

# Evidence of Impairment in Impaired Driving Cases

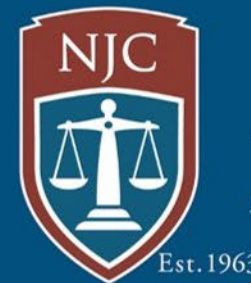
## *Legal & Constitutional Considerations*

*Tennessee General Session Judges Conference*

Judge Neil Edward Axel

Senior Judge, District Court of Maryland

October 5, 2023



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# Learning Objectives

After this session you will be able to:

- *Identify and discuss what constitutes proof of impairment in impaired driving trials; and*
- *Identify, analyze, and rule on Fourth Amendment issues that arise during the trial of impaired driving cases*

# Hypothetical

- Tom is operating their vehicle at 11:30 p.m. on a 2-lane road
- He is driving erratically, loses control of their vehicle and hits another vehicle
- Tom has a strong odor of alcohol and admits to “2 beers”
- Has a baggie of marijuana and a valid prescription slip for Prozac.



# Polling Question #1

Assuming that Tom is under the influence, what substance is he under the influence of?

- a) alcohol
- b) marijuana
- c) cocaine
- d) antidepressants
- e) we don't know

# The Cause . . .

- Legalized Medical Marijuana (38 States & D.C.)
- Legalized/Decriminalization of Marijuana (34 States & D.C.)
- Increased use and abuse of Rx
- Continued use of illegal & designer drugs
- Increased acceptance of drug use



## . . . and the Effect

### Washington

(Grondel, et al., 2018)

- poly-drug impairment is #1 cause of impairment in fatal crashes (2008-2016)
- 44% of drivers tested positive for combination of substances

### Colorado

(Rosenthal & Reed 2022)

- in 45% of 26,000 impaired driving cases driver tested positive for multiple substances
- 68% of those positive for THC had at least one other substance on board



# Trial Evidence of Impairment *Considerations*



# What is Impairment?

## Driving

“a complex activity requiring alertness, divided yet wide-ranging attention, concentration, eye-hand-foot coordination, and the ability to process visual, auditory, and kinesthetic information quickly.”

## Impairment

*The deterioration of one's ability to perform a task*





# When is One “Under the Influence”?

When any substance affecting the CNS:

- impairs the driver’s ability to safely operate a motor vehicle
- by depriving the driver of the clearness of mind and control of oneself
- that the driver would otherwise possess.

Tenn. Code Ann. §55-10-401

# “Under the Influence”

*“ . . . . The degree of intoxication must be such that it impairs to **any** extent the driver's ability to operate a vehicle.”*

T.P.I.Crim. 38.01 cited with approval in *State v. Brooks*, 277 S.W.3d 407 (TN Ct.Crim.App. 2008)

# Polling Question #2

The higher the level of alcohol in the body, the greater the level of impairment.

- a) True
- b) False



# Typical Effects on the Body → Blood Alcohol Concentration

.02  
Feel relaxed,  
experience  
altered mood,  
feel warmer,  
loss of  
judgement

.05  
Exaggerated  
behavior, loss of  
small muscle  
control, impaired  
judgment,  
lowered  
alertness,  
release of  
inhibition

.08  
Poor muscle  
coordination  
(balance,  
speech, vision),  
impaired  
judgment,  
reasoning &  
memory

.10  
Clear  
deterioration of  
reaction time,  
slurred speech,  
poor  
coordination,  
slowed thinking

.15  
Muscle control  
deteriorated,  
vomiting may  
occur, major  
loss of balance

Decline in  
divided attention  
capabilities

Reduced ability  
to track moving  
objects

Reduced  
information  
processing (signal  
detection, visual  
search)

Reduced ability to  
maintain lane  
position and brake  
appropriately

Substantial  
impairment in  
vehicle control

# Polling Question #3



The higher the level of THC in the body, the greater the level of impairment.

- a) True
- b) False

# Evidence of Impairment

Driving  
Observations

Post-stop  
Observations

Admissions  
& Seized  
Evidence

SFSTs

DRE & Other  
Opinion  
Testimony

Breath &  
Blood  
Testing

# Hypothetical

- stopped for speeding 72/55 mph zone
- odor of marijuana
- bloodshot eyes
- admitted recently smoking mj
- failed SFSTs
- blood draw ⇒ 10 ng/ml Delta 9 THC



# Fourth Amendment Considerations

## *It All Begins With a Stop*



# Warrantless Searches



“searches conducted outside the judicial process, without prior approval by a judge or magistrate, are *per se* unreasonable under the Fourth amendment – subject only to a few specifically established and well-delineated exceptions.”

*Arizona v. Gant*, 556 U.S. 332, 338 (2009);  
*see also State v. McElrath*, 569 S.W.3d (Tenn. 2019)

# Allowable Warrantless Searches

- Search incident to arrest
- Exigent circumstances
- Automobile search
- Consent
- Inventory search



## Polling Question #4

What is the consequence for an unlawful vehicle stop, or an unlawful search by a police officer?

- a) None
- b) Officer may be administratively sanctioned
- c) Officer is subject to civil liability
- d) The resulting observations or seized evidence is inadmissible
- e) (b) and (c) only

# Basis for Lawful Traffic Stop

- Automobile stop is a 4<sup>th</sup> amendment “seizure.”  
*State v. Pulley*, 863 S.W.2d 29 (Tenn. 1993)
- Stop is permissible if based on **reasonable articulable suspicion**. *Whren v. U.S.*, 517 U.S. 806 (1996)



# “Reasonable Articulable Suspicion”

*State v. Smith*, 484 S.W.3d 393 (TN 2016)

- a *particularized and objective basis* for suspecting criminal activity
- more than a mere hunch or suspicion
- from the perspective of the objectively reasonable *officer*, not the reasonable *person*
  - subjective state of mind is irrelevant
- based on totality of the circumstances

# *Duration of Stop*

*Rodriguez v. U.S.*, 135 S.Ct. 1609 (2015)

- Once stopped, officer may conduct an investigation “reasonably related” to scope of stop, including
  - license, registration & insurance checks
  - check for outstanding warrants
- Once purpose of traffic stop has been or should have been addressed, stop cannot be extended even briefly for unrelated investigative activities



# *Duration of Stop*

*Rodriguez v. U.S., 135 S.Ct. 1609 (2015)*

BUT, the stop may be extended for unrelated investigation with “reasonable, articulable suspicion”



# Hypothetical

- Traffic stop at 2:30 a.m. after observing:
  - weaving
  - crossing the center & edge lines
  - driving at 40 mph in 50 mph zone
- Following the stop
  - vehicle has 2 occupants
  - upon approach, police detect odor of marijuana

# Query: Is the Odor of MJ a Basis For Probable Cause . . . ?

- to search the vehicle?
- to search the driver?
- to search a passenger?

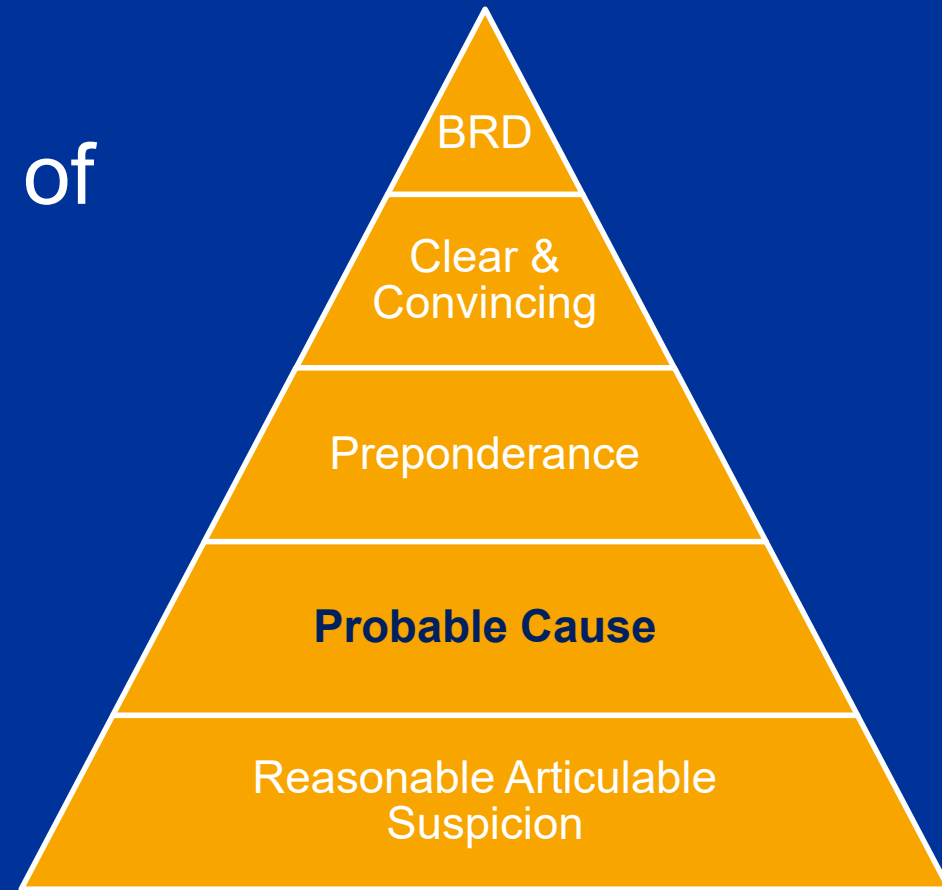


# Query: Is the Odor of MJ a Basis For Probable Cause . . . ?

- to search the vehicle?
  - Automobile search
  - Inventory Search
- to search the driver?
  - Search incident to arrest
  - Exigent circumstances
- to search a passenger?
  - Consent

# Probable Cause

- “a reasonable ground for suspicion supported by circumstances indicative of an illegal act.” *State v. Carter*, 160 S.W.3d 526 (Tenn. 2005)
- more than RAS, but less than preponderance of evidence
- simply a fair probability



# Vehicle Search Based on Odor of MJ

*State v. Hughes*

544 S.W.2d 99  
(TN.Sup.Ct. 1976)

Hart v. State

568 S.W.2d 295  
(TN.Ct.Crim.App.1978)

*State v. Hicks*

534 S.W.2d 872  
(TN.Ct.Crim.App. 1975)

# Odor of Marijuana vs. Hemp

*State v. Green*, 2023 WL 3944057 (TN Ct.Crim.App. 2023)

- Citing other trial court decisions, Circuit Court granted motion to suppress absent proof that canine could distinguish between hemp & MJ
- While we acknowledge the rationale behind these trial court decisions, **at this juncture the binding precedent from the Tennessee Supreme Court allows the smell of marijuana to provide probable cause for a search.”**



# Odor of Marijuana vs. Hemp

*Moore v. State, 211 N.E.3d 574 (Ind.Ct.App. 2023)*

- *“Although the legal landscape for cannabis-derived substances is ever-changing, one thing remains true: some types of marijuana possession remain illegal . . . .”*
- *“It follows then that the odor of marijuana reasonably may indicate criminal activity.”*

# Odor of Marijuana Sufficient

- *United States v. Vaughn*, 429 F. Supp. 3d 499 (E.D. Tenn. 2019):
  - contention that the smell could have been hemp does not change the fact that it also could be marijuana
  - court applied the “fair probability” test and found probable cause to issue search warrant based on the “odor of marijuana”
  - “Absolute certainty is not required.”
- *See also United States v. Garth*, 2021 WL 8442271 (E.D. Tenn. 2021) (search of motor vehicle)

# SFST Testimony: Admissibility vs. Weight?



# ***City of West Bend v. Wilkens***

## **278 Wis.2d 643 (2005)**

Held: Standardized Field Sobriety Tests

- Are not scientific tests
- Are observational tools
- Are relevant and probative

# *State v. Mueller*

## 386 Wis.2d 351 (2019)

- Issue: are FSTs admissible in DUI-D cases?
- Held: nothing in *Wilkins* suggests need for different FSTs in DUI-D cases
- FSTs can provide probative evidence of impairment

# Admissibility of SFSTs – DUI Mj

*Com. v. Gerhardt, 477 Mass. 775 (2017)*

- SFSTs admissible in operating under the influence of marijuana case
- Lay witness may testify concerning observable behavior:
  - Bloodshot eyes
  - Lack of coordination/poor balance
  - Reaction times
  - Slow speech
  - Paranoia

# Search Incident to Arrest for DUI

- *Chimel v. California*, 395 U.S. 752 (1969)
- *N.Y. v. Belton*, 453 U.S. 454 (1981)
- *Arizona v. Gant*, 556 U.S. 332 (2009)





# Drug Recognition Expert Testimony





# Admissibility Generally

- DRE as “expert” under FRE 702 analysis & opinion admissible under *Frye* or *Daubert*
- Admissible as “lay” witness with specialized knowledge
- Admissible under a combination of theories
- Express statutory authority (Maine, NC)



# National DRE Appellate Caselaw (Reported Cases)

- Under *Daubert*: Admissible in 7 States
- Under *Frye*: Admissible in 3 States
- Under Other Basis: Admissible in 9 States

# *State v. Chitwood*

369 Wis.2d 132, 879 N.W.2d 786 (2016)

*“every court to have considered the issue has concluded that testimony based upon the DRE protocol is admissible into evidence.”*



# *State v. Brewer*

**2020 WL 1672958 (TN Ct.Crim.App. 2020)**

- Court did not abuse its discretion in admitting DRE testimony
- DRE had followed procedures
- DRE's training qualified him as an expert
- evidence would substantially assist trier of fact as required by Tennessee Rules of Evidence 702 and 703



# **Breath & Blood Testing:**

## **Collision of Implied Consent and the 4<sup>th</sup> Amendment**

# Hypothetical

- Single vehicle crash, minor injuries to driver; driver appears disoriented
- Odor of alcohol on breath; odor of marijuana from inside vehicle
- Burnt roach inside cup holder
- At police station – 0.03 BAC (breath)
- Refuses blood test
- Taken to hospital for warrantless blood draw



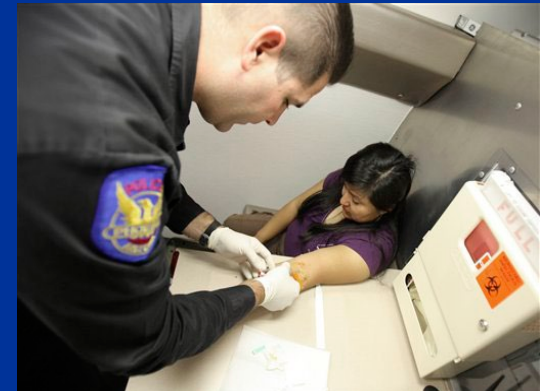
# Polling Question #5

Under what circumstances may the police obtain blood without a warrant?

- a) Incident to arrest
- b) With exigent circumstances
- c) With consent
- d) Incident to medical treatment
- e) Never

# Breath & Blood Testing and the 4<sup>th</sup> Amendment

- *Missouri v. McNeely* (2013)
- *Mitchell v. Wisconsin* (2019)
- *Birchfield v. North Dakota* (2016)





# Exigent Circumstances



# *Missouri v. McNeely*

*133 S.Ct. 1552 (2013)*

Issue presented: “whether the natural dissipation of alcohol in the bloodstream establishes a per se exigency that suffices on its own to justify an exception to the warrant requirement for nonconsensual blood testing in drunk-driving investigations”



# *Missouri v. McNeely*

## The Facts

### At 2:08 a.m.

- Observed speeding & crossing the centerline.
- Odor of alcohol, bloodshot eyes, slurred speech
- “couple of beers”
- Unsteady on his feet & failed SFSTs
- Refused PBT, breath & blood test

### At 2:35 a.m.

- blood drawn over objection
- BAC = 0.154



# *Missouri v. McNeely*

133 S.Ct. 1552 (2013)

- Non-consensual blood draw = “search”
- Warrant or exception required
- HELD: dissipation of alcohol is not a *per se* exigency



# Exigent Circumstances

## Possible Examples

- Officer delayed by need to investigate crash
- Officer had to go to hospital to begin DWI investigation
- Suspect was being treated for injuries
- Alcohol/drug dissipation
- Time necessary to obtain warrant
- Unavailability of magistrate/judge

# *Mitchell v. Wisconsin*

139 S.Ct. 2525 (2019)



# *Mitchell v. Wisconsin*

## Plurality Opinion

- HELD: exigent circumstances exist when natural dissipation is combined with other pressing police duties
- “Both conditions are met when a suspect is unconscious.”



# *Mitchell v. Wisconsin*

## Rationale

- “such test must be prompt because it is a biological certainty that alcohol **dissipates from the bloodstream literally disappearing by the minute.**”
- “BACs serve important purpose to enforce DUI laws that save lives”





# *State v. Reynolds*

2023 WL 3835846 (TN Ct.Crim.App. 2023)

- Reynolds crosses center line and strikes vehicle causing fatality
- leaves the scene but located 2-3 hours later
- incoherent, non-responsive, unable to consent
- Trooper believed Reynolds to be UI depressant
- HELD: exigent circumstances justified the warrantless blood draw

# *State v. Oaks*

**2019 WL 560271 (TN Ct.Crim.App. 2019)**

- 11:00 pm - suspected DUI crash
- 12:00 a.m. -Oaks brought to hospital as trauma patient
- 12:20 a.m. - warrantless blood draw
  
- HELD: trial court erred in determining exigent circumstances to justify warrantless blood draw

# May the State Obtain Breath/Blood Samples “Incident to Arrest” For Impaired Driving Without A Warrant?

*Birchfield v. North Dakota*

136 S.Ct 2160 (2016)



# ***Birchfield v. North Dakota***

## **Search Incident to Arrest**

- Court employed balancing test
  - 4<sup>th</sup> Amendment permits warrantless breath tests incident to arrest
  - blood tests are significantly more intrusive, therefore 4<sup>th</sup> amendment does not permit a warrantless blood test incident to arrest

# *Birchfield v. North Dakota*

136 S.Ct. 2160 (6/23/16)

- HELD: Motorists may not be criminally punished for refusing a **blood** test based on legally implied consent to submit to them.
- It is one thing to approve implied-consent laws that impose **civil penalties** and **evidentiary consequences** but quite another for a State to insist upon an intrusive blood test and then to impose **criminal penalties** on refusal to submit.

# Application of *Birchfield*

- Warrantless Breath Test – refusal is subject to prosecution
- Warrantless Blood Test – refusal is not subject to prosecution unless
  - valid exception to warrant requirement?
- Administrative sanctions & evidentiary inferences permissible

# Impact of Test Refusal (Pre-*Birchfield*)

- Administrative sanctions – loss of license
- Evidentiary inferences
- Criminal prosecution
- Enhanced penalties
- Ignition interlock

# Impact of Test Refusal (*Post-Birchfield*)

- Administrative sanctions – loss of license
- Evidentiary inferences
- ~~Criminal prosecution~~
- ~~Enhanced penalties~~
- Ignition interlock



# Consent to Testing



# Implied Consent: The Issues

- Is "implied consent" sufficient consent under the 4th amendment?
- May a driver withdraw his/her implied consent?
- What if driver is unconscious and unable to either expressly consent, or withdraw implied consent?

# Consent Under the 4<sup>th</sup> Amendment

- Consent to search, voluntarily given, is an exception to both state and federal warrant requirements. *Florida v. Bostick*, 501 U.S. 429, 438 (1991)
- Constitutional consent must be “unequivocal, specific, intelligently given, and uncontaminated by duress or coercion. *State v. Simpson*, 968 S.W.2d 776, 784 (Tenn. 1996)

# Implied Consent vs. 4<sup>th</sup> Amendment

*State v. Henry*, 539 S.W.3d 223 (TN Ct.Crim.App. 2017)

## ➤ Facts:

- rear-end collision with personal injuries
- probable cause to believe Henry was UI
- Henry had prior convictions
- mandatory blood draw conducted w/o warrant under IC statute

## ➤ Held:

- Statutory implied consent, on its own, cannot justify warrantless **blood draw**
- Statutory implied consent unnecessary to justify warrantless **breath test**

# ***State v. Hafer***

**2020 WL 918653 (Tn.Ct.Crim.App. 2020)**

“no credible argument can be made that the statutory implied consent actually supplies the type of voluntary consent sufficient to create an exception to the warrant requirement.”

*[citing State v. Simpson, 968 S.W.2d 776 (Tenn. 1998)]*

# Tennessee Implied Consent Law (Post – 2019)

## Breath Tests

- with implied consent (which may be withdrawn)
- express consent
- search warrant
- without consent incident to arrest

## Blood Tests

- with implied consent (which may be withdrawn)
- express consent
- search warrant
- exigent circumstances

## Other Provisions

- Unconscious Driver:
  - **blood test** only with warrant or exigent circumstances
- Class A misdemeanor for refusals repealed

# Lawful Blood Draws: A Review

1. With a search warrant
  - Consent not required; exigencies not required
2. Without a search warrant
  - with exigent circumstances; or
  - by express consent
3. Incident to medical treatment
  - no 4<sup>th</sup> amendment issue

# Is Separate Search Warrant Required to Test Drawn Blood?

Search warrant to seize driver's blood is sufficient to also support the chemical testing of the blood without need for second warrant.

*Crider v. State*, 607 S.W.3d 305 (Tx.Ct.Crim.App. 2020)

*State v. Martines*, 355 P.3d 1111 (Wash. 2015)

*State v. Frescoln*, 911 N.W.2d 450 (Iowa Ct. App. 2017)

*State v. Swartz*, 517 S.W.3d 40 (Mo.Ct.App. 2017)

*Schmerber v. California*, 384 U.S. 757 (1966)





# No Expectation of Privacy in Blood Sample

- *People v. Woodard*, 321 Mich.App. 377 (2017)
  - **testing** of defendant's blood was not separate search such that defendant could withdraw consent to preclude testing.
- *State v. Almeida*, 174 N.H. 464 (2021)
- *State v. Randall*, 387 Wis.2d 744 (2019)

# Impact of a Negative Drug Test



- What does a negative lab result mean?
- Does a negative test result have any bearing on impairment?

A photograph of a police officer in a dark uniform, possibly a sheriff's deputy, using a tablet computer. The officer is wearing a badge and a uniform with a white shirt underneath. The scene is at night, with a car's headlights visible in the background, creating a blue and white glow. The overall image has a dark, moody atmosphere with a blue tint.

# eWarrants

# eWarrants

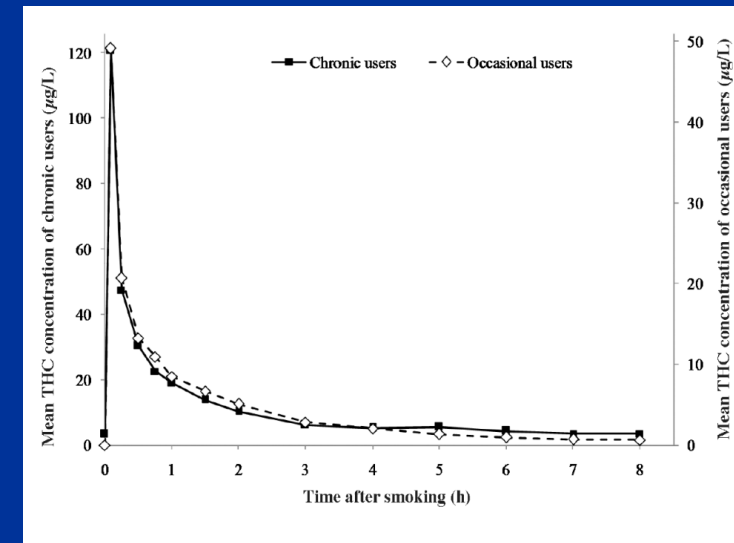
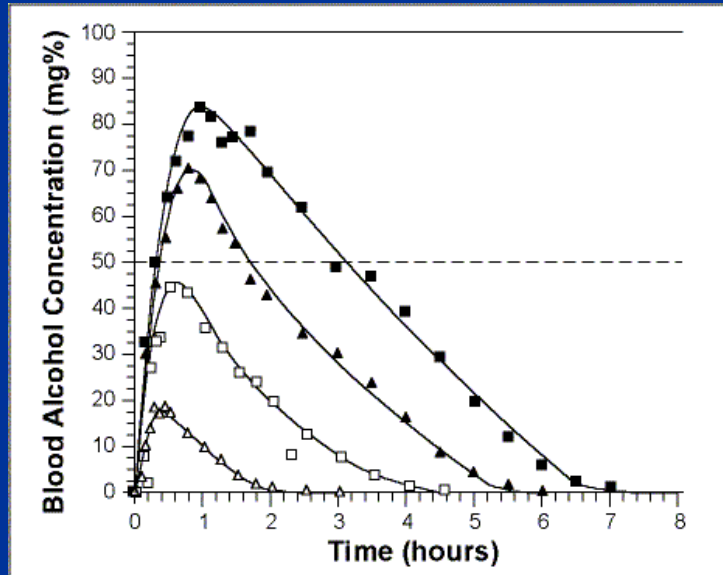
- A computerized version of the search warrant affidavit and judicially approved warrant
- a.k.a.
  - E-warrants
  - Electronic warrants
  - Expedited warrants

# eWarrant System

- Provide a mechanism to obtain BAC or toxicology results in a timely manner
- Uses electronic submissions via tablets, smartphones, or on-board computers
- Electronic transmission of warrant affidavit and judicial approval through online information system

# Reasons to Implement eWarrant System

## *Dissipation of Alcohol & THC*



# Impact of Technology on “Exigency”

*“But technological developments that enable police officers to secure warrants more quickly . . . are relevant to an assessment of exigency.”*

*Missouri v. McNeely*, 133 S.Ct. 1552 (2013)

*“The astonishing advances that have marked communications and information technology over recent decades have dramatically pared back the physical obstacles to warrant acquisition. “*

*With the use of technology to apply for warrants, “the significance of delay in the exigency analysis would markedly diminish.”*

*State v. Rodriguez*, 156 P.3d 771, 778 (UT. 2007)



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