

# The GREEN LIGHT NEWS

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## Use of Oral Fluid to Detect Drugged Drivers

By: Christine Moore, Bill Lindsey, Curt E. Harper, and Jennifer R. Knudsen

Drugged driving is becoming more prevalent throughout the United States. Data produced in the National Highway Traffic Safety Administration (NHTSA) sponsored National Roadside Surveys (NRS 2007; 2013/2014) have shown the prevalence of drugs in blood and oral fluid collected voluntarily from drivers increased from 16.3% to 20%, with marijuana detection rates rising from 8.6% to 12%. Many law enforcement officers and prosecutors are unfamiliar and uncomfortable with investigating and prosecuting these types of impaired driving cases. Traffic safety professionals are exploring avenues to combat these issues. For example, several states have improved warrant systems to get them faster to prevent the loss of critical evidence from biological samples. Perhaps the greatest benefit of using oral fluid for laboratory-based confirmation testing is the ability to analyze a biological specimen collected at the roadside, closer to the time an individual was operating a motor vehicle. This offers better information about drug positivity that could be lost by collecting a specimen with time periods between the traffic stop and the collection of the specimen. Additionally, the advances in roadside oral fluid field screening technology give law enforcement an additional tool to use to develop probable cause for such warrants before laboratory-based confirmation testing is pursued.

While oral fluid drug screening technology is not new to the science arena, use of this technology by law enforcement at the roadside is a newer concept prompted by the commercialization of cannabis and the opioid epidemic. Programs have been in place internationally for many years;

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however, they are relatively new within the United States. Lessons learned from jurisdictions that have piloted and/or utilize oral fluid drug testing are instructive for jurisdictions that are exploring the viability of this approach.

There are advantages and disadvantages of different specimen types (i.e., blood, urine, oral fluid) for purposes of drugged driving investigation. Most states collect blood in suspected drugged driving cases; therefore, the greatest volume of reference data is available for blood drug concentrations. Specimen choice considerations include level of invasiveness, ease and cost of collection and analysis, state statute, and correlation to recency of use. It is important to note that there is not a direct correlation between concentration and the degree of impairment for drugs other than alcohol

with any specimen type and it is ill-advised to predict impairment in a specific individual based on toxicology results alone. The totality of circumstances in a drugged driving case should also be considered when opining on impairment.

Blood is considered, by most, to be the gold standard of biological samples in drug impaired driving cases. It is blood that carries the drug throughout the body so that it can interact with receptors in the brain to cause effects. Therefore, it is an attractive specimen that contains pharmacologically active parent drug and often reflects recent drug use.

Due to the invasive nature of a blood collection, people are afforded more legal protections than other samples (e.g., breath, which may be taken as a search incident to arrest). Adulteration potential is extremely low with blood. However, some challenges with blood analysis include delay in collection time (e.g., ≥ 2 hours between arrest and blood draw in many states), requirement of specialized personnel for collection (e.g., nurse, phlebotomist), higher laboratory costs, and longer analysis time.

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# Saving Lives in CMV Enforcement

By: Jim Camp



As prosecutors and law enforcement officers, our mission is to save lives. To accomplish this mission, we must spread the word to prosecutors and law enforcement that reducing Commercial Motor Vehicle (CMV) related crashes is dependent upon holding commercial driver's license (CDL) holders accountable. We all know instinctively, that when a driver interacts with law enforcement, bad driving (at least for a time), can be deterred. That is the reason why high visibility enforcement campaigns in the DUI world work.

CMVs are defined in part as having a gross weight rating of 26,001 pounds.<sup>1</sup> Some are vehicles that are designed to transport 16 or more passengers including the driver<sup>2</sup> or a vehicle used to transport hazardous materials.<sup>3</sup> For these reasons CMV drivers, i.e., CDL holders, require special skills. Most CDL holders are safe, responsible, skilled professionals.

However, some unsafe CDL holders are also on the road. In 2018, 4,630 large trucks

**In 2018, 4,630 large trucks and buses were involved in fatal crashes,<sup>4</sup> and 121,000 large trucks and buses were involved in injury crashes.<sup>5</sup>**

and buses were involved in fatal crashes,<sup>4</sup> and 121,000 large trucks and buses were involved in injury crashes.<sup>5</sup> Aggressive traffic enforcement can prevent many of these incidents. Yet some officers despite developing reasonable suspicion of a traffic infraction are reluctant to stop trucks or buses driven by CDL holders. There are several reasons for this reluctance: a concern that a citation could cost the driver his/her job, the officer's lack of Motor Carrier Safety Assistance Program (MCSAP)<sup>6</sup> certification, or a belief that it is too much trouble.

In 2019, there were 170,955 driver out-of-service violations.<sup>7</sup> Inspectors noted

63,408 inoperative/defective brakes violations<sup>8</sup>, and 18,534 violations of using a hand-held mobile telephone while operating a CMV.<sup>9</sup> The inspectors who enforced these equipment violations, and the road officers who enforced the traffic violations held culpable drivers accountable, and took vehicles with defects off the road, undoubtedly saving lives. All officers should be encouraged to follow this example and overcome any reluctance to stop a CMV by treating it like a big car. When a traffic infraction committed in a CMV is observed, remember our life saving mission-stop the vehicle and issue the appropriate citation(s). If a law enforcement officer is not trained to review drivers' logs or conduct inspections, simply issue the appropriate traffic citation, or call a MCSAP-certified officer to assist.



Please visit our [website](#) for more information and programs including our On Demand Webinars: *Mastering Masking*, and *Human Trafficking and the Impact on Commercial Driver's Licenses*. Also contact me, Jim Camp, [jcamp@ndaajustice.org](mailto:jcamp@ndaajustice.org) or Romana Lavalas, [rlavalas@ndaajustice.org](mailto:rlavalas@ndaajustice.org) for these and other customized trainings.

**Editor's Note:** Jim Camp began his career in 1982 focusing on civil litigation, spent over sixteen years as an elected District Attorney in Wisconsin and nine years as a Traffic Safety Resource Prosecutor in Tennessee. He is currently a Staff Attorney at the National Traffic Law Center in Arlington, Virginia.

1. 49 C.F.R. § 383.5.

2. *Id.*

3. *Id.*

4. U.S. Dep't of Transp., Federal Motor Carrier Safety Administration, *2020 Pocket Guide to Large Truck and Bus Statistics*, 34, (Oct. 2020), <https://www.fmcsa.dot.gov/sites/fmcsa.dot.gov/files/2020-10/FMCSA%20Pocket%20Guide%202020-v8-FINAL-10-29-2020.pdf>

5. *Id.* at 35.

6. 49 C.F.R. § 350.101

7. *2020 Pocket Guide to Large Truck and Bus Statistics*, *supra*, at 20.

8. *Id.* at 24.

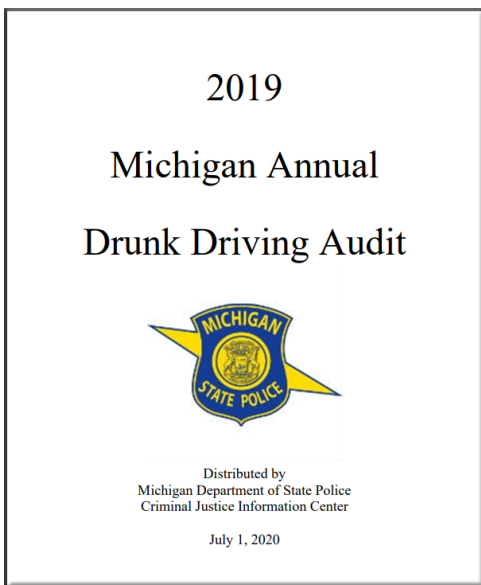
9. *Id.* at 23.

# Michigan Mothers Against Drunk Driving: Working with Prosecutors to Better Serve Victims

By Branden Coleman, MADD Michigan Manager of Victim Services

Michigan's Mothers Against Drunk Driving (MADD) staff and prosecutors can work together to better serve victims of drunk and drugged driving crimes.

According to the Michigan State Police Michigan Annual Drunk Driving Audit Report in 2019, there were 419 alcohol



and drug-related fatalities and 6,449 alcohol and drug-related injuries in Michigan.<sup>1</sup> MADD's mission is *"to end drunk driving, help fight drugged driving, support the victims of these violent crimes and prevent underage drinking."*<sup>2</sup>

The MADD Michigan Victim Services Team consists of a manager and three Victim Services Specialists. All are funded through the Victim of Crime Act grant. Every county in the state has a MADD Victim Services Specialist assigned to it from one of our three regional offices. Victim Services Specialists provide support and information to those who have had a loved one killed or injured in an impaired driving crash and to those who've sustained property damage as a result of an impaired driver. Services include immediate crisis intervention, emotional support, information sharing,

**Together we have come a long way in the fight to end impaired driving. Together one day we will see it end.**

court accompaniment and advocacy, and referrals to community resources.

Victim Services Specialists assist victims with writing victim impact statements. We provide samples of well written statements as a resource and a booklet that serves as a guide. We help victims organize and type up information the prosecution needs for sentencing. A Victim Services Specialist works with victims when emotions are running high. We work to help the individuals and families we serve learn what to expect in court and proper courtroom behavior.

The COVID-19 pandemic has changed the way we serve victims throughout the state. We help victims access their court cases online. Meetings that once were held in person are now held virtually. For example, Monday nights the Grief Discussion Group meets on Zoom, and the Injury Support Group meets via conference call Thursday mornings. Our services are free, confidential, and do not expire. Long after cases are adjudicated, those impacted by impaired driving continue their healing journey by attending groups that connect them with other survivors.

Our Victim Services Specialists work to build positive relationships with each prosecutor's office. We value victim referrals and hope that our outreach brochures are included in victim packets. We strive to build relationships with our local prosecutor's offices by acting as liaisons. We can also collect information from victims for their cases (e.g. victim impact statements), and assist prosecutors with breaking down court language for victims to better understand. The MADD Victim Services Team works alongside the prosecutor's office victim

advocates in aiding victims through the criminal justice process. We do not show up at a case unless we are invited to do so by the victim or survivor, by one of their loved ones, or by the prosecutor or a victim advocate with the office.

If you have a victim or survivor of a drunk or drugged crash that needs assistance, please contact your MADD-Michigan Regional Victim Services Specialist.

Betsy Harris - Northern Michigan & Upper Peninsula - (906) 474-9346

Stephanie Hurst - Western Michigan - (616) 225-3349

Laurie Hollister-Southern Michigan - (248) 528-1745 (ext. 2654)

Branden Coleman-Eastern Michigan & the Thumb - (248) 528-1745 (ext. 2651)

If you would like copies of our outreach brochures for your office, please contact the MADD Michigan State Office located at 1739 W. Big Beaver Rd., Troy Michigan 48084. We can also be reached at (248) 528.1745.

Together we have come a long way in the fight to end impaired driving. Together one day we will see it end. Together we can make a difference in the lives of those impacted by impaired driving.



1. MSP - Michigan Drunk Driving Audit
2. About Us | MADD

# MADD Lifesaver Awards

By: Sue Strong, MADD Michigan Program Coordinator

Every year Mothers Against Drunk Driving (MADD) Michigan recognizes law enforcement officers who embrace MADD's mission. That mission is *to end drunk driving, help fight drugged driving, support the victims of these violent crimes, and prevent underage drinking*. Normally the officers recognized are invited to attend the Lifesaver Awards Luncheon, but unfortunately this event was canceled this year due to the ongoing COVID-19 pandemic.

The MADD Lifesaver Awards are a collaborative effort by the Office of Highway Safety Planning (OHSP), the Michigan State Police (MSP), and the Prosecuting Attorneys Association of Michigan (PAAM). Nomination forms are sent to all law enforcement agencies and prosecutor offices throughout the state. Categories for the nominations are listed below as well this year's award recipients.



This year MADD received over a hundred nomination forms, which were all reviewed by a selection committee. The selection committee consisted of representatives from the following agencies: MSP, Michigan Association of Chiefs of Police, Michigan Sheriffs' Association, OHSP, PAAM, and the Michigan Department of Attorney General.

Each year there are anywhere from 17 to 23 awardees that are selected from the 100-plus nominations. These officers also receive a scholarship to attend the OHSP's Traffic Safety Summit held each year in East Lansing. Law enforcement agencies and prosecutors are also recognized for their efforts in fighting impaired driving.

It has been my pleasure to be part of the Lifesaver Award Luncheon for the past five years. Usually over 200 people attend and officers are encouraged to bring their family members. It is a lot of work, but to see the smiles on all those faces is heartwarming. I have been told that the law enforcement arena is very appreciative of being recognized by an outside organization. With law enforcement being our first responders, their lives are at stake every time they put on the uniform, this is the least that MADD Michigan can do to honor them.

## Lifesavers Awardees of 2020

### OUTSTANDING OFFICER

Clawson Police Department - Sgt. Scott Vierk  
 Grand Blanc Township Police Department - Officer Wes Evans  
 Gun Lake Tribal Police Department - Officer Brandon Kueppers  
 Livonia Police Department - Officer Joshua Kohler  
 Washtenaw County Sheriff's Office - Deputy Brian Webb  
 MSP - Iron Mountain Post - Trooper Greg Primeau  
 MSP - Niles Post - Trooper Kevin Lee  
 MSP - Metro North Post - Trooper Stephen James  
 MSP - Metro North Post - Trooper Eric Whitcomb  
 MSP - Rockford Post - Trooper Matthew Slagter

### OUTSTANDING ROOKIE

Dearborn Heights Police Department - Officer Adam Krot  
 Kent County Sheriff's Office - Deputy Matthew Rybar  
 MSP - Houghton Lake Post - Trooper Kevin Dugan

### OUTSTANDING AGENCY

Auburn Hills Police Department  
 Clinton County Sheriff's Office  
 MSP - Iron Mountain Post

### RECOGNITION OF EXCELLENCE

Barry County Sheriff's Office - Deputy Scott Ware  
 Grand Blanc Township Police Department - Lt. Bill Renye  
 Mt. Pleasant Police Department - Officer Michael Covarrubias  
 MSP-Caro Post - Trooper Nichole Dhooghe

### DEPUTY LEWIS TYLER LONGEVITY AWARD

Shelby Township Police Department - Officer Robert Van Dyke  
 Washtenaw County Sheriff's Office - Det./Corporal Doug McMullen

### DAVID M. SCHEIBER AWARD

Wayne County Prosecutor's Office - Jennifer Douglas, APA



# For Your Information

## OHSP Offers Free Traffic Safety Materials

The Michigan Office of Highway Safety Planning (OHSP) publishes informative brochures, flyers, posters, and other traffic safety-related items.

Topics include:

- Impaired driving
- Bicycle, bus, and pedestrians
- Car seats and boosters
- Motorcycles
- Seat belts
- Teen driving

These materials are available free of charge. Quantities, unless otherwise noted, are limited to 250. Only one order per month will be accepted per customer. Please allow two to four weeks to receive your items.

[Michigan Traffic Safety Materials Catalog](#)

**Note: Materials are only available to Michigan residents.**

For more information, contact Jessica Beyer at [BeyerJ1@Michigan.gov](mailto:BeyerJ1@Michigan.gov) or (517) 636-4256.



## Speeding<sup>1</sup>

Speeding endangers everyone on the road: In 2018, speeding killed 9,378 people. We all know the frustrations of modern life and juggling a busy schedule, but speed limits are put in place to protect all road users. Learn about the dangers of speeding and why faster doesn't mean safer.

### Dangers of Speeding

For more than two decades, speeding has been involved in approximately one-third of all motor vehicle fatalities. In 2017, speeding was a contributing factor in 26% of all traffic fatalities.

Speed also affects your safety even when you are driving at the speed limit but too fast for road conditions, such as during bad weather, when a road is under repair, or in an area at night that isn't well lit.

Speeding endangers not only the life of the speeder, but all of the people on the road around them, including law enforcement officers. It is a problem we all need to help solve. NHTSA provides [guides and toolkits](#) to help spread the message about safe driving, including tips on what you can do if you encounter an aggressive driver on the road.

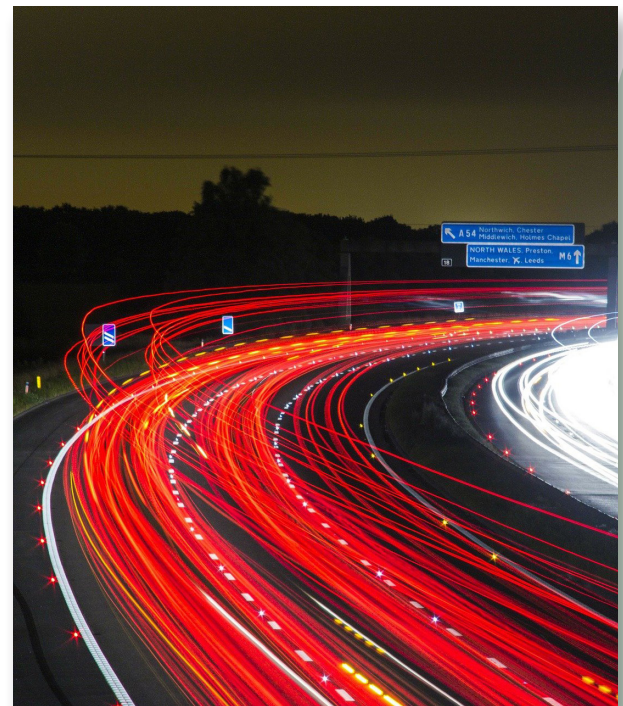
### Consequences

Speeding is more than just breaking the law. The consequences are far-ranging:

- Greater potential for loss of vehicle control;
- Reduced effectiveness of occupant protection equipment;
- Increased stopping distance after the driver perceives a danger;
- Increased degree of crash severity leading to more severe injuries;
- Economic implications of a speed-related crash; and
- Increased fuel consumption/cost.

### What Drives Speeding?

Speeding is a type of aggressive driving behavior. Several factors have contributed to an overall rise in aggressive driving:



1. <https://www.nhtsa.gov/risky-driving/speeding>

**Traffic:** Traffic congestion is one of the most frequently mentioned contributing factors to aggressive driving, such as speeding. Drivers may respond by using aggressive driving behaviors, including speeding, changing lanes frequently, or becoming angry at anyone who they believe impedes their progress.

**Running Late:** Some people drive aggressively because they have too much to do and are “running late” for work, school, their next meeting, lesson, soccer game, or other appointment.

**Anonymity:** A motor vehicle insulates the driver from the world. Shielded from the outside environment, a driver can develop a sense of detachment, as if an observer of their surroundings, rather than a participant. This can lead to some people feeling less constrained in their behavior when they cannot be seen by others and/or when it is unlikely that they will ever again see those who witness their behavior.

**Disregard for Others and For the Law:** Most motorists rarely drive aggressively, and some never do. For others, episodes of aggressive driving are frequent, and for a small proportion of motorists it is their usual driving behavior. Occasional episodes of aggressive driving—such as speeding and changing lanes abruptly - might occur in response to specific situations, like when the driver is late for an important appointment, but is not the driver’s normal behavior.

If it seems that there are more cases of rude and outrageous behavior on the road now than in the past, the observation is correct - if for no other reason than there are more drivers driving more miles on the same roads than ever before.

### E-Scooter-related injuries are on the rise

A new report by the United States Consumer Product Safety Commission (CPSC) found that injuries and deaths associated with the use of micro-mobility products (e.g., e-scooters, hoverboards, and e-bikes) have increased. According to the report, there were about 133,000 emergency room visits associated with micro-mobility products from 2017-2019. Much of the increase over the years is attributable to e-scooters, with emergency room visits going from 7,700 in 2017, to 14,500 in 2018, and 27,700 in 2019. The CPSC recommends the following safety tips when using a micro-mobility device:

- Wear a helmet.
- Check the device for damage before use.
- Always test the brakes.
- See and be seen, don’t make unpredictable movements.
- Beware of obstacles.
- Don’t listen to music while riding, it’s distracting.
- Don’t perform stunts.
- Follow all manufacturer instructions.



### Use of Oral Fluid to Detect Drugged Drivers *(continued from page 1)*

Urine typically contains high concentrations of drug metabolites while often lacking parent drugs (e.g., THC). These metabolites may be present for days or weeks after last use. The window of detection for drugs in urine does not reflect recent use and lacks any correlation to impairment. Despite costing less to perform qualitative testing in urine, agencies are discouraged from using this specimen type in impaired driving cases. With that said, it is recognized that some states collect urine for drugged driving cases because of per se laws and/or the ease of analyzing for drugs.

Despite its limited use in drugged driving investigations in the United States, oral fluid testing has been around for over a decade

and is used today in workplace drug testing, pain management monitoring, and other applications. Oral fluid is the most practical specimen to be used by field screening devices (e.g., at the roadside) due to rapid, noninvasive, and simple sample collection. These devices may be used by law enforcement to establish probable cause in a drugged driving investigation. Currently, there are no reports of intentional volume manipulation or adulteration with oral fluid. Observed collection minimizes the potential for adulteration and same-gender observation is not required. The level of invasiveness is lower than blood or urine and likely more akin to breath testing. Like blood, oral fluid contains the pharmacologically active parent drug,

which likely represents recent drug use. Another significant advantage of oral fluid in a drugged driving investigation is the ability to collect the confirmation specimen closer to the time proximity of driving (e.g., at the roadside) than blood or urine. It is well-known that some drugs (e.g., THC, cocaine) rapidly metabolize and dissipate from the body and a timely collection increases the likelihood of detection.

A major advantage of oral fluid drug screening is the amenability to rapid point of collection (on-site) results (e.g., roadside screening for drugged driving investigations). These devices typically include an oral fluid collector (e.g., cartridge with pad) and an internal detection system

based on lateral flow immunoassay. The presence of a drug can be determined by an objective reading of the test strip by the device itself, typically in the form of an analyzer (e.g., Abbott SoToxa [formerly DDS2], Dräger DrugTest 5000), or by visual inspection of an appearance of a line similar to a pregnancy test (e.g., DrugWipe).

Oral fluid, which is largely a reflection of the free drug circulating in the blood, can be collected and analyzed with commercially available field screening devices allowing the result to be determined within a few minutes; this is particularly useful for situations where drug intake must be determined quickly to take further action.

In recent years, improvements in sensitivity, technology, and instrumentation have greatly improved performance and there are now several commercially available devices that are valid for roadside use. It is important to be aware of devices which should not be used for evidentiary purposes.

A field screening result represents a qualitative assessment (*i.e.*, positive or negative). Devices are immunoassay based and, consequently for forensic purposes, require an independent confirmatory test as recommended with any laboratory-based immunoassay screening procedure. A positive field screening result may indicate a specific drug (e.g., methamphetamine) or drug class (e.g., benzodiazepines). The results are considered presumptive positives until an evidentiary confirmation has been conducted. An evidentiary confirmation will indicate the specific drug present in the oral fluid. For example, a benzodiazepine positive by a field screening device could be confirmed as alprazolam by evidentiary confirmation in the laboratory. There are numerous benzodiazepines available for therapeutic use or recreational abuse.

Field screening is generally thought to consist of small handheld instruments or visually read devices, but bench-top instruments operating in jails and hospital settings may also be considered screening devices. The devices based on immunoassay technology are prone to the same advantages and drawbacks associated with cross-reactivity and antibody selection as other immunoassays. Advantages include

convenient sample collection, ease of use, rapid results, straight-forward interpretation, and relatively low costs associated with implementation of a drug screening program.

**There are a multitude of oral fluid field screening devices available; therefore, law enforcement and laboratory personnel must take a variety of factors into consideration when determining which devices to approve and use in the field.**

Disadvantages may include smaller sample volume, difficulty providing a specimen (e.g., dry mouth) and sensitivity challenges from specific drug classes (e.g., benzodiazepines). Further disadvantages related to the field screening devices include the cost of devices and test cartridges and limited scope of analysis.

The implementation of an oral fluid drug screening (at roadside) or testing (laboratory-based) program should be a collaborative process involving multiple stakeholders within the administrative and criminal justice systems. This ensures that different perspectives are considered, and important contemplations of each system facet are addressed. An isolated approach limits success and has the potential to lead to unnecessary challenges or issues that could otherwise be easily resolved. There are a multitude of oral fluid field



screening devices available; therefore, law enforcement and laboratory personnel must take a variety of factors into consideration when determining which devices to approve and use in the field.

The cost of roadside devices that include an analyzer as part of the system and their test cartridges may prohibit some

agencies from purchasing these tools. There is variability in oral fluid technology because some devices are single use and disposable and others utilize systems. The size of systems can also vary because some units have large box-like analyzers and others are hand-held. While oral fluid screening can be costly, the cost of oral fluid confirmation collection devices is typically significantly more affordable. While per test costs are presently high, the development of a larger market for oral fluid technology is likely to create more competition and drive down costs similar to other forms of alcohol and drug testing technology.

Roadside devices do not typically allow confirmation laboratory testing of the same specimen that is screened although there are a few exceptions (e.g., the use of the Dräger DrugTest 5000 in Australia). Therefore, a second oral fluid confirmation sample should be collected for forensic toxicology laboratories offering this testing. In such cases, total oral fluid-elution buffer volume is typically low (~2–4mL) and may restrict the number of confirmatory tests that can be performed. This can be adequately handled if a laboratory performs qualitative analysis via LC-MS/MS. Lastly, oral fluid testing is not currently common to most forensic laboratories and would require time, financial resources, and skilled personnel to conduct method development and validation. However, increasing laboratory capacity has become an important priority for many within the traffic safety field and further appropriations to state laboratories to increase efficiency and reduce backlog in sample analyses could support more widespread adoption of oral fluid confirmation testing.

There are cutoffs (*i.e.*, for field screening devices) and limit of detections (*i.e.*, for confirmation techniques) with any analytical test. False positive and negative rates and precision at the decision point should be evaluated during device approval and method validation. There is always the possibility of the presence of a drug below the cutoff or limit of detection (LOD). This should be considered in conjunction with the timing of sample collection when interpreting toxicology results.

Oral fluid field screening devices can be used by law enforcement during a drugged driving investigation to

identify drug use. Most of the devices that have been evaluated in recent reports screen for marijuana, cocaine, methamphetamine, amphetamine, opioids, and benzodiazepines. The devices are analogous to preliminary breath tests (PBTs) for alcohol and should be used to establish probable cause. They display results of *positive* or *negative* and should be administered after standardized field sobriety tests (SFSTs) to confirm suspicion of drug use. At this stage, the officer has concluded that the driver is impaired and unable to safely operate a motor vehicle. The roadside oral fluid screen is used to identify what drug class(es) is/are likely causing the impairment. This information can be used to assist with obtaining a search warrant to collect a confirmation specimen (*i.e.*, blood and/or oral fluid). A field screen should not be used for evidentiary purposes, and local law will dictate if these results are admissible in court and under what circumstances.

Preferably, an oral fluid specimen will be collected as the evidentiary specimen proximate to the time of driving and suspected impairment. It is known that some drugs (*e.g.*, THC, cocaine) metabolize and dissipate rapidly from the body resulting in drug concentrations that are low or none detected at the time of a blood draw, often two hours or more after the arrest or crash. Therefore, the analysis of the blood specimen does not reflect blood concentration at the time of the traffic stop or crash. In states that have established *per se* limits for drugs, the delay in blood sample collection is particularly problematic and can make it difficult to prosecute cases. It is for these reasons that oral fluid should be collected by the investigating officer or by his or her representative as close to the arrest or crash as possible (*e.g.*, at roadside) to increase the likelihood of detecting the impairing substance at the time of driving. To paint the most comprehensive picture of impairment and recency of use, a program may elect to test both blood and oral fluid as confirmation specimens (the oral fluid drug testing program established by the Alabama Department of Forensic Sciences utilizes this approach).

As with any impaired driving investigation, all facets of the investigation should be considered (*i.e.*, vehicle in motion, personal

contact, and SFST performance). The totality of circumstances in conjunction with the toxicological analysis should be reviewed.

**Blood tests are significantly more intrusive, because getting blood is extracting a part of the person's body by piercing skin and going into a vein and blood can be tested for things besides the alcohol content.**

The adjudication of impaired driving offenses is difficult due to the complex and scientific nature of these cases. Drug-impaired driving cases tend to be particularly challenging because state statutes vary considerably and the approaches commonly used in prosecuting impaired driving cases (*e.g.*, proving that a defendant had a blood alcohol concentration above the *per se* limit) are not always applicable.

The use of field screening devices and laboratory oral fluid testing has not been widely litigated in the criminal justice system. Some states have laws authorizing oral fluid testing, but practices vary greatly. When police ask a person to provide a biological sample during an impaired driving investigation, it is considered a search and is subject to constitutional scrutiny. *See Schmerber v. California*, 384 U.S. 757, 86 S. Ct. 1826, 1833-36 (1966) (testing of the blood is a search under the Fourth Amendment requiring courts to determine whether the search was justified and whether the means used to get blood were reasonable).

*Birchfield v. North Dakota*, 136 S. Ct. 2160 (2016), provides guidance on the legal analysis of these searches. This decision notes that there are far fewer privacy



concerns with breath tests, than blood tests. *Id.* at 2176-77 (there is no piercing of the skin, the effort is comparable to

blowing up a balloon, expelled air [breath] is not part of the body, breath test reveals only the amount of alcohol compared to other results that may come from testing blood, etc.). Breath tests do not give rise to significant privacy issues (including no embarrassing moments during collection) and only create minimal inconvenience for the test subject. “[T]he Fourth Amendment permits warrantless breath tests incident to arrests for drunk driving,” but not blood tests. *Id.* at 2184. Blood tests are significantly more intrusive, because getting blood is extracting a part of the person's body by piercing skin and going into a vein and blood can be tested for things besides the alcohol content. *Id.* at 2178. Thus, courts must weigh more privacy issues in cases involving blood.

The Court has not heard a case concerning oral fluid, but sample types can be compared using its analysis of breath and blood in *Birchfield*. The level of intrusiveness is somewhere between blood and breath. There is no piercing of the skin, but the collection involves taking something from the body that a person is not ordinarily disposing of frequently like breath when someone exhales. Although there is no needle inserted in a vein, the subject may have to keep a device in her mouth for several minutes (compared to seconds for breath testing instruments or blowing up a balloon). No embarrassing moments should occur during the collection. Oral fluid is almost always collected to test for drugs other than alcohol so it is more like blood in that the results are not just limited to the measurement of alcohol in the sample.

Another similarity between breath and oral fluid is that law enforcement may take two breath samples, one on the roadside (PBT) and one after arrest (using an approved instrument in a controlled environment). The PBT results may help a law enforcement officer establish probable cause to arrest and/or know whether further testing is required (*i.e.*, if the person who appears to be greatly intoxicated blows .000 on a PBT, then an officer should consider a test that can detect other drugs). The roadside result should be used in pretrial hearings or as allowed by law only. After probable cause has been established, the results from a secondary laboratory-based



confirmatory test may be used at trial. The use of oral fluid testing can be conducted in a similar way. An oral fluid field screening device is also used by law enforcement to assist in establishing probable cause for the arrest and to apply for a search warrant for blood and/or confirmatory oral fluid sample. Any laboratory results from testing oral fluid (like blood results) are admissible in all legal proceedings, including trial.

The collection of the oral fluid sample to send to a laboratory is similar to DNA collection. Oral fluid can be collected as an undiluted fluid via passive drool, expectoration into a tube, or using a cotton or synthetic fiber collection pad placed into a dry tube or into a diluent for shipment to a laboratory; although the collection of passive drool without a stabilizing buffer allows THC to degrade rapidly. The United States Supreme Court has already ruled that similar types of collection processes are far gentler than a blood draw and that the intrusion is negligible. *See Maryland v. King*, 133 S. Ct. 1958 (2013). The balance of privacy issues and law enforcement concerns will aid in the determining the reasonableness of the search.

There is not a direct corollary with the evidentiary test results and degree of impairment, but it will aid law enforcement and prosecutors in explaining the impairment and may give all parties a potential timeframe of when the individual last used the drug.

At least one court has had a hearing on the admissibility of an oral fluid field screening device result. The evidentiary hearing concerned the use of a Dräger DrugTest 5000, and the court found that “the correct scientific procedures were used . . . [t]he court further finds that there is sufficient reliable evidence of the drug screening test administered.” *People v. Junior Salas*, Register of Actions Kern County, California Case Number BF15363A. November 30, 2015 (Appendix A) and Transcript of Excerpt of Jury Trial Testimony (402 Hearing) (Appendix B).

We depend on law enforcement and prosecutors to promote the usefulness of oral fluid drug screening technology, while not overstating how such results can be used during the adjudication of an

impaired driving suspect. Ultimately, we want to create a process that provides law enforcement, scientists, and prosecutors with the tools to develop, utilize, and admit oral fluid testing results in criminal courts. Always remember, no matter the impairment, “if you feel different, you drive different.”

#### AUTHOR BIOS

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**Editor's Note:** The article "Supreme Court Decision Gives Officers Flexibility in Blood Draws Regarding Fourth Amendment Rights" from the August 2020 newsletter should have referenced the following article: *Mitchell v. Wisconsin*, 133 Harv. L. Rev. 302 (2019); <https://harvardlawreview.org/2019/11/mitchell-v-wisconsin> Though the article referenced the fact that blood results may be admissible without a search warrant in certain circumstances, best practices dictate that law enforcement should pursue a blood search warrant whenever possible.

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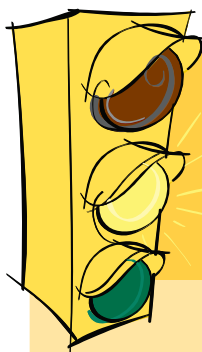
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# The YELLOW LIGHT LEGAL UPDATE

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Clicking on case names (highlighted in blue text) will take you directly to the PDF version of the opinions online.

## Published Cases

### United States Supreme Court

The United States Supreme Court held that a Kansas officer acted reasonably in making a traffic stop, reversing the Kansas Supreme Court. The Court ruled 8-1 that a sheriff's deputy making an investigative traffic stop after running a vehicle's license plate and learning that the registered owner's driver's license had been revoked was reasonable under the Fourth Amendment. The Kansas Supreme Court had unanimously held

other traffic infractions or identifying the driver, the deputy pulled over the vehicle, discovered the owner was in fact the driver, and cited the defendant as a habitual violator for driving while his license was revoked.

The Court noted the ruling was narrow and that any traffic stop in this situation must quickly end if the officer's reasonable suspicion about who is driving the vehicle is not confirmed.

[\*Kansas v Glover\*](#), case no. 18-556, decided April 6, 2020.

### Michigan Court of Appeals

Defendant was stopped for no seatbelt and arrested for Operating While Intoxicated after a roadside investigation. At the police station, he blew .09 into the DataMaster.

The prosecution filed a pretrial motion asking the district court to admit the 120-day test logs as business records under MRE 803(6) and to find that the technician performing the 120-day tests on the instruments was a nontestimonial witness for purposes of the Confrontation Clause. The district court denied the motion, but stayed the case pending appeal. The circuit court denied leave and the prosecution appealed to the Court of Appeals (COA).

**Thus, the primary purpose of Gier testing the DataMaster's accuracy was to comply with administrative regulations, see Mich Admin Code R 325.2653(3), and to ensure its reliability for future tests—not to prosecute defendant specifically. As such, the DataMaster logs were nontestimonial and the trial court erred by holding that they were testimonial.**

In a two-to-one majority, the COA vacated the district court's decision on both points. As to the Confrontation Clause issue, the majority held the following:

"Here, the DataMaster logs are nontestimonial. The DataMaster logs here were created before defendant's breathalyzer test to prove the accuracy of the DataMaster machine; they were not created for the purpose of prosecuting defendant specifically; thus, they did not accuse a targeted individual of engaging in criminal conduct. Furthermore, the DataMaster logs were also created as part of the Michigan State Police's normal administrative function of assuring that the DataMaster machine produces accurate results. The DataMaster would have been checked for proper functioning even if defendant had not been tested with it. Thus, the primary purpose of Gier testing the DataMaster's accuracy was to comply with administrative regulations, see Mich Admin Code R 325.2653(3), and to ensure its reliability for future tests—not to prosecute defendant specifically. As such, the DataMaster logs were nontestimonial and the trial court erred by holding that they were testimonial."

The majority also agreed with the prosecution that the logs fall under the business-records exception to the hearsay rule. The COA, citing the Michigan State Police's (MSP) administrative rules for chemical-breath testing, observed that police "keep the DataMaster logs 'in the course of a regularly conducted business activity' and it is 'the regular practice of that business activity to make the . . . record' as required by the administrative DataMaster regulations." It then addressed the dissent's contention that the DataMaster calibrator's acknowledgement of making a mistake in a prior case rendered these logs untrustworthy:



the stop violated the Fourth Amendment. "The inference that the driver of a car is its registered owner does not require any specialized training; rather, it is a reasonable inference made by ordinary people on a daily basis," Justice Clarence Thomas wrote for the majority.

While on routine patrol, the deputy involved in this case ran a registration check on a pickup truck with a Kansas license plate. The Kansas Department of Revenue's electronic database indicated the truck was registered to an individual whose driver's license had been revoked. Without observing any

**The Yellow Light Legal Update is an addition to The Green Light News. With this insert, you can keep a notebook for just the traffic safety cases.**

“MRE 803(6) addresses the trustworthiness of the type of document in question, not the specific document at issue in a given case. Whether the DataMaster logs at issue in this case were accurate has no effect on whether they are an actual business record. Indeed, a business record can certainly be inaccurate such as when a business intentionally creates inaccurate accounting statements for tax evasion purposes. Those records are certainly not trustworthy, but they certainly would be considered business records because they were created during the normal course of business. Whether those records are believed by the fact-finder is a question of the weight and credibility of the evidence for the fact-finder to decide. Such is the case here. Whether the DataMaster logs in this case are accurate and trustworthy is a question of the weight that the fact-finder should give to the DataMaster logs.”

*People v. Fontenot*, no. 350391, decided on September 10, 2020 (Michigan Court of Appeals)

## Unpublished Cases

*(An unpublished opinion is not binding as precedent but may have persuasive value in court. See, Michigan Court Rule 7.215)*

The prosecution appealed by leave granting the circuit court's order affirming the district court's suppression of evidence and dismissing the charge of operating while intoxicated.

The defendant was arrested after MSP troopers witnessed him speeding. Defendant was taken to an MSP post,



where he was given two DataMaster breath tests. Both tests indicated .24 grams of alcohol per 210 liters of breath.

Defendant retained counsel, who submitted a request to the MSP under the Freedom of Information Act (FOIA), for the MSP to produce and preserve any and all evidence related to defendant's arrest, including video recordings from the booking room in which the DataMaster test was administered.

**Our Supreme Court has stated “suppression of the evidence is not an appropriate remedy for a statutory violation where there is no indication in the statute that the Legislature intended such a remedy and no constitutional rights were violated.”**

The district court found MSP acted in bad faith in failing to preserve the booking video recording. The circuit court affirmed the district court's order suppressing the DataMaster test results and dismissing the charge against defendant. The COA granted, leave to appeal.

The prosecution first argued suppression of the DataMaster test results was not an appropriate remedy for a violation of FOIA, because MCL 15.240b does not expressly provide for suppression of evidence as a remedy for violation of the statute. The COA agreed.

The COA held as follows: “The FOIA does not provide for any further statutory penalties...Our Supreme Court has stated “suppression of the evidence is not an appropriate remedy for a statutory violation where there is no indication in the statute that the Legislature intended such a remedy and no constitutional rights were violated.” *People v Anstey*, 476 Mich 436, 442-443; 719 NW2d 579 (2006). Although *Anstey* permits the possibility that a FOIA violation may result in suppression of evidence if that violation causes a constitutional violation, suppression is not appropriate just because FOIA was violated.”

Next, the prosecution argued the district court incorrectly found that the MSP acted in bad faith when it failed to preserve the booking room video. The COA agreed.

The COA noted, “A due process violation is clearly not established merely because a recording was destroyed after

timely notice was given requesting its preservation.”

The COA held, “Although the evidence could allow a finder of fact to infer incompetence on the part of the official actors in this case, there is no evidence of official animus on the part of the MSP post or MSP's Freedom of Information Unit. Problems undoubtedly existed, but negligence such as that shown by the record here does not create a due-process violation, and defendant has failed in meeting his burden to prove bad faith.”

Reversed and remanded.

*People v Feeney*, case no. 349339, decided October 22, 2020.

The Michigan COA held that National Precursor Log Exchange (NPLEx) records are not testimonial for purposes of the Confrontation Clause. NPLEx is a nationwide database that tracks purchases of products containing pseudoephedrine. The database is administered by a private company, and the information is obtained by pharmacies at the time of purchase.

Defendant appealed his jury convictions of manufacturing methamphetamine (meth), operating or maintaining a meth laboratory, tampering with evidence, obtaining pseudoephedrine to make meth, assault with a dangerous weapon, and assaulting, resisting, or obstructing a police officer. On appeal, defendant argued the trial court erred by admitting into evidence NPLEx records because they were hearsay without exception and their admission violated his rights under the Confrontation Clause. Specifically, defendant argued the NPLEx records “are testimonial because the pharmacists or any reasonable person could assume that the records would be used at a later trial should there be a violation of the allowed amount of purchases.”

The COA disagreed and stated the following: “That NPLEx records could be used should a violation occur is insufficient to show that the records are ‘prepared specifically for use at . . . trial,’ *Melendez-Diaz*, 557 US at 324; 129 S Ct 2527, 2540, and with ‘the primary purpose’ of targeting one accused of criminal

conduct, *Williams*, 567 US at 84, 132 S Ct 2221, 2243. Detective Trooper Ryan Dunlap testified that Michigan law requires pharmacies to scan the ID of anyone who purchases pseudoephedrine, and that the log is created to show identifying information, including how many grams



were purchased, where, when, and by whom. The police have the ability to retrieve the logs but cannot manipulate them in any way.”

The COA was also not persuaded by defendant’s arguments that the business-records exception to hearsay, MRE 803(6), could not apply to NPLeX records given “the motivation for the data collection,” and because the witness through whose testimony the prosecution introduced the records, Detective Trooper Dunlap, neither created the records nor was he their custodian. The COA held there was no abuse of discretion when the trial court admitted the records based on its finding Detective Trooper Dunlap to be a “qualified witness” for purposes of MRE 803(6), and absent any requirement that the “qualified witness” created the records or is their custodian.

Affirmed.

*People v Linnartz*, case no. 348297, decided October 22, 2020.

The Michigan COA affirmed defendant’s jury convictions of first-degree felony murder, MCL 750.316(1)(b), reckless driving causing death, MCL 257.626(4), reckless driving causing serious impairment of a body function, MCL 257.626(3), and reckless driving, MCL 257.626(2).

In June 2017, a city of Fraser employee observed a man remove two leaf blowers from a city trailer being used by a grass-

cutting crew. That man left in a Jeep that was driven by a second man. The prosecution’s theory at trial was that the first man stole the leaf blowers and the second man, the defendant, was the driver of the Jeep. Witnesses observed the Jeep driving away from the scene at a high rate of speed. The employee who observed the crime attempted to follow the Jeep, but lost sight of it until he came upon a two-vehicle collision. One of the vehicles involved was the Jeep. The backseat passenger in the second vehicle was killed in the crash. Defendant ran from the scene to a nearby neighborhood where he was apprehended and arrested.

On appeal, one of the issues defendant argued was that there was no causal connection between the underlying theft and the fatal car crash, thereby precluding a conviction of felony murder predicated on the commission of the larceny. The COA disagreed. It held that the evidence presented at trial was sufficient to enable the jury to find beyond a reasonable doubt that defendant was speeding to get away from the original crime scene and that there was no break in the course of defendant’s reckless driving to escape and avoid detection before the time of the collision.

Affirmed.

*People v Walker*, case no. 348615, decided September 3, 2020.

The defendant was pulled over by Northville Police Officer Kyle Smith after Officer Smith was dispatched for a possible drunk driver. Although defendant did not initially pull over when Officer Smith activated his lights and emergency siren, defendant eventually came to a stop after slowly rolling past a stop sign. Officer Smith had defendant exit his vehicle and perform several field sobriety tests.

Those tests included a horizontal gaze nystagmus (HGN) test, alphabet and counting tests, standing and walking tests. Officer Smith testified that, on the basis of defendant’s performance of the HGN test, he believed defendant had intoxicants in his blood. Additionally, with respect to the alphabet and counting tests, defendant said letters and numbers out of order and said things that Officer Smith could not understand. Officer Smith also

believed that defendant’s performance on these tests established defendant was under the influence of alcohol. Officer Smith additionally asserted defendant smelled of alcohol, but defendant denied having consumed any alcohol that day. Officer Smith administered a preliminary breath test to defendant, with a result of

**“MCL 257.625a(6)(a) makes the evidence of defendant’s DataMaster breathalyzer test results admissible against defendant, given the obvious relevance of defendant’s blood alcohol level. The enactment of MCL 257.625a(6)(a) demonstrates an implicit acknowledgment by the Michigan Legislature that breathalyzer test results are highly probative.”**

0.16. Officer Smith arrested defendant for operating a vehicle while intoxicated and took him to the Northville Township Police Department.

Once at the Northville Township Police Department, Officer Smith administered a DataMaster breathalyzer test to defendant to determine his blood alcohol content. After observing defendant for 15 minutes, Officer Smith gave defendant the breathalyzer test. Defendant blew a .15 and .14. Defendant was convicted after a bench trial in Wayne County.

On appeal, the defendant argued that in failing to order a hearing under *Daubert* regarding the reliability of the DataMaster breathalyzer instrument, the trial court abused its discretion. The COA disagreed and held the following: “MCL 257.625a(6)(a) makes the evidence of defendant’s DataMaster breathalyzer test results admissible against defendant, given the obvious relevance of defendant’s blood alcohol level. The enactment of MCL 257.625a(6)(a) demonstrates an implicit acknowledgment by the Michigan Legislature that breathalyzer test results are highly probative. Although defendant argues that the prosecution had to prove that the specific DataMaster device used to test his blood alcohol content was reliable and that the trial court erred by making defendant prove that the device was unreliable, the language of MCL 257.625a(6)(a) includes no such requirement.”

Defendant also argued on appeal the trial court erred when it allowed the HGN test results into evidence because the evidence below did not establish that Officer Smith complied with the standards for administering the HGN test. The COA agreed, but found such error was harmless because there was substantial other evidence of defendant's intoxication. The COA stated the following: "Officer Smith acknowledged the possibility that he may not have performed the HGN test properly. The trial court concluded that the ambiguity in Officer Smith's testimony about whether he performed the HGN test properly went to the weight of the evidence, rather than its admissibility. However, in *Berger*, this Court held that as a prerequisite to admissibility, the prosecution must demonstrate that the test was performed properly and that the officer administering the test was qualified to perform it. *Berger*, 217 Mich App at 217-218; see also MRE 104(a). The trial court was incorrect in concluding that whether Officer Smith performed the HGN test properly went to the weight of the evidence."

Affirmed.

*People v Craig*, case no. 344840, decided August 13, 2020.



## New Laws

Public Act 187 of 2020, signed by the Governor on October 12, 2020, effective April 11, 2021, prohibits a person from applying to have set aside, and prohibit a judge from setting aside, certain convictions, including a conviction for operating while intoxicated by any person. Please see Public Act 187 below.

Sec. 1c. (1) A person shall not apply to have set aside, and a judge shall not set aside, a conviction for any of the following:

(a) A felony for which the maximum punishment is life imprisonment or an attempt to commit a felony for which the maximum punishment is life imprisonment.

(b) A violation or attempted violation of section 136b(3), 136d(1)(b) or (c), 145c, 145d, 520c, 520d, or 520g of the Michigan penal code, 1931 PA 328, MCL 750.136b, 750.136d, 750.145c, 750.145d, 750.520c, 750.520d, and 750.520g.

(c) A violation or attempted violation of section 520e of the Michigan penal code, 1931 PA 328, MCL 750.520e, if the conviction occurred on or after January 12, 2015.

(d) The following traffic offenses:

(i) A conviction for operating while intoxicated by any person.

(ii) Any traffic offense committed by an individual with an indorsement on his or her operator's or chauffeur's license to operate a commercial motor vehicle that was committed while the individual was operating the commercial motor vehicle or was in another manner a commercial motor vehicle violation.

(iii) Any traffic offense that causes injury or death.

(e) A felony conviction for domestic

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violence, if the person has a previous misdemeanor conviction for domestic violence.

(f) A violation of former section 462i or 462j or chapter LXVIIA or chapter LXXXIII-A of the Michigan penal code, 1931 PA 328, MCL 750.462a to 750.462h and 750.543a to 750.543z.

(2) The prohibition on the setting aside of the convictions under subsection (1) upon application also applies to the setting aside of convictions without application under section 1g.

(3) An order setting aside a conviction for a traffic offense under this act must not require that the conviction be removed or expunged from the applicant's driving record maintained by the secretary of state as required under the Michigan vehicle code, 1949 PA 300, MCL 257.1 to 257.923.

Enacting section 1. This amendatory act takes effect 180 days after the date it is enacted into law.

### Consult Your Prosecutor Before Adopting Practices Suggested by Reports in this Article.

The statutes and court decisions in this publication are reported to help you keep up with trends in the law. Discuss your practices that relate to these statutes and cases with your commanding officers, police legal advisors, and the prosecuting attorney before changing your practices in reliance on a reported court decision or legislative change.



This material was developed through a project funded by the Michigan Office of Highway Safety Planning and the U.S. Department of Transportation.