

2010 Michigan Traffic Safety Summit-Legal Update

*Presented by:
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Melendez-Diaz v. Massachusetts,

U.S. Supreme Court, 6/25/09

- Under *Crawford*, a witness's testimony against a defendant is inadmissible unless the witness appears at trial or, if the witness is unavailable, the defendant had a prior opportunity for cross-examination.
- The laboratory certificates were affidavits, which fell within the "core class of testimonial statements" covered by the Confrontation Clause.



Arizona v. Gant, U.S. Supreme Court, 4/21/09

- The United States Supreme Court held that the police may search the passenger compartment of a vehicle incident to a recent occupant's arrest only if it is reasonable to believe that the arrestee might access the vehicle at the time of the search or that the vehicle contains evidence of the offense of arrest.
- The Court rejected a broad reading of *Belton*.



Arizona v. Johnson, U.S. Supreme Court, 1/26/09

- A reasonable passenger would understand that during the time a car is lawfully stopped, he or she is not free to terminate the encounter with the police and move about at will.
- An officer's inquiries into matters unrelated to the justification for the traffic stop do not convert the encounter into something other than a lawful seizure, so long as the inquiries do not extend the stop's duration.



Herring v U.S., U.S. Supreme Court, 1/14/09

- Suppression is not the remedy for a search incident to an arrest warrant that should have been recalled.
- Exclusion of the evidence was not required because the purpose of the exclusionary rule is to deter deliberate police misconduct, not negligent, non-recurring mistakes.



Scott v Harris, 127 S Ct 1769 (2007)

- A police officer's attempt to terminate a high-speed car chase that threatens the lives of innocent bystanders does not violate the 4th Amendment.
- Police officer is immune from lawsuit.
- Reviewing courts are allowed to view facts depicted by the videotape which captured events underlying excessive force.



United States v Davis, No. 07-1964 (6th Cir., April 30, 2009)

- On December 19, 2008, the Court held that the “dangling ornament” provision of MCLA 257.709(1)(c) was unconstitutionally vague.
- On December 31, 2008, the Court withdrew its December 19, 2008 opinion.
- On April 30, 2009, the Court held the mere sight of the dangling “Tweety Bird” supplied the individualized suspicion sufficient to establish probable cause to believe that Davis was violating 257.709(1)(c). Therefore, the stop was reasonable under the Fourth Amendment, and the district court correctly denied Davis's motion to suppress.



.08 – OWI LAW

PENALTY FOR A REFUSING TO TAKE A CHEMICAL TEST HAS INCREASED

- One year suspension for first offense, two years for a second refusal in two years.

PRESUMPTION OF ALCOHOL IN YOUR BLOOD OR URINE

- No longer any presumptions in statute other than when blood or breath test is given, the results of the tests are presumed to be the same as at the time person was driving.



HEIDI'S LAW

- 2006 PA 565, effective 1/3/07, MCL 257.625
- Eliminated 10 year time requirement for prior convictions. The result is that if a person at any time in his life has two prior convictions, may be charged with a felony.
- Requirement of 1 prior conviction within 7 years has not changed.
- Applies to OWI, impaired, child endangerment, zero tolerance with minor in vehicle and operating with presence of schedule one controlled substance.
- Added other ways to prove a prior conviction including court register of action, judgment of conviction or information contained in the PSR.



Federal OWI Convictions

- Specifies that OWI convictions under federal law that substantially correspond to MCL 257.625 may be used as prior convictions. MCL 257.625(25).
- Effective, 1/1/09



OWI-Causation

- Only need to show that the defendant's operating of motor vehicle caused death or great bodily injury, need not show that intoxication was the cause. *People v Schaefer*, 473 Mich 418 (2005). However, see, *People v. Soares*, unpublished opinion from the COA (Docket No. 273333, decided 7/24/08).
- Same causation rule applies when the defendant has in his system a schedule one controlled substance or cocaine. *Derror, supra*.



OUID

Schedule One:

- If any amount of a schedule one controlled substance (e.g. marijuana) or cocaine in body, need not prove that suspect was under the influence or impaired. MCL 257.625(8). If not schedule one or cocaine, must prove operating under the influence or impaired. MCL 257.625(1).
- 11-carboxy THC is a schedule 1 controlled substance -- the prosecution need not prove beyond a reasonable doubt that the defendant knew he was intoxicated. *People v Derror*, 475 Mich 316 (2006).



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MIP (MCL 436.1703)

- Criminalizes any bodily alcohol content (.02 or any presence of alcohol within body) (misdemeanor)
- Increase Punishment- 30 days in jail is possible for second and 60 days in jail for third (but only if minor violated probation or other court ordered sanctions)



MIP (MCL 436.1703)

- Federal District Court ruled that the portion of the MIP statute, compelling a PBT upon a finding a reasonable cause, constituted an unreasonable search without a warrant. *Platte, et al v Thomas Township, et al*, 504 F Supp 2d 227 (ED Mich, 2007); *People v. Chowdhury*, No. 288696 (Mich. App., September 10, 2009).
- Police officers may not rely on any authority granted them pursuant to MCL 436.1703(6).



What Do These Decisions Mean?

- The portion of the PBT statute and any PBT ordinance is unconstitutional.
- Officers should seek consent. Under Michigan law, “A consent to search permits a search and seizure when the consent is unequivocal, specific and freely and intelligently given.”
- Based on officer’s observation, officer can still write ticket for MIP. Law enforcement officers will have to do an investigation using the tools they learned before technology:
 - What is in their hands?
 - How do their eyes look?
 - What do they smell?
 - How do they speak?
 - How do they act?
 - Are there beer bottles around the person?
 - What evidence is there that the minor had been drinking?



Operating-Minor With Any BAC (Zero Tolerance)-MCL 257.625(6)

- A person less than 21 years of age who operates a vehicle on a highway, place open to the general public, or parking lot while having a bodily alcohol content of .02% or more but less than .08% or having any presence of alcohol resulting from the consumption of alcohol is guilty of a misdemeanor.
- If the person's bodily alcohol content is .08% or higher, it is recommended to pursue Operating While Intoxicated.
- Punishment may be enhanced if subject has a prior alcohol-related driving offense; however, only one zero tolerance conviction may be used for a felony drunk driving enhancement.
- Upon conviction, subject may be ordered to pay costs of prosecution and provide reimbursement for emergency response.



People v Hyde, No. 282782 (Mich. App., September 1, 2009)

- The Court held that taking the blood sample under the implied consent law was improper due to the defendant's diabetes.
- Therefore, the Court concluded that the defendant's blood was unconstitutionally seized in violation of the 4th Amendment, and the test results should be suppressed.



People v Wujkoski, 230 Mich App 181 (1998)

- A six second gap in observation prior to administering a DataMaster in violation of administrative rule does not automatically require suppression of breath test results.
- Officer/operator failed to observe the defendant for approximately 6 seconds while checking the time, with jailor observing the defendant.



People v Philabuan, 461 Mich 255 (1999)

A subject who refuses to submit to a chemical test **given pursuant to a search warrant** is subject to being charged with resisting or obstructing an officer (even if no active aggression was exhibited).



People v Burruss, Case No. 281039 (Mich. App., Nov. 18, 2009)

The dangling ornaments did not create reasonable suspicion for stopping a vehicle properly registered in another state.



Independent Tests

A person who takes a chemical test administered at a peace officer's request as provided in this section shall be given a **reasonable opportunity** to have a person of his or her own choosing administer 1 of the chemical tests described in this subsection within a **reasonable time** after his or her detention. MCL 257.625a(6)(d).



People v Anstey, 476 Mich 436 (2006)

- Dismissal of charges and suppression of evidence is not the appropriate remedy for violation of statutory right to an independent test
- Trial courts must give appropriate instructions, telling jurors that statutory right was violated



Operated a Vehicle (not just “driving”)

A person, whether licensed or not, shall not **operate** a vehicle upon highway or other place open to the general public or generally accessible to motor vehicles including an area designated for the parking of vehicles.....MCL 257.625(1).



People v Yamat, 474 Mich 49 (2006)

Operate means “actual physical” – power or authority to guide or manage. Act of grabbing steering wheel and causing car to veer constitutes actual physical control.



People v Stephens, 262 Mich App 213 (2004)

People v Solmonson, 261 Mich App 657 (2004)

Even if suspect was not “operating” at moment that police observed conduct (sleeping in a parked car), can still be charged and convicted if can prove circumstantially that suspect was operating vehicle while intoxicated prior to the police approach.



People v Nickerson, 227 Mich App 434 (1998)

Pit area of a speedway is
“generally accessible to motor vehicles”
even though there are age and waiver
requirements for admission.

What about private driveways?



People v Hrllic, 277 Mich App 260 (2008)

Signaling a lane change is required by the Michigan Vehicle Code and can be the basis for a traffic stop.



People v Horton, Mich App, March 31, 2009

Information provided to law enforcement officers by concerned citizens who have personally observed suspicious activities is entitled to a finding of reliability when the information is sufficiently detailed and is corroborated within a reasonable time period of time by the officer's own observations.



US v Ellison, 462 F2d 557 (6th Cir., 2006);
People v Jones, 260 Mich App 424 (2004)

There is no reasonable expectation of privacy in a license plate and it does not implicate the 4th Amendment to run the plate through LEIN.



People v Jones, 270 Mich App 86 (2008)

Canine sniff provides probable cause for issuance of a search warrant.



Attorney General's Opinion, 2009

- Under MCL 257.625a, “An actual criminal prosecution need not be pending before a prosecutor may obtain the results of blood alcohol tests taken by a medical facility in the course of providing medical treatment to a driver involved in a motor vehicle.”



Television or Similar Electronic Device

- 2008 PA 19, effective March 7, 2008, MCL 257.708
- A person shall not operate a motor vehicle with a television or other similar electronic device that displays a video image that can be viewed by the operator while the motor vehicle is in motion.
- Civil Infraction



Preliminary Examination Hearings

- 2007 PA 89, effective 12/29/07; MCL 766.11b
- Evidence of the results of properly performed drug analysis field testing is sufficient to establish that the substance tested is a controlled substance for purposes of a preliminary examination.



Federal Ban on Texting

- On January 6, 2010, U.S. Transportation Secretary Ray LaHood announced federal guidelines to expressly prohibit texting by drivers of commercial vehicles such as large trucks and buses.
- Those who text while driving commercial motor vehicles may be subject to civil or criminal penalties of up to \$2,750.00.



Moving Violations

- Moving violation that caused serious impairment of a body function of another person-Misdemeanor (93 days);
- Moving violation that caused death of another person-Misdemeanor (1 year);
- Reckless driving that caused serious impairment of a body function of another person-Felony (5 years);
- Reckless driving that caused death of another person-Felony (15 years);
- Repeal sections that prescribe penalties for felonious driving and negligent homicide;
- Effective, October, 2010.



Interlock Status-Michigan

- Approximately 55,000 drunk driving arrests each year;
- About 28,000 involve a driver with a 0.15 BAC, while 21,000 involve repeat offenders;
- In 2008, 3,994 interlocks in use;
- Only 1 in 8 repeat drunk drivers use an ignition interlock device.



What is an Interlock?

- It is a breath alcohol analyzer connected to the ignition of a car;
- A vehicle equipped with this device cannot be driven unless the driver passes the unit's breath alcohol tests (Below .025 BAC).
- AKA: Breathalyzer, Interlock, Baiid





Separate Drinking From Driving

- Breath alcohol ignition interlock devices are the only available technology that separates drinking from driving.
- Other technologies (PBTs, ankle bracelets) measure drinking behavior. They do not prevent a vehicle from being started if alcohol is detected.



Michigan's Ignition Interlock Law

The law amends various sections of the MCL 257.625 pertaining to:

- Drunk Driving Offenses;
- License Sanctions for Drunk Driving Offenses;
- Use of An Interlock Device;
- Effective, October 31, 2010.



“The High BAC Law” in Michigan

- New Section MCL 257.625(1)(c) prohibits operation of a vehicle if:
 - (c) The person has an alcohol content of 0.17 grams or more per 100 milliliters of blood, per 210 liters of breath, or per 67 milliliters of urine.
- There will be 3 different “drunk driving” crimes.



“High BAC” Criminal Penalties

- A “High BAC” will be a misdemeanor punishable by a maximum of 180 days, and/or a fine of at least \$200 but not more than \$700, and/or community service.
- The criminal penalties for a subsequent high BAC offense will be the same as for any repeat drunk driving offense.



License Restrictions

- It will require the SOS to suspend the person's license for 1 year, with restrictions permitted after 45 days.
- A restricted license shall include a condition that the person may only operate a vehicle equipped with an ignition interlock.



Violations of the Restrictions

- SOS will impose an additional period of license suspension and restriction if the person violated the conditions of the restricted license.
- It will not apply to a start-up test failure within the first two months after the device had been installed.
- It will prohibit a person issued a restricted license requiring a device from removing the device or causing it to be removed unless the SOS issued an order authorizing its removal (90 day misdemeanor).



Mandatory Rehabilitation

- MCL 257.625b(5) is modified to require that courts imposed mandatory rehabilitation for High BAC offenders.
- The new law puts some parameters on the rehabilitation:
The programs include:
 - ...but are not limited to, an alcohol treatment program for a period of not less than 1 year. The treatment plan shall be devised from an assessment performed by an appropriately licensed alcohol assessor and approved by the court.



Michigan to Join Other “High BAC” States

Super Drunk

Over 40 states – but not Michigan – have separate laws to address extreme drunk driving, and many are requiring ignition interlock devices for first-time offenders.

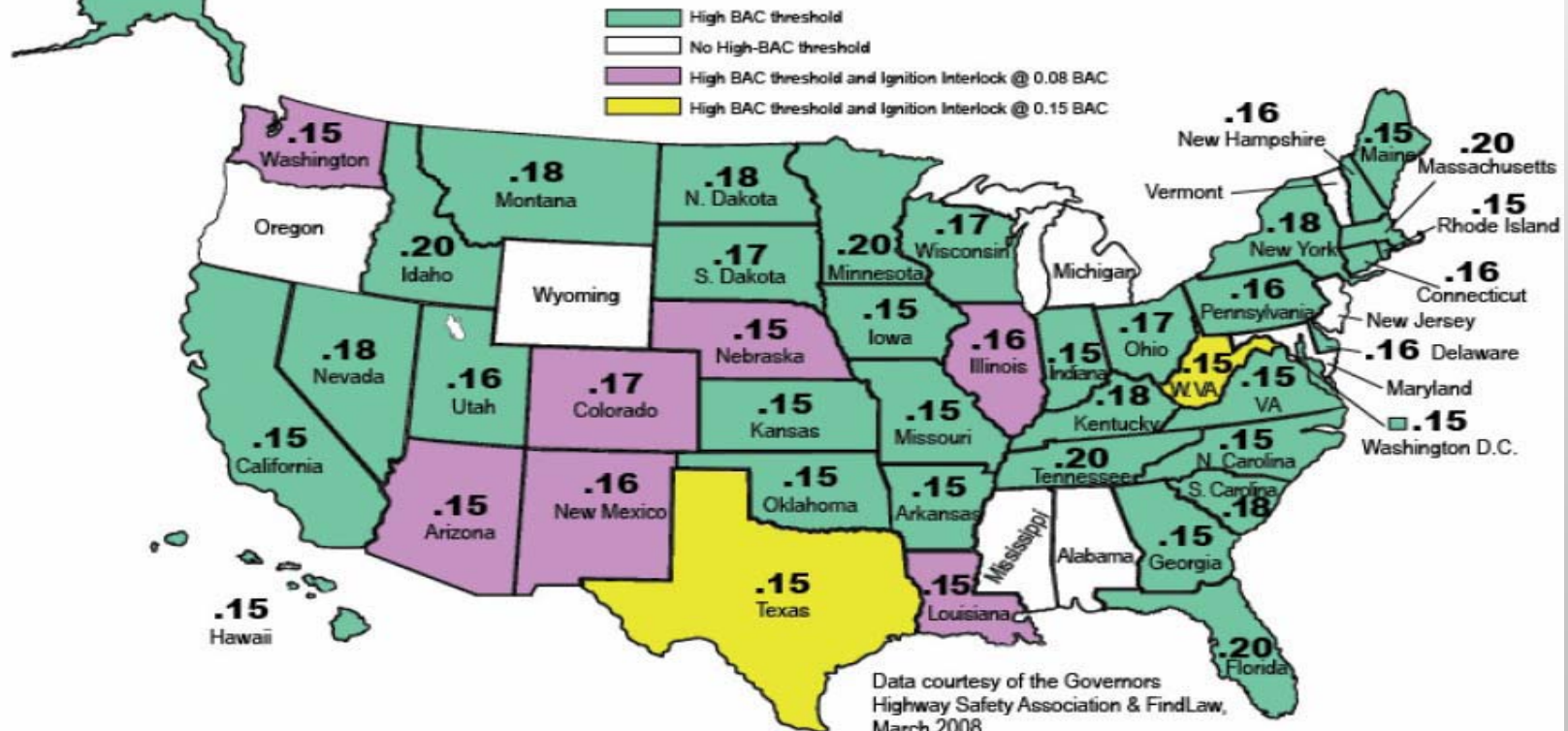


Photo ID Interlock

Photo Identification

- Records every test for accurate positive identification
- Answers the question...
Who took the test?



Photo ID client

May 2nd, 2008 09:05:37 AM

9:05:37 AM Picture Requested Test Started

9:05:50 AM Initial Test-Pass 0.000

9:05:54 AM Engine Start

9:05:55 AM Picture Requested Vehicle Started



Cost

Without Camera

- Installation- \$75.00
- Daily- \$2.50

Photo ID Device

- Installation- \$100.00
- Daily- \$3-4 (depending on program PBT requirements)



Michigan's Medical Marihuana Act

November 4, 2008:

Michigan voters approved Ballot Initiative that legalized Medical Marihuana (MCLA 333.26421-333.26430).

On December 4, 2008:

Michigan's Medical Marihuana law takes effect. The law required the MDCH to implement rules within 120 days.

On April 4, 2009:

MDCH adopts rules to implement the Act.



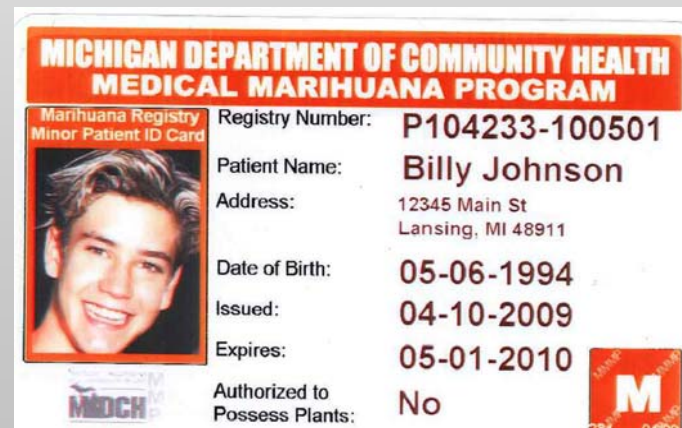
Registry Statistics

- Applications received as of 2/26/2010
- 18,487 applications received since April 6, 2009
 - 9,466 patients registered
 - 4,000 caregivers registered
- 2,977 applications denied
 - Reason for denial typically is that application is incomplete – missing photo; missing physician certification; application form incomplete; insufficient fee
 - Some denied because medical condition is not covered such as depression
 - Currently, MDCH is working on processing valid applications received mid-November 2009.
 - An average of 81 applications are received each day.



Identification Card System

MDCH has established an identification card system for patients qualified to use Marihuana and individuals qualified to be primary caregivers.



Application Process for the Registry ID Card

- An applicant submits a MDCH approved application, fee, copy of current photo ID and a physician certification to MDCH
 - Fee is \$100 for patient or \$25 if receiving SSI, receiving full Medicaid benefits, or SSD
- MDCH reviews and approves/denies application with 15 days of receipt
- MDCH issues registration card with 5 days of approval
- The statute allows for a copy of the application submitted to serve as a valid registry identification if the card is not issued within 20 days of its submission to MDCH.



Physician is not Prescribing Marihuana

- The certifying physician is not prescribing marihuana, physicians cannot do so.
- The physician is not recommending marihuana; the law does not require them to do so.
- The physician is only stating an “opinion” as to the likelihood of a medical benefit, and can do so under the law without any legal or professional liability, except that a physician is always subject to professional malpractice.



Visiting Qualifying Patients

- A card issued elsewhere in the United States would have the same force and effect as a card issued by the MDCH.
- A “visiting qualifying patient” refers to a patient who is not a Michigan resident or who had been a Michigan resident for less than 30 days.



Qualifications for Registered Primary Caregiver

- Patient designates an individual as the primary caregiver on the registration application form

The primary caregiver must:

- be 21 years old
- have no felony convictions involving illegal drugs
- agree to assist patient with medical use of marihuana



Designation

- The patient could designate a caregiver, and would have to indicate whether the patient or the caregiver would be allowed to possess Marijuana for the patient's medical use.
- Each patient could only have one caregiver and each caregiver could assist no more than five patients.



Enclosed, Locked Facility

A closet, room, or other enclosed area equipped with locks or other security devices that permit access only by a registered primary caregiver or registered qualifying patient.



Compensation for Registered Primary Caregiver

A caregiver may receive compensation for costs associated with assisting a registered qualifying patient in the medical use of marihuana. Any such compensation shall not constitute the sale of controlled substance.



Not Subject to Arrest

These primary caregivers shall not be subject to arrest, prosecution, or civil penalty or disciplinary action by a business or professional licensing board or bureau, for the medical use of Marijuana.



In the Presence or Vicinity

A person shall not be subject to arrest or prosecution, solely for being in the presence or vicinity of the medical use of marihuana, or for assisting a registered qualifying patient.



No Probable Cause

The possession or application for a registry identification card would not constitute probable cause or reasonable suspicion and could not be used to support the search of the person or property of an individual who possesses or applies for a card, or otherwise subject the person to inspection by local, county, or state governmental agencies.



What is Prohibited Under the Act?

- Smoking marihuana “in any public place”
- Smoking marihuana on any form of public transportation
- Any use by a person who has no serious or debilitating medical condition
- Operating, navigating, or being in actual physical control of any motor vehicle, aircraft, or motorboat while under the influence of marihuana
- Any use or possession in a school bus
- Any use or possession on the grounds of any preschool, primary, or secondary school
- Any use or possession in any correctional facility



Other Michigan Laws

Section 7(e) reads that:

“All other acts and parts of acts inconsistent with this act do not apply to the medical use of marihuana as provided by this act.”



Operation of a Motor Vehicle

What about a driver who may not be “under the influence” of marijuana, but may be in violation of MCL 257.625(8)-Operating Under the Influence of Drugs-Per Se?



People v. Malik, decided July 14, 2009

- The Barry County Circuit Court stated that “Failing to require the prosecuting attorney to prove impairment in an accident resulting in death would lead to prison sentences for drivers unlucky enough to cause a fatal accident.”
- The Court ordered that MCLA 257.625(8) is invalid on the basis of due process.



What About the Plants?

- Michigan does not limit the size or distinguish between seedlings and mature, producing plants.
- A caregiver can cultivate 12 marihuana plants per patient for up to 5 patients. However, the law does not set any parameters as to how much the caregiver can charge for their services.
- 12 plants can produce quite a bit of marihuana. The annual yield of a 12 plant indoor marihuana grow site would generate between 44 and 72 ounces.
- It can be assumed that the primary caregiver is not legally allowed to keep part of the “harvest” as payment.



Law Enforcement

- A qualifying patient and caregiver could face felony penalties of imprisonment for up to two years and/or fine of not more than \$2,000.00 and revocation of his/her ID card for selling Marihuana to someone who is not allowed to use Marihuana.
- The Act would impose a \$500.00 fine for fraudulent representation of any fact or circumstance relating to the medical use of Marihuana to avoid prosecution.



LEIN Verification

- Verifications are now available through LEIN.
- Query can be made for registration number.
- Verifications can ONLY be given to law enforcement personnel.
- Passing on information violates HIPAA



Catch-22

- Individuals who have been issued a marihuana registry identification card can legally purchase marihuana, but the person selling it to them can be prosecuted.
- Qualifying patients can cultivate their own medical marihuana, but there is no place to legally purchase the seeds.
- There is no language in the Act that protects anyone from being terminated from their job for the medical use of marihuana.



ARIDE

- Advanced Roadside Impaired Driving Enforcement
- Program was developed by NHTSA with input from the IACP.
- It was created to address the gap in training between the Standardized Field Sobriety Testing (SFST) and the Drug Evaluation Classification (DEC) Program.
- It provides officers with the opportunity to develop advanced skills and knowledge that will assist them in identifying alcohol and drug impaired drivers.



Why ARIDE?

- Better identification of drugged drivers
- Better arrests
- Better prosecutions
- Saved lives



Issue

The current OUID Per Se statute prohibits operation with any marihuana or the active ingredient THC in the person's system. What if law enforcement needs to show marihuana substantially affects an individual's ability to operate a vehicle in a normal manner?



QUESTIONS



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