 0.08 g/dL). Because ethanol is hydrophilic, once it is introduced into the bloodstream it is evenly dispersed through the water volume in one's body. The faster a person drinks alcohol, the quicker he/she becomes intoxicated and unsafe to drive. The presence of food in the stomach slows down the absorption of alcohol.

Auto-Brewery Syndrome is an uncommon medical condition and understanding its effects on the body will allow a prosecutor to dispel the notion self-fermenting drivers are being wrongfully charged in impaired driving cases.

<sup>52</sup> The National Traffic Law Center maintains a database full of helpful resources, including numerous scientific studies relating to Auto-Brewery Syndrome. For further information on this topic, contact NTLC.

<sup>53</sup> Logan BK, Jones AW, "Endogenous Ethanol 'Auto-Brewery Syndrome' as a Drunk Driving Defense Challenge," 206 *Med. Sci. Law* (2000) Vol. 40, No. 3.

The frustration in reading the various case studies involving auto-brewery is they lack a timeline of whether there is a gradual increase in blood alcohol content. The studies only report the final measured BAC. One author points out the problem with this is the average person passes about 0.5 L of gas a day, but to go from a 0.00 BAC to a 0.12 BAC in two hours would require the person to pass approximately 24 L of gas during that time span. This is 50 times the amount of gas a person passes in a day, but in period of only 2 hours.<sup>54</sup> This would certainly be memorable to both the defendant and the investigating police officer. Many of the case studies do report how ill the person became in the case study and how hospitalization was often required.

Justice would certainly not be served, if credible evidence revealed the naturally produced ethanol was delivered directly into the bloodstream, bypassing both the fermentation and metabolization processes. This is not the case. In fact, some case studies reveal the person studied had multiple impaired driving convictions and/or failed to follow the treatment plan and continued to eat carbohydrate-rich meals. The effects did not sneak up on the person where he/she was suddenly spontaneously impaired at or above the legal per se limit. The person had time to recognize something was affecting the normal use of his/her mental and physical faculties and therefore unsafe to drive a car.

Logan and Jones state, "The idea that a huge quantity of ethanol might be produced endogenously and in some way overwhelm the oxidizing capacity of the liver is simply not credible."<sup>55</sup>

In an impaired driving case, a defendant may claim to have Auto-Brewery Syndrome, which caused the behavior, breath test results, and ultimately, his/her intoxication. The courtroom cure will be to first determine if the defendant has been properly diagnosed by a reputable medical professional. Whether the defendant has been properly diagnosed may not legally matter if impaired driving is a strict liability offense in the jurisdiction, but there may be other justice considerations if the defendant actually suffers from this medical condition. If the defendant has not been properly diagnosed, however, the defense is speculative and should be precluded by the court. A proper diagnosis would need to include close monitoring of the defendant to rule-out any consumption of alcohol.

A prosecutor should be wary of the studies in terms of risk of bias. A literature search was conducted on September 1, 2020, by researchers who identified 824 studies on auto-brewery. One hundred studies were found to be duplicates. The researchers then selected 22 case studies, excluded 5 of those 22 and admitted 7 being judged as good, 7 being judged as fair, and 2 were poor in terms of risk of bias.<sup>56</sup> This review of case studies consisted of 20 total patients and only 8 were

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<sup>54</sup> "Gut Fermentation Syndrome," *The Medical Bag*, April 4, 2014.

<sup>55</sup> Logan BK, Jones AW, "Endogenous Ethanol 'Auto-Brewery Syndrome' as a Drunk Driving Defense Challenge," 206 *Med. Sci. Law* (2000) Vol. 40, No. 3, page 209.

<sup>56</sup> Bayoumy et al., "Gut fermentation syndrome: A systematic review of case reports." *United European Gastroenterol J.* 2021;1-11.

under strict supervision and monitoring during the diagnostic evaluation, leaving it possible undisclosed alcohol consumption occurred in the other case reports.

### WHAT WOULD A PROPER DIAGNOSTIC EVALUATION LOOK LIKE?

According to Bayoumy et al., a proper diagnostic evaluation would include the following:

“The complete evaluation of the GFS includes history taking, physical examination, laboratory testing, stool sampling with culture, a carbohydrate challenge test, and endoscopy with biopsies for culture. The evaluation of patients should be composed of complete history taking, including antibiotic use, alcohol intake, and unexplained episodes of intoxication. A general physical exam should have followed by a neurological exam. In the exam, special focus should be given to signs of liver abnormalities (*e.g.*, liver enlargement, jaundice, spider naevi) and neurological deficits (*e.g.*, slurred speech and walking difficulties) matching with alcohol intoxication. Laboratory testing includes complete blood count, electrolytes (sodium, potassium), kidney function tests (creatinine, blood urea nitrogen), liver function tests (alanine aminotransferase, alkaline phosphatase, bilirubin), endocrine functions (glucose, thyroid stimulating hormone), and vitamin status (especially vitamin B1 and B12). A fecal stool test can be used for fungal or bacterial growth. A carbohydrate challenge of 100–200 g glucose combined with blood alcohol concentration (BAC) and breath or plasma alcohol testing at intervals of 0, 4, 8, 16 and 24 h can be performed to diagnose the GFS. The  $t_0$  measurement should be performed before administering glucose. It is important that the patients are strictly monitored during the test for any consumption of alcoholic beverages, which would otherwise severely bias the test. ... An upper and lower GI-tract endoscopy can be used to collect gastrointestinal secretions and biopsies for fungal and bacterial testing. These fungi and bacteria can then be tested for antifungal and antibiotic sensitivity testing. The diagnosis GFS can be made when the carbohydrate challenge test is positive and a causal micro-organism have been cultured, and all other causes of symptoms have been excluded.”<sup>57</sup>

A driver is required to know whether he/she is in condition to drive.

### STRATEGIES TO CONSIDER

A prosecutor should consider filing a motion in limine to prohibit the auto-brewery defense if his/her jurisdiction’s impaired driving statute does not require consumption of the alcohol or other drugs before or while driving; it is otherwise irrelevant how the intoxicating substance got into the body. A driver is required to know whether he/she is in condition to drive. A prosecutor should be sure to consult his/her jurisdiction’s case law as involuntary intoxication is not a defense in many jurisdictions. Also, a prosecutor should consider filing a motion in limine to prohibit the defendant from raising this defense during cross-examination

<sup>57</sup> *Id.* at 6.

of the prosecution witnesses and then never introducing any evidence to establish the defendant has received a medical diagnosis from a legitimate medical doctor. Whether before trial or during trial, the auto-brewery defense should not be raised unless the defendant has actually been diagnosed with the condition. A prosecutor should request the defendant provide (1) the date of diagnosis; (2) the current treating physician; and (3) the recommended treatment regimen. The earlier in the discovery process a prosecutor can obtain this type of information the better. Lastly, a prosecutor facing this type of defense can contact the NTLC to obtain the latest research and information on the auto-brewery defense.

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# Challenges relating to commercial driver's licenses

Most commercial driver's license (CDL) holders are safe, responsible, and skilled professionals. It is important to know that commercial motor vehicle (CMV) drivers, *i.e.*, CDL holders, require special skills. CMV drivers must undergo extensive training that includes detailed review of traffic regulations and the adverse effect violations of those regulations will have on their CDL. After all, CMVs are defined in part as having a gross weight rating of 26,001 pounds.<sup>58</sup> Some are vehicles designed to transport 16 or more passengers including the driver<sup>59</sup> or a vehicle used to transport hazardous materials.<sup>60</sup>

There are also some unsafe CDL holders on the road, however. In 2019, of the 33,244 fatal crashes on the nation's roadways, 4,696 (14.1 percent) involved at least one large truck or bus. In addition, there were an estimated 6,722,000 nonfatal crashes, 575,000 (8.6 percent) of which involved at least one large truck or bus.<sup>61</sup> Considering these statistics, it is particularly important for prosecutors to be aware of the prohibition against masking when handling criminal traffic cases in which the defendant has a CDL.

In an impaired driving case involving a defendant with a CDL, it is not uncommon for the defendant to seek from the prosecutor a disposition favorable to his/her CDL status. A prosecutor must realize, however, that resolving an impaired driving case in this manner is illegal under the Federal Motor Carrier Safety Administration (FMCSA) regulations. This case resolution, called "masking" under the regulations, is prohibited. Masking includes, among other things, deferral, or diversions of a CDL holder's moving traffic violations including, but not limited to, speeding and impaired driving.

These prosecutions have a greater impact on CDL holders than on nonprofessional drivers because of federal and state penalties and prohibitions when they violate traffic laws.<sup>62</sup> Even ordinary traffic offenses, such as speeding, impact CDL holders

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<sup>58</sup> 49 C.F.R. § 383.5.

<sup>59</sup> *Id.*

<sup>60</sup> *Id.*

<sup>61</sup> U.S. Department of Transportation, Federal Motor Carrier Safety Administration, *2021 Pocket Guide to Large Truck and Bus Statistics*, 32 (Dec. 2021).

<sup>62</sup> 49 C.F.R. § 383.51.

regardless of whether they are operating a CMV when stopped. For instance, if a CDL holder was convicted of two separate speeding tickets within a three-year period and both convictions were for traveling 15 miles per hour or more above the speed limit, the driver's CDL would be disqualified for 60 days.<sup>63</sup>

One aspect of the law often unknown to prosecutors is that violations for CDL holders operating personal vehicles can affect a professional driver's CDL privileges. For instance, under CFR 49 § 383.51(b) (1) (2), a CDL holder operating a non-CMV convicted of operating while intoxicated or under the influence of drugs faces a mandatory disqualification of his/her CDL privileges for one year. For a second conviction of the same offense, the penalty is dramatically more substantial—a "lifetime" or 10-year revocation of the driver's CDL privileges.<sup>64</sup>

Because of these heightened consequences to CDL holders, prosecutors often face increased pressure from defense counsel to reduce, dismiss, or defer charges for CDL holders. Resolving cases in this manner is illegal and constitutes masking. A prosecutor must be vigilant in negotiating these pleas to ensure that masking does not occur.

### Plea negotiations and masking<sup>65</sup>

The prohibition against masking is not meant to bar plea negotiations in cases involving a violation by a commercial learner's permit (CLP) or CDL holder. Offenders often are charged with multiple offenses arising from the same incident. Not every charge is provable to the standard of beyond a reasonable doubt.

A prosecutor must be vigilant in negotiating these pleas to ensure that masking does not occur.

<sup>63</sup> Regulatory Guidance for 49 C.F.R. 383.51—Disqualification of Drivers—General Questions  
Question 1:

- a. If a CDL holder was convicted of one "excessive speeding" (15 or more miles over the speed limit) violation in a CMV and the same violation in his/her personal vehicle, would the driver be disqualified? Or,
- b. If a CDL holder was convicted of two separate "excessive speeding" (15 or more miles over the speed limit) violations in his/her personal passenger vehicle, would the driver be disqualified?

Guidance: Yes, in both cases, if the second offense was within 3 years of the first. Whether the vehicle is a CMV is irrelevant. Commercial Driver's License Standards, Requirements and Penalties, Regulatory Guidance, 84 FR 8464-01.

<sup>64</sup> Reinstatement after lifetime disqualification. "A State may reinstate any driver disqualified for life for offenses described in paragraphs (b)(1) through (8) of this section (Table 1 to § 383.51) after 10 years, if that person has voluntarily entered and successfully completed an appropriate rehabilitation program approved by the State. Any person who has been reinstated in accordance with this provision and who is subsequently convicted of a disqualifying offense described in paragraphs (b)(1) through (8) of this section (Table 1 to § 383.51) must not be reinstated." 49 C.F.R. § 383.51 (a)(6).

<sup>65</sup> This section is largely taken from the article "[Mastering Masking: Why & How to Avoid Masking CDL-Holder Convictions](#)," written by Elizabeth Ealeywine, FMCSA Attorney Advisor for NTLC's July 2019 *Between the Lines* newsletter (Vol. 27, Issue 6).

The federal regulation and the state statutes (*i.e.*, state statutes incorporating the federal regulations) prohibiting masking do not bar negotiations entered in good faith and supported by facts and law. The anti-masking regulation cannot supersede a defendant's due process or other Constitutionally protected rights.

Plea negotiations may take many forms, some of which may contravene the prohibition against masking. In some routine traffic matters,<sup>66</sup> a common disposition may be that the driver agrees to plead guilty and pay court costs. As long as the driver pays the court costs and does not get another traffic violation in the subsequent six months, the charges are dismissed. This is a clear case of deferring judgment, which constitutes masking. If the driver is a CDL-holder<sup>67</sup> and the violation is not reported as a conviction, as defined in 49 C.F.R. § 383.5, it has been masked.<sup>68</sup> Likewise, where a driver is charged with impaired driving, a common plea negotiation for a first offense could be a diversion program. Here, the driver agrees to certain terms, which typically includes substance abuse education or counseling, and the charges are dismissed upon successful completion of the terms. This occurs pre-trial or pre-disposition, so the driver never pleads guilty or is never found guilty. As with the previous scenario, if the driver is a CDL holder and a conviction is not reported to the licensing agency, masking has occurred.<sup>69</sup>

Furthermore, just because a CMV operator has given up his or her CDL does not mean that deferral or diversion are legally permissible dispositions. If the individual had a CDL at the time of the offense, allowing the charge to be deferred or granting diversion would be prohibited by the anti-masking regulation.<sup>70</sup> In *Indiana Bureau of Motor Vehicles v. Hargrave*, the defendant, a CDL holder at the time of the offense, was charged with driving under the influence. He surrendered his CDL prior to pleading guilty to the offense and was granted diversion with the understanding that the charge would be dismissed upon successful completion of the program.<sup>71</sup> The defendant later filed a petition to reduce the time of his administrative suspension, which the court granted.<sup>72</sup> Upon receiving the order regarding the suspension, the Bureau of Motor Vehicles (BMV) petitioned the court to reconsider, arguing that the defendant was not eligible for a diversion

If the individual had a CDL at the time of the offense, allowing the charge to be deferred or granting diversion would be prohibited by the anti-masking regulation.

<sup>66</sup> Such as those involving offenses listed in Table 2 to 49 C.F.R. § 383.51.

<sup>67</sup> Or "someone required to hold a CDL." 49 C.F.R. § 383.51.

<sup>68</sup> 49 C.F.R. § 384.226

<sup>69</sup> *Id.*

<sup>70</sup> See, e.g., *Indiana Bureau of Motor Vehicles v. Hargrave*, 51 N.E.2d 255 (In. Ct. App. 2016) (Driver was not eligible to participate in a diversion program, or to have judgment deferred on that conviction, regardless of when he surrendered his CDL); *People v. Meyer*, 186 Cal.App.4th 1279 (2010) (Surrendering commercial driver's license did not permit defendant to attend traffic school in lieu of adjudication).

<sup>71</sup> *Id.* at 258.

<sup>72</sup> *Id.*

program due to his holding a CDL at the time of the offense.<sup>73</sup> The appellate court agreed with the BMV, stating, “[a]llowing *Hargrave* to surrender his license, avoid his conviction, and possibly return to driving professionally with no record of the offense is precisely what the anti-masking law is designed to prevent. Hargrave’s suggested interpretation of the law is unreasonable, as it would permit the very mischief that the law is designed to prevent.”<sup>74</sup>

A more challenging scenario for prosecutors, defense attorneys, and judges occurs when the defense requests that a charge be reduced. Sometimes the request is for a reduction to an offense that would be considered a lesser included offense of the charge, while on other occasions, the reduced charge has no bearing on the original offense. In either scenario, the prosecutor and judge must determine the reason for the amendment. Is there a bona fide legal and/or factual issue with the original charges brought against the driver? Where the answer is yes, those legal or factual issues provide justification for amending or reducing the charge. If not, the intent behind the action is no different than that found in *Hargrave*. The driver will have avoided the conviction, and will continue to drive with no record of the actual offense. Where there are no legitimate legal or factual bases for a reduction, then masking has occurred, as the purpose of the plea is to conceal the nature of the offense.

When a prosecutor is unsure if a proposed resolution constitutes masking, he/she is encouraged to contact the state TSRP and/or NTLC for additional guidance. NTLC provides numerous, free resources relating to CDLs and masking on its website.<sup>75</sup>

When a prosecutor is unsure if a proposed resolution constitutes masking, he/she is encouraged to contact the state TSRP and/or NTLC for additional guidance.

<sup>73</sup> *Id.*

<sup>74</sup> *Id.* at 260.

<sup>75</sup> For additional information and resources relating to CDLs and masking, visit [www.ndaa.org/programs/ntlc/commercial-drivers-license/](http://www.ndaa.org/programs/ntlc/commercial-drivers-license/).

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## Challenges relating to jury selection<sup>76</sup>

Before the first witness is called at trial, a prosecutor should know a good deal of information about each of the prospective jurors in the case. Jury selection, or *voir dire*, is the process by which a prosecutor provides information to a potential juror to elicit his/her feelings about the laws of the jurisdiction, opinions about the crime of impaired driving, and to expose any potential biases. Jury selection is not a time to indoctrinate or change the juror's mind about his/her core values, beliefs, and attitudes, but a prosecutor should listen to what a juror expresses about his/her thoughts and beliefs as this will affect how he/she hears and interprets the evidence presented in the case.

A prosecutor should use this process to build rapport and a relationship with the jury. Jury selection is the best opportunity to get jurors with strong opinions about impaired driving to voice them. If a prosecutor finds a juror has strong negative feelings toward impaired drivers, let him/her voice the concern. Remember: the other jurors in the box and the venire in the courtroom are listening, too. A prosecutor cannot usually announce how dangerous impaired drivers are, but often a juror will do it instead. The goal of jury selection is to seat a fair jury, but to also seat one with an understanding of the dangers posed by sharing the road with impaired drivers. Impaired driving is a unique crime in that many jurors may relate to the offense in a way they do not with other crimes, such as rape and murder. Jurors need education to remove notions that proof of guilt requires sloppy drunkenness, and that using medications prescribed by a doctor means it is okay to drive.

When a prosecutor finds a juror willing to talk and the conversation is advantageous to the case, let them talk. Other jurors will view this person as their peer and will give more credence to what they say. Anytime a juror educates other jurors by sharing their life experiences is a success for the prosecutor. Even when a juror expresses a view contrary to the law, the prosecutor can use the moment as a teaching experience for not only that particular juror, but the other jurors as well. This is also a good opportunity to allow the jurors to educate each other by having a conversation about their shared experiences and knowledge.

Reality often gets in the way of perfection and jury selection can be challenging. This section provides a prosecutor with suggestions to improve jury selection in impaired driving cases. Every jurisdiction is different, so a prosecutor may not be

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<sup>76</sup> In addition to the topics covered here in this section, please see the tips for jury selection in the section for challenges relating to driving proofs and actual, physical control.

able to use all or any of these methods, but they will, at a minimum, offer ideas to improve selecting the triers of fact. The below questions are not meant to be exhaustive or used as a script. They do not need to be asked in the order listed. A prosecutor should be flexible in his/her approach, listen to the answers provided, and follow up when responses naturally allow for more questions.

### Researching the potential jurors<sup>77</sup>

Unless there is a legal prohibition from doing so, a prosecutor may want to consider obtaining the driving history for each prospective juror and/or a completed juror questionnaire. In examining the histories, a prosecutor may want to note the following:

- Does the juror have any prior impaired driving convictions? If so, follow up to see if he/she pled guilty or was convicted after a trial. Someone who pled guilty may have a different attitude toward another person charged with impaired driving who is fighting the charge at trial.
- Does the juror's driving history indicate several crashes in proximity of one another? A drug-impaired driver is frequently involved in minor rear end crashes and the impairment is often undetected by the investigating officer. Repeated crashes on a driving record, even without arrests, should throw up red flags for a prosecutor.
- Does the history reflect repeated failures to appear in court on traffic violations? If so, the juror does not appear to follow rules and may have difficulty following jury instructions.
- Does the juror have a commercial driver's license (CDL)? A CDL holder may have a better understanding of driver behavior due to the training he/she received to obtain a CDL and driving history. Professional drivers do not like to share the road with impaired drivers.
- Check the juror's home address. Is it near the location of the traffic stop or crash in the trial case? Jurors do not like impaired drivers in their neighborhoods.
- Has the juror ever refused a breath or blood test? A refusal may be reflected on a juror's driving record.

Some of the information gleaned from a driving record does not require a prosecutor to ask any questions of the jurors; it is merely useful information for the decisions a prosecutor makes through the jury selection process. Some facts, however, may help a prosecutor to form questions, inserting information about the case into the potential jurors' minds. A prosecutor should consider this when

Jury selection is the best opportunity to get jurors with strong opinions about impaired driving to voice them.

<sup>77</sup> A prosecutor must be aware of state laws and local court rules about this practice. Some jurisdictions may require a prosecutor to share information on jurors' driving records and/or criminal histories with the defense.

## CHALLENGES RELATING TO JURY SELECTION

formulating the questions, however, if a prosecutor does not want to disclose that he/she ran the jurors' driving histories. There are ways to ask questions the answer to which the prosecutor knows. For example:

### PREVIOUS GUILTY PLEA FOR IMPAIRED DRIVING

- *Do any of you know anyone who has been charged with or convicted of impaired driving? This includes whether you yourself have been. (Mr. Jones raises his hand, but you expected him to do so; if Mr. Jones does not raise his hand then you know to question his veracity in the jury selection process.)*
- *Mr. Jones: do you mind telling us about it? (Mr. Jones says he was charged with DWI, and you already know he pled guilty.)*
- *Mr. Jones: did you exercise your right to a trial like the defendant is doing or did you plead guilty? Is there anything about the fact you pled guilty for your actions and the defendant is exercising his right to a trial, which puts you in a position where you can't be fair to either side?*

### COMMERCIAL DRIVER'S LICENSE

- *Do any of you hold or have you held a commercial driver's license?*
- *Mr. Smith: how many years have you had a CDL? Did it require specialized training? Are there specific vehicles you are authorized to drive? Do you drive long or short haul?*
- *During your career as a professional driver, have you seen other cars on the road where you were concerned the driver was impaired? What did you observe the car do that made you think that? Did you call the police?*
- *Have you come across or been delayed by crashes? Could you tell if people were injured or worse, killed?*

### HOME ADDRESS

- *This crime scene (location of crash, stop, or checkpoint) is 123 Main Street near the intersection with Elm Avenue. Are any of you familiar with this location?*
- *Mrs. Johnson: you said this is a route you take every day. Is there anything about the fact the defendant is accused of driving his car while impaired on a route you routinely take which puts you in a position where you cannot be fair to both sides?*
- *Mr. Harvey: you said your home is right around the corner. Do the grandchildren you already told us about visit you there? Do they play in the yard? Is there anything about the fact the defendant is accused of driving his car while impaired so near your home place you in a position where you cannot be fair to either side?*

### Introductory questions for prospective jurors

Jurors are typically anxious. When called for duty, jurors may feel out of their element and concerned about the task at hand. Pedigree questions, such as who are you, where do you live, do you work outside the home, etc., are questions which can relax everyone because they are easy questions for a prosecutor to ask, easy questions for jurors to answer, and can elicit common ground to encourage conversation. When asking these questions, a prosecutor should look at the jury and properly follow up if a juror looks puzzled. When receiving a positive response, a prosecutor should dig a little deeper. Most jurisdictions place a limit on the number of peremptory challenges allowed, and no limit on challenges for cause. If a juror has a preconceived notion—about impaired driving or the parties involved, for example—which he/she cannot put aside, a prosecutor needs to establish that fact to challenge them for cause. A prosecutor should always ask: *Does the fact you know them put you in a position where you feel you can't be fair to both the defendant and the State? Do you think your knowledge/relationship to them would make you better suited to sit as a juror in another case?* A prosecutor should bear in mind, however, the defense attorney or his/her partner could have been on the other side of the juror's divorce, leaving that juror with strong feelings against the defense lawyer. Establishing this fact quickly will save the prosecutor, and the court, time.

Words are important so the way a prosecutor couches a question may keep from offending the juror. For example, a prosecutor should not ask a prospective juror what his/her "husband's" or "wife's" occupation is and, instead, ask what his/her "spouse's" occupation is. Also, a prosecutor should consider not asking a potential juror if he/she has a job; there are many jurors who would love to be employed but are unable to find work. Additionally, there are homemakers, who are working hard but not for a paycheck. A prosecutor does not want to begin the questioning process by making a juror feel less important, because he/she does not have a 9-to-5 occupation. A prosecutor may solicit information about volunteer work performed by a juror, if the question is asked properly. During questioning, if a prosecutor receives a response indicating a juror, or a juror's family member, works in law enforcement, a legal office, or courthouse-related job, a prosecutor should inquire if that would prohibit the juror from being fair and impartial in the case. Follow up questions may be worded like, *The fact you have knowledge of the legal system won't affect your ability to be fair, will it?* On the other hand, if a juror has a connection to a defense firm, the follow up should be worded like, *Do you feel it would put you in an awkward position to have to decide the guilt of this attorney's client?*

Jurors are typically anxious. When called for duty, jurors may feel out of their element and concerned about the task at hand.

### Questions about juror contact with law enforcement

Often the only witness a prosecutor may have in an impaired driving case is a law enforcement officer. As a result, a prosecutor should ask if the potential jurors have strong feelings about law enforcement. This has a two-fold reason. If the prosecutor was able to obtain criminal or driving records, he/she can determine who gives honest answers. In addition, a prosecutor needs to ferret out any predispositions against law enforcement. A prosecutor should watch reactions carefully when asking the question and choose whether to address some jurors individually. For example:

- *Do you have any strong feelings, negative or positive, towards law enforcement?*
- (Individual, if positive) *Can you tell us about your experience?*
- (Individual, if negative: do not ask for specifics) *The State will be calling law enforcement officers to prove the defendant was driving impaired. Part of your job is to judge the credibility of witnesses. Since you have concerns about law enforcement in general, do you think you would be better suited to serve as a juror on a case which does not involve law enforcement officers?*

Again, these are opportunities to do more than select jurors. A juror who is pro-law enforcement can positively endorse law enforcement in front of the jury panel in a way the prosecutor cannot. For anti-law enforcement jurors, the prosecutor probably does not want the entire venire hearing a juror's negative experience with an officer. Additionally, the prosecutor does not want to burn peremptory challenges; make the juror feel like he/she can keep his/her opinion so the judge will remove him/her for cause. If, however, he/she is saying too much negative, a prosecutor should consider dropping it and using a peremptory challenge.

### Questions designed to educate the jurors about the facts and witnesses

Asking questions to educate the jury about the facts and/or witnesses of an impaired driving case can be tricky; a prosecutor needs to be familiar with the laws in his/her jurisdiction as well as the rules of the Court. Along with the basic information about the parties, the incident location, and the specific charges, a prosecutor should forecast the witnesses and the facts about which the witnesses will testify. Since the prosecutor's goal is to find fair jurors, he/she should be able to include some facts without irritating the judge.

### EXAMPLES IN AN ALCOHOL CASE

- (For alcohol cases with BAC) *Do you understand to prove impairment the State must only prove the defendant's blood alcohol concentration was 0.08 or more? Will you accept and follow the law?*

Often the only witness a prosecutor may have in an impaired driving case is a law enforcement officer.

## CHALLENGES RELATING TO JURY SELECTION

- (For alcohol case with or without BAC) *Do you understand the State has no burden to prove the defendant was drunk? That “drunk” and “impaired” are two entirely different standards? Do you understand when a person, such as the defendant, is impaired it does not necessarily mean he was drunk? Will you hold the State to the standard of impairment rather than the higher standard of drunkenness?*

### EXAMPLE WITH DRUGS OTHER THAN ALCOHOL

- *In this case the State will prove the defendant was under the influence of drugs rather than alcohol. The drugs caused his impairment. If you have always considered this type of crime to be “drunk driving” instead of “impaired driving,” can you put those feelings aside and only hold the State to the standard of impairment? Will you listen to the proof regarding how the defendant’s mental and physical faculties were impaired by the drugs he took, and base your decision on that?*

### EXAMPLES WITH WITNESSES

- *The officer in this case asked the defendant to perform standardized field sobriety tests, or SFSTs. Have you ever heard this term before?*
- *The three SFSTs are horizontal gaze nystagmus, which is the involuntary jerking of the eyes as they move side to side, walk and turn, and one leg stand. Have you ever heard of these tests before? They are designed to determine if the defendant’s mental and physical abilities are affected by whatever drug they consumed. Will you listen to what the officer instructed the defendant to do, the officer’s interpretation of what he observed based on his training and experience, and use this information to render a fair verdict?*
- *You will hear from an officer with specialized training, known as a Drug Recognition Officer or DRE. Will you listen to what the officer asked the defendant to do, the officer’s interpretation of what he observed based on his training and experience, and use this information to render a fair verdict?*
- *You will hear from a toxicologist who tested the defendant’s blood/urine sample. Will you listen to the toxicologist’s explanation of their analysis and findings and use this information to render a fair verdict?*

### Questions designed to educate on the law and the elements of the crime

Again, under the heading of fairness, a prosecutor needs to ensure the jurors will follow the law. A prosecutor should consider reviewing the elements of the charged crime, standards and burdens of proof, and make sure the jurors will follow the law, even if the law is different from what they originally thought it was. A prosecutor should use his/her jurisdiction’s standard jury instructions to avoid trouble with the Court, and always preface the questions with the statement “the judge will instruct you on the law and you are to follow his instructions, but ...”

### EXAMPLES

- *The defendant is charged with Driving While Impaired. You have probably heard the term before, either in news reports about the number of people charged or through familiarity with advocacy groups, such as MADD. If you have already formed a notion about what is required to be guilty of driving while impaired, will you put those notions aside and follow the law as the judge explains it to you?*
- *Have any of you seen someone impaired by alcohol (cannabis/other drugs), in other words drunk (stoned/high/etc.)? What made you think they were drunk (stoned/high/etc.)? What did you see them do or hear them say? Can we all agree it is easy for people without training to recognize the signs and symptoms of impairment? Can we also agree officers who have specific training and experience with impaired people would be even better at recognizing impairment?*
- *Do you understand the elements of driving while impaired are the defendant is operating a vehicle on a street, highway, or public vehicular area while under the influence of an impairing substance? Will you accept and follow the law?*
- *Some of the State's proof will be direct evidence. Eyewitness observations are direct evidence. Some of the proof is circumstantial. An example would be proving it snowed last night. If you watched it snow, your observations are direct evidence of it having snowed last night. Are there other ways to prove it snowed last night? Let's say there was no snow on the ground when you went to bed, but there were six inches on the ground when you woke up. This is circumstantial evidence that it snowed last night. Does everyone understand the difference between circumstantial and direct evidence? Can you also accept that in the eyes of the law, you should not put greater confidence in either kind of evidence? That is, circumstantial evidence is just as good as direct evidence? Will you view both direct and circumstantial evidence by the same standard, even if you were unaware that is the law in this State?*
- *Does anyone watch the TV shows Law and Order, CSI, or Cops? Do you understand Law and Order and CSI are for entertainment purposes and not realistic? Do you understand even though Cops is a reality show, they edit it so the material which gets televised is the most outrageous and, therefore, entertaining arrests? Do you promise to hold the State to a standard other than "wildly entertaining?"*
- *Do you also understand the State has the burden of proof in all criminal trials? Do you understand "beyond a reasonable doubt" is not the same as "beyond all doubt?" Do you understand it is not the same as "beyond a shadow of a doubt?" Do you understand holding the State to the standard of "beyond any doubt," "beyond all doubt," or "beyond a shadow of a doubt" would be unreasonable, and unless you saw the crime take place it can never be proven to you 100%? Do you each promise to hold the State to the standard of proof beyond a reasonable doubt, and nothing higher?*

### Questions designed to make the case personal

It is inappropriate for a prosecutor to say to jurors they are in danger or it could have been them involved in a crash with the defendant. It is not inappropriate, however, to ask questions which potentially cause them to reach that conclusion. For example, if the crime scene is in front of the juror's child's school, it is not inappropriate for the prosecutor to ask "Does the fact the defendant was stopped for impaired driving in front of your child's school put you in a position where you can't be fair to either side?" Is the prosecutor inferring the juror's child was in danger? Perhaps, but that is the juror's interpretation and therefore not inappropriate.

More directly, a prosecutor should find out if the juror has had contact with an impaired driver:

- *Have you or someone you know ever been in a collision with an impaired driver? If yes, get him/her talking about the situation in as much detail as possible about that event. He/she may be removed for cause by the defendant, but the entire venire will hear what he/she has to say. If the response is he/she had a friend/family member killed by an impaired driver, ask his/her permission to talk about it. Some will go into detail about the impact, while others may be too emotional to discuss it. Tread lightly.*
- *Do you know anyone who has been charged with impaired driving? If yes, very gently try to determine his/her attitude towards the charge. If he/she felt it was justified, ask whether the person had a drug or alcohol problem / did he/she know if the person drove this way a lot and never got caught until then / did he/she think the justice system treated the person with fairness.*

Often what is personal is use of the drug of choice. Although asking the jurors if any of them use cocaine would alienate a prosecutor from the jury and most certainly should not be done, many adults use alcohol. Many use pharmaceuticals as prescribed, which have the potential to impair. Some adults may use illegal drugs or drugs that have recently become legal. It is important for a prosecutor to not demonize the drug; just the driving while under the influence of the drug. A prosecutor needs to let the jury know this; infer to them while addiction is a disease, a conscious decision to drive impaired is a crime.

### EXAMPLES

- *Have any of you ever had contact with a person, whether a relative, friend, or neighbor, who had a drug or alcohol problem? If yes, I am not trying to pry, but was it someone close to you? Did this person ever get in trouble with the law as a result of their addiction? Did they ever try to get treatment for their addiction? Is there anything about the situation which puts you in a position where you could not be fair to both the defendant and the State?*
- *Do any of you have such strong feelings about the use of alcohol you cannot be fair to the defendant and the State? If a prosecutor receives a positive response, the person may be so rigid in his/her beliefs that he/she may not make a good*

It is important for a prosecutor to not demonize the drug; just the driving while under the influence of the drug.

juror. Remember: if a prosecutor can rehabilitate the juror, the defendant may be forced to a peremptory challenge to excuse the juror, rather than one for cause. Explain to the juror everyone comes to jury service with their own thoughts and feelings. Explain the crime with which the defendant is charged is not drinking but drinking in conjunction with driving a two-thousand-pound car [or words to that effect]. Craft your questions so they respond appropriately, for example: *You try to be a fair person, don't you Mr. Jones? So, you will try and set aside your personal beliefs and follow the law as the judge gives it to you, won't you?*

### Questions specific to the case

A good prosecutor reviews his/her case like a defense attorney and anticipates the defenses, weaknesses, and holes in the case. After a prosecutor has done that, he/she should address them in jury selection.

### EXAMPLES

- *You have probably seen news stories about impaired drivers having alcohol concentrations above a 0.08, the illegal limit in this State. In this case, however, we do not have evidence of an alcohol concentration (maybe a refusal, result suppressed, drugs other than alcohol). Can you accept and understand an alcohol concentration is only one of the ways we can prove the defendant was impaired, listen carefully to the testimony you hear under oath, compare those facts to the law, and render a fair verdict?*
- *The toxicologist who ran the original analysis of the defendant's blood/urine is no longer available, but another toxicologist in the State Crime Lab reviewed the results of the testing and will be here to render his/her own independent conclusions. Will you listen to him/her to determine what drugs the defendant had consumed before driving?*
- *The analysis of the defendant's blood revealed "no substances found." A toxicologist, however, will testify the report does not necessarily mean none were present. Will you carefully listen to the conclusions of this scientist and use that testimony to render a fair verdict?*
- *The defendant was outside his/her car when the officer arrived at the crash scene. Will you listen to the law regarding circumstantial evidence as the judge explains it, compare that with the officer's testimony regarding his/her observations, and use that information to render a fair verdict?*
- *The defendant was impaired by drugs which were prescribed to him/her by his/her doctor. Do you understand in this State that is not a defense to impaired driving?*
- *Do you understand therapeutic levels of some drugs can still impair? For example, sleep aids, when taken as prescribed, are disastrous when combined with driving.*
- *Do you understand just because a drug is an over-the-counter drug, it can still be impairing? In fact, alcohol is the #1 over-the-counter drug.*

A good prosecutor reviews his/her case like a defense attorney and anticipates the defenses, weaknesses, and holes in the case.

### Final thoughts on jury selection

- A prosecutor should never use the word “allegedly.” If a prosecutor thinks the crime is only an allegation, he/she should not be trying the case.
- A prosecutor should never be rude to a juror. If he/she says something negative about the prosecutor’s office or law enforcement, the prosecutor should simply move on and not argue with the juror.
- Many courthouses are small and do not allow for much separation between jurors and the parties involved in litigation. A prosecutor should not let the jurors see him/her joking around with the defense attorney. Jurors have a natural perception that prosecutors and defense attorneys should be enemies and they may view camaraderie as corruption. Professionalism is the best policy.
- Prosecutors encourage officers to choose their words carefully when they testify. A prosecutor must do the same. The jury judges the witnesses and the prosecutor, too; a prosecutor should be professional, approachable, interested, and knowledgeable. Jury selection is a two-way job interview; a prosecutor should maintain eye contact with jurors and listen carefully to their answers.
- A prosecutor should be wary of jurors too anxious to serve; hidden agendas may be dangerous.
- There are no rewards for speed in jury selection. A prosecutor should take his/her time (or the time allowed by the court) to pick the most appropriate jurors.
- A prosecutor should listen carefully to the questions asked by the defense attorney when he/she speaks to the jury. A prosecutor should look at the jurors while they answer the defense attorney. The defense attorney may uncover a challenge for cause the prosecutor missed and needs to pursue. A prosecutor should want the jury to understand it is important. Ignoring the defense voir dire does not convey that message.

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# Conclusion

Impaired driving cases are among the most difficult criminal cases a prosecutor can handle and are further complicated when the impairment is due to drugs. These cases usually involve technical testimony, scientific testimony, and juror empathy. Frequently, they also involve an experienced, skilled, and knowledgeable defense attorney who has done his or her homework on this and many other cases. Hopefully, the guidance offered in this monograph will enable prosecutors to present impaired driving cases more skillfully and professionally.

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# Resources

## National Traffic Law Center Resources

The following monographs are available for free on the NTLC website. Access by clicking on the hyperlink for each or visit [ndaa.org/resources/publications-videos/](https://ndaa.org/resources/publications-videos/) and scroll down to Traffic Law Publications to access these and many other resources.

- *Alcohol Toxicology for Prosecutors*
- *Basic Trial Techniques for Prosecutors in Impaired Driving Cases*
- *Challenges and Defenses II: Claims and Responses to Common Challenges and Defenses in Driving While Impaired Cases*
- *The Criminal Justice System: A Guide for Law Enforcement Officers and Expert Witnesses in Impaired Driving Cases*
- *Cross-Examination for Prosecutors*
- *Drug Toxicology for Prosecutors*
- *Saving Lives and Preventing Crashes, The Drug Evaluation and Classification (DEC) Program*
- *Investigation and Prosecution of Cannabis-Impaired Driving Cases*
- *Overcoming Impaired Driving Defenses*
- *Horizontal Gaze Nystagmus: The Science and The Law, A Resource Guide for Judges, Prosecutors and Law Enforcement*

## National Highway Traffic Safety Administration Resources

- SFST Curricula Guides and Manuals
- Safety Issues and Recalls, [www.nhtsa.gov/recalls](http://www.nhtsa.gov/recalls)
- SafeCar.gov, Recall Look-up by Vehicle VIN, [vinrcl.safercar.gov/vin/](http://vinrcl.safercar.gov/vin/)
- Couper, F.J. and Logan, B.K. *Drugs and Human Performance Fact Sheets*, April 2014 (Revised), National Highway Traffic Safety Administration, Washington, D.C., DOT HS 908 725.

## The Foundation for Advancing Alcohol Responsibility Resources

- *Law Enforcement DUI Testimony, Silver Tips Checklist*

## American Academy of Forensic Sciences Publications

- *Guidelines for Opinions and Testimony in Forensic Toxicology, ANSI/ASB Best Practice Recommendation 037, First Edition 2019*

