MINUTES

KANSAS DUI COMMISSION

August 6-7, 2009
Room 545-N—Statehouse

Members Present

Senator Thomas C. (Tim) Owens, Chairperson
Representative Janice Pauls, Vice-Chairperson (August 6)
Senator David Haley
Representative Lance Kinzer (August 6)
Greg Benefiel, Assistant District Attorney, Douglas County
Pete Bodyk, Kansas Department of Transportation
Major Mark Bruce, Kansas Highway Patrol
Honorable Jennifer Jones, Municipal Judge, Sedgwick County (August 6)
Wiley Kerr, Kansas Bureau of Investigation
Mary Ann Khoury, Victim advocate
Ray Dalton, substituted for Don Jordan, Secretary, Kansas Department of Social and Rehabilitation Services (August 6)
Don Jordan, Secretary, Kansas Department of Social and Rehabilitation Services (August 7)
Sheriff Ken McGovern, Douglas County
Chris Mechler, Court Services Officer
Helen Pedigo, Executive Director, Kansas Sentencing Commission
Jennifer Hermann substituted for Marcy Ralston, Kansas Department of Revenue
Honorable Peter V. Ruddick, 10th Judicial District
Dalyn Schmitt, Substance Abuse Professional
Les Sperling, President, KAAP
Jeremy Thomas, Parole Officer
Doug Wells, Attorney, Kansas Bar Association
Roger Werholtz, Secretary, Kansas Department of Corrections
Karen Wittman, Traffic Safety Resource Prosecutor, Attorney General's Office
Ed Klumpp for Policy Chief Bob Story (August 7)

Staff Present

Athena Andaya, Kansas Legislative Research Department
Jerry Donaldson, Kansas Legislative Research Department
Jason Thompson, Office of the Revisor of Statutes
Doug Taylor, Office of the Revisor of Statutes
Sean Ostrow, Office of the Revisor of Statutes
Karen Clowers, Committee Assistant

Others Attending

See attached list.

Thursday, August 6
Morning Session

The meeting was called to order by Chairperson Thomas C. "Tim" Owens at 10:05 a.m.

Senator Owens distributed copies of an editorial dated July 18, 2009, by the *Topeka Capital-Journal* regarding the DUI Commission (Attachment 1).

Chris Mechler moved, Pete Bodyk seconded, to approve the minutes of July 1-2, 2009. Motion carried.

Commission members Les Sperling and Dalyn Schmitt briefed the Commission on Substance Abuse Interventions: Evidence-Based Practices (Attachments 2 and 3).

The Commission recessed for lunch.

Afternoon Session

The meeting reconvened at 1:05 p.m.

Legislative staff presented several briefings on subjects requested by the Commission during its meeting in July.

Jason Thompson, Revisor of Statutes Office, provided a review of the Kansas ignition interlock device statute and regulation (Attachment 4). Commission members discussed conflicting issues under current law.

Mr. Thompson continued with a brief on Continuous Alcohol Monitoring (CAM) in the states of Delaware, Missouri, Nebraska, North Carolina, Ohio, South Dakota, and Vermont (Attachment 5).

Athena Andaya, Kansas Legislative Research Department, referred to a memorandum from the Department of Revenue regarding the Kansas implied consent law to answer questions raised during the meeting in July (Attachment 6). Ms. Andaya also provided additional information from Pete Bodyk, Kansas Department of Transportation, regarding proposed federal sanctions against states that fail to enact and enforce ignition interlock devices for first-time offenders by September 2012 (Attachment 7).

Ms. Andaya presented a briefing on CAM use by courts and accuracy of device (Attachments 8 and 9).

Ms. Andaya continued with a briefing on EtG (Ethyl Glucuronide) and EtS (Ethyl Sulfate) Monitoring (Attachment 10).

Ms. Andaya concluded the briefings with a review of driver sanctions in other states and how they are monitored, how repeat offenders are tracked, and the number of states allowing DUI offenses to be handled by municipalities (Attachment 11).

A briefing on regional issues in DUI prosecutions was presented by Brian Sherwood, Assistant Finney County District Attorney, and Mike Nichols, Assistant Wyandotte County District Attorney (Attachments 12 and 13). Following the presentation the Commission discussed challenges under current law.

Matt Strausz of the Smart Start Interlock Company provided the Commission a presentation on the ignition interlock device offered by his company (Attachment 14).

The meeting was adjourned at 4:10 p.m. to the Dillon House for a demonstration of the ignition interlock device and the continuous alcohol monitoring device.

Friday, August 7
Morning Session

The meeting was called to order by Chairperson Owens at 9:08 a.m.

Senator Owens distributed an article from the *Topeka Capital-Journal* regarding the Commission's meeting from yesterday (Attachment 15).

Following a brief discussion on current record-keeping procedures and the goal of establishing a central repository for DUI records, the Commission broke into subcommittees for discussion of their assigned topics.

The Commission reconvened at 1:30 p.m.

Roger Werholtz reported the Subcommittee on Criminal Justice began with a discussion on the effectiveness of current strategies. The Subcommittee believes the current law for first-time offenders is sufficient. Secondly, the majority of the Subcommittee agreed on the need to criminalize refusal to submit to a breath test. The Subcommittee also would like to review the current response to juvenile offenders and possible recommendations to improve current law.

Les Sperling stated the Substance Abuse and Treatment Subcommittee would like to look at what is the absolute best approach, regardless of the cost, to determine which enhancements should be implemented.

Karen Wittman reported the Law Enforcement Subcommittee continued the discussion on the issues regarding records. The Subcommittee discussed the possibility of creating a two-page journal entry for every DUI as a solution to tracking repeat offenders. The Subcommittee would like to hear presentations regarding the current database capabilities of the KBI, Department of Motor Vehicles, and the Kansas Criminal Justice Information System (KCJIS) with respect to the creation of a central repository for records.

The next scheduled meeting is September 14-15, 2009.

Prepared by Karen Clowers
Edited by Athena Andaya

Approved by Commission on:

September 14, 2009
(Date)

PLEASE CONTINUE TO ROUTE TO NEXT GUEST

DUI COMMISSION COMMITTEE GUEST LIST

DATE: Aug 6, 2009

NAME	REPRESENTING
Tim Carpenter	CJ
Bob Keller	JCSO
DARIN DERRYBERRY	KHP
Harold W. Casey	Substance Abuse Center @ KASAS.
Matt Casey	GBA
Jill McKenney	Johnson Co. DA
Corey F. Kenney	Lenexa City Prosecutor
Chris Noble	Sunflower Alcohol Safety Action
Whitney Damron	KS Bar Assn.
Stuart Little	KS Assoc. of Addiction Profs
MIKE LINDBLAD	GUARDIAN IGNITION INTERLOCK
MATT STRAUSZ	Smart Start
Drew Brenner	RMOMS- Wichita KS
Bryan Smart	RMOMS- Topeka KS
Shannon Bell	Little Government Relations
Kevin Barone	KIIA
	KAAP
	PARS

PLEASE CONTINUE TO ROUTE TO NEXT GUEST

DUI COMMISSION COMMITTEE GUEST LIST

DATE: Aug 6, 2009

NAME	REPRESENTING
Michelle Budke	Capitol Strategies
Ed Klumpp	KACP/KPOA
Vicki Vinson	KWSWA
Spencer Duncan	Capitol connection llc

PLEASE CONTINUE TO ROUTE TO NEXT GUEST

DUI COMMISSION COMMITTEE GUEST LIST

DATE: Aug 7, 2009

NAME	REPRESENTING
Ed Knapp	KACP/KPOA
Matt Casey	GBA
DARIAN DERNOVISH	KHP
Corey F. Kenney	City of Lenexa
Kevin Berens	Kansas Ignition Interlock Assoc.
Spencer Duncan	Capitol Connection LC
Bob Keller	JCSO

THE TOPEKA CAPITAL-JOURNAL
cjonline.com

Editorial: DUI laws too lax

Existing laws aren't sufficient to protect public from the danger presented by drunken drivers

BY THE CAPITAL-JOURNAL EDITORIAL BOARD
July 17, 2009 - 9:25pm

We've all heard the stories of Kansans being convicted again and again of drunken driving.

Seven times. Nine. Eleven. The door keeps revolving, and the wheels keep spinning.

Sen. Tim Owens, an Overland Park Republican who chairs the Kansas DUI Commission, summed up perfectly the impression created by those stories. "There is broad consensus the system doesn't work," Owens said.

Here's hoping Owens and the members of the recently-formed DUI commission can help fix it. The panel was created to conduct a thorough analysis of the DUI system, from enforcement to treatment to prevention, to give lawmakers the information needed to enact reforms and better protect motorists from drunken drivers.

Clearly, more uniformity is needed.

In some cases, Owen said, prosecutors have violated a ban on making plea bargains in DUI cases. In others, authorities have failed to gather full criminal records of defendants, and there have been instances of motorists being convicted multiple times of DUI and never receiving treatment.

The shortcomings of the system were made tragically clear last year when Gary Hammit, who'd racked up four convictions for drunken driving, struck and killed 4-year-old Gisele Mijares and her mother, Claudia, as the two were walking to Gisele's preschool class in Wichita.

Hammit's blood-alcohol level was an incredible .0469 percent, nearly six times the legal limit.

The fatality was one of the more shocking reminders of the devastating effects of drinking and driving, but unfortunately others occur on a regular basis. The number of alcohol-related fatalities increased 33 percent last year compared to 2007.

The DUI Commission is one of two ways lawmakers addressed the growing problem of drunken driving. They also passed more severe sanctions for DUI, including requiring alcohol treatment after a third conviction as opposed to a fourth.

Under the legislation establishing the commission, the panel's objective is to produce a preliminary report for the 2010 session followed by a full examination of the system for 2011.

Members will include representatives from the Legislature, the court system, law enforcement and state government administration.

Among the questions to consider is whether to place ignition locks on the vehicles of DUI offenders, which would prevent the vehicles from being operated if the driver fails an automated breath test.

Reducing the risk from drunken drivers won't be easy, especially amid an economic downturn that

DUI Commission 2009
8-6-09
Attachment 1

leave money available to combat the problem. But it's well worth addressing.

1-2

KANSAS DUI COMMISSION

August 6, 2009

SUBSTANCE ABUSE POLICY BOARD POLICY RECOMMENDATIONS

- The legislature should provide resources to SRS sufficient to establish and maintain quality assurance capacity to ensure that both ADSAP providers and treatment providers are delivering services faithful to evidence based models utilizing properly credentialed staff.

SUBSTANCE ABUSE POLICY BOARD POLICY RECOMMENDATIONS

2) The legislature should designate a single specific agency or entity as the authority to set standards for content and structure of ADSAP and ADIS programs, as well as credentialing of providers and their employees who deliver those programs. It should require that standards and credentials be consistent with evidenced based, research driven models and practices.

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Attachment 2

SUBSTANCE ABUSE POLICY BOARD POLICY RECOMMENDATIONS

- Validated and standardized assessment tools should be used in determining appropriate treatment services for DUI offenders.

SUBSTANCE ABUSE POLICY BOARD POLICY RECOMMENDATIONS

4) KSA 8-1008(c) should be changed to require that ADSAP providers address the substance abuse problem with Court Services Officers doing the criminal history report. Likewise, evaluation and assessment material on fourth and subsequent DUI offenders should be routinely shared between ADSAP providers and parole staff.

Evaluation and Treatment Concerns

- Significant discrepancies in scope and quality of evaluations and education programs.
- Lack of DUI specific treatment programs.
- Some providers assess and place only to services they provide.
- Accurate criminal histories are not routinely available.
- Collateral information is not routinely collected to verify evaluation conclusions.

Judicial Districts and Municipal Courts

- 31 Judicial Districts
- 400+ Municipal Courts

Community-based ADSAP programs shall provide:

- Presentence alcohol and drug evaluations for persons convicted of violating 8-1567 or comparable city ordinance and of persons eligible to enter a diversion agreement in lieu of further criminal proceedings
- Supervision and monitoring of all persons whose sentences, terms of probation, or diversion agreements require completion of an ADSAP program or an alcohol/drug treatment program.

Summary of Key Findings KSA 8-1008,8-1567, and 75-4215

- Laws allow both ADSAP certification and licensing
- Certification practices are inconsistent
  - ✓ Certification only requires "Practical experience in diagnosis/referral prior to July 1, 1982
  - ✓ Confusion about "certification by the state"
  - ✓ Some districts only use one provider
  - ✓ Courts do not like "being an accountant" for fines

Summary of Key Findings KSA 8-1008,8-1567, and 75-4215

- ✓ ADSAP Committee
- ✓ Must have Masters Degree
- ✓ Local providers only
- ✓ Prescribe specific treatment protocols
- ✓ Few districts have re-certification process
- ✓ Providers chosen based upon opinion of CSO
- ✓ No formal Administrative Order
- ✓ One district will not allow assessing agency to also provide treatment

Summary of Key Findings KSA 8-1008,8-1567, and 75-4215

- ✓ Statute allows for local ordinances
- ✓ Fines not paid if offender deemed indigent
- ✓ ADIS curriculum ill-defined

Comments and Concerns

- DUIs are being dumped on the counties instead of state facilities with a trend toward house arrest and electronic monitoring
- It's a problem for the court to have to collect the fees.
- Our district is a "closed shop". We may add another agency to the list but will continue to use our regular agency because when we tried to use someone else, they didn't have access to NCIC.

Comments and Concerns

- A concern in the past (but not lately) is for payment for services. The clerks take the money and hold it, which requires each county to act as an accountant and the courts don't like to be the accountant.
- We need more money and transportation is needed for the clients.
- One person had been working in the court for ten years, and had never seen the list change.

Comments and Concerns

- "Additional providers are needed in the western part of our district."
- The state needs to provide free inpatient treatment

CENTURY COUNCIL OFFENDER RESEARCH

- Estimates range from about 1 arrest in 50 trips to 1 arrest in 100 DWI trips and 1 arrest for every 772 trips where the driver has been drinking within 2 hours. Consequently, many hardcore drunk drivers go undetected and aren't reflected in any statistics
- About one-third of all drivers arrested for DWI are repeat offenders and over half have a BAC over 0.15 (Hedlund and McCartt June 2002).

CENTURY COUNCIL OFFENDER RESEARCH

- On a national level it is estimated that 50% of first time DUI offenders and 80% of second or subsequent DUI offenders will be re-arrested at some point for another DUI offense.

CENTURY COUNCIL OFFENDER RESEARCH

- Treatment appears to be most effective when it is combined with long-term counseling, education, and closely monitored supervision, including probation, education, and structured interaction in self-help groups (Mann et al. 1994).
- A 2001 study of recidivism of offenders receiving assessment and treatment in North Carolina found offenders completing their mandated programs were 64% less likely to re-offend in one year (Baker 2001).

EFFECTIVE EVALUATION

Effective Evaluation	Standard
• Acute intoxication and/or withdrawal potential	• Driving history information
• Biomedical conditions and complications	• Alcohol/drug use information
• Emotional/Behavioral conditions/complications	• BAC at time of arrest
• Treatment acceptance/resistance	• Prior alcohol or other drug treatment
• Relapse/continued use potential	• Poly-drug use
• Recovery Environment	• Prior alcohol and drug related arrest
• Valid testing instruments	• Recommendations for education/treatment
• Diagnosis	• Other information as indicated
• Severity of illness	
• Recommends treatment interventions commensurate with severity	

DSM-IV Substance Abuse Criteria

- Substance dependence is defined as a maladaptive pattern of substance use leading to clinically significant impairment or distress as manifested by one (or more) of the following, occurring within a 12-month period:

  1) Recurrent substance use resulting in a failure to fulfill major role obligations at work, school, or home (such as repeated absences or poor work performance related to substance use; substance-related absences, suspensions, or expulsions from school; or neglect of children or household).

DSM-IV Substance Abuse Criteria

2) Recurrent substance use in situations in which it is physically hazardous (such as driving an automobile or operating a machine when impaired by substance use)

3) Recurrent substance-related legal problems (such as arrests for substance related disorderly conduct).

4) Continued substance use despite having persistent or recurrent social or interpersonal problems caused or exacerbated by the effects of the substance (for example, arguments with spouse about consequences of intoxication and physical fights).

Alternatively, the symptoms have never met the criteria for substance dependence for this class of substance.

DSM-IV Substance Dependence Criteria

- Addiction (termed substance dependence by the American Psychiatric Association) is defined as a maladaptive pattern of substance use leading to clinically significant impairment or distress, as manifested by three (or more) of the following, occurring any time in the same 12-month period.

DSM-IV Substance Dependence Criteria

1) Tolerance, as defined by either of the following:
   - ✓ A need for markedly increased amounts of the substance to achieve intoxication or the desired effect, OR
   - ✓ Markedly diminished effect with continued use of the same amount of the substance

DSM-IV Substance Dependence Criteria

2) Withdrawal, as manifested by either of the following:
   - ✓ The characteristic withdrawal syndrome for the substance OR
   - ✓ The same (or closely related) substance is taken to relieve or avoid withdrawal symptoms.

DSM-IV Substance Dependence Criteria

3) The substance is often taken in larger amounts or over a longer period than intended
4) There is a persistent desire or unsuccessful efforts to cut down or control substance use.
5) A great deal of time is spent in activities necessary to obtain the substance, use the substance, or recover from its effects.

DSM-IV Substance Dependence Criteria

6) Important social, occupational, or recreational activities are given up or reduced because of substance use.

7) The substance use is continued despite knowledge of having a persistent physical or psychological problem that is likely to have been caused or exacerbated by the substance (for example, current cocaine use despite recognition of cocaine-induced depression or continued drinking despite recognition that an ulcer was made worse by alcohol consumption)

EFFECTIVE TREATMENT

- Breaks cycle of addiction, criminal behavior, and recidivism
- Has a rehabilitative approach
- Matches intensity of treatment interventions with severity of illness
- Provides close supervision/case management
- Frequent drug/alcohol testing
- High level of accountability
- Predictable and escalating sanctions

Principles of Addiction Treatment: A Research Based Guide

- Addiction is a complex but treatable disease that affects brain function and behavior.
- No single treatment is appropriate for everyone.
- Treatment needs to be readily available.
- Effective treatment attends to multiple needs of the individual, not just his or her drug abuse.
- Remaining in treatment for an adequate period of time is critical.

Principles of Addiction Treatment: A Research Based Guide

- Counseling-individual and/or group-and other behavioral therapies are the most commonly used forms of drug abuse treatment.
- Medications are an important element of treatment for many patients, especially when combined with counseling and other behavioral therapies.
- An individual's treatment and services plan must be assessed continually and modified as necessary to ensure that it meets his or her changing needs.

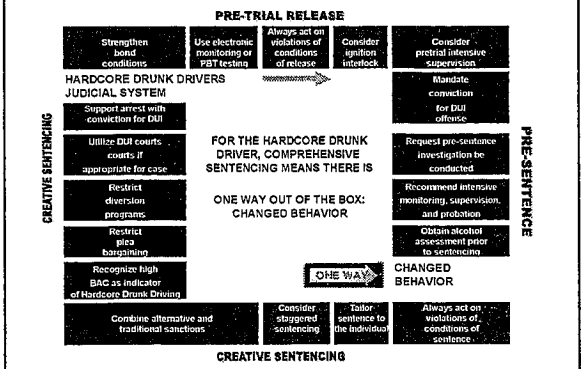
Principles of Addiction Treatment: A Research Based Guide

- Many drug-addicted individuals also have other mental disorders.
- Medically assisted detoxification is only the first stage of addiction treatment and by itself, does little to change long-term drug abuse.
- Treatment does not need to be voluntary to be effective.

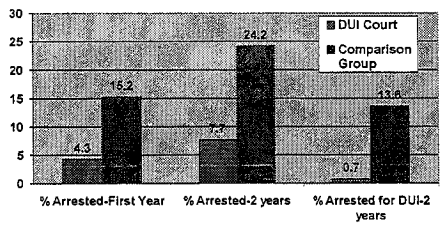
Principles of Addiction Treatment: A Research Based Guide

- Drug use during treatment must be monitored continuously, as lapses during treatment do occur.
- Treatment programs should assess patients for the presence of HIV / AIDS, hepatitis B and C, tuberculosis, and other infectious diseases as well as provide targeted risk-reduction counseling to help patients modify or change behaviors that place them at risk of contracting or spreading infectious diseases.

SENTENCING BOX



Percent of Individuals Re-Arrested: DUI Court and Comparison Group



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DUI COMMISSION

OVERVIEW OF SB67 4TH TIME DUI PROGRAM

AUGUST 6, 2009

Senate Bill 67

- SB 67 4th time DUI program passed into law in 2001 / implemented state wide in July 2002
- Model utilized is a nationally recognized, multidisciplinary strategy that provides communication /collaboration between:
  - 4th time DUI Offender
  - RADAC Care Coordinator
  - Contracted Substance Abuse Treatment Provider
  - KDOC Parole Officer

SB 67 How It Works

- Journal entry triggers referral to one of three contracted agencies state wide.
- Completed standardized assessment tool based on ASAM criteria utilized state wide (KCPC)
  - SRS/AAPS provides licensing and access to clinical tool
  - Centralized Depository for Clinical Data
- Based on clinical criteria referral initiated to one of 50 treatment providers, approved by AAPS, based on skill set treating multiple DUI offenders
  - 300 SRS/AAPS licensed treatment providers statewide

How It Works

- One year mandatory participation in recovery based Alcohol/Drug treatment service designed for this population
- One year of RADAC Care Coordination linking legal system with treatment system and natural community resources
- One year KDOC post release supervision

4th Time DUI Offender Profile in Kansas

• Median Offender Age		45
• Gender		90% Male
• Offender Race	Caucasian	79%
	Hispanic	10%
	Black	7%
	Other	5%
• Veterans Status		12%
• Average income	<10,000	51%
• Average Income	<30,000	87%

4th Time DUI Offender Profile in Kansas

- 15% have an untreated mental illness
- 74% smoke/use Tobacco
- 70% have a no diploma, GED, or High School Diploma
- Housing Status
  - Independent 67%
  - Dependent 31%
  - Homeless 2%
- 69% of DUI recidivists are single, separated, or divorced

SB67 Program Outcomes

- 72% of program participants completed treatment while on post release (7/2001 – 3/2009)
  - Treatment is defined by duration and ongoing exposure; not intensity
- Employment

• At time of admission	Full/Part-time	51%
• At Discharge	Full/Part-time	65%

- Recidivism rate /repeat DUI: 9%

SB67 Data - What We Learned

- Length of time exposed to treatment and care coordination has an impact on offender success.
- It is not the intensity of level of care but the duration of exposure to Recovery Oriented System of Care.
- Approximately 30% have not received formal treatment prior to 4th DUI (self report)

What We Learned With SB 67

- Although other issues are identified (TBI, mental illness, medical issues) resources and funding are not available
- Collaboration between systems eliminates silos
- We can build non-threatening relationships where each party maintains their expertise (legal does legal & clinical does clinical)

FY 2009 Funding

- 1.2 Million dollars allocated for treatment cost (averages $3000 per offender)
- $500,000 allocated for systems care coordination (averages $500 per offender)
- 2008 KDOC data indicates yearly incarceration cost per offender was approximately $25,570

NEW SYSTEM

- SB 67 Model is implemented on the 3rd DUI
- Redesigned process with 1st and 2nd DUI;
- Mandate standardized clinical evaluation tools with central depository of clinical data to SRS/AAPS
- System boundaries: treatment is not punishment
  - Legal Intervention vs. Clinical Intervention
- Network of treatment providers is based on skill set

FY 2010 Funding

- $1.2 million allocate to substance abuse treatment decreased to $416,000
- Services Covered under new funding
  - Level 1 & education outpatient services: 36 units/hours over a minimum of 90 days
- New contract awards September 1, 2010 (to drop from 50 treatment providers to 10-15)
- Presently 488 offenders have been moved to reduced treatment services in the last 30 days

AD CTION
PROFESSIONAL

Issue Date: January-February 2008, Posted On: 1/1/2008
Features

Evaluating the 'Hard-Core Drinking Driver'
Illinois prioritizes the identification of offenders who need services the most
by WILLIAM L. WHITE, MA and JOY SYRCLE, MA

Alcohol-related fatalities have significantly decreased over the past 25 years, but alcohol-impaired driving continues to kill more than 17,000 individuals per year—accounting for 40% of all traffic fatalities.1 Sustained public education campaigns and toughened laws have led to dramatic decreases in the number of social drinking drivers. As the pool of social drinking drivers decreases, "hard-core drinking drivers" constitute a larger portion of the impaired driving offender population.2

States have called upon addiction professionals to evaluate those arrested for impaired driving in order to identify high-risk drivers, but the accuracy of these evaluations has often been compromised by reliance on self-report data and imperfect instruments. Particularly troublesome is that the percentage of retrospective alcohol dependence diagnoses triples when impaired drivers are re-evaluated five years following their first arrest.3 This article describes efforts in the state of Illinois to enhance the quality of such evaluations, and highlights a recent study that sheds light on the profile of the hard-core drinking driver.

One state's response

Illinois has a long history of collaboration across multiple agencies to reduce alcohol-related driving fatalities. Between 1982 and 2001, toughened laws, assertive law enforcement and prosecution, an informed judiciary, assertive monitoring by probation officers, rigorous gatekeeping of licensure reinstatement by administrative hearing officers in the Secretary of State's office, and mandated professional evaluation and treatment all contributed to a 60% reduction in Illinois' alcohol-related fatalities.4 Even in the face of such success, calls grew for a more sophisticated approach to the evaluation and management of the state's driving under the influence offenders.

Historically, evaluators have been asked to answer three questions related to the DUI offender: 1) Does this offender have a problem in his/her relationship with alcohol and/or other drugs? 2) If so, what is the duration and level of severity of this problem? 3) What combination of educational and treatment services has the greatest probability of resolving these problems? While such questions are appropriate in the context of addiction treatment, they do not in and of themselves answer two broader questions: 1) What degree of risk does this offender pose to the safety of the public (risk defined as DUI recidivism and future involvement in alcohol-related crashes involving damage to property, personal injury, and death)? 2) What community strategies can best be combined to lower the threat to public safety posed by this offender?
In an effort to provide better answers to these questions, the Illinois Department of Transportation, in collaboration with the Administrative Office of the Illinois Courts, the state Division of Alcoholism and Substance Abuse, and the Illinois Secretary of State, created a DUI Task Force and a Risk Reduction Work Group. The latter was charged in 2000 with the responsibility of examining the state's DUI evaluation process. This committee's work was performed under the direction of the Institute for Legal and Policy Studies at the University of Illinois.

Over the ensuing years, the Risk Reduction Work Group conducted a literature review of the DUI evaluation process,5 created a scientific advisory panel, conducted a 2001 national survey of state DUI evaluation processes/instruments (47 states participated), and conducted focus groups with Illinois prosecutors, judges, probation officers, evaluators, treatment specialists, and administrative hearing officers.

Two major findings stemmed from these early steps. First, we found that states varied widely in their evaluation protocol. There were differences in which state agency was responsible for alcohol-related public safety, in who conducted the evaluation of DUI offenders (e.g., a private contractor versus a probation officer), and in DUI evaluation instruments. Twenty-three of 47 states mandated use of one or more instruments, with the Driver Risk Inventory-II (DRI-II) and the Mortimer-Filkins test being the most commonly mandated evaluation tools. We found a total of 33 evaluation instruments in use, with only half the states reporting that they were satisfied with the instrument they were using.

Second, multiple stakeholders shared concerns that the integrity of DUI evaluations was being compromised by reliance on self-reports, inconsistent access to criminal and driving/insurance records, and instruments that did not collect critical areas of information (e.g., histories of drug use other than alcohol). There was also concern in states in which DUI evaluation was the province of the private sector that competition for defense attorney referrals downgraded the rigor of the evaluation process (i.e., those agencies with reputations for rigorous assessment were not getting referrals). There was a particular concern that existing evaluation instruments/processes did not identify those offenders who posed the greatest threat to public safety and therefore should receive the greatest intensity of supervision resources. This led the Risk Reduction Work Group to identify those qualities of an ideal evaluation instrument and to explore whether any existing instrument met those criteria.

When the group found no instruments that met all the desired criteria for an evaluation instrument, it identified an instrument that met the highest number of criteria—The Adult Substance Use and Driving Survey (ASUDS). It then contracted with the instrument's developers (Kenneth Wanberg, PhD, and David Timken, PhD) to modify the instrument to include additional data collection elements desired by Illinois DUI stakeholders. The revised instrument, the ASUDS-RI (Revised for Illinois), was then piloted in 2004 with 486 offenders at 10 evaluation sites.

The ASUDS-RI is a self-administered assessment instrument comprising 113 questions arranged into 15 scales and sub-scales. The scales

are designed based on research related to DUI risk and risk prediction. Scales related to drug use and criminal history were added or modified for the Illinois version of the instrument based on the feedback received from multiple DUI constituency groups. The scales include the following:

- *Alcohol Involvement.* Measures the extent of alcohol use.
- *Driving Risk.* Evaluates general risk-taking behavior while driving.
- *Antisocial.* Assesses antisocial behavior and attitudes.
- *Mood Disruption.* Measures depression, anger, and/or anxiety problems.
- *Alcohol/Drug Involvement.* Measures drug use across 10 major categories.
- *Disruption.* Measures the problems/consequences encountered by the respondent as a result of drugs or alcohol; identifies symptoms of abuse or dependence.
- *Involvement/Disruption One-Year.* Measures the scope and intensity of alcohol and drug use and negative consequences related to such use in the past 12 months.
- *Global.* A composite of Involvement, Disruption, Antisocial, and Mood Disruption scales that provides an overall risk profile for each offender.
- *Motivation.* Measures the degree to which the respondent is willing to make necessary changes related to alcohol or drug use.
- *Benefits.* Utilizes components of the Involvement scales to measure social or psychological benefits gained from use and self-treatment of depression or anxiety.
- *Antisocial (community).* Sub-scale of Antisocial; identifies general attitudes linked to antisocial behavior.
- *Antisocial (criminal justice).* Sub-scale of Antisocial; measures past and current involvement with the criminal justice system.
- *Psycho-social Disruption.* Sub-scale of Disruption; measures physical and psychological problems related to alcohol or drug use.
- *Social-behavioral Disruption.* Sub-scale of Disruption; identifies social problems such as inability to work and problems with family resulting from use.
- *Defensiveness.* Measures the degree to which the respondent is willing to disclose sensitive information.

The output from the instrument provides a raw score for each scale and a percentile rank showing where the respondent falls in relation to other DUI offenders, and a composite score with cut points indicating the level of service needed.

A major goal in refining the ASUDS-RI was to develop an instrument that could differentiate first-time DUI offenders who are unlikely to be involved in future DUI offenses from first-time DUI offenders whose problems are likely to escalate into increased risk of DUI recidivism and alcohol/drug-related crashes. We will use this Phase One pilot data from Illinois to illustrate growing understanding of the hard-core drinking driver.6

Driver's profile

The hard-core drinking driver is an individual who, following repeated sanctions, continues to drive at least once a month with a blood alcohol content of .15 or greater.7 Such drivers make up only about 3% of licensed drivers, but contribute 80% of the total impaired driving trips.8 Because of the frequency with which they drive while impaired and the degree of that impairment, hard-core drinking drivers pose a very significant threat to public safety. One of the tasks of the addiction professional serving as a DUI evaluator is to recognize this individual and recommend interventions that can lower the public safety threat.

A profile of the hard-core drinking driver is emerging from multiple studies that compare DUI non-recidivists with DUI recidivists.9 Several components dominate that profile and are illustrated by the Illinois ASUDS-RI data.

First, as a group, DUI recidivists are predominantly single, separated, or divorced Caucasian or Hispanic males between the ages of 25 and 45. They have fewer than 12 years of education, are transiently employed in blue-collar jobs, and are part of social groups whose members are heavy drinkers and drinking drivers. In the Illinois pilot study, repeat offending peaked between ages 31 and 35. The fact that recidivism risk declines with age suggests the need to mobilize community resources to contain hard-core drinking drivers until they age out of this high-risk group.

Co. . ed to the non-recidivist, the DUI recidivist is more likely to believe that he/she can drive safely after drinking and to see h. DUI arrest as a function of bad luck or police harassment. These individuals are also more likely to have past histories of high-risk driving (e.g., failure to wear seatbelts, moving violations, accidents, injuries).10 In the Illinois pilot, recidivists were more likely to have prior arrests for speeding, failure to yield/stop, improper lane usage, and seatbelt or child safety violations, as well as being nearly twice as likely as first-time offenders to have at least one prior collision on their driving record.

Also, DUI recidivists are distinguished from non-recidivist offenders by an increased propensity for family histories of alcohol- and other drug-related problems. Many recidivists reported early exposure to drinking and driving by their parents, and adolescent exposure to drinking and driving within their peer group. They also are more likely to report early age of onset of alcohol, tobacco, and other drug use. In the Illinois pilot, recidivists were more likely to be heavy smokers (one to two packs a day) and less likely to have successfully quit smoking, and they reported a greater number of episodes of past illicit drug use.

Multiple offenders were substantially more likely to have previously attended treatment and, to a lesser extent, self-help groups—a factor likely influenced by mandated treatment or AA exposure linked to earlier DUI arrests. Research reviews note that recidivists are more likely to have dropped out of prior treatment and to have failed to complete earlier court-ordered services9; this factor was not tested in the Illinois pilot.

DUI arrests of recidivists, when compared to those of non-recidivists, were more likely to be characterized by a high blood alcohol content (greater than .15) without gross signs of intoxication; collateral charges; and refusal to take a Breathalyzer test. More than half (55.6%) of the DUI recidivists in the Illinois pilot study refused the Breathalyzer, compared with only 30% of first-time offenders. Even with this high rate of refusal, the remaining recidivists still had a significantly higher BAC (mean of .159) than first-time offenders, as well as self-reports of drinking more hours and more drinks.

Recidivists also were more likely to have been arrested on Monday, Wednesday, and Thursday. It is unclear why the trend toward an increased likelihood for repeat offender arrests during non-weekend nights does not hold true for Tuesday, unless this reflects a pattern of brief reprieve among daily, heavy drinkers whose consumption peaks over the course of extended weekend drinking episodes.

Those with one or more prior DUI offenses are significantly more likely to have a prior non-DUI arrest on their criminal history report than are first-time DUI offenders. Nearly half of the multiple offenders have two or more prior non-DUI arrests, compared to less than 20% for first-time offenders. Nine percent of repeat offenders have five or more previous non-DUI arrests. Multiple offenders had a history of crimes against persons at a rate twice that of first-time offenders (30% versus 15%). In addition, person crimes of repeat offenders were more likely to be related to domestic violence, with 56% of the person crimes for multiple offenders being for domestic violence.

The difference between first-time and repeat offenders is less pronounced in terms of previous charges related to controlled substances, with rates of 11% and 19%, respectively. The overrepresentation of cannabis and controlled substance violations in the multiple offender group is consistent with the finding that multiple offenders are almost three times more likely to have a collateral charge of cannabis possession at their DUI arrest than are first offenders (9% compared with 3.2%).

DUI recidivists are more likely than non-recidivists to have prior treatment for psychiatric illness as well as medical treatment reflecting injury to self via risk-taking. Recidivists also are distinguished by diminished capacity for empathy, a marked absence of guilt and remorse, a failure to take personal responsibility for decisions and their outcomes, and a general pattern of impulsivity and risk-taking.9 Evaluation instruments such as the ASUDS-RI that focus on global assessment will increase our ability to identify such risk factors and to tailor specific interventions to address them.

The future

The ASUDS-RI pilot study was able to obtain completed evaluations on 486 individuals and to analyze the evaluation data to establish Illinois norms for the ASUDS-RI. The pilot study also added information on the profile of the Illinois DUI offender and DUI recidivist population. This preliminary study confirms a number of risk factors for DUI recidivism that have been noted in the national profile literature. Nearly all of the ASUDS-RI scales revealed significant differences between the first-time DUI offender and the multiple DUI offender.

Continued follow-up of this and other populations of DUI offenders will reveal increasingly precise delineations of those factors that predict DUI recidivism and broader threats to public safety. Once we have defined this highest-risk population of impaired drivers, it could be possible to develop specialized treatment protocols designed to enhance their recovery rates and to lower their threat to communities across the country.

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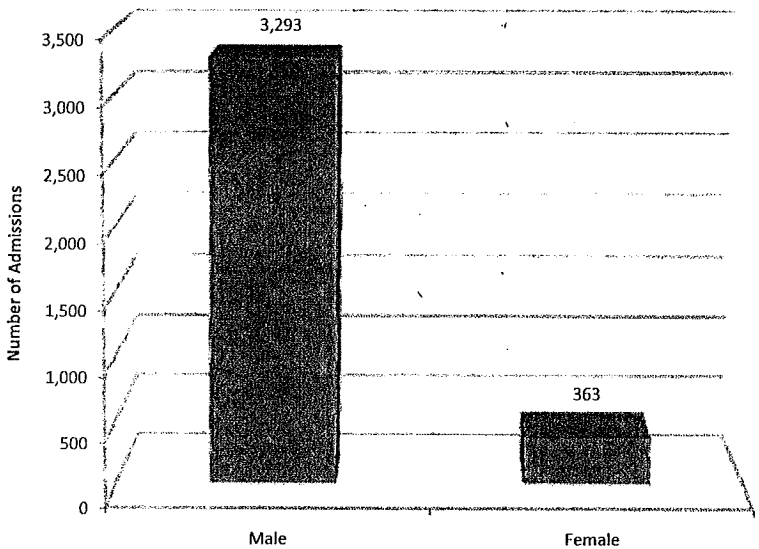
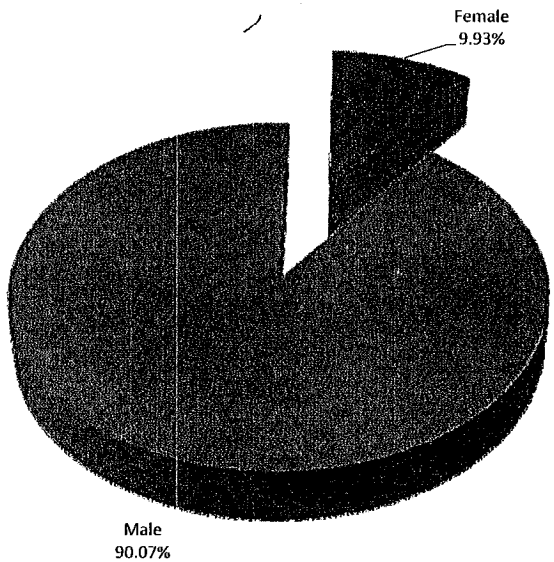
Department of Correction's 4th Time DUI Clients Admitted or Assessed

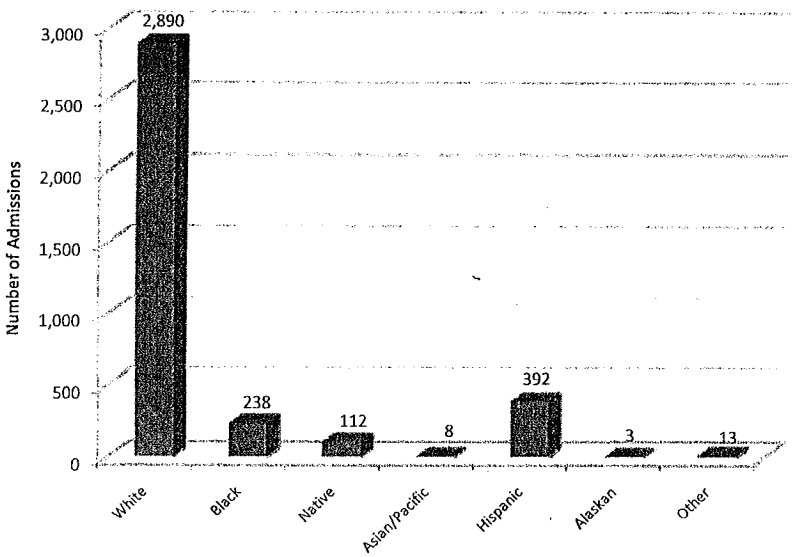
By Gender



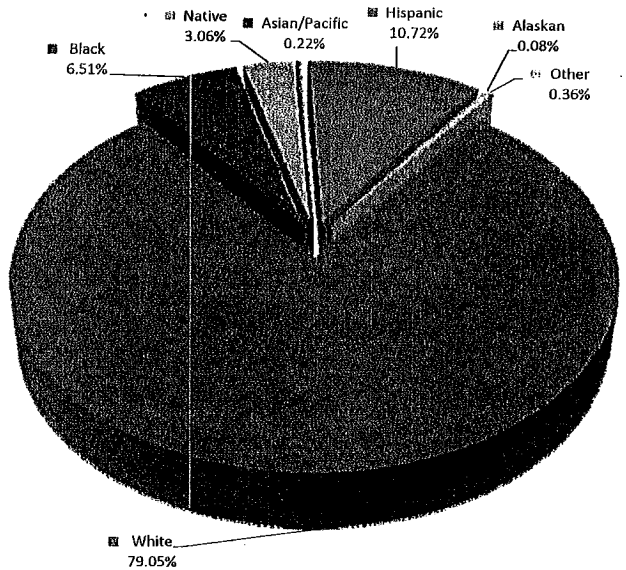
Percent by Gender



By Race/Ethnicity



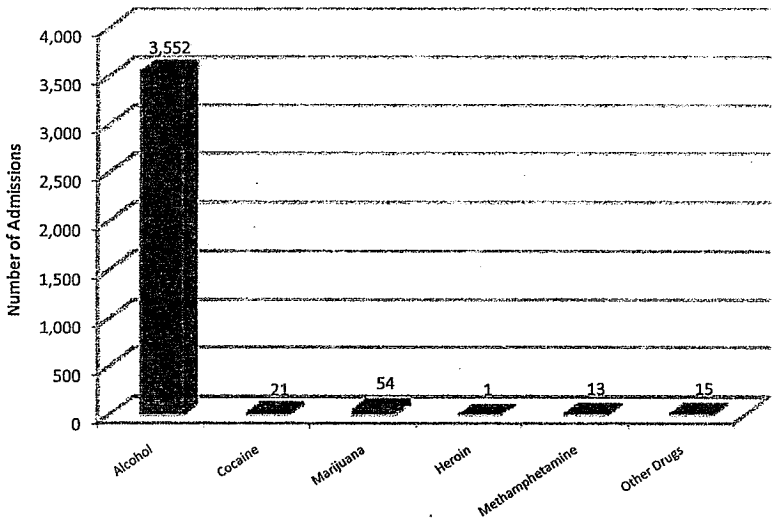
Percent by Race/Ethnicity



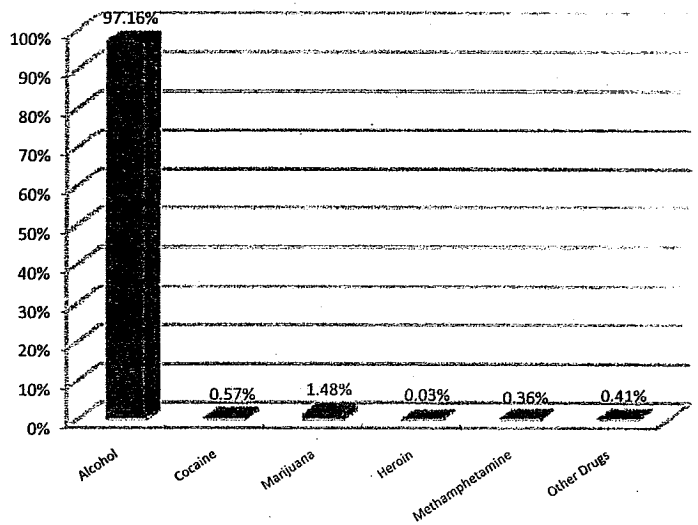
Data Source: KCPC
Available data between: July 1, 2002 through July 31, 2009

Department of Correction's 4th Time DUI Clients Admitted or Assessed

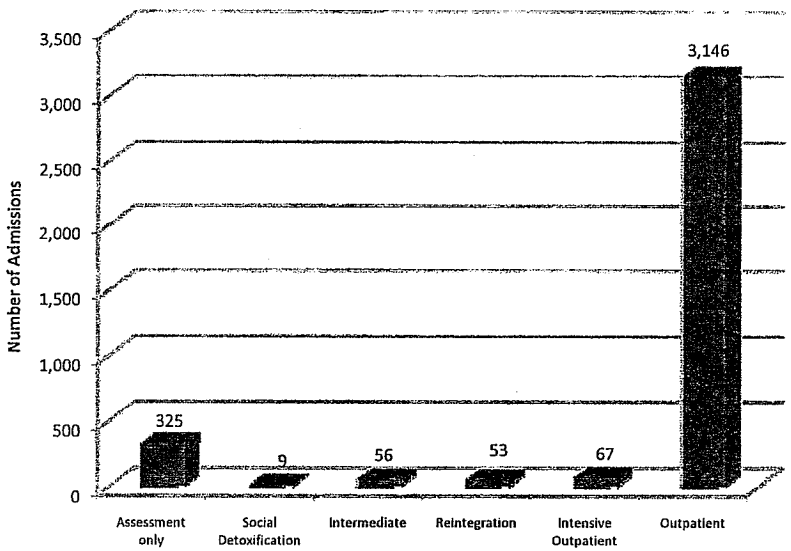
By Primary Problem



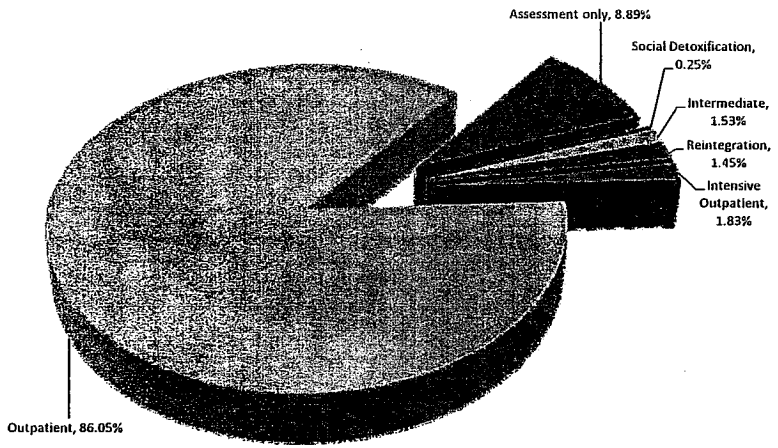
Percent by Primary Problem



By Admission Modality



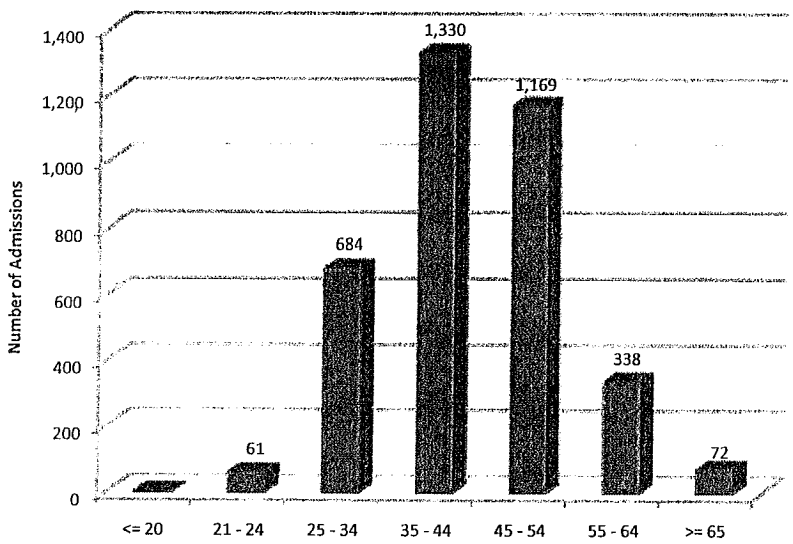
Percent by Admission Modality



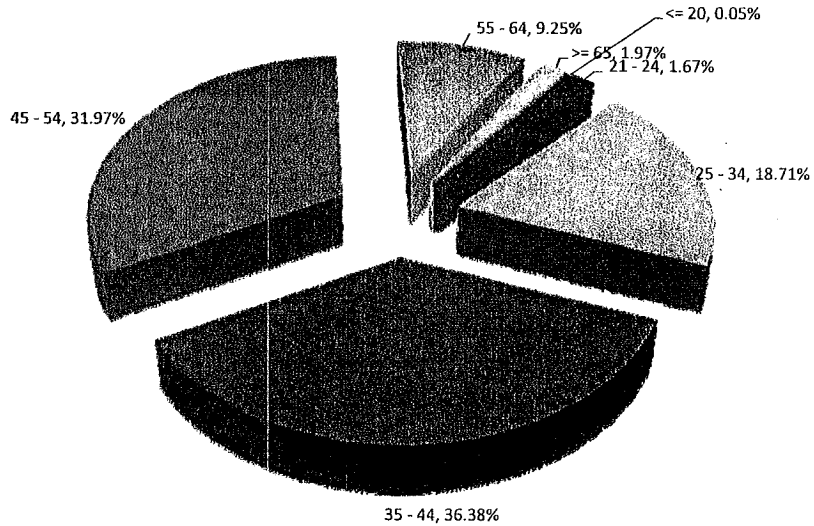
Data Source: KCPC
Available data between: July 1, 2002 through July 31, 2009

Department of Correction's 4th Time DUI Clients Admitted or Assessed

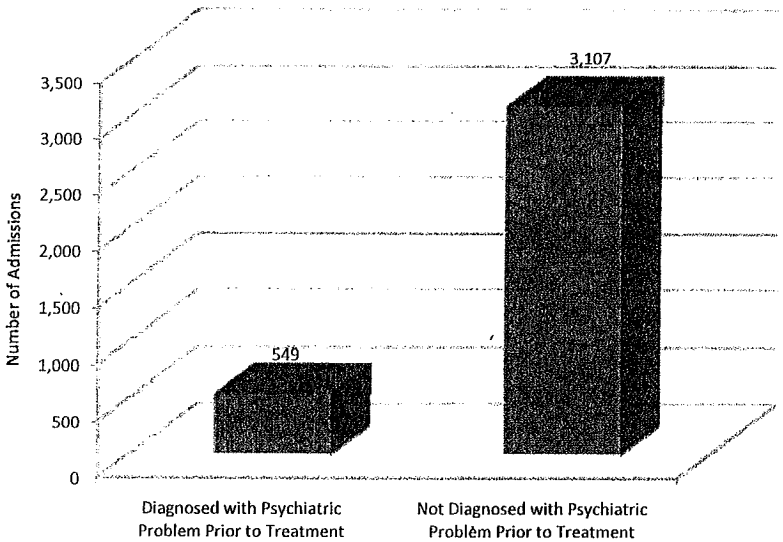
By Age



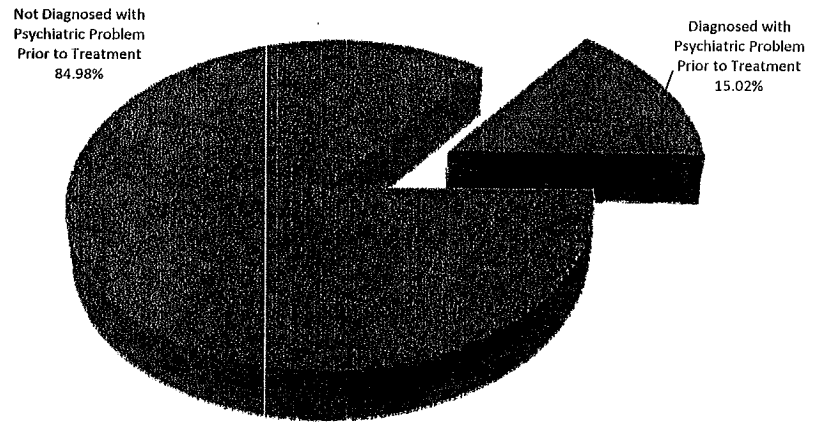
Percent by Age



Number by Clients Diagnosed with a Psychiatric Problem Prior to Treatment



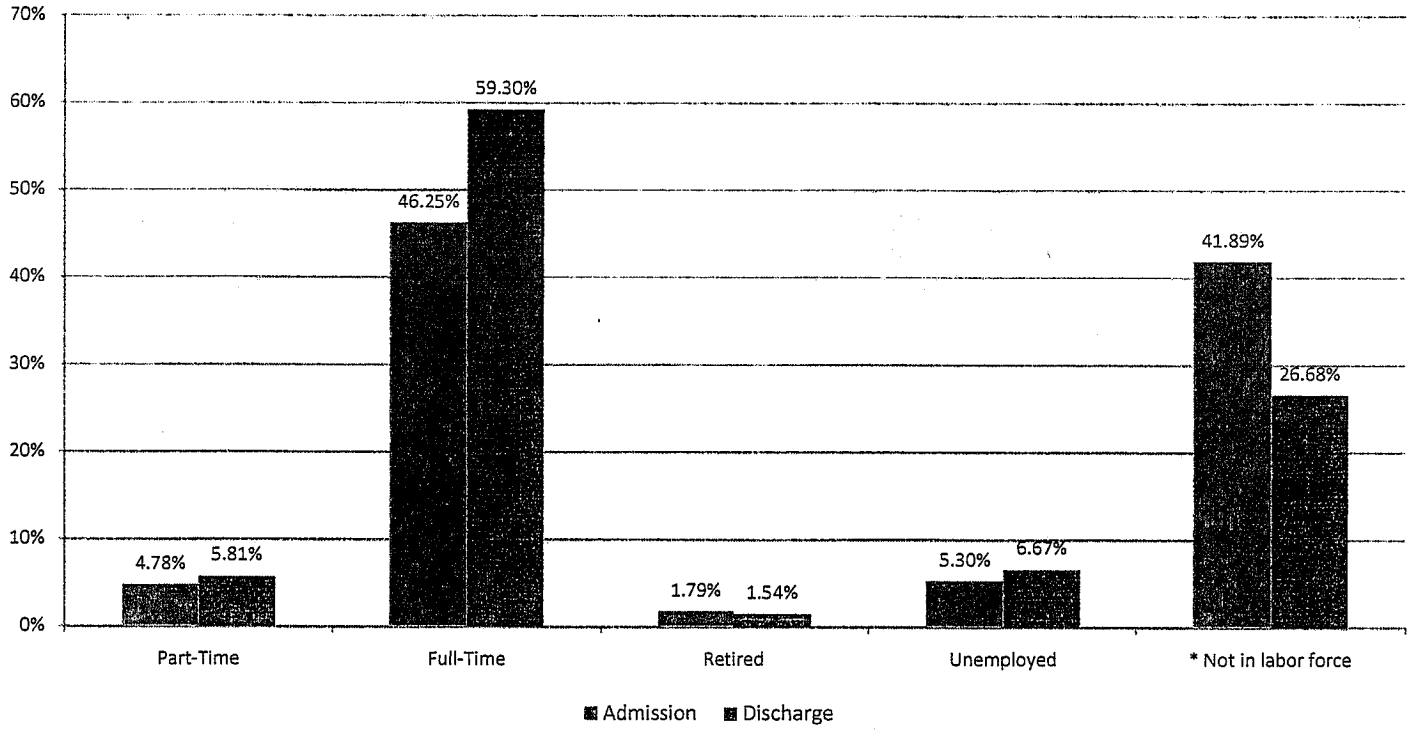
Percent of Clients Diagnosed with a Psychiatric Problem Prior to Treatment



Data Source: KCPC
Available data between: July 1, 2002 through July 31, 2009

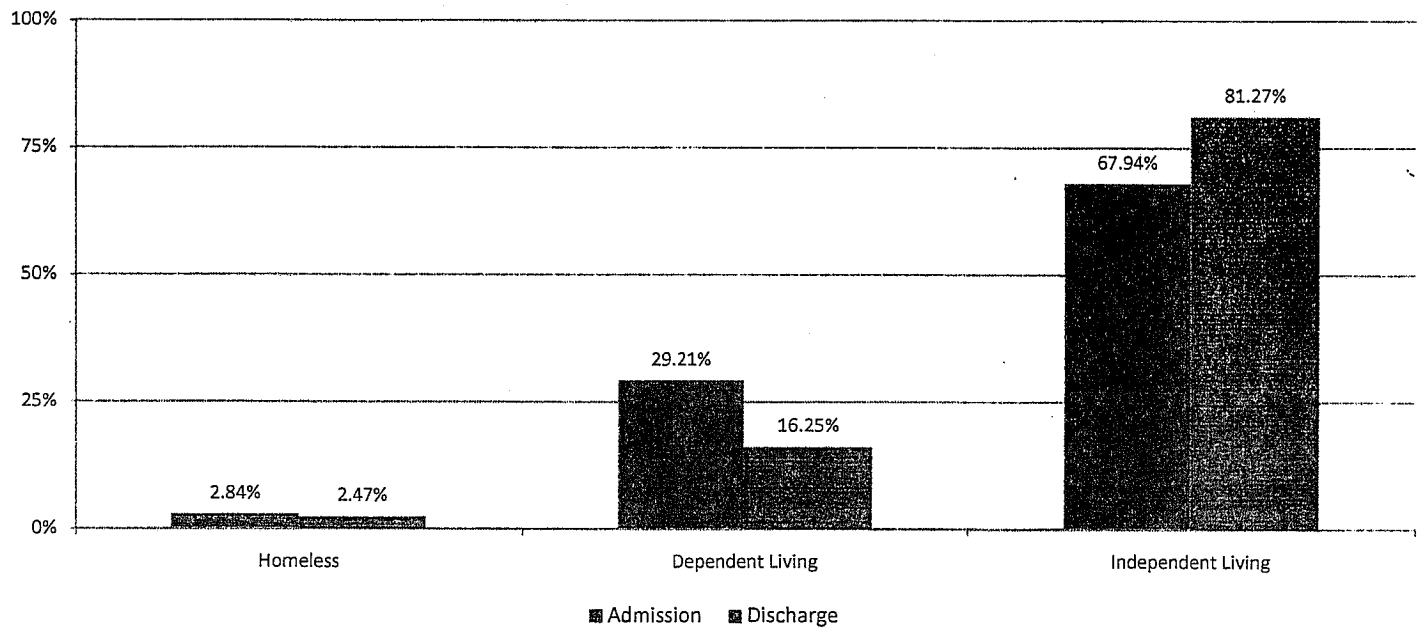
Department of Correction's 4th Time DUI Clients

Comparison Between Admission and Discharge by Employment Status



* Not in labor force: Includes Homemaker, Student, not looking for work in the past 30 days, or an inmate of an institution.

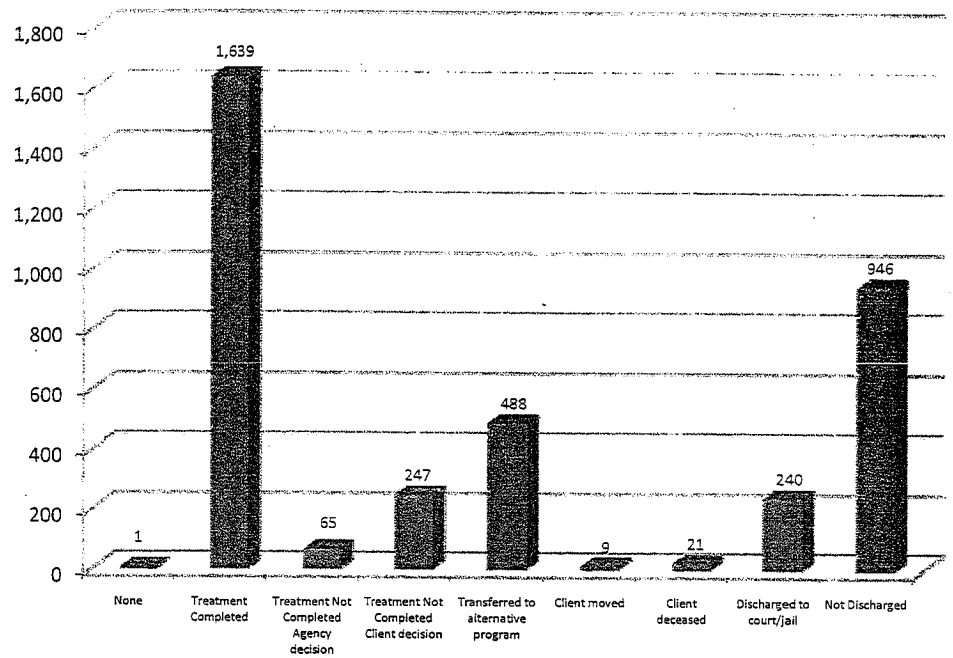
Comparison Between Admission and Discharge by Living Arrangement 4th Time DUI Clients



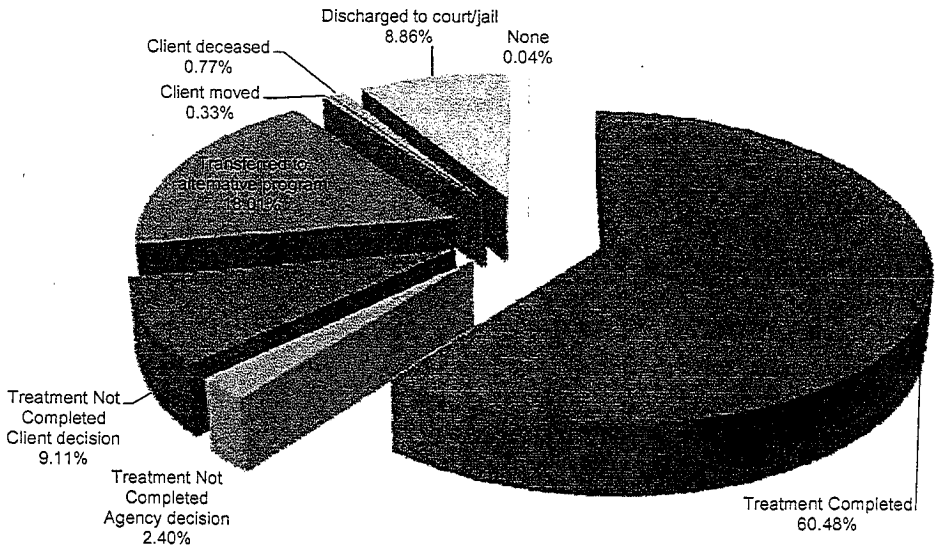
Data Source: KCPC
Available data between: July 1, 2002 through July 31, 2009

Department of Correction's DUI Clients Admitted to Addiction and Prevention Service's Programs

Discharge Reason



Discharge Reason



Data Source: KCPC

Available data between: July 1, 2002 through July 31, 2009

3-12

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MEMORANDUM

To: Members of the Kansas DUI Commission

From: Jason Thompson, Assistant Revisor of Statutes JT

Date: August 6, 2009

Subject: Ignition Interlock in Kansas

This memorandum provides a brief overview of current Kansas statutes and administrative regulations concerning ignition interlock devices.

- K.S.A. 8-1013, subsection (d), defines "ignition interlock device" as: "a device which uses a breath analysis mechanism to prevent a person from operating a motor vehicle if such person has consumed an alcoholic beverage."

- K.S.A. 8-1014 states the administrative driving privilege penalties for test refusal, test failure or alcohol or drug-related conviction. (Attachment A) (NOTE: High BAC = .15 or higher)

	REFUSAL		**FAILURE**		**FAILURE - High BAC**	
	Suspend	Restrict	Suspend	Restrict	Suspend	Restrict
first	1 year	1 year	30 days	330 days	1 year	1year
second	2 years	0	1 year	1 year	1 year	2 years
third	3 years	0	1 year	1 year	1 year	3 years
fourth	10years	0	1 year	1 year	1 year	4 years
fifth +	permanent		permanent		permanent	

Subsection (a): First occurrence of test refusal requires the division of motor vehicles to suspend driving privileges for 1 year and at the end of the suspension, restrict driving privileges for 1 year to driving only a motor vehicle equipped with an ignition interlock device; no ignition interlock provision for subsequent occurrences.

Subsection (b)(1): Second, third or fourth occurrence of test failure, or second, third or fourth alcohol or drug-related conviction in this state, requires the division to suspend driving privileges for 1 year and at the end of the suspension, restrict driving privileges for 1 year to driving only a motor vehicle equipped with an ignition interlock device. Subsection (b)(1) does not authorize the division to impose ignition interlock for a first occurrence, but K.S.A. 8-1015 (Attachment B) authorizes the division to impose ignition interlock in lieu of other restrictions upon request of the person whose driving privileges are to be restricted.

Subsection (b)(2): Increasing periods of restriction if the person's blood or breath alcohol concentration is .15 or greater; first occurrence, 1 year suspension, 1 year ignition interlock; second occurrence, 1 year suspension, 2 years ignition interlock; third occurrence, 1 year suspension, 3 years ignition interlock; fourth occurrence, 1 year suspension, 4 years ignition interlock.

Subsection (c): Mandatory 1 year suspension for a first occurrence when a person who is less than 21 years of age fails a test or has an alcohol or drug-related conviction in this state, but only requires ignition interlock restriction for a first occurrence if the person's blood or breath alcohol concentration is .15 or greater.

- K.S.A. 8-1016 governs ignition interlock device approval by the division, and adoption of rules and regulations. (Attachment C)

K.A.R. 92-56-1 through 92-56-5 are the result of this statute. (Attachment D)

- K.S.A. 8-1017 prohibits circumvention of ignition interlock devices; violation is a class A, nonperson misdemeanor, with additional penalty of 2 year driver's license suspension. (Attachment E)
  [NOTE: class A misdemeanor up to 1 year in county jail, up to $2500 fine (K.S.A. 21-4502, 21-4503)]

- K.S.A. 8-1567, subsection (l): Second or subsequent conviction, court shall order that each motor vehicle owned or leased by the convicted person shall either be equipped with an ignition interlock device or be impounded or immobilized for a period of 2 years; convicted person shall pay all costs associated with the installation, maintenance and removal of the ignition interlock device and all towing, impoundment and storage fees or other immobilization costs. (Attachment F)

This provision creates the issues raised at the last meeting regarding administratively ordered ignition interlock and court ordered ignition interlock. There have apparently been some issues with how to compute the amount of time a person must have ignition interlock, which the commission may wish to address.

8-1014. Suspension and restriction of driving privileges for test refusal, test failure or alcohol or drug-related conviction; increased penalties for blood or breath alcohol concentration of .15 or greater; ignition interlock device. (a) Except as provided by subsection (e) and K.S.A. 8-2,142, and amendments thereto, if a person refuses a test, the division, pursuant to K.S.A. 8-1002, and amendments thereto, shall:

(1) On the person's first occurrence, suspend the person's driving privileges for one year and at the end of the suspension, restrict the person's driving privileges for one year to driving only a motor vehicle equipped with an ignition interlock device;

(2) on the person's second occurrence, suspend the person's driving privileges for two years;

(3) on the person's third occurrence, suspend the person's driving privileges for three years;

(4) on the person's fourth occurrence, suspend the person's driving privileges for 10 years; and

(5) on the person's fifth or subsequent occurrence, revoke the person's driving privileges permanently.

(b) (1) Except as provided by subsections (c) and (e) and K.S.A. 8-2,142, and amendments thereto, if a person fails a test or has an alcohol or drug-related conviction in this state, the division shall:

(A) On the person's first occurrence, suspend the person's driving privileges for 30 days, then restrict the person's driving privileges as provided by K.S.A. 8-1015, and amendments thereto, for an additional 330 days;

(B) on the person's second, third or fourth occurrence, suspend the person's driving privileges for one year and at the end of the suspension, restrict the person's driving privileges for one year to driving only a motor vehicle equipped with an ignition interlock device; and

(C) on the person's fifth or subsequent occurrence, the person's driving privileges shall be permanently revoked.

(2) Except as provided by subsection (e) and K.S.A. 8-2,142, and amendments thereto, if a person fails a test or has an alcohol or drug-related conviction in this state and the person's blood or breath alcohol concentration is .15 or greater, the division shall:

(A) On the person's first occurrence, suspend the person's driving privileges for one year and at the end of the suspension, restrict the person's driving privileges for one year to driving only a motor vehicle equipped with an ignition interlock device;

(B) on the person's second occurrence, suspend the person's driving privileges for one year and at the end of the suspension, restrict the person's driving privileges for two years to driving only a motor vehicle equipped with an ignition interlock device;

(C) on the person's third occurrence, suspend the person's driving privileges for one year and at the end of the suspension restrict the person's driving privileges for three years to driving only a motor vehicle equipped with an ignition interlock device;

(D) on the person's fourth occurrence, suspend the person's driving privileges for one year and at the end of the suspension, restrict the person's driving privileges for four years to driving only a motor vehicle equipped with an ignition interlock device; and

(E) on the person's fifth or subsequent occurrence, the person's driving privileges shall be permanently revoked.

(3) Whenever a person's driving privileges have been restricted to driving only a motor vehicle equipped with an ignition interlock device, proof of the installation of such device, for the entire restriction period, shall be provided to the division before the person's driving privileges are

fully reinstated.

(c) Except as provided by subsection (e) and K.S.A. 8-2,142, and amendments thereto, if a person who is less than 21 years of age fails a test or has an alcohol or drug-related conviction in this state, the division shall:

(1) On the person's first occurrence, suspend the person's driving privileges for one year. If the person's blood or breath alcohol concentration is .15 or greater, the division shall at the end of the suspension, restrict the person's driving privileges for one year to driving only a motor vehicle equipped with an ignition interlock device;

(2) on the person's second and subsequent occurrences, penalties shall be imposed pursuant to subsection (b).

(d) Whenever the division is notified by an alcohol and drug safety action program that a person has failed to complete any alcohol and drug safety action education or treatment program ordered by a court for a conviction of a violation of K.S.A. 8-1567, and amendments thereto, the division shall suspend the person's driving privileges until the division receives notice of the person's completion of such program.

(e) Except as provided in K.S.A. 8-2,142, and amendments thereto, if a person's driving privileges are subject to suspension pursuant to this section for a test refusal, test failure or alcohol or drug-related conviction arising from the same arrest, the period of such suspension shall not exceed the longest applicable period authorized by subsection (a), (b) or (c), and such suspension periods shall not be added together or otherwise imposed consecutively. In addition, in determining the period of such suspension as authorized by subsection (a), (b) or (c), such person shall receive credit for any period of time for which such person's driving privileges were suspended while awaiting any hearing or final order authorized by this act.

If a person's driving privileges are subject to restriction pursuant to this section for a test failure or alcohol or drug-related conviction arising from the same arrest, the restriction periods shall not be added together or otherwise imposed consecutively. In addition, in determining the period of restriction, the person shall receive credit for any period of suspension imposed for a test refusal arising from the same arrest.

(f) If the division has taken action under subsection (a) for a test refusal or under subsection (b) or (c) for a test failure and such action is stayed pursuant to K.S.A. 8-259, and amendments thereto, or if temporary driving privileges are issued pursuant to K.S.A. 8-1020, and amendments thereto, the stay or temporary driving privileges shall not prevent the division from taking the action required by subsection (b) or (c) for an alcohol or drug-related conviction.

(g) Upon restricting a person's driving privileges pursuant to this section, the division shall issue a copy of the order imposing the restrictions which is required to be carried by the person at any time the person is operating a motor vehicle on the highways of this state.

(h) Any person whose license is restricted to operating only a motor vehicle with an ignition interlock device installed may operate an employer's vehicle without an ignition interlock device installed during normal business activities, provided that the person does not partly or entirely own or control the employer's vehicle or business.

History: L. 1988, ch. 47, § 7;L. 1989, ch. 38, § 37;L. 1990, ch. 48, § 2;L. 1990, ch. 47, § 2;L. 1993, ch. 259, § 6; L. 1993, ch. 275, § 3;L. 1994, ch. 353, § 10;L. 1999, ch. 125, § 18;L. 2001, ch. 200, § 5;L. 2006, ch. 173, § 3;L. 2007, ch. 181, § 5; July 1.

8-1015. Same; authorized restrictions of driving privileges; ignition interlock device. (a) When subsection (b)(1) of K.S.A. 8-1014, and amendments thereto, requires or authorizes the division to place restrictions on a person's driving privileges, the division shall restrict the person's driving privileges to driving only under the circumstances provided by subsections (a)(1), (2), (3) and (4) of K.S.A. 8-292 and amendments thereto.

(b) In lieu of the restrictions set out in subsection (a), the division, upon request of the person whose driving privileges are to be restricted, may restrict the person's driving privileges to driving only a motor vehicle equipped with an ignition interlock device, approved by the division and obtained, installed and maintained at the person's expense. Prior to issuing such restricted license, the division shall receive proof of the installation of such device.

(c) When a person has completed the one-year suspension pursuant to subsection (b)(2) of K.S.A. 8-1014, and amendments thereto, the division shall restrict the person's driving privileges for one year to driving only a motor vehicle equipped with an ignition interlock device, approved by the division and maintained at the person's expense. Proof of the installation of such device, for the full year of the restricted period, shall be provided to the division before the person's driving privileges are fully reinstated.

(d) Upon expiration of the period of time for which restrictions are imposed pursuant to this section, the licensee may apply to the division for the return of any license previously surrendered by the licensee. If the license has expired, the person may apply to the division for a new license, which shall be issued by the division upon payment of the proper fee and satisfaction of the other conditions established by law, unless the person's driving privileges have been suspended or revoked prior to expiration.

History: L. 1988, ch. 47, § 12;L. 1989, ch. 38, § 39;L. 1989, ch. 38, § 40;L. 1993, ch. 259, § 7;L. 1994, ch. 353, § 11;L. 1996, ch. 216, § 2;L. 2001, ch. 200, § 6;L. 2006, ch. 173, § 4; July 1.

Attachment 2

8-1016. Same; ignition interlock devices; approval by division; immunity from civil and criminal liability; rules and regulations. (a) The secretary of revenue may adopt rules and regulations for:

(1) The approval by the division of models and classes of ignition interlock devices suitable for use by persons whose driving privileges have been restricted to driving a vehicle equipped with such a device;

(2) the calibration and maintenance of such devices, which shall be the responsibility of the manufacturer; and

(3) ensuring that each manufacturer approved provides a reasonable statewide service network where such devices may be obtained, repaired, replaced or serviced and such service network can be accessed 24 hours per day through a toll-free phone service.

In adopting rules and regulations for approval of ignition interlock devices under this section, the secretary of revenue shall require that the manufacturer or the manufacturer's representatives calibrate and maintain the devices at intervals not to exceed 60 days. Calibration and maintenance shall include but not be limited to physical inspection of the device, the vehicle and wiring of the device to the vehicle for signs of tampering, calibration of the device and downloading of all data contained within the device's memory and reporting of any violation or noncompliance to the division.

(4) The division shall adopt by rules and regulations participant requirements for proper use and maintenance of a certified ignition interlock device during any time period the person's license is restricted by the division to only operating a motor vehicle with an ignition interlock device installed and by rules and regulations the reporting requirements of the approved manufacturer to the division relating to the person's proper use and maintenance of a certified ignition interlock device.

(5) The division shall require that each manufacturer provide a credit of at least 2% of the gross program revenues in the state as a credit for those persons who have otherwise qualified to obtain an ignition interlock restricted license under this act who are indigent as evidenced by qualification and eligibility for the federal food stamp program.

(b) If the division approves an ignition interlock device in accordance with rules and regulations adopted under this section, the division shall give written notice of the approval to the manufacturer of the device. Such notice shall be admissible in any civil or criminal proceeding in this state.

(c) The manufacturer of an ignition interlock device shall reimburse the division for any cost incurred in approving or disapproving such device under this section.

(d) Neither the state nor any agency, officer or employee thereof shall be liable in any civil or criminal proceeding arising out of the use of an ignition interlock device approved under this section.

History: L. 1988, ch. 48, § 1; L. 1988, ch. 47, § 18;L. 1994, ch. 319, § 4;L. 2001, ch. 200, § 7; July 1.

for each such fund in the year immediately preceding the year in which such moneys are received bears to the total levied by such taxing subdivisions for all such funds in the year immediately preceding the year in which such moneys are received. (Authorized by K.S.A. 1980 Supp. 79-5115; implementing K.S.A. 1980 Supp. 79-5110; effective, E-81-40, Dec. 17, 1980; effective May 1, 1981.)

92-55-9. Allocation of estimated tax receipts in budget preparation. For the purpose of preparing the 1982 budget in the year 1981, the amount estimated to be received by any taxing subdivision from motor vehicle tax receipts pursuant to K.S.A. 1980 Supp. 79-5111 shall be apportioned among the general ad valorem tax funds of such subdivision in the proportion that the amount levied for each such fund in the year 1980 for use and expenditure in the year 1981 bears to the total amount levied for all such funds in the year 1980 for use and expenditure in the year 1981. For the purpose of preparing the budget for any year following 1982, the amount estimated to be received by any taxing subdivision from motor vehicle tax receipts pursuant to K.S.A. 1980 Supp. 79-5111 shall be apportioned among the general ad valorem tax funds of such subdivision in the proportion that the amount levied for each such fund in the year immediately preceding the year in which such budget is being prepared bears to the total amount levied for all such funds in the year immediately preceding the year in which such budget is being prepared.

Estimated motor vehicle tax receipts shall not be apportioned to a tax levy fund of the taxing subdivision for which no taxes were levied in the year immediately preceding the year in which the budget is being prepared or to a tax levy fund being discontinued in the year for which the budget is prepared. (Authorized by K.S.A. 1980 Supp. 79-5115; implementing K.S.A. 1980 Supp. 79-5111; effective, E-81-40, Dec. 17, 1980; effective May 1, 1981.)

92-55-10. Motor vehicles registered in more than one (1) state. Any motor vehicle which is required by law to be registered in this state and in another state, shall not be taxed under the provisions of article 51 of chapter 79 of the Kansas Statutes Annotated if the vehicle has a permanent situs in such other state and such vehicle is, in fact, being subjected to ad valorem property taxation in that state. Upon making application for registration in this state, the owner of the motor vehicle shall present to the county treasurer proof that the motor vehicle is being assessed in such other state for ad valorem property taxation and an affidavit which shall contain the following information: A statement that the person is the owner of the motor vehicle for which application for registration is being made; the residence of such person; the name of the other state in which the motor vehicle is required to be registered; a statement that the vehicle has a permanent situs in such other state; and a statement that the vehicle is subject to ad valorem taxation in such other state. The motor vehicle tax shall not be imposed upon any motor vehicle registered in this state for which the affidavit and proof of assessment have been submitted to the county treasurer of the county in which the vehicle is being registered. (Authorized by K.S.A. 1980 Supp. 79-5115; implementing K.S.A. 1980 Supp. 79-5102, 79-5106; effective, E-81-40, Dec. 17, 1980; effective May 1, 1981.)

Article 56.—IGNITION INTERLOCK DEVICES

92-56-1. Ignition interlock device, definitions. As used in these regulations, the following terms shall have these meanings: (a) "Ignition interlock device" and "device" mean an electronic device using microcomputer logic and internal memory and having a breath alcohol analyzer as a major component that interconnects with the ignition and other control systems of a motor vehicle. This device measures the breath alcohol concentration (BrAC) of an intended driver to prevent the motor vehicle from being started if the BrAC exceeds a preset limit and to deter and record attempts to circumvent or tamper with the device.

(b) "Alcohol setpoint" means the breath alcohol concentration at which the ignition interlock device is set to lock the ignition. The alcohol setpoint is the normal lockpoint at which the ignition interlock device is set at the time of calibration. The alcohol setpoint for retests shall be set at .06 as a safety factor to preclude a false positive test result during the operation of the vehicle.

(c) "BrAC" means the breath alcohol concentration expressed in percent by weight by volume based upon grams of alcohol per 210 liters of breath.

(d) "BrAC fail" means the condition in which

the ignition interlock device registers a BrAC value in excess of the alcohol setpoint limit when the intended driver conducts an initial test or retest. This condition is recorded as a violation.

(e) "Breath sample" means the sample of alveolar or end-expiratory breath that is analyzed for the analysis of alcohol content after the expiration of a minimum of 1.2 liters of air.

(f) "Circumvention" means an overt, conscious attempt to bypass the ignition interlock device by any of the following:

(1) Providing samples other than the natural, unfiltered breath of the driver;

(2) starting the vehicle without using the ignition switch; or

(3) performing any other act intended to start the vehicle without first taking and passing a breath test. Circumvention permits a driver with a BrAC in excess of the alcohol setpoint to start the vehicle.

(g) "Emergency bypass switch" means the switch that allows the driver to bypass the ignition interlock device in case of an emergency or failure of the device and that places the ignition interlock device in a run state mode so that no test is required when the ignition switch is turned on. The bypass switch can be used only once. If used, the event shall be recorded in the event log, and the device shall be put into early service status.

(h) "Fail-safe" means a condition in which the ignition interlock device cannot operate properly due to a problem, including improper voltage and a dead sensor. In a fail-safe condition, the ignition interlock device will not permit the vehicle to be started.

(i) "Lockout" means an instance in which the ignition interlock device will prevent the vehicle from starting. The vehicle cannot be operated until serviced by the service provider.

(j) "Rolling retest" means a subsequent breath test that must be conducted according to the preset conditions of the ignition interlock device for a fixed time period and must be completed while the motor vehicle is in operation. Failure to execute a valid retest will cause the vehicle ignition system to enter a lockout condition after a fixed time period.

(k) "Violation" means either of the following:

(l) The driver has blown a high BrAC and fails the initial breath test when attempting to start the vehicle.

(2) The driver fails a breath test within the allowable time after a retest has been requested.

(Authorized by and implementing K.S.A. 8-1016; effective Oct. 23, 1989; amended July 5, 2002.)

92-56-2. Ignition interlock device; certification and standards. (a) Each manufacturer of an ignition interlock device desiring to market the device in this state shall apply to the division of vehicles for certification of the device and submit the following information:

(1) The name and address of the manufacturer;

(2) the name and model number of the device;

(3) certification that the device meets the following criteria:

(A) Offers safe operation of the vehicle in which installed, works reliably and accurately in an unsupervised environment, and, when in a fail-safe condition, prevents the vehicle from starting;

(B) offers protection against tampering and is able to detect and be resistant to circumvention;

(C) allows for a free restart of the vehicle's ignition within two minutes after the ignition has been turned off without requiring another breath test if the driver has not registered a BrAC fail or is not in the process of completing a retest;

(D) allows for a rolling retest of a subsequent breath test after the vehicle has been in operation;

(E) disables the ignition system if the BrAC of the person using the device exceeds the alcohol setpoint of .04;

(F) contains an emergency bypass switch;

(G) records each time the vehicle is started, the duration of the vehicle's operation, and any instances of tampering or attempts to tamper with the device;

(H) displays to the driver all of the following:

(i) When the device is on;

(ii) when the device has enabled the ignition system;

(iii) when a BrAC fail condition has occurred, along with the BrAC reading that caused the failure; and

(iv) the date that a lockout will occur; and

(I) alerts the driver with a three-minute warning light or tone that a rolling retest is required;

(4) a list of ignition interlock device service providers and the address where the device can be obtained, repaired, replaced, or serviced 24 hours a day by calling a toll-free phone number. Service providers shall be located within 100 miles of all Kansas residents. Manufacturers shall be responsible for the quality of service provided by their service providers; and

(5) the name of an insurance carrier authorized

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to do business in this state that has committed to issue a liability insurance policy for the manufacturer in the amounts specified in K.A.R. 92-56-3.

(b) Each certification issued by the division shall continue in effect for three years unless either of the following occurs:

(1) The manufacturer requests in writing that the certification be discontinued.

(2) The division informs the manufacturer in writing that the certification is suspended or revoked.

(c) If a manufacturer modifies a certified device, the manufacturer shall notify the division of the exact nature of the modification. A device may be required by the division to be recertified at any time.

(d) Each manufacturer of a certified device shall notify the division of the failure of any device to function as designed. The manufacturer shall provide an explanation for the failure and shall identify the actions taken by the manufacturer to correct the malfunctions.

(e) Each manufacturer of a certified device shall accumulate a credit of at least two percent of the gross revenues attributed to installation, maintenance, calibration, and removal of ignition interlock devices in Kansas. Any existing credit shall be made available to people who are restricted to operating a vehicle with an ignition interlock device and who are indigent as evidenced by eligibility for the federal food stamp program. The amount of the credit available shall be limited to the amount of the existing credit balance.

(f) Each manufacturer of a certified device shall submit a report to the division by January 31 of each year with the following information for the previous calendar year's activities:

(1) The number of ignition interlock devices initially installed on vehicles for Kansas drivers who were restricted to driving only with an ignition interlock device;

(2) the number of vehicles that had devices removed due to failures and, for each vehicle, the driver's name, the driver's license number, the specific failure or operational problem that occurred during the period installed, and the resolution of each situation; and

(3) a chronological accounting summary of the following information:

(A) The beginning credit balance;

(B) two percent of the gross revenues attributable to installation, maintenance, calibration, and removal of ignition interlock devices;

(C) amounts credited to indigent drivers; and

(D) the ending credit balance. (Authorized by and implementing K.S.A. 8-1016; effective Oct. 23, 1989; amended July 5, 2002.)

92-56-3. Insurance; policy limits. (a). Each manufacturer submitting an application for certification of an ignition interlock device shall obtain a policy of product liability insurance from a carrier authorized to do business in the state of Kansas. The insurance policy shall contain minimum liability limits of $1,000,000 per occurrence with an aggregate coverage of $3,000,000. The insurance policy shall cover all liability arising from defects in design and materials, including the manufacture of the device, its calibration, maintenance, installation, and removal.

(b) Each insurance carrier shall provide 30-day notice to the division before canceling any insurance policy.

(c) The cancelation of insurance coverage by a carrier shall be a basis for revoking the certification for the device. (Authorized by and implementing K.S.A. 8-1016; effective Oct. 23, 1989; amended July 5, 2002.)

92-56-4. Installation, inspection, and calibration standards. (a) Each ignition interlock device installed at the direction of the division shall be done at the driver's own expense, except as allowed by K.A.R. 92-56-2(e).

(b) Each service provider shall meet the following requirements:

(1) Install each device in accordance with the manufacturer's instructions. Each service provider shall, within two weeks of installation, inform the division each time a device has been installed;

(2) install each device so that the device will be deactivated if the driver has a BrAC of .04 or higher until a successful retest occurs;

(3) set each device so that if the driver fails an ignition interlock test, a retest cannot be done for 15 minutes;

(4) set each device so that a rolling retest will occur after the vehicle has been in operation for 10 minutes. Subsequent rolling retests shall occur at 30-minute intervals. A three-minute warning light or tone shall be set to come on to alert the driver that a retest is coming. The driver shall have five minutes to complete the retest. The free restart shall not be operative when the device is waiting for a rolling retest sample;

(5) calibrate each device at least every 60 days

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at the driver's own expense, except as allowed by K.A.R. 92-56-2(e), and maintain an inspection and calibration record with the following information:

(A) The name of the person performing the calibration;

(B) the date of the inspection and calibration;

(C) the method by which the calibration was performed;

(D) the name and model number of the device calibrated;

(E) a description of the vehicle in which the device is installed, including the license plate number, make, model, year, and color; and

(F) a statement by the installer indicating whether there is any evidence that attempts have been made to circumvent the device; and

(6) set each device so that a lockout will occur seven days after any of the following events occurs:

(A) The 60-day calibration and service requirement has been reached;

(B) five or more violations are recorded;

(C) the emergency bypass switch has been used;

(D) a hardware failure or evidence of tampering is recorded; or

(E) the events log has exceeded 90 percent of capacity.

(c) Each driver restricted to driving a vehicle equipped with an ignition interlock device shall keep a copy of the inspection and calibration records in the vehicle at all times. The manufacturer shall retain the original record for each current driver for a period of one year after the device is removed. The manufacturer shall notify the division within seven days after a device has been serviced due to a lockout that occurred for any of the reasons specified in paragraph (b)(6)(B), (b)(6)(C), or (b)(6)(D) of this regulation. (Authorized by and implementing K.S.A. 8-1016; effective Oct. 23, 1989; amended July 5, 2002.)

92-56-5. Revocation of certification. A certification for any ignition interlock device may be revoked for any of the following reasons:

(a) The device fails to comply with specifications or requirements provided by the division.

(b) The policy of product liability insurance required by K.A.R. 92-56-3 is canceled or not renewed.

(c) The manufacturer has failed to make adequate provisions for the installation, maintenance, inspection, calibration, repair, and removal of the device.

(d) The manufacturer has failed to provide statewide service network coverage or 24-hour, seven-day service support.

(e) The manufacturer is no longer in the business of manufacturing ignition interlock devices. (Authorized by and implementing K.S.A. 8-1016; effective Oct. 23, 1989; amended July 5, 2002.)

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Attachment E

8-1017. Same; circumvention of ignition interlock device; penalty. (a) No person shall:

(1) Tamper with an ignition interlock device for the purpose of circumventing it or rendering it inaccurate or inoperative;

(2) request or solicit another to blow into an ignition interlock device, or start a motor vehicle equipped with such device, for the purpose of providing an operable motor vehicle to a person whose driving privileges have been restricted to driving a motor vehicle equipped with such device;

(3) blow into or start a motor vehicle equipped with an ignition interlock device for the purpose of providing an operable motor vehicle to a person whose driving privileges have been restricted to driving a motor vehicle equipped with such device; or

(4) operate a vehicle not equipped with an ignition interlock device during the restricted period.

(b) Violation of this section is a class A, nonperson misdemeanor.

(c) In addition to any other penalties provided by law, upon receipt of a conviction for a violation of this section, the division shall suspend the person's driving privileges for a period of two years.

History: L. 1988, ch. 48, § 2;L. 1994, ch. 353, § 12; July 1.

Attachment F

SENATE Substitute for HOUSE BILL No. 2096

AN ACT concerning driving; creating the Kansas DUI commission; creating the correctional services special revenue fund; relating to driver improvement clinics; providing for disposition of certain moneys; relating to penalties for driving under the influence of alcohol or drugs; information sent to the Kansas bureau of investigation central repository; amending K.S.A. 12-4517 and K.S.A. 2008 Supp. 8-255, 8-267, 8-1567, 8-1567, as amended by section 5 of this act, and 12-4106 and repealing the existing sections.

Be it enacted by the Legislature of the State of Kansas:

New Section 1. (a) There is hereby created the Kansas DUI commission.

(b) The commission shall:

(1) Review past and current driving under the influence statutes in Kansas;

(2) review driving under the influence statutes in other states;

(3) review proposals related to driving under the influence introduced in the 2009 legislative session;

(4) review other subjects related to driving under the influence referred to the commission by the chairperson of the standing senate committee on judiciary, house committee on judiciary or house committee on corrections and juvenile justice;

(5) review what is effective in changing the behavior of driving under the influence offenders by examining evaluation, treatment and supervision practices, enforcement strategies and penalty structure;

(6) develop a balanced and comprehensive legislative proposal that centralizes recordkeeping so that offenders are held accountable, assures highway safety by changing the behavior of driving under the influence offenders at the earliest possible time and provides for significant restriction on personal liberty at some level of frequency and quantity of offenses; and

(7) assess and gather information on all groups and committees working on issues related to driving under the influence and determine if any results or conclusions have been found to address the issues.

(c) The commission shall be made up of the following members:

(1) The chairperson of the standing committee on judiciary of the senate;

(2) the chairperson of the standing committee on judiciary of the house of representatives;

(3) the ranking minority member of the standing committee on judiciary of the house of representatives;

(4) the ranking minority member of the standing committee on judiciary of the senate;

(5) a district judge and a municipal court judge who exercise regular jurisdiction in driving under the influence cases, each appointed by the chief justice of the supreme court;

(6) the attorney general, or the attorney general's designee;

(7) one prosecuting attorney who regularly prosecutes driving under the influence cases, appointed by the Kansas county and district attorneys association;

(8) one defense attorney who regularly represents defendants in driving under the influence cases, appointed by the Kansas bar association;

(9) one victim advocate, appointed by the governor;

(10) two persons appointed by the Kansas association of addiction professionals;

(11) the secretary of corrections;

(12) the secretary of social and rehabilitation services;

(13) the secretary of revenue, or the secretary's designee;

(14) the secretary of transportation, or the secretary's designee;

(15) the chairperson of the Kansas sentencing commission, or the chairperson's designee;

(16) the superintendent of the Kansas highway patrol, or the superintendent's designee;

(17) the director of the Kansas bureau of investigation, or the director's designee;

(18) one sheriff, appointed by the attorney general who shall consider, but not be limited to, a list of three nominees submitted therefor by the Kansas sheriffs' association;

(19) one municipal law enforcement officer, appointed by the attorney general who shall consider, but not be limited to, a list of three nominees submitted therefor by the Kansas association of chiefs of police;

schools in Kansas. Except as otherwise provided by K.S.A. 8-241, and amendments thereto, the state treasurer shall credit the balance of all moneys received under this act, including all moneys received from commercial driver's license endorsements to the state highway fund.

Sec. 5. K.S.A. 2008 Supp. 8-1567 is hereby amended to read as follows: 8-1567. (a) No person shall operate or attempt to operate any vehicle within this state while:

(1) The alcohol concentration in the person's blood or breath as shown by any competent evidence, including other competent evidence, as defined in paragraph (1) of subsection (f) of K.S.A. 8-1013, and amendments thereto, is .08 or more;

(2) the alcohol concentration in the person's blood or breath, as measured within two hours of the time of operating or attempting to operate a vehicle, is .08 or more;

(3) under the influence of alcohol to a degree that renders the person incapable of safely driving a vehicle;

(4) under the influence of any drug or combination of drugs to a degree that renders the person incapable of safely driving a vehicle; or

(5) under the influence of a combination of alcohol and any drug or drugs to a degree that renders the person incapable of safely driving a vehicle.

(b) No person shall operate or attempt to operate any vehicle within this state if the person is a habitual user of any narcotic, hypnotic, somnifacient or stimulating drug.

(c) If a person is charged with a violation of this section involving drugs, the fact that the person is or has been entitled to use the drug under the laws of this state shall not constitute a defense against the charge.

(d) Upon a first conviction of a violation of this section, a person shall be guilty of a class B, nonperson misdemeanor and sentenced to not less than 48 consecutive hours nor more than six months' imprisonment, or in the court's discretion 100 hours of public service, and fined not less than $500 nor more than $1,000. The person convicted must serve at least 48 consecutive hours' imprisonment or 100 hours of public service either before or as a condition of any grant of probation or suspension, reduction of sentence or parole.

In addition, the court shall enter an order which requires that the person enroll in and successfully complete an alcohol and drug safety action education program or treatment program as provided in K.S.A. 8-1008, and amendments thereto, or both the education and treatment programs.

(e) On a second conviction of a violation of this section, a person shall be guilty of a class A, nonperson misdemeanor and sentenced to not less than 90 days nor more than one year's imprisonment and fined not less than $1,000 nor more than $1,500. The person convicted must serve at least five consecutive days' imprisonment before the person is granted probation, suspension or reduction of sentence or parole or is otherwise released. The five days' imprisonment mandated by this subsection may be served in a work release program only after such person has served 48 consecutive hours' imprisonment, provided such work release program requires such person to return to confinement at the end of each day in the work release program. The court may place the person convicted under a house arrest program pursuant to K.S.A. 21-4603b, and amendments thereto, to serve the remainder of the minimum sentence only after such person has served 48 consecutive hours' imprisonment.

As a condition of any grant of probation, suspension of sentence or parole or of any other release, the person shall be required to enter into and complete a treatment program for alcohol and drug abuse as provided in K.S.A. 8-1008, and amendments thereto.

(f) (1) On the third conviction of a violation of this section, a person shall be guilty of a nonperson felony and sentenced to not less than 90 days nor more than one year's imprisonment and fined not less than $1,500 nor more than $2,500. The person convicted shall not be eligible for release on probation, suspension or reduction of sentence or parole until the person has served at least 90 days' imprisonment. The 90 days' imprisonment mandated by this paragraph may be served in a work release program only after such person has served 48 consecutive hours'

on the convicted person's motor vehicle subject to impoundment or immobilization expires in less than one year from the date of the impoundment or immobilization, the time of impoundment or immobilization of such vehicle shall be the amount of time remaining on the lease.

(l) (1) Except as provided in paragraph (3), in addition to any other penalty which may be imposed upon a second or subsequent conviction of a violation of this section, the court shall order that each motor vehicle owned or leased by the convicted person shall either be equipped with an ignition interlock device or be impounded or immobilized for a period of two years. The convicted person shall pay all costs associated with the installation, maintenance and removal of the ignition interlock device and all towing, impoundment and storage fees or other immobilization costs.

(2) Any personal property in a vehicle impounded or immobilized pursuant to this subsection may be retrieved prior to or during the period of such impoundment or immobilization.

(3) As used in this subsection, the convicted person's motor vehicle or vehicles shall include any vehicle leased by such person. If the lease on the convicted person's motor vehicle subject to impoundment or immobilization expires in less than two years from the date of the impoundment or immobilization, the time of impoundment or immobilization of such vehicle shall be the amount of time remaining on the lease.

(m) (1) Prior to filing a complaint alleging a violation of this section, a prosecutor shall request and shall receive from the division a record of all prior convictions obtained against such person for any violations of any of the motor vehicle laws of this state.

(2) Prior to filing a complaint alleging a violation of this section, a prosecutor shall request and shall receive from the Kansas bureau of investigation central repository all criminal history record information concerning such person.

~~(m)~~ *(n)* The court shall *electronically* report every conviction of a violation of this section and every diversion agreement entered into in lieu of further criminal proceedings or a complaint alleging a violation of this section to the division. Prior to sentencing under the provisions of this section, the court shall request and shall receive from the division a record of all prior convictions obtained against such person for any violations of any of the motor vehicle laws of this state.

~~(n)~~ *(o)* For the purpose of determining whether a conviction is a first, second, third, fourth or subsequent conviction in sentencing under this section:

(1) "Conviction" includes being convicted of a violation of this section or entering into a diversion agreement in lieu of further criminal proceedings on a complaint alleging a violation of this section;

(2) "conviction" includes being convicted of a violation of a law of another state or an ordinance of any city, or resolution of any county, which prohibits the acts that this section prohibits or entering into a diversion agreement in lieu of further criminal proceedings in a case alleging a violation of such law, ordinance or resolution;

(3) any convictions occurring during a person's lifetime shall be taken into account when determining the sentence to be imposed for a first, second, third, fourth or subsequent offender;

(4) it is irrelevant whether an offense occurred before or after conviction for a previous offense; and

(5) a person may enter into a diversion agreement in lieu of further criminal proceedings for a violation of this section, and amendments thereto, or an ordinance which prohibits the acts of this section, and amendments thereto, only once during the person's lifetime.

~~(o)~~ *(p)* Upon conviction of a person of a violation of this section or a violation of a city ordinance or county resolution prohibiting the acts prohibited by this section, the division, upon receiving a report of conviction, shall suspend, restrict or suspend and restrict the person's driving privileges as provided by K.S.A. 8-1014, and amendments thereto.

~~(p) (1)~~ *(q) (1) (A)* Nothing contained in this section shall be construed as preventing any city from enacting ordinances, or any county from adopting resolutions, declaring acts prohibited or made unlawful by this act as unlawful or prohibited in such city or county and prescribing penalties for violation thereof. Except as specifically provided by this subsection, the minimum penalty prescribed by any such ordinance or resolution shall not be less than the minimum penalty prescribed by this act

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MEMORANDUM

To: Members of the Kansas DUI Commission

From: Jason Thompson, Assistant Revisor of Statutes JT

Date: August 6, 2009

Subject: Continuous Alcohol Monitoring (CAM) in Delaware, Missouri, Nebraska, North Carolina, North Dakota, Ohio, South Dakota and Vermont

This memorandum provides a brief overview of statutes and programs concerning continuous alcohol monitoring (CAM) in Delaware, Missouri, Nebraska, North Carolina, North Dakota, Ohio, South Dakota and Vermont. According to Alcohol Monitoring Systems, Inc., these 8 states have passed CAM-related legislation.

- Delaware: Delaware Code, Title 11, Section 4219

DUI offenders may be required to have CAM for 90 days on 1st offense and 120 days for 2nd offense. Inmates incarcerated for DUI may be selected for release under special program created by Delaware Department of Corrections. (Attachment A)

- Missouri: 2009 House Bill No. 2230

Bill was not adopted, would have provided for CAM parole or probation condition for intoxication-related traffic offenses and would have reduced mandatory minimum imprisonment time if offenders abstain from alcohol, as verified by CAM, for certain lengths of time ordered by court. (Attachment B)

In addition, Missouri corrections officials used CAM in a pilot project in 7 counties for 6 months this year. (Attachment C)

- Nebraska: Nebraska State Statute Sections 60-6,197.01 and 60-6,211.05

2nd or subsequent DUI offense, court may order CAM and abstention from

alcohol for a period not to exceed the license revocation period, but only if court also orders ignition interlock. (Attachment D)

If probation is granted for DUI offense and court orders ignition interlock, then court may also order CAM and abstention from alcohol for the period of probation. (Attachment E)

- North Carolina: North Carolina General Statutes Section 20-179

5 levels of punishment established for impaired driving, CAM may be imposed as a condition of probation for defendants subject to Level One or Level Two punishments. (Attachment F)

Sections 15A-1343.3 and 15A-1374 also provide for Department of Corrections CAM system for broader use as condition of parole for any offense. (Attachments G and H)

- North Dakota: Sobriety program through Attorney General's office

Legislature authorized the program; DUI offense, court may order sobriety program participation and CAM. (Attachment I)

- Ohio: Ohio Revised Code Sections 4510.13, 4510.46 and 4511.198

Court may order CAM for certain DUI offenders, and shall order for others. Sentenced under division (G)(1)(b) of section 4511.19 (2nd violation within 6 years): first instance the court may require CAM; second instance the court shall require - minimum of forty days; third instance or more, the court shall require - minimum of sixty days. Sentenced under division (G)(1)(c), (d), or (e) of section 4511.19 (3rd violation within 6 years, 4th or 5th within 6 years, or 6th or more within 20 years): first instance the court shall require - minimum of forty days; second instance or more, the court shall require - minimum of sixty days. (Attachment J)

If ignition interlock prevents vehicle from starting, court shall order CAM and other sanctions. (Attachment K)

If a court grants limited driving privileges for DUI offender, may order CAM for certain offenders and shall order for others. (Attachment L)

- South Dakota: South Dakota 24/7 Sobriety Project

Legislature authorized the program; broad program that uses CAM as one mechanism of ensuring sobriety. (Attachment M)

- Vermont: Vermont Statutes, Title 28, Sections 202 and 403

Authorizes use of CAM use for probation and parole, named primarily for discouraging DUI offenders from operating vehicles. (Attachments N and O)

Attachment A 3

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§ 4201 § 4202 § 4203 § 4204 § 4204A § 4205 § 4205A § 4206 § 4207 § 4208 § 4209 § 4209A § 4210 § 4211 § 4212 § 4213 § 4214 § 4215 § 4215A § 4216 § 4217 § 4218 § 4219 § 4220

TITLE 11

Crimes and Criminal Procedure

Criminal Procedure Generally

CHAPTER 42. CLASSIFICATION OF OFFENSES; SENTENCES

§ 4201. Transition provisions.

(a) Felonies are classified, for the purpose of sentence, into 7 categories:

(1) Class A felonies;

(2) Class B felonies;

(3) Class C felonies;

(4) Class D felonies;

(5) Class E felonies;

(6) Class F felonies;

(7) Class G felonies.

(b) Any crime or offense which is designated as a felony but which is not specifically given a class shall be a class G felony and shall carry the sentence provided for said class felony.

(c) The following felonies shall be designated as violent felonies:

Title 11, Section Crime

513 Conspiracy First Degree

602 Aggravated Menacing

604 Reckless Endangering First Degree

605 Abuse of a Pregnant Female in the Second Degree

(g) Notwithstanding any provision of this section to the contrary, the court shall not admit a defendant to Probation Before Judgment nor otherwise apply any provision of this section unless the defendant first gives written consent to the court permitting any hearing or proceeding pursuant to this section to occur in the defendant's absence if:

(1) Timely notice of the hearing or proceeding is sent or delivered to the address provided by the defendant pursuant to subsection (a) of this section; and

(2) The defendant fails to appear at said proceeding. In the event that a defendant fails to appear at any hearing or proceeding pursuant to this section, the court may proceed in the defendant's absence if it first finds that timely notice of the hearing or proceeding was sent or delivered to the address provided by the defendant pursuant to subsection (a) of this section. Nothing in this subsection shall limit the power of the Court to hold a hearing to determine whether a defendant is in violation of the terms of that defendant's probation.

(h) Notwithstanding the provisions of subsection (a) of this section to the contrary, in any case in which the Delaware Department of Justice does not intend to enter its appearance, the consent of the State shall not be required prior to placing a defendant on "probation before judgment." Notwithstanding the foregoing, except for the offenses under Title 21 to which this section applies, the Attorney General or other prosecuting authority may advise the court of aggravating circumstances in opposition to placing a defendant on "probation before judgment."

72 Del. Laws, c. 126, § 1; 70 Del. Laws, c. 186, § 1; 72 Del. Laws, c. 453, §§ 1-8; 73 Del. Laws, c. 301, §§ 3, 4; 75 Del. Laws, c. 184, § 1; 75 Del. Laws, c. 364, § 2; 76 Del. Laws, c. 251, § 2.;

§ 4219. Continuous Remote Alcohol Monitoring Program.

(a) There is hereby established for sentencing and probation purposes a Continuous Remote Alcohol Monitoring Program which shall use technology to monitor offenders for alcohol use. The program shall be administered by the Department of Correction which shall have the sole authority to determine which offenders are accepted into the program.

(b) The Board of Parole or any Court of competent jurisdiction may request and recommend, as part of conditions of release or the sentence of any person convicted under § 4177(a) of Title 21 for a first offense where the first offender election is not available, or for a subsequent offense involving a blood alcohol content of .20 or higher, a period of continuous remote alcohol monitoring not to exceed 90 days for a first offense and 120 days for a second offense.

(c) Any inmate incarcerated for violations of § 4177 of Title 21 and selected for participation in the program shall be released on Level IV status, subject to the conditions of the program, and those conditions imposed by

the sentencing judge. The remainder of the participant's sentence of incarceration shall be suspended upon completion of the program requirements. Participants failing to satisfactorily complete the program shall be returned to the Board of Parole or the sentencing authority for resentencing.

(d) Any offender considered for participation must agree to adhere to the conditions established for participation before being accepted into the program.

(e) The Department of Correction shall report annually on the use of the program, and its effectiveness as a supervision mechanism.

75 Del. Laws, c. 143, § 1; 70 Del. Laws, c. 186, § 1; 75 Del. Laws, c. 381, §§ 1, 2; 76 Del. Laws, c. 134, § 1; 76 Del. Laws, c. 366, § 1.;

§ 4220. Modification, suspension or reduction of sentence for substantial assistance.

(a) The Attorney General may move the sentencing court to modify, reduce or suspend the sentence of any person who is convicted of any crime or offense specified in this Code, and who provides substantial assistance in the identification, arrest or prosecution of any other person for a crime or offense specified in this Code, in the laws of the United States, or any other state or territory of the United States.

(b) Upon good cause shown, any motion made pursuant to subsection (a) of this section may be filed and heard in camera.

(c) The provisions of §§ 4204(d) or 4217 of this title, any court rule or any other provision of law to the contrary notwithstanding, a judge of the court that is imposing or that has imposed a sentence, upon hearing a motion filed pursuant to subsection (a) of this section, may modify, reduce or suspend that sentence, including any minimum or mandatory sentence, or a portion thereof, if the court finds that the person rendered such substantial assistance.

77 Del. Laws, c. 46, § 1.;

Attachment C MO

FIRST REGULAR SESSION

HOUSE COMMITTEE SUBSTITUTE FOR

HOUSE BILL NO. 330

95TH GENERAL ASSEMBLY

1016L.03C D. ADAM CRUMBLISS, Chief Clerk

AN ACT

To repeal section 577.023, RSMo, and to enact in lieu thereof one new section relating to continuous alcohol monitoring, with penalty provisions.

Be it enacted by the General Assembly of the state of Missouri, as follows:

Section A. Section 577.023, RSMo, is repealed and one new section enacted in lieu thereof, to be known as section 577.023, to read as follows:

577.023. 1. For purposes of this section, unless the context clearly indicates otherwise:

(1) An "aggravated offender" is a person who:

(a) Has pleaded guilty to or has been found guilty of three or more intoxication-related traffic offenses; or

(b) Has pleaded guilty to or has been found guilty of one or more intoxication-related traffic offense and, in addition, any of the following: involuntary manslaughter under subdivision (2) or (3) of subsection 1 of section 565.024, RSMo; murder in the second degree under section 565.021, RSMo, where the underlying felony is an intoxication-related traffic offense; or assault in the second degree under subdivision (4) of subsection 1 of section 565.060, RSMo; or assault of a law enforcement officer in the second degree under subdivision (4) of subsection 1 of section 565.082, RSMo;

(2) A "chronic offender" is:

(a) A person who has pleaded guilty to or has been found guilty of four or more intoxication-related traffic offenses; or

(b) A person who has pleaded guilty to or has been found guilty of, on two or more separate occasions, any combination of the following: involuntary manslaughter under subdivision (2) or (3) of subsection 1 of section 565.024, RSMo; murder in the second degree under section 565.021, RSMo, where the underlying felony is an intoxication-related traffic

EXPLANATION — Matter enclosed in bold-faced brackets [thus] in the above bill is not enacted and is intended to be omitted from the law. Matter in **bold-face** type in the above bill is proposed language.

offense; assault in the second degree under subdivision (4) of subsection 1 of section 565.060, RSMo; or assault of a law enforcement officer in the second degree under subdivision (4) of subsection 1 of section 565.082, RSMo; or

(c) A person who has pleaded guilty to or has been found guilty of two or more intoxication-related traffic offenses and, in addition, any of the following: involuntary manslaughter under subdivision (2) or (3) of subsection 1 of section 565.024, RSMo; murder in the second degree under section 565.021, RSMo, where the underlying felony is an intoxication-related traffic offense; assault in the second degree under subdivision (4) of subsection 1 of section 565.060, RSMo; or assault of a law enforcement officer in the second degree under subdivision (4) of subsection 1 of section 565.082, RSMo;

(3) **"Continuous alcohol monitoring", means automatically testing breath, blood, or transdermal alcohol concentration levels and tamper attempts at least once every hour, regardless of the location of the person who is being monitored, and regularly transmitting the data. Continuous alcohol monitoring is an electronic monitoring service as provided in subsection 3 of section 217.690, RSMo;**

(4) An "intoxication-related traffic offense" is driving while intoxicated, driving with excessive blood alcohol content, involuntary manslaughter pursuant to subdivision (2) or (3) of subsection 1 of section 565.024, RSMo, murder in the second degree under section 565.021, RSMo, where the underlying felony is an intoxication-related traffic offense, assault in the second degree pursuant to subdivision (4) of subsection 1 of section 565.060, RSMo, assault of a law enforcement officer in the second degree pursuant to subdivision (4) of subsection 1 of section 565.082, RSMo, or driving under the influence of alcohol or drugs in violation of state law or a county or municipal ordinance, where the defendant was represented by or waived the right to an attorney in writing;

[(4)] **(5)** A "persistent offender" is one of the following:

(a) A person who has pleaded guilty to or has been found guilty of two or more intoxication-related traffic offenses;

(b) A person who has pleaded guilty to or has been found guilty of involuntary manslaughter pursuant to subdivision (2) or (3) of subsection 1 of section 565.024, RSMo, assault in the second degree pursuant to subdivision (4) of subsection 1 of section 565.060, RSMo, assault of a law enforcement officer in the second degree pursuant to subdivision (4) of subsection 1 of section 565.082, RSMo; and

[(5)] **(6)** A "prior offender" is a person who has pleaded guilty to or has been found guilty of one intoxication-related traffic offense, where such prior offense occurred within five years of the occurrence of the intoxication-related traffic offense for which the person is charged.

2. Any person who pleads guilty to or is found guilty of a violation of section 577.010

or 577.012 who is alleged and proved to be a prior offender shall be guilty of a class A misdemeanor.

3. Any person who pleads guilty to or is found guilty of a violation of section 577.010 or 577.012 who is alleged and proved to be a persistent offender shall be guilty of a class D felony.

4. Any person who pleads guilty to or is found guilty of a violation of section 577.010 or section 577.012 who is alleged and proved to be an aggravated offender shall be guilty of a class C felony.

5. Any person who pleads guilty to or is found guilty of a violation of section 577.010 or section 577.012 who is alleged and proved to be a chronic offender shall be guilty of a class B felony.

6. No state, county, or municipal court shall suspend the imposition of sentence as to a prior offender, persistent offender, aggravated offender, or chronic offender under this section nor sentence such person to pay a fine in lieu of a term of imprisonment, section 557.011, RSMo, to the contrary notwithstanding. No prior offender shall be eligible for parole or probation until he or she has served a minimum of five days imprisonment, unless as a condition of such parole or probation such person performs at least thirty days of community service under the supervision of the court in those jurisdictions which have a recognized program for community service. No persistent offender shall be eligible for parole or probation until he or she has served a minimum of ten days imprisonment, unless as a condition of such parole or probation such person performs at least sixty days of community service under the supervision of the court. **In addition to any other terms or conditions of probation or parole the court shall consider as a condition of parole or probation, for any person who pleads guilty to or is found guilty of an intoxication-related traffic offense, requiring the offender to abstain from consuming or using alcohol or any products containing alcohol as demonstrated by continuous alcohol monitoring or by verifiable breath alcohol testing performed a minimum of four times per day as scheduled by the court for such duration as determined by the court.** No aggravated offender shall be eligible for parole or probation until he or she has served a minimum of sixty days imprisonment. **However, the court may suspend execution of up to thirty days of this term if, as a condition of such parole or probation, such person abstains from consuming or using alcohol or any products containing alcohol as demonstrated by continuous alcohol monitoring or by verifiable breath alcohol testing performed a minimum of six times per day as scheduled by the court, for not less than sixty days nor more than one hundred twenty days as determined by the court.** No chronic offender shall be eligible for parole or probation until he or she has served a minimum of two years imprisonment. **However, the court may, acting under section 559.115, RSMo, grant probation if as a condition of such parole**

or probation such person abstains from consuming or using alcohol or any products containing alcohol as demonstrated by continuous alcohol monitoring or by verifiable breath alcohol testing performed a minimum of six times per day as scheduled by the court, for not less than six months nor more than two years as determined by the court. The court may, in addition to imposing any other fine, costs, or assessments provided by law, require the offender to bear any costs associated with continuous alcohol monitoring or verifiable breath alcohol testing.

7. The state, county, or municipal court shall find the defendant to be a prior offender, persistent offender, aggravated offender, or chronic offender if:

(1) The indictment or information, original or amended, or the information in lieu of an indictment pleads all essential facts warranting a finding that the defendant is a prior offender or persistent offender; and

(2) Evidence is introduced that establishes sufficient facts pleaded to warrant a finding beyond a reasonable doubt the defendant is a prior offender, persistent offender, aggravated offender, or chronic offender; and

(3) The court makes findings of fact that warrant a finding beyond a reasonable doubt by the court that the defendant is a prior offender, persistent offender, aggravated offender, or chronic offender.

8. In a jury trial, the facts shall be pleaded, established and found prior to submission to the jury outside of its hearing.

9. In a trial without a jury or upon a plea of guilty, the court may defer the proof in findings of such facts to a later time, but prior to sentencing.

10. The defendant shall be accorded full rights of confrontation and cross-examination, with the opportunity to present evidence, at such hearings.

11. The defendant may waive proof of the facts alleged.

12. Nothing in this section shall prevent the use of presentence investigations or commitments.

13. At the sentencing hearing both the state, county, or municipality and the defendant shall be permitted to present additional information bearing on the issue of sentence.

14. The pleas or findings of guilt shall be prior to the date of commission of the present offense.

15. The court shall not instruct the jury as to the range of punishment or allow the jury, upon a finding of guilt, to assess and declare the punishment as part of its verdict in cases of prior offenders, persistent offenders, aggravated offenders, or chronic offenders.

16. Evidence of a prior conviction, plea of guilty, or finding of guilt in an intoxication-related traffic offense shall be heard and determined by the trial court out of the

hearing of the jury prior to the submission of the case to the jury, and shall include but not be limited to evidence of convictions received by a search of the records of the Missouri uniform law enforcement system maintained by the Missouri state highway patrol. After hearing the evidence, the court shall enter its findings thereon. A plea of guilty or a finding of guilt followed by incarceration, a fine, a suspended imposition of sentence, suspended execution of sentence, probation or parole or any combination thereof in any intoxication-related traffic offense in a state, county, or municipal court, or any combination thereof, shall be treated as a prior plea of guilty or finding of guilt for purposes of this section.

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Attachment C MTO

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THE KANSAS CITY STAR

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Wednesday, Apr 15, 2009

Posted on Tue, Apr. 14, 2009

Ankle bracelets keep alcohol offenders out of jail and on straight and narrow

By LAURA BAUER
The Kansas City Star

Missouri corrections officials are testing a way to keep offenders out of jail by putting bracelets on their ankles.

But the bracelets won't be tracking the whereabouts of alcohol-related offenders on probation or parole. The bracelets will test their sweat.

Every 30 minutes, 24 hours a day, a pump inside the bracelet will suck moisture from the offender's skin and detect whether he or she has consumed alcohol.

If they've been drinking, their probation or parole could be revoked. If they stay alcohol free, they could stay out of jail or prison.

"I tell my clients, 'Don't mess with this; it's going to catch you,' " said Denise Masters of local Electronic Sentencing Alternatives, which maintains the alcohol monitoring program in the area. "I say, 'If you think you're going to beat it, you won't.' "

Through August, the state will try out the Secure Continuous Remote Alcohol Monitor technology — known as SCRAM — in seven counties, including Jackson. If after the six-month pilot the state decides to implement it, Missouri will be the second in the nation to adopt that type of statewide system.

The technology is designed for offenders with documented histories of alcohol abuse who have been convicted of crimes such as drunken driving or domestic violence.

"The goal of the program is to increase our ability to ensure sobriety for clients in our program," said Angie Morfeld, public information officer for the Missouri Department of Corrections, "ultimately reducing the number of revocations while increasing the safety in the community."

The technology — which can cost from $10 to $15 a day per bracelet, typically at the offender's expense — also saves taxpayer money and can save jail and prison space by keeping offenders out but monitored. That alone makes prosecutors believers.

"We're always concerned with overcrowding," said Darrell Moore, prosecutor in Greene County, one of the pilot sites. "I want to make sure we have bed space for the career and dangerous criminals."

For the past five years, counties and courts across the country have been using SCRAM on a case-by-case basis. Courts in 46 states used the technology and have monitored more than 91,000 offenders, said Kathleen Brown, spokeswoman for Alcohol Monitoring Systems Inc. out of Littleton, Colo., which manufactures SCRAM.

The bracelets have garnered attention when worn by celebrities such as Lindsay Lohan, who reportedly wore one voluntarily after a much-publicized stint in rehabilitation.

Early critics questioned the accuracy of the tests. In late 2004, a judge in Michigan threw out a case involving the use of a SCRAM device and said it lacked scientific credibility.

With the alcohol monitoring bracelet, most offenders must sit by a modem and download their readings once a day. By the next morning, analysts in Colorado will know if the person consumed alcohol the day before. That information then is reported to local representatives, who send it on to probation and parole.

The process of revoking the person's probation or parole can start immediately.

"Seems logical to me that with alcoholics, when there's immediate consequences to their actions, sometimes that's better," said Brady Twenter, assistant Jackson County prosecutor. "This allows us to do something immediately

after they drink."

The monitoring bracelets give an alcohol offender focus and responsibility, said Mike McIntosh, an Independence criminal defense attorney specializing in DWI cases.

"In a perfect world, they'd be strong and be able to self persevere."

But when people are suffering from a disease, he said, sometimes they need help.

How SCRAM works:

•Every 30 minutes, the bracelet takes alcohol readings by sampling perspiration collected from the air above the skin.

•The bracelet stores the data and at predetermined intervals transmits information to a modem. Data are stored in a Web-based application.

•The data can provide a snapshot of a single event or a comprehensive view of an offender's behavior over time.

To reach Laura Bauer, call 816-234-4944 or send an e-mail to lbauer@kcstar.com. Source: Alcohol Monitoring Systems Inc.

Attachment D JE

60-6,197.01 Driving while license has been revoked; driving under influence of alcoholic liquor or drug; second and subsequent violations; restrictions on motor vehicles; additional restrictions authorized. (1) Upon conviction for a violation described in section 60-6,197.06 or a second or subsequent violation of section 60-6,196 or 60-6,197, the court shall impose either of the following restrictions:

(a)(i) The court shall order all motor vehicles owned by the person so convicted immobilized at the owner's expense for a period of time not less than five days and not more than eight months and shall notify the Department of Motor Vehicles of the period of immobilization. Any immobilized motor vehicle shall be released to the holder of a bona fide lien on the motor vehicle executed prior to such immobilization when possession of the motor vehicle is requested as provided by law by such lienholder for purposes of foreclosing and satisfying such lien. If a person tows and stores a motor vehicle pursuant to this subdivision at the direction of a peace officer or the court and has a lien upon such motor vehicle while it is in his or her possession for reasonable towing and storage charges, the person towing the vehicle has the right to retain such motor vehicle until such lien is paid. For purposes of this subdivision, immobilized or immobilization means revocation or suspension, at the discretion of the court, of the registration of such motor vehicle or motor vehicles, including the license plates; and

(ii)(A) Any immobilized motor vehicle shall be released by the court without any legal or physical restraints to any registered owner who is not the registered owner convicted of a second or subsequent violation of section 60-6,196 or 60-6,197 if an affidavit is submitted to the court by such registered owner stating that the affiant is employed, that the motor vehicle subject to immobilization is necessary to continue that employment, that such employment is necessary for the well-being of the affiant's dependent children or parents, that the affiant will not authorize the use of the motor vehicle by any person known by the affiant to have been convicted of a second or subsequent violation of section 60-6,196 or 60-6,197, that affiant will immediately report to a local law enforcement agency any unauthorized use of the motor vehicle by any person known by the affiant to have been convicted of a second or subsequent conviction of section 60-6,196 or 60-6,197, and that failure to release the motor vehicle would cause undue hardship to the affiant.

(B) A registered owner who executes an affidavit pursuant to subdivision (1)(a)(ii)(A) of this section which is acted upon by the court and who fails to immediately report an unauthorized use of the motor vehicle which is the subject of the affidavit is guilty of a Class IV misdemeanor and may not file any additional affidavits pursuant to subdivision (1)(a)(ii)(A) of this section.

(C) The department shall adopt and promulgate rules and regulations to implement the provisions of subdivision (1)(a) of this section; or

(b) As an alternative to subdivision (1)(a) of this section, the court shall order the convicted person, in order to operate a motor vehicle, to obtain an ignition interlock permit and install an ignition interlock device on each motor vehicle owned or operated by the convicted person if he or she was sentenced to an operator's license revocation of at least one year. No ignition interlock permit may be issued until sufficient evidence is presented to the department that an ignition interlock device is installed on each vehicle and that the applicant is eligible for use of an ignition interlock device. The installation of an ignition interlock device shall be for a period not less than six months.

(2) In addition to the restrictions required by subdivision (1)(b) of this section, the court may require a person convicted of a second or subsequent violation of section 60-6,196 or 60-6,197 to use a continuous alcohol monitoring device and abstain from alcohol use for a period of time not to exceed the maximum term of license revocation ordered by the court. A continuous alcohol monitoring device shall not be ordered for a person convicted of a second or subsequent violation unless the installation of an ignition interlock device is also required.

Source Laws 1999, LB 585, § 7;Laws 2001, LB 38, § 49;Laws 2006, LB 925, § 10; Laws 2008, LB736, § 7;Laws 2009, LB497, § 5.
Effective Date: May 14, 2009

Attachment E

60-6,211.05 Ignition interlock device; continuous alcohol monitoring device and abstention from alcohol use; orders authorized; prohibited acts; violation; penalty; costs; tampering with device; hearing. (1)(a) If an order of probation is granted under section 60-6,196 or 60-6,197, as such sections existed prior to July 16, 2004, or section 60-6,196 or 60-6,197 and sections 60-6,197.02 and 60-6,197.03, as such sections existed on or after July 16, 2004, the court may order that the defendant install an ignition interlock device of a type approved by the Director of Motor Vehicles on each motor vehicle operated by the defendant during the period of probation. Upon sufficient evidence of installation, the defendant may apply to the director for an ignition interlock permit pursuant to section 60-4,118.06. The device shall, without tampering or the intervention of another person, prevent the defendant from operating the motor vehicle when the defendant has an alcohol concentration greater than three-hundredths of one gram or more by weight of alcohol per one hundred milliliters of his or her blood or three-hundredths of one gram or more by weight of alcohol per two hundred ten liters of his or her breath.

(b) If the court orders an ignition interlock permit and installation of an ignition interlock device as part of the judgment of conviction pursuant to subdivision (1), (2), or (3) of section 60-6,197.03, the device shall be of a type approved by the director and shall be installed on each motor vehicle operated by the defendant. The device shall, without tampering or the intervention of another person, prevent the defendant from operating the motor vehicle when the defendant has an alcohol concentration greater than three-hundredths of one gram or more by weight of alcohol per one hundred milliliters of his or her blood or three-hundredths of one gram or more by weight of alcohol per two hundred ten liters of his or her breath.

(2) If the court orders installation of an ignition interlock device and issuance of an ignition interlock permit pursuant to subsection (1) of this section, the court may also order the use of a continuous alcohol monitoring device and abstention from alcohol use at all times. The device shall, without tampering or the intervention of another person, test and record the alcohol consumption level of the defendant on a periodic basis and transmit such information to probation authorities.

(3) Any order issued by the court pursuant to this section shall not take effect until the defendant is eligible to operate a motor vehicle pursuant to subsection (3) of section 60-498.02.

(4)(a) If the court orders an ignition interlock device or the Board of Pardons orders an ignition interlock device under section 83-1,127.02, the court or the Board of Pardons shall order the defendant to apply for an ignition interlock permit as provided in section 60-4,118.06 which indicates that the defendant is only allowed to operate a motor vehicle equipped with an ignition interlock device.

(b) Such court order shall remain in effect for a period of time as determined by the court not to exceed the maximum term of revocation which the court could have imposed according to the nature of the violation and shall allow operation of an ignition-interlock-equipped motor vehicle only to and from the defendant's residence, the defendant's place of employment, the defendant's school, an alcohol treatment program, required visits with his or her probation officer, or an ignition interlock service facility.

(c) Such Board of Pardons order shall remain in effect for a period of time not to exceed any period of revocation the applicant is subject to at the time the application for a reprieve is made.

(5) A person who tampers with or circumvents an ignition interlock device installed under a court order while the order is in effect, who operates a motor vehicle which is not equipped with an ignition interlock device in violation of a court order made pursuant to this section, or who otherwise operates a motor vehicle equipped with an ignition interlock device in violation of the requirements of the court order under which the device was installed shall be guilty of a Class II misdemeanor.

(6) Any person restricted to operating a motor vehicle equipped with an ignition interlock device, pursuant to a Board of Pardons order, who operates upon the highways of this state a motor vehicle without such device or if the device has been disabled, bypassed, or altered in any way, shall be punished as provided in subsection (3) of section 83-1,127.02.

(7) If a person ordered to use a continuous alcohol monitoring device and abstain from alcohol use pursuant to a court order as provided in subsection (2) of this section violates the provisions of such court order by removing, tampering with, or otherwise bypassing the continuous alcohol monitoring device or by consuming alcohol while required to use such device, he or she shall have his or her ignition interlock permit revoked and be unable to apply for reinstatement for the duration of the revocation period imposed by the court.

(8) The director shall adopt and promulgate rules and regulations regarding the approval of ignition

interlock devices, the means of installing ignition interlock devices, and the means of administering the ignition interlock permit program.

(9) The costs incurred in order to comply with the ignition interlock requirements of this section shall be paid by the person complying with an order for an ignition interlock permit and installation of an ignition interlock device unless the court or the Board of Pardons has determined the person to be incapable of paying for the cost of installation, removal, or maintenance of the ignition interlock device in accordance with this subsection.

(10)(a) An ignition interlock service facility shall notify the appropriate district probation office, if the order is made pursuant to subdivision (1)(a) of this section, or notify the appropriate court if the order is made pursuant to subdivision (1)(b) of this section, of any evidence of tampering with or circumvention of an ignition interlock device, or any attempts to do so, when the facility becomes aware of such evidence.

(b) If a district probation office receives evidence of tampering with or circumvention of an ignition interlock device, or any attempts to do so, from an ignition interlock service facility, the district probation office shall notify the appropriate court of such violation. The court shall immediately schedule an evidentiary hearing to be held within fourteen days after receiving such evidence, either from the district probation office or an ignition interlock service facility, and the court shall cause notice of the hearing to be given to the person operating a motor vehicle pursuant to an order under subsection (1) of this section. If the person who is the subject of such evidence does not appear at the hearing and show cause why the order made pursuant to subsection (1) of this section should remain in effect, the court shall rescind the original order. Nothing in this subsection shall apply to an order made by the Board of Pardons pursuant to section 83-1,127.02.

(11) Notwithstanding any other provision of law, the costs associated with the installation, maintenance, and removal of a court-ordered ignition interlock device by the Office of Probation Administration shall not be construed so as to create an order of probation when an order for the installation of an ignition interlock device and ignition interlock permit was made pursuant to subdivision (1)(b) of this section as part of a conviction.

Source Laws 1993, LB 564, § 6;Laws 1998, LB 309, § 24;Laws 2001, LB 38, § 55; Laws 2003, LB 209, § 15;Laws 2004, LB 208, § 22;Laws 2006, LB 925, § 16; Laws 2008, LB736, § 10;Laws 2009, LB497, § 10.
Effective Date: May 14, 2009

Attachment F

§ 20-179. Sentencing hearing after conviction for impaired driving; determination of grossly aggravating and aggravating and mitigating factors; punishments.

(a) Sentencing Hearing Required. – After a conviction under G.S. 20-138.1, G.S. 20-138.2, a second or subsequent conviction under G.S. 20-138.2A, or a second or subsequent conviction under G.S. 20-138.2B, or when any of those offenses are remanded back to district court after an appeal to superior court, the judge shall hold a sentencing hearing to determine whether there are aggravating or mitigating factors that affect the sentence to be imposed.

(1) The court shall consider evidence of aggravating or mitigating factors present in the offense that make an aggravated or mitigated sentence appropriate. The State bears the burden of proving beyond a reasonable doubt that an aggravating factor exists, and the offender bears the burden of proving by a preponderance of the evidence that a mitigating factor exists.

(2) Before the hearing the prosecutor shall make all feasible efforts to secure the defendant's full record of traffic convictions, and shall present to the judge that record for consideration in the hearing. Upon request of the defendant, the prosecutor shall furnish the defendant or his attorney a copy of the defendant's record of traffic convictions at a reasonable time prior to the introduction of the record into evidence. In addition, the prosecutor shall present all other appropriate grossly aggravating and aggravating factors of which he is aware, and the defendant or his attorney may present all appropriate mitigating factors. In every instance in which a valid chemical analysis is made of the defendant, the prosecutor shall present evidence of the resulting alcohol concentration.

(a1) Jury Trial in Superior Court; Jury Procedure if Trial Bifurcated. –

(1) Notice. – If the defendant appeals to superior court, and the State intends to use one or more aggravating factors under subsections (c) or (d) of this section, the State must provide the defendant with notice of its intent. The notice shall be provided no later than 10 days prior to trial and shall contain a plain and concise factual statement indicating the factor or factors it intends to use under the authority of subsections (c) and (d) of this section. The notice must list all the aggravating factors that the State seeks to establish.

(2) Aggravating factors. – The defendant may admit to the existence of an aggravating factor, and the factor so admitted shall be treated as though it were found by a jury pursuant to the procedures in this section. If the defendant does not so admit, only a jury may determine if an aggravating factor is present. The jury impaneled for the trial may, in the same trial, also determine if one or more aggravating factors is present, unless the court determines that the interests of justice require that a separate sentencing proceeding be used to make

that determination. If the court determines that a separate proceeding is required, the proceeding shall be conducted by the trial judge before the trial jury as soon as practicable after the guilty verdict is returned. The State bears the burden of proving beyond a reasonable doubt that an aggravating factor exists, and the offender bears the burden of proving by a preponderance of the evidence that a mitigating factor exists.

(3) Convening the jury. – If prior to the time that the trial jury begins its deliberations on the issue of whether one or more aggravating factors exist, any juror dies, becomes incapacitated or disqualified, or is discharged for any reason, an alternate juror shall become a part of the jury and serve in all respects as those selected on the regular trial panel. An alternate juror shall become a part of the jury in the order in which the juror was selected. If the trial jury is unable to reconvene for a hearing on the issue of whether one or more aggravating factors exist after having determined the guilt of the accused, the trial judge shall impanel a new jury to determine the issue.

(4) Jury selection. – A jury selected to determine whether one or more aggravating factors exist shall be selected in the same manner as juries are selected for the trial of criminal cases.

(a2) Jury Trial on Aggravating Factors in Superior Court.

(1) Defendant admits aggravating factor only. – If the defendant admits that an aggravating factor exists, but pleads not guilty to the underlying charge, a jury shall be impaneled to dispose of the charge only. In that case, evidence that relates solely to the establishment of an aggravating factor shall not be admitted in the trial.

(2) Defendant pleads guilty to the charge only. – If the defendant pleads guilty to the charge, but contests the existence of one or more aggravating factors, a jury shall be impaneled to determine if the aggravating factor or factors exist.

(b) Repealed by Session Laws 1983, c. 435, s. 29.

(c) Determining Existence of Grossly Aggravating Factors. – At the sentencing hearing, based upon the evidence presented at trial and in the hearing, the judge, or the jury in superior court, must first determine whether there are any grossly aggravating factors in the case. Whether a prior conviction exists under subdivision (1) of this subsection, or whether a conviction exists under subdivision (d)(5) of this section, shall be matters to be determined by the judge, and not the jury, in district or superior court. If the sentencing hearing is for a case remanded back to district court from superior court, the judge shall determine whether the defendant has been convicted of any offense that was not considered at the initial sentencing hearing and impose the appropriate sentence under this section. The judge must impose the Level One punishment under subsection (g) of this section if it is determined that two or more grossly aggravating factors apply. The judge must impose the Level Two punishment

under subsection (h) of this section if it is determined that only one of the grossly aggravating factors applies. The grossly aggravating factors are:

(1) A prior conviction for an offense involving impaired driving if:
   a. The conviction occurred within seven years before the date of the offense for which the defendant is being sentenced; or
   b. The conviction occurs after the date of the offense for which the defendant is presently being sentenced, but prior to or contemporaneously with the present sentencing; or
   c. The conviction occurred in district court; the case was appealed to superior court; the appeal has been withdrawn, or the case has been remanded back to district court; and a new sentencing hearing has not been held pursuant to G.S. 20-38.7.

   Each prior conviction is a separate grossly aggravating factor.

(2) Driving by the defendant at the time of the offense while his driver's license was revoked under G.S. 20-28, and the revocation was an impaired driving revocation under G.S. 20-28.2(a).

(3) Serious injury to another person caused by the defendant's impaired driving at the time of the offense.

(4) Driving by the defendant while a child under the age of 16 years was in the vehicle at the time of the offense.

In imposing a Level One or Two punishment, the judge may consider the aggravating and mitigating factors in subsections (d) and (e) in determining the appropriate sentence. If there are no grossly aggravating factors in the case, the judge must weigh all aggravating and mitigating factors and impose punishment as required by subsection (f).

(c1) Written Findings. – The court shall make findings of the aggravating and mitigating factors present in the offense. If the jury finds factors in aggravation, the court shall ensure that those findings are entered in the court's determination of sentencing factors form or any comparable document used to record the findings of sentencing factors. Findings shall be in writing.

(d) Aggravating Factors to Be Weighed. – The judge, or the jury in superior court, shall determine before sentencing under subsection (f) whether any of the aggravating factors listed below apply to the defendant. The judge shall weigh the seriousness of each aggravating factor in the light of the particular circumstances of the case. The factors are:

(1) Gross impairment of the defendant's faculties while driving or an alcohol concentration of 0.15 or more within a relevant time after the driving. For purposes of this subdivision, the results of a chemical analysis presented at trial or sentencing shall be sufficient to prove the person's alcohol concentration, shall be conclusive, and shall not be subject to modification by any party, with or without approval by the court.

(2) Especially reckless or dangerous driving.

(3) Negligent driving that led to a reportable accident.

(4) Driving by the defendant while his driver's license was revoked.

(5) Two or more prior convictions of a motor vehicle offense not involving impaired driving for which at least three points are assigned under G.S. 20-16 or for which the convicted person's license is subject to revocation, if the convictions occurred within five years of the date of the offense for which the defendant is being sentenced, or one or more prior convictions of an offense involving impaired driving that occurred more than seven years before the date of the offense for which the defendant is being sentenced.

(6) Conviction under G.S. 20-141.5 of speeding by the defendant while fleeing or attempting to elude apprehension.

(7) Conviction under G.S. 20-141 of speeding by the defendant by at least 30 miles per hour over the legal limit.

(8) Passing a stopped school bus in violation of G.S. 20-217.

(9) Any other factor that aggravates the seriousness of the offense.

Except for the factor in subdivision (5) the conduct constituting the aggravating factor shall occur during the same transaction or occurrence as the impaired driving offense.

(e) Mitigating Factors to Be Weighed. – The judge shall also determine before sentencing under subsection (f) whether any of the mitigating factors listed below apply to the defendant. The judge shall weigh the degree of mitigation of each factor in light of the particular circumstances of the case. The factors are:

(1) Slight impairment of the defendant's faculties resulting solely from alcohol, and an alcohol concentration that did not exceed 0.09 at any relevant time after the driving.

(2) Slight impairment of the defendant's faculties, resulting solely from alcohol, with no chemical analysis having been available to the defendant.

(3) Driving at the time of the offense that was safe and lawful except for the impairment of the defendant's faculties.

(4) A safe driving record, with the defendant's having no conviction for any motor vehicle offense for which at least four points are assigned under G.S. 20-16 or for which the person's license is subject to revocation within five years of the date of the offense for which the defendant is being sentenced.

(5) Impairment of the defendant's faculties caused primarily by a lawfully prescribed drug for an existing medical condition, and the amount of the drug taken was within the prescribed dosage.

(6) The defendant's voluntary submission to a mental health facility for assessment after he was charged with the impaired driving offense for which he is being sentenced, and, if recommended by the facility, his voluntary participation in the recommended treatment.

(6a) Completion of a substance abuse assessment, compliance with its recommendations, and simultaneously maintaining 60 days of continuous abstinence from alcohol consumption, as proven by a

continuous alcohol monitoring system. The continuous alcohol monitoring system shall be of a type approved by the Department of Correction.

(7) Any other factor that mitigates the seriousness of the offense.

Except for the factors in subdivisions (4), (6), (6a), and (7), the conduct constituting the mitigating factor shall occur during the same transaction or occurrence as the impaired driving offense.

(f) Weighing the Aggravating and Mitigating Factors. – If the judge or the jury in the sentencing hearing determines that there are no grossly aggravating factors, the judge shall weigh all aggravating and mitigating factors listed in subsections (d) and (e). If the judge determines that:

(1) The aggravating factors substantially outweigh any mitigating factors, the judge shall note in the judgment the factors found and his finding that the defendant is subject to the Level Three punishment and impose a punishment within the limits defined in subsection (i).

(2) There are no aggravating and mitigating factors, or that aggravating factors are substantially counterbalanced by mitigating factors, the judge shall note in the judgment any factors found and the finding that the defendant is subject to the Level Four punishment and impose a punishment within the limits defined in subsection (j).

(3) The mitigating factors substantially outweigh any aggravating factors, the judge shall note in the judgment the factors found and his finding that the defendant is subject to the Level Five punishment and impose a punishment within the limits defined in subsection (k).

It is not a mitigating factor that the driver of the vehicle was suffering from alcoholism, drug addiction, diminished capacity, or mental disease or defect. Evidence of these matters may be received in the sentencing hearing, however, for use by the judge in formulating terms and conditions of sentence after determining which punishment level shall be imposed.

(f1) Aider and Abettor Punishment. – Notwithstanding any other provisions of this section, a person convicted of impaired driving under G.S. 20-138.1 under the common law concept of aiding and abetting is subject to Level Five punishment. The judge need not make any findings of grossly aggravating, aggravating, or mitigating factors in such cases.

(f2) Limit on Consolidation of Judgments. – Except as provided in subsection (f1), in each charge of impaired driving for which there is a conviction the judge shall determine if the sentencing factors described in subsections (c), (d) and (e) are applicable unless the impaired driving charge is consolidated with a charge carrying a greater punishment. Two or more impaired driving charges may not be consolidated for judgment.

(g) Level One Punishment. -- A defendant subject to Level One punishment may be fined up to four thousand dollars ($4,000) and shall be sentenced to a term of imprisonment that includes a minimum term of not less than 30 days and a maximum term of not more than 24 months. The term of imprisonment may be suspended only if a

condition of special probation is imposed to require the defendant to serve a term of imprisonment of at least 30 days. If the defendant is placed on probation, the judge shall impose a requirement that the defendant obtain a substance abuse assessment and the education or treatment required by G.S. 20-17.6 for the restoration of a drivers license and as a condition of probation. The judge may impose any other lawful condition of probation.

(h) Level Two Punishment. – A defendant subject to Level Two punishment may be fined up to two thousand dollars ($2,000) and shall be sentenced to a term of imprisonment that includes a minimum term of not less than seven days and a maximum term of not more than 12 months. The term of imprisonment may be suspended only if a condition of special probation is imposed to require the defendant to serve a term of imprisonment of at least seven days. If the defendant is placed on probation, the judge shall impose a requirement that the defendant obtain a substance abuse assessment and the education or treatment required by G.S. 20-17.6 for the restoration of a drivers license and as a condition of probation. The judge may impose any other lawful condition of probation.

(h1) The judge may impose, as a condition of probation for defendants subject to Level One or Level Two punishments, that the defendant abstain from alcohol consumption for a minimum of 30 days, to a maximum of 60 days, as verified by a continuous alcohol monitoring system. The total cost to the defendant for the continuous alcohol monitoring system may not exceed one thousand dollars ($1,000). The defendant's abstinence from alcohol shall be verified by a continuous alcohol monitoring system of a type approved by the Department of Correction.

(h2) Notwithstanding the provisions of subsection (h1), if the court finds, upon good cause shown, that the defendant should not be required to pay the costs of the continuous alcohol monitoring system, the court shall not impose the use of a continuous alcohol monitoring system unless the local governmental entity responsible for the incarceration of the defendant in the local confinement facility agrees to pay the costs of the system.

(h3) Any fees or costs paid pursuant to subsections (h1) or (h2) of this section shall be paid to the clerk of court for the county in which the judgment was entered or the deferred prosecution agreement was filed. Fees or costs collected under this subsection shall be transmitted to the entity providing the continuous alcohol monitoring system.

(i) Level Three Punishment. – A defendant subject to Level Three punishment may be fined up to one thousand dollars ($1,000) and shall be sentenced to a term of imprisonment that includes a minimum term of not less than 72 hours and a maximum term of not more than six months. The term of imprisonment may be suspended. However, the suspended sentence shall include the condition that the defendant:

(1) Be imprisoned for a term of at least 72 hours as a condition of special probation; or
(2) Perform community service for a term of at least 72 hours; or
(3) Repealed by Session Laws 2006-253, s. 23, effective December 1, 2006, and applicable to offenses committed on or after that date.

(4) Any combination of these conditions.

If the defendant is placed on probation, the judge shall impose a requirement that the defendant obtain a substance abuse assessment and the education or treatment required by G.S. 20-17.6 for the restoration of a drivers license and as a condition of probation. The judge may impose any other lawful condition of probation.

(j) Level Four Punishment. – A defendant subject to Level Four punishment may be fined up to five hundred dollars ($500.00) and shall be sentenced to a term of imprisonment that includes a minimum term of not less than 48 hours and a maximum term of not more than 120 days. The term of imprisonment may be suspended. However, the suspended sentence shall include the condition that the defendant:

(1) Be imprisoned for a term of 48 hours as a condition of special probation; or
(2) Perform community service for a term of 48 hours; or
(3) Repealed by Session Laws 2006-253, s. 23, effective December 1, 2006, and applicable to offenses committed on or after that date.
(4) Any combination of these conditions.

If the defendant is placed on probation, the judge shall impose a requirement that the defendant obtain a substance abuse assessment and the education or treatment required by G.S. 20-17.6 for the restoration of a drivers license and as a condition of probation. The judge may impose any other lawful condition of probation.

(k) Level Five Punishment. – A defendant subject to Level Five punishment may be fined up to two hundred dollars ($200.00) and shall be sentenced to a term of imprisonment that includes a minimum term of not less than 24 hours and a maximum term of not more than 60 days. The term of imprisonment may be suspended. However, the suspended sentence shall include the condition that the defendant:

(1) Be imprisoned for a term of 24 hours as a condition of special probation; or
(2) Perform community service for a term of 24 hours; or
(3) Repealed by Session Laws 2006-253, s. 23, effective December 1, 2006, and applicable to offenses committed on or after that date.
(4) Any combination of these conditions.

If the defendant is placed on probation, the judge shall impose a requirement that the defendant obtain a substance abuse assessment and the education or treatment required by G.S. 20-17.6 for the restoration of a drivers license and as a condition of probation. The judge may impose any other lawful condition of probation.

(k1) Credit for Inpatient Treatment. – Pursuant to G.S. 15A-1351(a), the judge may order that a term of imprisonment imposed as a condition of special probation under any level of punishment be served as an inpatient in a facility operated or licensed by the State for the treatment of alcoholism or substance abuse where the defendant has been accepted for admission or commitment as an inpatient. The defendant shall bear the expense of any treatment unless the trial judge orders that the costs be absorbed by the State. The judge may impose restrictions on the defendant's ability to leave the premises of the treatment facility and require that the defendant follow the rules of the treatment facility. The judge may credit against the active sentence imposed on a

defendant the time the defendant was an inpatient at the treatment facility, provided such treatment occurred after the commission of the offense for which the defendant is being sentenced. This section shall not be construed to limit the authority of the judge in sentencing under any other provisions of law.

(l) Repealed by Session Laws 1989, c. 691.

(m) Repealed by Session Laws 1995, c. 496, s. 2.

(n) Time Limits for Performance of Community Service. – If the judgment requires the defendant to perform a specified number of hours of community service as provided in subsections (i), (j), or (k), the community service shall be completed:

(1) Within 90 days, if the amount of community service required is 72 hours or more; or

(2) Within 60 days, if the amount of community service required is 48 hours; or

(3) Within 30 days, if the amount of community service required is 24 hours.

The court may extend these time limits upon motion of the defendant if it finds that the defendant has made a good faith effort to comply with the time limits specified in this subsection.

(o) Evidentiary Standards; Proof of Prior Convictions. – In the sentencing hearing, the State shall prove any grossly aggravating or aggravating factor beyond a reasonable doubt, and the defendant shall prove any mitigating factor by the greater weight of the evidence. Evidence adduced by either party at trial may be utilized in the sentencing hearing. Except as modified by this section, the procedure in G.S. 15A-1334(b) governs. The judge may accept any evidence as to the presence or absence of previous convictions that he finds reliable but he shall give prima facie effect to convictions recorded by the Division or any other agency of the State of North Carolina. A copy of such conviction records transmitted by the police information network in general accordance with the procedure authorized by G.S. 20-26(b) is admissible in evidence without further authentication. If the judge decides to impose an active sentence of imprisonment that would not have been imposed but for a prior conviction of an offense, the judge shall afford the defendant an opportunity to introduce evidence that the prior conviction had been obtained in a case in which he was indigent, had no counsel, and had not waived his right to counsel. If the defendant proves by the preponderance of the evidence all three above facts concerning the prior case, the conviction may not be used as a grossly aggravating or aggravating factor.

(p) Limit on Amelioration of Punishment. – For active terms of imprisonment imposed under this section:

(1) The judge may not give credit to the defendant for the first 24 hours of time spent in incarceration pending trial.

(2) The defendant shall serve the mandatory minimum period of imprisonment and good or gain time credit may not be used to reduce that mandatory minimum period.

(3) The defendant may not be released on parole unless he is otherwise eligible, has served the mandatory minimum period of imprisonment,

and has obtained a substance abuse assessment and completed any recommended treatment or training program.

With respect to the minimum or specific term of imprisonment imposed as a condition of special probation under this section, the judge may not give credit to the defendant for the first 24 hours of time spent in incarceration pending trial.

(q) Repealed by Session Laws 1991, c. 726, s. 20.

(r) Supervised Probation Terminated. – Unless a judge in his discretion determines that supervised probation is necessary, and includes in the record that he has received evidence and finds as a fact that supervised probation is necessary, and states in his judgment that supervised probation is necessary, a defendant convicted of an offense of impaired driving shall be placed on unsupervised probation if he meets three conditions. These conditions are that he has not been convicted of an offense of impaired driving within the seven years preceding the date of this offense for which he is sentenced, that the defendant is sentenced under subsections (i), (j), and (k) of this section, and has obtained any necessary substance abuse assessment and completed any recommended treatment or training program.

When a judge determines in accordance with the above procedures that a defendant should be placed on supervised probation, the judge shall authorize the probation officer to modify the defendant's probation by placing the defendant on unsupervised probation upon the completion by the defendant of the following conditions of his suspended sentence:

(1) Community service; or

(2) Repealed by Session Laws 1995 c. 496, s. 2.

(3) Payment of any fines, court costs, and fees; or

(4) Any combination of these conditions.

(s) Method of Serving Sentence. – The judge in his discretion may order a term of imprisonment to be served on weekends, even if the sentence cannot be served in consecutive sequence. However, if the defendant is ordered to a term of 48 hours or more, or has 48 hours or more remaining on a term of imprisonment, the defendant shall be required to serve 48 continuous hours of imprisonment to be given credit for time served.

(1) Credit for any jail time shall only be given hour for hour for time actually served. The jail shall maintain a log showing number of hours served.

(2) The defendant shall be refused entrance and shall be reported back to court if the defendant appears at the jail and has remaining in his body any alcohol as shown by an alcohol screening device or controlled substance previously consumed, unless lawfully obtained and taken in therapeutically appropriate amounts.

(3) If a defendant has been reported back to court under subdivision (2) of this subsection, the court shall hold a hearing. The defendant shall be ordered to serve his jail time immediately and shall not be eligible to serve jail time on weekends if the court determines that, at the time of his entrance to the jail.

a. The defendant had previously consumed alcohol in his body as shown by an alcohol screening device, or

b. The defendant had a previously consumed controlled substance in his body.

It shall be a defense to an immediate service of sentence of jail time and ineligibility for weekend service of jail time if the court determines that alcohol or controlled substance was lawfully obtained and was taken in therapeutically appropriate amounts.

(t) Repealed by Session Laws 1995, c. 496, s. 2. (1937, c. 407, s. 140; 1947, c. 1067, s. 18; 1967, c. 510; 1969, c. 50; c. 1283, ss. 1-5; 1971, c. 619, s. 16; c. 1133, s. 1; 1975, c. 716, s. 5; 1977, c. 125; 1977, 2nd Sess., c. 1222, s. 1; 1979, c. 453, ss. 1, 2; c. 903, ss. 1, 2; 1981, c. 466, ss. 4-6; 1983, c. 435, s. 29; 1983 (Reg. Sess., 1984), c. 1101, ss. 21-29, 36; 1985, c. 706, s. 1; 1985 (Reg. Sess., 1986), c. 1014, s. 201(d); 1987, c. 139; c. 352, s. 1; c. 797, ss. 1, 2; 1989, c. 548, ss. 1, 2; c. 691, ss. 1-3, 4.1; 1989 (Reg. Sess., 1990), c. 1031, ss. 1, 2; c. 1039, s. 6; 1991, c. 636, s. 19(b), (c); c. 726, ss. 20, 21; 1993, c. 285, s. 9; 1995, c. 191, s. 3; c. 496, ss. 2-7; c. 506, ss. 11-13; 1997-379, ss. 2.1-2.8; 1997-443, s. 19.26(c); 1998-182, ss. 25, 31-35; 2006-253, s. 23; 2007-165, ss. 2, 3; 2007-493, ss. 6, 20, 26.)

Attachment G

§ 15A-1343.3. Department of Corrections to establish regulations for continuous alcohol monitoring systems.

The Department of Correction shall establish regulations for continuous alcohol monitoring systems that are authorized for use by the courts as evidence that an offender on probation has abstained from the use of alcohol for a specified period of time. A "continuous alcohol monitoring system" is a device that is worn by a person that can detect, monitor, record, and report the amount of alcohol within the wearer's system over a continuous 24-hour daily basis. The regulations shall include the procedures for supervision of the offender, collection and monitoring of the results, and the transmission of the data to the court for consideration by the court. All courts, including those using continuous alcohol monitoring systems prior to July 4, 2007, shall comply with the regulations established by the Department pursuant to this section.

The Secretary, or the Secretary's designee, shall approve continuous alcohol monitoring systems for use by the courts prior to their use by a court as evidence of alcohol abstinence, or their use as a condition of probation. The Secretary shall not unreasonably withhold approval of a continuous alcohol monitoring system and shall consult with the Division of Purchase and Contract in the Department of Administration to ensure that potential vendors are not discriminated against. (2007-165, s. 6)

Attachment H (NC

§ 15A-1374. Conditions of parole.

(a) In General. – The Post-Release Supervision and Parole Commission may in its discretion impose conditions of parole it believes reasonably necessary to insure that the parolee will lead a law-abiding life or to assist him to do so. The Commission must provide as an express condition of every parole that the parolee not commit another crime during the period for which the parole remains subject to revocation. When the Commission releases a person on parole, it must give him a written statement of the conditions on which he is being released.

(a1) Required Conditions for Certain Offenders. – A person serving a term of imprisonment for an impaired driving offense sentenced pursuant to G.S. 20-179 that:

(1) Has completed any recommended treatment or training program required by G.S. 20-179(p)(3); and

(2) Is not being paroled to a residential treatment program;

shall, as a condition of parole, receive community service parole pursuant to G.S. 15A-1371(h), or be required to comply with subdivision (b)(8a) of this section.

(b) Appropriate Conditions. – As conditions of parole, the Commission may require that the parolee comply with one or more of the following conditions:

(1) Work faithfully at suitable employment or faithfully pursue a course of study or vocational training that will equip him for suitable employment.

(2) Undergo available medical or psychiatric treatment and remain in a specified institution if required for that purpose.

(3) Attend or reside in a facility providing rehabilitation, instruction, recreation, or residence for persons on parole.

(4) Support his dependents and meet other family responsibilities.

(5) Refrain from possessing a firearm, destructive device, or other dangerous weapon unless granted written permission by the Commission or the parole officer.

(6) Report to a parole officer at reasonable times and in a reasonable manner, as directed by the Commission or the parole officer.

(7) Permit the parole officer to visit him at reasonable times at his home or elsewhere.

(8) Remain within the geographic limits fixed by the Commission unless granted written permission to leave by the Commission or the parole officer.

(8a) Remain in one or more specified places for a specified period or periods each day and wear a device that permits the defendant's compliance with the condition to be monitored electronically.

(8b) Remain alcohol free, and prove such abstinence through evaluation by a continuous alcohol monitoring system of a type approved by the Department of Correction.

(9) Answer all reasonable inquiries by the parole officer and obtain prior approval from the parole officer for any change in address or employment.

(10) Promptly notify the parole officer of any change in address or employment.

(11) Submit at reasonable times to warrantless searches by a parole officer of the parolee's person and of the parolee's vehicle and premises while the parolee is present, for purposes reasonably related to the parole supervision. The Commission may not require as a condition of parole that the parolee submit to any other searches that would otherwise be unlawful. If the parolee has been convicted of an offense which is a reportable conviction as defined in G.S. 14-208.6(4), or which involves the physical, mental, or sexual abuse of a minor, warrantless searches of the parolee's computer or other electronic mechanism which may contain electronic data shall be considered reasonably related to the parole supervision. Whenever the search consists of testing for the presence of illegal drugs, the parolee may also be required to reimburse the Department of Correction for the actual cost of drug testing and drug screening, if the results are positive.

(11a) Make restitution or reparation to an aggrieved party as provided in G.S. 148-57.1.

(11b) Comply with an order from a court of competent jurisdiction regarding the payment of an obligation of the parolee in connection with any judgment rendered by the court.

(11c) In the case of a parolee who was attending a basic skills program during incarceration, continue attending a basic skills program in pursuit of a General Education Development Degree or adult high school diploma.

(12) Satisfy other conditions reasonably related to his rehabilitation.

(b1) Mandatory Satellite-Based Monitoring Required as Condition of Parole for Certain Offenders. – If a parolee is in a category described by G.S. 14-208.40(a)(1) or G.S. 14-208.40(a)(2), the Commission must require as a condition of parole that the parolee submit to satellite-based monitoring pursuant to Part 5 of Article 27A of Chapter 14 of the General Statutes.

(c) Supervision Fee. – The Commission must require as a condition of parole that the parolee pay a supervision fee of thirty dollars ($30.00) per month. The Commission may exempt a parolee from this condition of parole only if it finds that requiring him to pay the fee will constitute an undue economic burden. The fee must be paid to the clerk of superior court of the county in which the parolee was convicted. The clerk must transmit any money collected pursuant to this subsection to the State to be deposited in the general fund of the State. In no event shall a person released on parole be required to pay more than one supervision fee per month.

(d) Any fees or costs paid by the parolee in order to comply with the imposition of subdivision (8b) of subsection (b) of this section shall be paid to the clerk of court for the county in which the parolee was convicted. Fees or costs collected under this subsection shall be transmitted to the entity providing the continuous alcohol monitoring system. (1977, c. 711, s. 1; 1979, c. 749, s. 11; 1983, c. 562; 1985, c. 474, s.

6; 1987, c. 579, s. 3; c. 830, s. 17; 1989 (Reg. Sess., 1990), c. 1034, s. 2; 1991, c. 54, s. 1; 1991 (Reg. Sess., 1992), c. 1000, s. 2; 1993, c. 538, s. 39; 1994, Ex. Sess., c. 24, s. 14(b); 2002-126, s. 29A.2(c); 2006-247, s. 15(h); 2006-253, s. 27; 2007-165, ss. 4, 5; 2007-213, s. 8.)

Attachment I [N

SOBRIETY PROGRAM GUIDELINES

I. GENERAL PROVISIONS

A. POLICY STATEMENT

The 60th Legislative Assembly, in Section 11 of Senate Bill 2003, authorized the Attorney General to establish a sobriety program pilot project in one or more judicial districts of the state. The sobriety program will involve coordination among state, county, and municipal agencies. The Attorney General, in cooperation with Law Enforcement, the Judiciary, the Department of Corrections and Rehabilitation, and the Department of Transportation Traffic Safety Division, is authorized to develop guidelines, policies and procedures, and to establish user fees for a sobriety program pilot project.

B. DEFINITIONS

"Blood alcohol concentration" means the level of alcohol content of blood by weight.

"Breath test" means the collection of a breath sample to measure blood alcohol concentration.

"Court" means a District Court or Municipal Court in the state of North Dakota.

"Defendant" means a person charged or found guilty of a violation of N.D.C.C. § 39-08-01 or equivalent ordinance.

"Officer" means a peace officer, correctional officer, or test-site operator designated by a Sheriff or Correctional Facility Administrator.

"Prosecutor" means a States Attorney, Assistant States Attorney, City Attorney, or Assistant City Attorney in the state of North Dakota.

"Remote Electronic Alcohol Monitoring" means continuous alcohol monitoring through the use of an installed electronic bracelet capable of taking alcohol readings from a defendant's skin to determine alcohol consumption twenty-four hours per day that may be monitored at another location by way of an analog telephone line or computer download.

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"Testing site" means the facility, including a correctional facility or law enforcement agency, where sobriety breath testing and remote electronic alcohol monitoring will be conducted.

C. SOBRIETY TESTING AS A CONDITION OF BOND

1. If an defendant is charged with a second or subsequent offense in violation of N.D.C.C § 39-08-01 or equivalent ordinance, a Court may condition any bond or pre-trial release that the defendant not consume any alcoholic beverages and may also order the defendant to participate in a sobriety program in which the defendant will submit to twice-per day breath testing seven days per week through an on-site breath test, or if the defendant is eligible for electronic alcohol monitoring, the Court may order the defendant to be tested for alcohol consumption in accordance with electronic alcohol monitoring procedures. The Court may also condition any bond or pre-trial release on payment of the associated costs and expenses of the sobriety program.

2. The Court may also order as a condition of bond for a defendant charged with a first offense in of N.D.C.C § 39-08-01 or equivalent ordinance that the defendant participate in the sobriety program if in the Court's discretion, participation is appropriate.

3. The Court may also order participation in the sobriety program as a condition of probation under a sentence for conviction of a violation of N.D.C.C. § 39-08-01 or equivalent ordinance.

D. STATEMENT OF PARTICIPATION

A defendant in the sobriety program will execute a statement in the presence of the testing site officer or the Clerk of the Court acknowledging the terms and conditions of the referring Court ordering the Defendant to participate in the sobriety program.

E. SOBRIETY PROGRAM INFORMATION SYSTEM

1. At the time of intake, an officer will obtain necessary defendant identification information and enter it into a Sobriety Program Information System. The information will include general participant information such as name, address, DOB, etc.

2. The officer will check the Sobriety Program Information System for the defendant and complete the following:

3. If the defendant's name does not appear in the Sobriety Program Information System, the officer will make a new entry, take a digital photograph of the defendant, and download the picture into the computer file.

4. If the defendant is listed in the Sobriety Program Information System, the officer will update the defendant's file information and photograph the defendant and download the photograph into the Sobriety Program Information System.

5. All information in the Sobriety Program Information system will be kept current and confidential when required by law.

F. SOBRIETY PROGRAM FEES

1. Sobriety Program On-Site Testing Fees

a. Each defendant participating in on-site breath testing will pay $1.00 per test payable in advance on a weekly basis.

2. Remote Electronic Alcohol Monitoring Fees

a. Each defendant participating in remote electronic alcohol monitoring will pay a fee of $5.00 per day, payable in advance on a two-week basis. Each defendant participating in electronic alcohol monitoring will also pay an activation fee of $25.00 and a de-activation fee of $25.00. The activation and de-activation fees must be paid at the time of installation.

3. Method of Payment.

a. Each defendant will pay testing fees in advance on a weekly basis. The defendant will pay the testing or monitoring fees in cash or money orders. No personal checks will be accepted. The officer will provide a receipt to the defendant for testing or monitoring fees paid and enter a record of the payment into the Sobriety Program Information System to track each defendant's payments.

b. If a defendant has a positive balance upon completion or termination of the Sobriety Program, the defendant will receive a refund for the balance.

4. Pilot Sobriety Fund

In accordance with Section 11 of Senate Bill 2003, user fees collected will be deposited into the Attorney General's North Dakota Sobriety Program Fund.

5. Failure to pay testing or monitoring fees

If a defendant fails to pay for the breath testing fees or electronic alcohol monitoring fees, the officer will report the defendant's failure to pay to the referring Court. Any amount owed may be assessed against the defendant, to be paid into the North Dakota Sobriety Program Fund, at the time of sentencing.

II. On-Site Testing Procedures

A. Defendant Placement in the Sobriety On-Site Breath Testing Program

1. A defendant charged with an offense for a violation of N.D.C.C. § 39-08-01 or equivalent ordinance is eligible for participation in an on-site sobriety testing program if a Court has ordered the defendant to participate in the program as a condition of release on bond.

2. After being ordered to participate in on-site testing in the sobriety program as a condition of bond by the Court, the defendant will report to the testing site designated by the Court for admission to the Sobriety Program. The defendant must produce identification and a copy of the Court order authorizing the defendant to participate in the sobriety program. At that time, an officer will review the program requirements, including fees and consequences of any violations, with the defendant, and enter defendant information into a Sobriety Program Information System.

3. If a defendant has been ordered to participate in the Sobriety Program, but the defendant is currently serving, or is required to serve, a sentence of imprisonment, the defendant may not be placed into the Sobriety Program until the defendant has completed the sentence.

4. A defendant ordered to participate in the sobriety program will execute a participation statement in the presence of the testing site operator of the Clerk of the Court acknowledging the terms and conditions of the referring Court ordering the Defendant to participate in the sobriety program. The defendant will receive a copy of the Sobriety Program requirements and the statement.

5. If the defendant refuses to sign the Sobriety Program participation statement, the officer will return the defendant to the referring Court to set other conditions of bond.

B. Administering breath tests.

1. All defendants in the Sobriety Program on-site breath testing program will submit to a twice-daily breath test seven days per week. The tests will be given on time intervals of no longer or no less than 12 hours in between tests and will be at the same times each day. Test times will be between 6:00 a.m. and 9:00 a.m. and between 6:00 p.m. and 9:00 p.m.

2. The defendant shall submit to the breath tests at the testing site designated by the Court that has jurisdiction over the defendant's offense. .

3. A defendant may not consume or ingest substance, including alcohol in any form, mouthwash, toothpaste, medicine, coffee, and may not use any tobacco products, including chewing tobacco, cigarettes, or cigars, within fifteen minutes before a breath test.

4. A defendant must arrive before the scheduled time for a breath test to ensure the test is administered at the correct time. If a defendant arrives early, the defendant will wait until the defendant's scheduled time for the breath test to be administered.

5. The officer will perform a breath test as follows:

   a. Breath testing in accordance with the operating manual for the breath testing device.

   b. The Officer will record the test result and the time of the test in the Sobriety Program Defendant Information System.

6. If the breath test result indicates the presence of alcohol, the officer will have the defendant wait for 15 minutes and administer another test.

C. Late arrival

1. If a defendant is more than thirty minutes late for a scheduled breath test, an officer will record the defendant in the Sobriety Program Information System as a failure to appear.

2. If a defendant arrives late, but is within thirty minutes of the time for a scheduled breath test, the defendant may be allowed to take the test. An officer will record that the defendant was late. If a defendant is late more than two times, the officer must report the matter to the referring Court.

D. Failure to appear for scheduled breath testing

1. If a defendant was not excused from taking a breath test, the officer will record the defendant's failure to appear for testing in the Sobriety Program Information System.

E. Excused absence

1. The referring Court may excuse a defendant from a scheduled breath test. There must be a signed order from the Court.

2. An officer will record the excused absence in the Sobriety Program Information System.

F. Recording Test Results

1. The officer who administered the breath test will record the result of the breath test in the Sobriety Program Information System.

G. Violations

1. Positive Breath Test

a. A blood alcohol concentration of at least 0.007 by weight after a second breath test constitutes a violation of the Bond Order. If there is a violation, the officer will detain the defendant and notify the referring Court of the violation. If a correctional officer has administered the breath test, the officer will also notify a law enforcement officer to take the defendant into custody pending court proceedings, including a bond hearing.

b. The officer will complete an incident report and forward a copy of the report to the prosecutor.

c. If a defendant has a positive breath test and leaves the testing site before the defendant can be detained, the officer shall immediately notify another law enforcement officer, the prosecutor and the Court. A bench warrant may be issued to take the defendant back into custody.

2. Failure to Appear for Scheduled Testing

a. If a defendant fails to appear, or is more than thirty minutes late for a scheduled breath test, the testing officer will notify the prosecutor. The referring Court may issue a bench warrant directing any law enforcement officer to take the defendant into custody pending a hearing.

III. REMOTE ELECTRONIC ALCOHOL MONITORING

1. Eligibility for remote electronic alcohol monitoring includes:

a. The defendant is charged with a violation of N.D.C.C. § 39-08-01 or equivalent ordinance and a Court has ordered as a condition of bond that the defendant participate in the sobriety program.

b. The defendant lives in rural area and it is an unreasonable burden, or it may be dangerous, for the defendant to personally report to a law enforcement agency or detention facility for blood alcohol testing.

c. Based on prior contact with law enforcement or the Courts, the defendant is known to be at high risk for consumption of alcohol.

d. The defendant has a revoked or suspended license and does not have lawful alternative transportation for on-site testing.

e. A remote electronic alcohol monitoring bracelet ("bracelet") and the supporting equipment, including a modem, are available.

f. The defendant is capable of wearing a bracelet and paying the daily monitoring fees and activation and de-activation fees.

2. Remote Electronic Alcohol Monitoring Procedure

a. The Court will advise the defendant that as a condition of bond the person will be placed in the sobriety program and be issued a bracelet and supporting equipment. The Court will advise the defendant of the remote electronic alcohol monitoring requirements.

b. The Court will make a determination whether the defendant is able to pay the monitoring and activation and de-activation fees.

c. The defendant will report to a law enforcement agency or detention facility. An officer will advise the defendant of the remote electronic alcohol monitoring requirements, have the defendant sign a statement acknowledging the remote electronic alcohol monitoring requirements, install the bracelet , provide a modem and any other equipment as necessary, and schedule or program times for remote electronic alcohol monitoring reporting.

d. The officer will advise the defendant as to all remote electronic alcohol monitoring equipment replacement costs and the defendant's responsibility for any damaged, lost, or destroyed remote electronic alcohol monitoring equipment.

e. The defendant must be within the range of the remote electronic alcohol monitoring modem at scheduled reporting times.

3. Remote Electronic Alcohol Monitoring Non-compliance Reporting

a. Violations of a Bond Order for participation in the remote electronic alcohol monitoring surveillance program include positive alcohol detection and obstruction, tampering, damaging, or removal of the bracelet or the supporting equipment, or failure to be within the range of the remote electronic alcohol monitoring modem at scheduled reporting times.

b. The detection of a blood alcohol concentration at a level of at least .02 by weight more constitutes a violation of the Bond Order.

c. If the remote electronic alcohol monitoring test data cannot be communicated, the officer who is monitoring the defendant shall report the communication failure to a peace officer who shall contact the defendant and determine if there has been a violation.

d. Violations will be reported to testing site and the prosecutor and recorded in the Sobriety Program Information System.

e. If there has been a violation, the Court may issue a bench warrant and order the defendant be taken into custody.

f. The Court may revoke or modify conditions of bond upon hearing if there has been a violation, including ordering the defendant be taken into custody.

4. Removal of and Payment for Remote Electronic Alcohol Monitoring Bracelet and Supporting Equipment.

a. Only a law enforcement officer or a detention officer may remove the bracelet from an defendant, and only when:

(1) The program is complete

(2) Upon order of the court

(3) If the defendant is taken into custody

(4) If medically necessary

(5) If the Bracelet malfunctions

b. The defendant shall return all remote electronic alcohol monitoring equipment at the time of removal of the bracelet, unless another bracelet is installed on the defendant.

c. The defendant shall be responsible for all costs, including replacement and repair of a damaged bracelet, modem or other supporting equipment. The court may impose a requirement that all payments are court costs, and assess amounts due as court costs.

IV. Completion and Termination from Sobriety Compliance Program

A. Completion or Termination

A defendant's participation in the Sobriety Program will end upon completion of the program or termination of the program. Completion of the Program means there has been a final disposition of the criminal offense, including conviction and imposition of sentence, or acquittal. The officer will enter the completion of the program or termination of the program into the Sobriety Program Information System upon notification from the Court that the defendant has completed the program or has been terminated from the program.

B. Re-entry into program

The Court may authorize a defendant to re-enter the Sobriety Program after the defendant has violated the program in accordance with terms and conditions established by the Court.

V. Operator Qualifications, Equipment and Testing Site Maintenance

A. Testing Site Operator Training

Testing site operators must have undergone training on the use of the breath testing instruments to be used at the test site. The test site operators shall follow all operator requirements for preparing a breath testing instrument for a subject test and for conducting a test in accordance with the instrument manufacturer's specifications.

B. Calibration and maintenance of breath testing instruments.

Testing site operators shall perform regular accuracy and calibration checks of breath testing equipment in accordance with the instrument manufacturer's specifications. The testing site operators shall record all accuracy and calibration checks in a log book along with the date of the test and the expected result of the standard gas sample.

If a breath testing instrument fails to maintain its calibration in accordance with the manufacturer's specifications, the test operator may not use the breath testing instrument for further testing until after consulting with the manufacturer.

B. Use and Disposal of Mouthpieces.

Test site operators may only use clean, unused mouthpieces (breathing tubes) from sealed bags and that have been manufactured or approved by the manufacturer of the breath testing instrument used for breath testing.

Test site operators shall safely dispose of each used mouthpiece so that it may not be reused or create risk of transmission of disease.

VI. Record keeping, Accounting for Testing Fees, and Sobriety Program Information System

A. Sobriety Program Information System

1. Testing Site and Data Entry Personnel.

a) All site operators or data entry personnel (referred to here as "system users") who will be entering defendant information and data into the Sobriety Program Information System must have a password to access the system. The Sheriff of each county shall designate the system users who will need passwords to access the Sobriety Program Information System. The system users

will include Sheriff's deputies, correctional officers, office deputies, or other authorized personnel.

b) Each authorized system user shall complete a set of security challenge questions and send the completed questions to the Attorney General Information Technology Staff ("IT Staff") for password administration (in case a password is forgotten). This can be accomplished two ways:

1) If the system user has an e-mail account: Go to web page; https://secure.intranetapps.nd.gov/itd/passwordchg/emailenty.htm;

2) If the system user does not have an e-mail account: Get a printable PDF form which can be faxed or mailed to Attorney General IT Staff. http://www.state.nd.us/itd/security/docs/52378.pdf

2. New, removed, or changed password

The application will check each time a system user logs on to determine whether the system user' needs to change a password (e.g. first time logins and when the password expiration date nears).

If the system user needs to change the password, the system user will be redirected to: https://www.state.nd.us/itd/misc/pswd/changepassword.asp. The system user will enter the new password at this location. The system user will then have to go back to the Sobriety Program Information System site and log in again.

3. Locked out Accounts or Forgotten Passwords

The system user or Sheriff shall call the Attorney General IT Staff's Help desk (701-328-4470) to assist with unlocking an account or help with a password.

4. Password Security

Only authorized Attorney General IT staff and authorized system users may access the Sobriety Program Information System. System users are prohibited from allowing any other person to use the system user's password to access the Sobriety Program Information System.

5. Administration

Attorney General IT staff are responsible for the administration of the Sobriety Program Information System. Only authorized ITD staff may make any changes in the Sobriety Program Information System.

B. Finance and Accounting

1) Initial Forms, Collections, and Pre-Payment.

a) The Sobriety Program Fee Collection form must be completed each time a defendant pays for breath testing or for remote electronic alcohol monitoring, including daily monitoring fees and activation and de-activation fees.
b) The first time the Sobriety Program Fee Collection form is completed for a defendant, the court order must be sent with the form to the Office of Attorney General with the monthly submission of forms and payment of fees collected
c) The fees paid by defendants must be by cash or money order.
d) The testing site officers shall collect $1.00 per test, or $2.00 per day, from each defendant subject to twice-per day breath testing. Each defendant shall pay the twice-per-day testing fee seven days in advance, or a total of Fourteen Dollars ($14.00) per seven day period. Defendants who are participating in remote electronic alcohol monitoring shall pay five dollars ($5.00 per day) for daily monitoring and twenty-five dollars ($25.00) for activation and twenty-five dollars ($25.00) for de-activation. Defendants shall pay for remote electronic alcohol monitoring fees, including the activation and de-activation fees, in advance for two weeks, for a total of One Hundred and Twenty Dollars ($120.00).
e) In the event a defendant violates any requirements of the program and the defendant's bond is revoked, the amount the defendant has paid, including any unused balance, for twice daily breath testing or remote electronic alcohol monitoring, is non refundable.

2) Account Reconciliation

a) Each entity participating in the Sobriety Program shall establish a separate account to deposit the collected fees and make payments to the Office of Attorney General. Deposits to this fund must be made when Fifty Dollars ($50.00) has been collected, but not less than weekly.
b) Each entity in the Sobriety Program shall indicate a contact person on the Sobriety Program Collections Reconciliation form.

c) The amount of payment submitted should match the reconciliation form. If a court has waived any fees, the waiver must be reflected on the reconciliation form.
d) In the event Sobriety Program Fee Payment does not reconcile with the Sobriety Program Collections Reconciliation form, the Office of Attorney General shall contact the designated contact person.
e) By the second week of each successive month, each entity shall submit the reconciliation and individual forms, and a check for fees collected for the sobriety testing and remote electronic alcohol monitoring to the Office of Attorney General, Dept. 125, 600 East Boulevard, Bismarck, ND 58505-0040, and Attn: Finance/Sobriety Program.
f) Contact Michelle Metzger (328-4213), Deb Matzke (328-4295) or Kathy Roll (328-3622) with any questions related to accounting and finance policies and procedures.

Attachment J (OH)

4510.13 Restrictions on suspending suspension periods or granting limited driving privileges.

(A)(1) Divisions (A)(2) to (9) of this section apply to a judge or mayor regarding the suspension of, or the grant of limited driving privileges during a suspension of, an offender's driver's or commercial driver's license or permit or nonresident operating privilege imposed under division (G) or (H) of section 4511.19 of the Revised Code, under division (B) or (C) of section 4511.191 of the Revised Code, or under section 4510.07 of the Revised Code for a conviction of a violation of a municipal OVI ordinance.

(2) No judge or mayor shall suspend the following portions of the suspension of an offender's driver's or commercial driver's license or permit or nonresident operating privilege imposed under division (G) or (H) of section 4511.19 of the Revised Code or under section 4510.07 of the Revised Code for a conviction of a violation of a municipal OVI ordinance, provided that division (A)(2) of this section does not limit a court or mayor in crediting any period of suspension imposed pursuant to division (B) or (C) of section 4511.191 of the Revised Code against any time of judicial suspension imposed pursuant to section 4511.19 or 4510.07 of the Revised Code, as described in divisions (B)(2) and (C)(2) of section 4511.191 of the Revised Code:

(a) The first six months of a suspension imposed under division (G)(1)(a) of section 4511.19 of the Revised Code or of a comparable length suspension imposed under section 4510.07 of the Revised Code;

(b) The first year of a suspension imposed under division (G)(1)(b) or (c) of section 4511.19 of the Revised Code or of a comparable length suspension imposed under section 4510.07 of the Revised Code;

(c) The first three years of a suspension imposed under division (G)(1)(d) or (e) of section 4511.19 of the Revised Code or of a comparable length suspension imposed under section 4510.07 of the Revised Code;

(d) The first sixty days of a suspension imposed under division (H) of section 4511.19 of the Revised Code or of a comparable length suspension imposed under section 4510.07 of the Revised Code.

(3) No judge or mayor shall grant limited driving privileges to an offender whose driver's or commercial driver's license or permit or nonresident operating privilege has been suspended under division (G) or (H) of section 4511.19 of the Revised Code, under division (C) of section 4511.191 of the Revised Code, or under section 4510.07 of the Revised Code for a municipal OVI conviction if the offender, within the preceding six years, has been convicted of or pleaded guilty to three or more violations of one or more of the Revised Code sections, municipal ordinances, statutes of the United States or another state, or municipal ordinances of a municipal corporation of another state that are identified in divisions (G)(2)(b) to (h) of section 2919.22 of the Revised Code.

Additionally, no judge or mayor shall grant limited driving privileges to an offender whose driver's or commercial driver's license or permit or nonresident operating privilege has been suspended under division (B) of section 4511.191 of the Revised Code if the offender, within the preceding six years, has refused three previous requests to consent to a chemical test of the person's whole blood, blood serum or plasma, breath, or urine to determine its alcohol content.

(4) No judge or mayor shall grant limited driving privileges for employment as a driver of commercial motor vehicles to an offender whose driver's or commercial driver's license or permit or nonresident operating privilege has been suspended under division (G) or (H) of section 4511.19 of the Revised Code, under division (B) or (C) of section 4511.191 of the Revised Code, or under section 4510.07 of the Revised Code for a municipal OVI conviction if the offender is disqualified from operating a commercial motor vehicle, or whose license or permit has been suspended, under section 3123.58 or 4506.16 of the Revised Code.

(5) No judge or mayor shall grant limited driving privileges to an offender whose driver's or commercial driver's license or permit or nonresident operating privilege has been suspended under division (G) or (H) of section 4511.19 of the Revised Code, under division (C) of section 4511.191 of the Revised Code, or under section 4510.07 of the Revised Code for a conviction of a violation of a municipal OVI ordinance during any of the following periods of time:

(a) The first fifteen days of a suspension imposed under division (G)(1)(a) of section 4511.19 of the Revised Code or a comparable length suspension imposed under section 4510.07 of the Revised Code, or of a suspension imposed under division (C)(1)(a) of section 4511.191 of the Revised Code. On or after the sixteenth day of the suspension, the court may grant limited driving privileges, but the court may require that the offender shall not exercise the privileges unless the vehicles the offender operates are equipped with immobilizing or disabling devices that monitor the offender's alcohol consumption or any other type of immobilizing or disabling devices, except as provided in division (C) of section 4510.43 of the Revised Code.

(b) The first forty-five days of a suspension imposed under division (C)(1)(b) of section 4511.191 of the Revised Code. On or after the forty-sixth day of suspension, the court may grant limited driving privileges, but the court may require that the offender shall not exercise the privileges unless the vehicles the offender operates are equipped with immobilizing or disabling devices that monitor the offender's alcohol consumption or any other type of immobilizing or disabling devices, except as provided in division (C) of section 4510.43 of the Revised Code.

(c) The first sixty days of a suspension imposed under division (H) of section 4511.19 of the Revised Code or a comparable length suspension imposed under section 4510.07 of the Revised Code.

(d) The first one hundred eighty days of a suspension imposed under division (C)(1)(c) of section 4511.191 of the Revised Code. On or after the one hundred eighty-first day of suspension, the court may grant limited driving privileges, and either of the following applies:

(i) If the underlying arrest is alcohol-related, the court shall issue an order that, except as provided in division (C) of section 4510.43 of the Revised Code, for the remainder of the period of suspension the offender shall not exercise the privileges unless the vehicles the offender operates are equipped with a certified ignition interlock device.

(ii) If the underlying arrest is drug-related, the court in its discretion may issue an order that, except as provided in division (C) of section 4510.43 of the Revised Code, for the remainder of the period of suspension the offender shall not exercise the privileges unless the vehicles the offender operates are equipped with a certified ignition interlock device.

(e) The first forty-five days of a suspension imposed under division (G)(1)(b) of section 4511.19 of the Revised Code or a comparable length suspension imposed under section 4510.07 of the Revised Code.

On or after the forty-sixth day of the suspension, the court may grant limited driving privileges, and either of the following applies:

(i) If the underlying conviction is alcohol-related, the court shall issue an order that, except as provided in division (C) of section 4510.43 of the Revised Code, for the remainder of the period of suspension the offender shall not exercise the privileges unless the vehicles the offender operates are equipped with a certified ignition interlock device.

(ii) If the underlying conviction is drug-related, the court in its discretion may issue an order that, except as provided in division (C) of section 4510.43 of the Revised Code, for the remainder of the period of suspension the offender shall not exercise the privileges unless the vehicles the offender operates are equipped with a certified ignition interlock device.

(f) The first one hundred eighty days of a suspension imposed under division (G)(1)(c) of section 4511.19 of the Revised Code or a comparable length suspension imposed under section 4510.07 of the Revised Code. On or after the one hundred eighty-first day of the suspension, the court may grant limited driving privileges, and either of the following applies:

(i) If the underlying conviction is alcohol-related, the court shall issue an order that, except as provided in division (C) of section 4510.43 of the Revised Code, for the remainder of the period of suspension the offender shall not exercise the privileges unless the vehicles the offender operates are equipped with a certified ignition interlock device.

(ii) If the underlying conviction is drug-related, the court in its discretion may issue an order that, except as provided in division (C) of section 4510.43 of the Revised Code, for the remainder of the period of suspension the offender shall not exercise the privileges unless the vehicles the offender operates are equipped with a certified ignition interlock device.

(g) The first three years of a suspension imposed under division (G)(1)(d) or (e) of section 4511.19 of the Revised Code or a comparable length suspension imposed under section 4510.07 of the Revised Code, or of a suspension imposed under division (C)(1)(d) of section 4511.191 of the Revised Code. On or after the first three years of suspension, the court may grant limited driving privileges, and either of the following applies:

(i) If the underlying conviction is alcohol-related, the court shall issue an order that, except as provided in division (C) of section 4510.43 of the Revised Code, for the remainder of the period of suspension the offender shall not exercise the privileges unless the vehicles the offender operates are equipped with a certified ignition interlock device.

(ii) If the underlying conviction is drug-related, the court in its discretion may issue an order that, except as provided in division (C) of section 4510.43 of the Revised Code, for the remainder of the period of suspension the offender shall not exercise the privileges unless the vehicles the offender operates are equipped with a certified ignition interlock device.

(6) No judge or mayor shall grant limited driving privileges to an offender whose driver's or commercial driver's license or permit or nonresident operating privilege has been suspended under division (B) of section 4511.191 of the Revised Code during any of the following periods of time:

(a) The first thirty days of suspension imposed under division (B)(1)(a) of section 4511.191 of the Revised Code;

(b) The first ninety days of suspension imposed under division (B)(1)(b) of section 4511.191 of the Revised Code;

(c) The first year of suspension imposed under division (B)(1)(c) of section 4511.191 of the Revised Code;

(d) The first three years of suspension imposed under division (B)(1)(d) of section 4511.191 of the Revised Code.

(7) In any case in which a judge or mayor grants limited driving privileges to an offender whose driver's or commercial driver's license or permit or nonresident operating privilege has been suspended under division (G)(1)(b), (c), (d), or (e) of section 4511.19 of the Revised Code, under division (G)(1)(a) of section 4511.19 of the Revised Code for a violation of division (A)(1)(f), (g), (h), or (i) of that section, or under section 4510.07 of the Revised Code for a municipal OVI conviction for which sentence would have been imposed under division (G)(1)(a)(ii) or (G)(1)(b), (c), (d), or (e) of section 4511.19 of the Revised Code had the offender been charged with and convicted of a violation of section 4511.19 of the Revised Code instead of a violation of the municipal OVI ordinance, the judge or mayor shall impose as a condition of the privileges that the offender must display on the vehicle that is driven subject to the privileges restricted license plates that are issued under section 4503.231 of the Revised Code, except as provided in division (B) of that section.

(8) In any case in which the offender operates a motor vehicle that is not equipped with an ignition interlock device, circumvents the device, or tampers with the device or in any case in which the court receives notice pursuant to section 4510.46 of the Revised Code that a certified ignition interlock device required by an order issued under division (A)(5)(e), (f), or (g) of this section prevented an offender from starting a motor vehicle, the following applies:

(a) If the offender was sentenced under division (G)(1)(b) of section 4511.19 of the Revised Code, on a first instance the court may require the offender to wear a monitor that provides continuous alcohol monitoring that is remote. On a second instance, the court shall require the offender to wear a monitor that provides continuous alcohol monitoring that is remote for a minimum of forty days. On a third instance or more, the court shall require the offender to wear a monitor that provides continuous alcohol monitoring that is remote for a minimum of sixty days.

(b) If the offender was sentenced under division (G)(1)(c), (d), or (e) of section 4511.19 of the Revised Code, on a first instance the court shall require the offender to wear a monitor that provides continuous alcohol monitoring that is remote for a minimum of forty days. On a second instance or more, the court shall require the offender to wear a monitor that provides continuous alcohol monitoring that is remote for a minimum of sixty days.

(9) In any case in which the court issues an order under this section prohibiting an offender from exercising limited driving privileges unless the vehicles the offender operates are equipped with an immobilizing or disabling device, including a certified ignition interlock device, or requires an offender to wear a monitor that provides continuous alcohol monitoring that is remote, the court shall impose an additional court cost of two dollars and fifty cents upon the offender. The court shall not waive the payment of the two dollars and fifty cents unless the court determines that the offender is indigent and waives the payment of all court costs imposed upon the indigent offender. The clerk of court shall transmit one hundred per cent of this mandatory court cost collected during a month on or before the twenty-third day of the following month to the state treasury to be credited to the state highway safety

fund created under section 4501.06 of the Revised Code, to be used by the department of public safety to cover costs associated with maintaining the habitual OVI/OMWI offender registry created under section 5502.10 of the Revised Code. In its discretion the court may impose an additional court cost of two dollars and fifty cents upon the offender. The clerk of court shall retain this discretionary two dollar and fifty cent court cost, if imposed, and shall deposit it in the court's special projects fund that is established under division (E)(1) of section 2303.201 , division (B)(1) of section 1901.26, or division (B)(1) of section 1907.24 of the Revised Code.

(10) In any case in which the court issues an order under this section prohibiting an offender from exercising limited driving privileges unless the vehicles the offender operates are equipped with an immobilizing or disabling device, including a certified ignition interlock device, the court shall notify the offender at the time the offender is granted limited driving privileges that, in accordance with section 4510.46 of the Revised Code, if the court receives notice that the device prevented the offender from starting the motor vehicle because the device was tampered with or circumvented or because the analysis of the deep-lung breath sample or other method employed by the device to measure the concentration by weight of alcohol in the offender's breath indicated the presence of alcohol in the offender's breath in a concentration sufficient to prevent the device from permitting the motor vehicle to be started, the court may increase the period of suspension of the offender's driver's or commercial driver's license or permit or nonresident operating privilege from that originally imposed by the court by a factor of two and may increase the period of time during which the offender will be prohibited from exercising any limited driving privileges granted to the offender unless the vehicles the offender operates are equipped with a certified ignition interlock device by a factor of two.

(B) Any person whose driver's or commercial driver's license or permit or nonresident operating privilege has been suspended pursuant to section 4511.19 or 4511.191 of the Revised Code or under section 4510.07 of the Revised Code for a violation of a municipal OVI ordinance may file a petition for limited driving privileges during the suspension. The person shall file the petition in the court that has jurisdiction over the place of arrest. Subject to division (A) of this section, the court may grant the person limited driving privileges during the period during which the suspension otherwise would be imposed. However, the court shall not grant the privileges for employment as a driver of a commercial motor vehicle to any person who is disqualified from operating a commercial motor vehicle under section 4506.16 of the Revised Code or during any of the periods prescribed by division (A) of this section.

(C)(1) After a driver's or commercial driver's license or permit or nonresident operating privilege has been suspended pursuant to section 2903.06, 2903.08, 2903.11, 2907.24, 2921.331, 2923.02, 2929.02, 4511.19, 4511.251, 4549.02, 4549.021, or 5743.99 of the Revised Code, any provision of Chapter 2925. of the Revised Code, or section 4510.07 of the Revised Code for a violation of a municipal OVI ordinance, the judge of the court or mayor of the mayor's court that suspended the license, permit, or privilege shall cause the offender to deliver to the court the license or permit. The judge, mayor, or clerk of the court or mayor's court shall forward to the registrar the license or permit together with notice of the action of the court.

(2) A suspension of a commercial driver's license under any section or chapter identified in division (C)(1) of this section shall be concurrent with any period of suspension or disqualification under section 3123.58 or 4506.16 of the Revised Code. No person who is disqualified for life from holding a commercial driver's license under section 4506.16 of the Revised Code shall be issued a driver's license under this chapter during the period for which the commercial driver's license was suspended under this section, and no person whose commercial driver's license is suspended under any section or

chapter identified in division (C)(1) of this section shall be issued a driver's license under Chapter 4507. of the Revised Code during the period of the suspension.

(3) No judge or mayor shall suspend any class one suspension, or any portion of any class one suspension, imposed under section 2903.04, 2903.06, 2903.08, or 2921.331 of the Revised Code. No judge or mayor shall suspend the first thirty days of any class two, class three, class four, class five, or class six suspension imposed under section 2903.06, 2903.08, 2903.11, 2923.02, or 2929.02 of the Revised Code.

(D) The judge of the court or mayor of the mayor's court shall credit any time during which an offender was subject to an administrative suspension of the offender's driver's or commercial driver's license or permit or nonresident operating privilege imposed pursuant to section 4511.191 or 4511.192 of the Revised Code or a suspension imposed by a judge, referee, or mayor pursuant to division (B)(1) or (2) of section 4511.196 of the Revised Code against the time to be served under a related suspension imposed pursuant to any section or chapter identified in division (C)(1) of this section.

(E) The judge or mayor shall notify the bureau of motor vehicles of any determinations made pursuant to this section and of any suspension imposed pursuant to any section or chapter identified in division (C)(1) of this section.

(F)(1) If a court issues an immobilizing or disabling device order under section 4510.43 of the Revised Code, the order shall authorize the offender during the specified period to operate a motor vehicle only if it is equipped with an immobilizing or disabling device, except as provided in division (C) of that section. The court shall provide the offender with a copy of an immobilizing or disabling device order issued under section 4510.43 of the Revised Code, and the offender shall use the copy of the order in lieu of an Ohio driver's or commercial driver's license or permit until the registrar or a deputy registrar issues the offender a restricted license.

An order issued under section 4510.43 of the Revised Code does not authorize or permit the offender to whom it has been issued to operate a vehicle during any time that the offender's driver's or commercial driver's license or permit is suspended under any other provision of law.

(2) An offender may present an immobilizing or disabling device order to the registrar or to a deputy registrar. Upon presentation of the order to the registrar or a deputy registrar, the registrar or deputy registrar shall issue the offender a restricted license. A restricted license issued under this division shall be identical to an Ohio driver's license, except that it shall have printed on its face a statement that the offender is prohibited during the period specified in the court order from operating any motor vehicle that is not equipped with an immobilizing or disabling device. The date of commencement and the date of termination of the period of suspension shall be indicated conspicuously upon the face of the license.

Effective Date: 01-01-2004; 09-23-2004; 04-04-2007; 2008 SB17 09-30-2008; 2008 HB215 04-07-2009

Attachment K Unit

4510.46 Monitoring entity to inform court if vehicle operation prevented.

(A) A governmental agency, bureau, department, or office, or a private corporation, or any other entity that monitors certified ignition interlock devices for or on behalf of a court shall inform the court whenever such a device that has been installed in a motor vehicle indicates that it has prevented an offender whose driver's or commercial driver's license or permit or nonresident operating privilege has been suspended by a court under division (G)(1)(a), (b), (c), (d), or (e) of section 4511.19 of the Revised Code and who has been granted limited driving privileges under section 4510.13 of the Revised Code from starting the motor vehicle because the device was tampered with or circumvented or because the analysis of the deep-lung breath sample or other method employed by the ignition interlock device to measure the concentration by weight of alcohol in the offender's breath indicated the presence of alcohol in the offender's breath in a concentration sufficient to prevent the ignition interlock device from permitting the motor vehicle to be started.

(B) Upon receipt of such information pertaining to an offender whose driver's or commercial driver's license or permit or nonresident operating privilege has been suspended by a court under division (G)(1)(b), (c), (d), or (e) of section 4511.19 of the Revised Code and who has been granted limited driving privileges under section 4510.13 of the Revised Code, the court shall send a notice to the offender stating that it has received evidence of an instance described in division (A) of this section. If a court pursuant to division (A)(8) of section 4510.13 of the Revised Code requires the offender to wear an alcohol monitor, the notice shall state that because of this instance the offender is required to wear a monitor that provides for continuous alcohol monitoring in accordance with division (A)(8) of section 4510.13 of the Revised Code. The notice shall further state that because of this instance the court may increase the period of suspension of the offender's driver's or commercial driver's license or permit or nonresident operating privilege from that originally imposed by the court by a factor of two and may increase the period of time during which the offender will be prohibited from exercising any limited driving privileges granted to the offender unless the vehicles the offender operates are equipped with a certified ignition interlock device by a factor of two.

The notice shall state whether the court will impose these increases and, if so, that these increases will take effect fourteen days from the date of the notice unless the offender files a timely motion with the court, appealing the increases in the time described in this division and requesting a hearing on the matter. Any such motion that is filed within that fourteen-day period shall be considered to be filed in a timely manner, and any such motion that is filed after that fourteen-day period shall be considered not to be filed in a timely manner. If the offender files a timely motion, the court may hold a hearing on the matter. The scope of the hearing is limited to determining whether the offender in fact was prevented from starting a motor vehicle that is equipped with a certified ignition

interlock device because the device was tampered with or circumvented or because the analysis of the deep-lung breath sample or other method employed by the ignition interlock device to measure the concentration by weight of alcohol in the offender's breath indicated the presence of alcohol in the offender's breath in a concentration sufficient to prevent the ignition interlock device from permitting the motor vehicle to be started.

If the court finds by a preponderance of the evidence that this instance as indicated by the ignition interlock device in fact did occur, it may deny the offender's appeal and issue the order increasing the relevant periods of time described in this division. If the court finds by a preponderance of the evidence that this instance as indicated by the ignition interlock device in fact did not occur, it shall grant the offender's appeal and no such order shall be issued.

(C) In no case shall any period of suspension of an offender's driver's or commercial driver's license or permit or nonresident operating privilege that is increased by a factor of two or any period of time during which the offender is prohibited from exercising any limited driving privileges granted to the offender unless the vehicles the offender operates are equipped with a certified ignition interlock device that is increased by a factor of two exceed the maximum period of time for which the court originally was authorized to suspend the offender's driver's or commercial driver's license or permit or nonresident operating privilege under division (G)(1)(a), (b), (c), (d), or (e) of section 4511.19 of the Revised Code.

(D) Nothing in this section shall be construed as prohibiting the court from revoking an individual's driving privileges.

Effective Date: 2008 SB17 09-30-2008

Attachment L

4511.198 Limited driving privileges - remote continuous alcohol monitor.

(A)(1) If a court grants limited driving privilege to a person who is described in division (B) of this section and who is alleged to have committed a violation of division (A) of section 4511.19 of the Revised Code or of a substantially equivalent municipal ordinance, the court as a condition of granting limited driving privileges may prohibit the person from consuming any beer or intoxicating liquor and may require the person to wear a monitor that provides continuous alcohol monitoring that is remote. If the court imposes the requirement, the court shall require the person to wear the monitor until the person is convicted of, pleads guilty to, or is found not guilty of the alleged violation or the charges in the case are dismissed. Any consumption by the person of beer or intoxicating liquor prior to that time is grounds for revocation by the court of the person's limited driving privilege. The person shall pay all costs associated with the monitor, including the cost of remote monitoring.

(2) If a court grants limited driving privilege to a person who is described in division (C) of this section and who is alleged to have committed a violation of division (A) of section 4511.19 of the Revised Code or of a substantially equivalent municipal ordinance, the court as a condition of granting limited driving privileges, unless the court determines otherwise, shall prohibit the person from consuming any beer or intoxicating liquor and shall require the person to wear a monitor that provides continuous alcohol monitoring that is remote. The court shall require the person to wear the monitor until the person is convicted of, pleads guilty to, or is found not guilty of the alleged violation or the charges in the case are dismissed. Any consumption by the person of beer or intoxicating liquor prior to that time is grounds for revocation by the court of the person's limited driving privilege. The person shall pay all costs associated with the monitor, including the cost of remote monitoring.

(B) Division (A)(1) of this section applies to the following persons:

(1) A person who is alleged to have committed a violation of division (A) of section 4511.19 of the Revised Code and who, if convicted of the alleged violation, is required to be sentenced under division (G)(1)(c) or (d) of section 4511.19 of the Revised Code;

(2) A person who is alleged to have committed a violation of a municipal ordinance that is substantially equivalent to division (A) of section 4511.19 of the Revised Code and who, if the law enforcement officer who arrested and charged the person with the violation of the municipal ordinance instead had charged the person with a violation of division (A) of section 4511.19 of the Revised Code, would be required to be sentenced under division (G)(1)(c) or (d) of section 4511.19 of the Revised Code.

(C) Division (A)(2) of this section applies to the following persons:

(1) A person who is alleged to have committed a violation of division (A) of section 4511.19 of the Revised Code and who, if convicted of the alleged violation, is required to be sentenced under division (G)(1)(e) of section 4511.19 of the Revised Code;

(2) A person who is alleged to have committed a violation of a municipal ordinance that is substantially equivalent to division (A) of section 4511.19 of the Revised Code and who, if the law enforcement officer who arrested and charged the person with the violation of the municipal ordinance instead had charged the person with a violation of division (A) of section 4511.19 of the Revised Code, would be required to be sentenced under division (G)(1)(e) of section 4511.19 of the Revised Code.

Effective Date: 2008 SB17 09-30-2008

Attachment M

Attorney General's Office
24/7 Sobriety Project

- Administrative Rules
- House Bill 1072
- 24/7 Statistics
- UJS DUI Statistics
- Forms/Documents
- 24/7 Map
- Contact Us

Welcome to my 24/7 Sobriety web site. I am pleased to be able to share the details of this program to all South Dakotans. This is more than just a program but a commitment to working with chronic DWI defenders into changing their behavior and prevention of additional DWI arrests.

The program has one main goal for each DWI defendant and that is sobriety 24 hours per day and 7 days per week. This started as a pilot program in January 2005 and has grown to 56 counties. Our hope is that it can be adapted statewide and begin to have a real impact on not just the defendants, but their families and employers as well.

This site includes a wide array of resources, varying from program statistics, overviews of the program, contact information and links to additional information.

Thank you for visiting our web site and your interest in this project. We hope you find it useful.
Yours truly,

Larry Long
ATTORNEY GENERAL

Agency Login

Attachment N

§ 202. Powers and responsibilities of the commissioner regardingprobation

The commissioner shall be charged with the following powers and responsibilities regarding the administration of probation:

(1) To maintain general supervision of persons placed on probation, and to prescribe rules, consistent with any orders of the court, governing the conduct of such persons;

(2) To supervise the administration of probation services and establish policies and standards and make rules regarding probation investigation, supervision, case work and case loads, record keeping, and the qualification of probation officers;

(3) To use electronic monitoring equipment such as global position monitoring, automated voice recognition telephone equipment, and transdermal alcohol monitoring equipment to enable more effective or efficient supervision of individuals placed on probation. Transdermal alcohol monitoring equipment shall be used for such purposes as discouraging persons whose licenses have been suspended for DUI from operating motor vehicles on Vermont highways. (Added 1971, No. 199 (Adj. Sess.), § 20; amended 2007, No. 179 (Adj. Sess.), § 3.)

Attachment O

§ 403. Powers and responsibilities of the commissioner regarding parole

The commissioner is charged with the following powers and responsibilities regarding the administration of parole:

(1) To supervise and control persons placed on parole, subject to the rules and orders of the parole board as to the conditions of parole. The commissioner may use electronic monitoring equipment such as global position monitoring, automated voice recognition telephone equipment, and transdermal alcohol monitoring equipment to enable more effective or efficient supervision of individuals placed on parole. Transdermal alcohol monitoring equipment shall be used for such purposes as discouraging persons whose licenses have been suspended for DUI from operating motor vehicles on Vermont highways;

(2) To detain for safekeeping at a correctional facility any parolee who allegedly has violated the terms of his or her parole, pending a conference with the parole board at its next regularly scheduled meeting, such period of detention not to exceed 30 days;

(3) To establish and provide as he or she deems necessary outpatient counseling and treatment services to persons paroled from, or on pre-parole release or conditional release from, confinement within the department and, in his or her discretion, to require payment of reasonable fees for such services, if the person is financially able to make the payment;

(4) To establish and maintain a register of individuals who ask to be notified of the parole interview or review of an inmate by the parole board. The register shall constitute a confidential record which shall only be disclosed to persons within the department specifically designated by the commissioner;

(5) To provide written notification of the date, time, and place of a parole interview or review of an inmate by the parole board to an individual who asks to be notified of the parole interview or review. At least 30 days prior to the date of the interview or review, the notice shall be sent by first class mail, or by another most appropriate method, to the last address provided to the department by the individual. A copy of the notice shall be provided to the parole board prior to the interview or review. Failure of the department to provide the notice or provide it in a timely manner shall not affect the validity of proceedings conducted by the parole board. (Added 1971, No. 199 (Adj. Sess.), § 20; amended 1997, No. 148 (Adj. Sess.), § 56, eff. April 29, 1998; 2007, No. 179 (Adj. Sess.), § 7.)

KANSAS
DEPARTMENT OF REVENUE

Mark Parkinson, Governor
Joan Wagnon, Secretary

www.ksrevenue.org

MEMO

TO: Marcy Ralston

FROM: James G. Keller

RE: Issue Regarding Efficacy of the Kansas Implied Consent Law

DATE: July 30, 2009

Senate Substitute for House Bill No. 2096, enacted by the 2009 Kansas legislature, created the Kansas DUI commission. As you have advised, you have been selected by Secretary Wagnon as her designee on that commission as provided for in the legislation.

You have asked me for some input as to the reasons for both a civil/administrative implied consent law and also criminal sanctions for driving under the influence.

The Kansas Implied Consent Law was first enacted in 1955. The law provided for an administrative driver's license suspension if a person refused to submit to a test requested by an officer to determine the person's breath or blood alcohol content. The purpose of the law was to coerce a person suspected of driving under the influence to "consent" to a test to determine the person's alcohol content which would allow that evidence to be used in the criminal prosecution. If the person refused testing, the person's driving privileges would be suspended and the fact of refusal could be used as evidence in the DUI prosecution. *State v. Bristor*, 236 Kan. 313, 319, 691 P.2d 1 (1984).

In January of 1988, Governor Mike Hayden and Attorney General Bob Stephan conducted a joint press conference and announced they were jointly proposing legislation to address the issue of drunk driving, which would also comply with federal incentive programs tied to highway funding. In order to comply with the federal incentive programs, the legislation included a provision for an administrative driver's license suspension for failing a test for alcohol, as well as for refusing to submit to testing. The federal incentive program also required that the administrative suspension be enhanced if a person had any prior test refusals, test failures or DUI convictions. The Kansas Implied Consent Law was substantially amended to meet the requirements of the federal incentive program.

Kansas appellate decisions since 1988 have recognized substantial differences between DUI prosecutions and administrative suspensions under the Kansas Implied Consent Law. In DUI prosecutions, the burden of proof is on the State. In administrative hearings and district court appeals under the implied consent law, the burden is on the licensee to show the requirements of the law were not met. The issues addressed in the proceedings

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are also somewhat different. As the Kansas Court of Appeals noted in *Podrebarac v. Kansas Dept. of Revenue*, 15 Kan.App.2d 383, 807 P.2d 1327 (1991), the provisions of the implied consent law indicate a legislative intent to allow administrative suspensions for driving while intoxicated on less strict standards of proof than required for a criminal conviction.

Statistically, it is more likely that a person who drives while under the influence of alcohol in Kansas will experience an administrative driver's license suspension than a DUI conviction. Particularly in cases where a person refuses to submit to a test, it is difficult in some jurisdictions to obtain a DUI conviction. The difference in burden of proof makes the prosecutor's task more difficult even in those cases where there is evidence of the person's alcohol content.

According to information provided by the Insurance Institute for Highway Safety, 41 states and the District of Columbia currently have laws providing for administrative driver's license suspensions for either failing or refusing a test for alcohol. A study by the Institute indicated that administrative license suspension laws (ALS) reduce the number of fatal crashes involving alcohol. Based upon studies done regarding the impact of ALS laws, the Institute has concluded that "a well-publicized and enforced ALS law increases public perception that punishment for alcohol-impaired driving is likely to occur and will be swiftly applied and appropriately severe—a perception that is necessary to deter potential offenders."

There may still be federal incentive grants available in connection with state implied consent or ALS laws. The Kansas Department of Transportation supervises such programs and would have more current information regarding the status of any such programs.

Athena Andaya

From: Pete Bodyk [peteb@ksdot.org]
Sent: Friday, July 31, 2009 3:48 PM
To: Athena Andaya
Subject: Info. for DUI Commission
Attachments: 410 Final Rule.pdf

Athena

Below is a paragraph out of a summary I received concerning the Transportation Reauthorization Bill introduced in Congress in June. It involves a sanction against states that don't have an ignition interlock requirement for first time DUI offenders. Attached is a copy of the Final Rule for the Section 410 Federal Impaired Driving Grant Program. It lists the various requirements for states to qualify for federal grant funds for drunk driving programs. Thought the members of the Commission should have copies of these.

Pete

"A sanction would be authorized for states that fail to enact and enforce a law by September 30, 2012 that requires the installation of an ignition interlock for at least six months on each vehicle operated by a convicted first time DWI offender. Beginning on October 1 of that year (FY 2013), non-compliant states would lose 1% of Interstate Maintenance, National Highway System and Surface Transportation Program funds. The amount withheld would increase to 3% in FY 2014 and then 5% in FY 2015 and every year thereafter. Funds would be withheld for four years and then allowed to lapse. If a state comes into compliance anytime during that period, the withheld funds would be reapportioned to the state. DWI is defined as "having an alcohol concentration above the permitted limit as established by the state." Since every state must have a .08 BAC limit or face sanctions, it is assumed that the state limit must be .08 BAC."

DUI Commission 2009
8-6-09
Attachment 7

Controls with respect to any miscellaneous payments reported under § 130.10(c).

(b) Supplementary reports must be sent to the Directorate of Defense Trade Controls within 30 days after the payment, offer or agreement reported therein or, when requested by the Directorate of Defense Trade Controls, within 30 days after such request, and must include:

* * * * *

(2) The Directorate of Defense Trade Controls license number, if any, and the Department of Defense contract number, if any, related to the sale.

■ 102. Section 130.12 is amended by revising paragraphs (c), (d)(1) introductory text, and (d)(2) to read as follows:

§ 130.12 Information to be furnished by vendor to applicant or supplier.

* * * * *

(c) If the vendor believes that furnishing information to an applicant or supplier in a requested statement would unreasonably risk injury to the vendor's commercial interests, the vendor may furnish in lieu of the statement an abbreviated statement disclosing only the aggregate amount of all political contributions and the aggregate amount of all fees or commissions which have been paid, or offered or agreed to be paid, or offered or agreed to be paid, by the vendor with respect to the sale. Any abbreviated statement furnished to an applicant or supplier under this paragraph must be accompanied by a certification that the requested information has been reported by the vendor directly to the Directorate of Defense Trade Controls. The vendor must simultaneously report fully to the Directorate of Defense Trade Controls all information which the vendor would otherwise have been required to report to the applicant or supplier under this section. Each such report must clearly identify the sale with respect to which the reported information pertains.

(d)(1) If upon the 25th day after the date of its request to vendor, an applicant or supplier has not received from the vendor the initial statement required by paragraph (a) of this section, the applicant or supplier must submit to the Directorate of Defense Trade Controls a signed statement attesting to:

* * * * *

(2) The failure of a vendor to comply with this section does not relieve any applicant or supplier otherwise required by § 130.9 to submit a report to the Directorate of Defense Trade Controls from submitting such a report.

■ 103. Section 130.17 is amended by revising paragraph (a) to read as follows:

§ 130.17 Utilization of and access to reports and records.

(a) All information reported and records maintained under this part will be made available, upon request for utilization by standing committees of the Congress and subcommittees thereof, and by United States Government agencies, in accordance with § 39(d) of the Arms Export Control Act (22 U.S.C. 2779(d)), and reports based upon such information will be submitted to Congress in accordance with sections 36(a)(7) and 36(b)(1) of that Act (22 U.S.C. 2776(a)(7) and (b)(1)) or any other applicable law.

* * * * *

Dated: March 1, 2006.

Robert G. Joseph,

Under Secretary for Arms Control and International Security, Department of State.

[FR Doc. 06–3500 Filed 4–20–06; 8:45 am]

BILLING CODE 4710–25–P

DEPARTMENT OF TRANSPORTATION

National Highway Traffic Safety Administration

23 CFR Part 1313

[Docket No. NHTSA–2005–23454]

RIN 2127–AJ73

Amendment To Grant Criteria for Alcohol-Impaired Driving Prevention Programs

AGENCY: National Highway Traffic Safety Administration (NHTSA), Department of Transportation (DOT).

ACTION: Final rule.

SUMMARY: This final rule amends the regulation that implements 23 U.S.C. 410, under which States can receive incentive grants for alcohol-impaired driving prevention programs. The final rule implements changes that were made to the Section 410 program by the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy For Users (SAFETEA–LU).

SAFETEA–LU provides States with two alternative means to qualify for a Section 410 grant. Under the first alternative, States may qualify as a "low fatality rate State" if they have an alcohol-related fatality rate of 0.5 or less per 100 million vehicle miles traveled (VMT). Under the second alternative, States may qualify as a "programmatic State" if they demonstrate that they meet three of eight grant criteria for fiscal year 2006, four of eight grant criteria for fiscal year 2007, and five of eight grant criteria for fiscal years 2008 and 2009. Qualifying under both alternatives does not entitle the State to receive additional grant funds. SAFETEA–LU also provides for a separate grant to the ten States that are determined to have the highest rates of alcohol-related driving fatalities.

This final rule establishes the criteria States must meet and the procedures they must follow to qualify for Section 410 grants, beginning in FY 2006.

DATES: This final rule becomes effective on June 20, 2006.

FOR FURTHER INFORMATION CONTACT: For programmatic issues: Ms. Carmen Hayes, Highway Safety Specialist, Injury Control Operations & Resources (ICOR), NTI–200, National Highway Traffic Safety Administration, 400 Seventh Street, SW., Washington, DC 20590. Telephone: (202) 366–2121. For legal issues: Mr. Roland (R.T.) Baumann III, Attorney-Advisor, Legislation and General Law Division, Office of the Chief Counsel, NCC–113, National Highway Traffic Safety Administration, 400 Seventh Street, SW., Washington, DC 20590. Telephone: (202) 366–1834.

SUPPLEMENTARY INFORMATION:

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J. Regulatory Identifier Number (RIN)
K. Privacy Act

I. Background

The Alcohol Impaired Driving Countermeasures program was created by the Drunk Driving Prevention Act of 1988 and codified at 23 U.S.C. 410. As originally conceived, States could qualify for basic and supplemental grants under the Section 410 program if they met certain criteria. To qualify for a basic grant, States had to provide for an expedited driver's license suspension or revocation system and a self-sustaining impaired driving prevention program. To qualify for a supplemental grant, States had to be eligible for a basic grant and provide for a mandatory blood alcohol testing program, an underage drinking program, an open container and consumption program, or a suspension of registration and return of license plate program.

During the decade and a half since the inception of the Section 410 program, it has been amended several times to change the grant criteria and grant award amounts. The most recent amendments prior to those leading to this action arose out of the Transportation Equity Act for the 21st Century (TEA–21), Pub. L. 105–178. TEA–21 amended both the grant amounts and the criteria that States had to meet to qualify for both basic and supplemental grants under the Section 410 program. Under TEA–21, States qualified for a "programmatic" basic grant by meeting five of the seven following criteria: An administrative driver's license suspension or revocation system; an underage drinking prevention program; a statewide impaired-driving traffic enforcement program; a graduated driver's license system; a program to target drivers with a high blood alcohol concentration (BAC) level; a program to reduce drinking and driving among young adults (between the ages of 21 and 34); and a BAC testing program. In addition, States could qualify for a "performance" basic grant by demonstrating that the percentage of fatally injured drivers in the State with a BAC of 0.10 or more had decreased in each of the three previous calendar years and that the percentage of fatally injured drivers with a BAC of 0.10 or more in the State was lower than the average percentage for all States in the same three calendar years. Supplemental grants were also available for States that received a programmatic and/or performance grant and met additional criteria.

On August 10, 2005, the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (SAFETEA–LU) was enacted (Pub. L. 109–59). Section 2007 of SAFETEA–LU made new amendments to 23 U.S.C. 410. These amendments again modified the grant criteria and the award amounts and made a number of structural changes to streamline the program.

II. Section 410 Statutory Requirements

The SAFETEA–LU amendments, which take effect in FY 2006, retain the basic grant structure of the old Section 410 Program but eliminate all supplemental grants. States may qualify for a grant in one of two ways. A State determined to be a "low fatality rate State" by virtue of having an alcohol-related fatality rate of 0.5 or less per 100 million VMT is eligible for a grant. SAFETEA–LU prescribes that fatality rates are to be determined by using data from NHTSA's Fatality Analysis Reporting System (FARS). States may also qualify by meeting certain programmatic requirements. A State may qualify as a "programmatic State" by demonstrating compliance with several specified criteria. A State must demonstrate compliance with three of eight alcohol-impaired driving prevention programmatic criteria in FY 2006, four of eight in FY 2007, and five of eight in FY 2008 and FY 2009. These criteria include the following: a high visibility impaired driving enforcement program; a prosecution and adjudication outreach program; a BAC testing program; a high-risk drivers program; an alcohol rehabilitation or DWI court program; an underage drinking prevention program; an administrative driver's license suspension or revocation system; and a self-sustaining impaired driving prevention program. Five of these programmatic criteria are continued from the TEA–21 basic grant criteria with minor modifications. SAFETEA–LU eliminated two programmatic criteria from the TEA–21 basic criteria—the graduated driver's licensing system and the young adult drinking and driving program. These criteria were replaced by a prosecution and adjudication outreach program and the alcohol rehabilitation or DWI court programs—two new programmatic criteria. The eighth programmatic criterion, the self-sustaining impaired driving prevention program, existed under TEA–21 as a supplemental grant criterion and is continued under SAFETEA–LU as the equivalent of a programmatic basic grant criterion under the old Section 410 program.

The SAFETEA–LU amendments include provisions for separate grants to be made to "high fatality rate States." Each of the ten States with the highest alcohol-related fatality rates, based on FARS data, are eligible for a separate grant. High fatality rate States may also qualify for funding as programmatic States.

III. Section 410 Administrative Requirements

Under SAFETEA–LU, a number of administrative requirements apply to the Section 410 program. States that qualify for grants under Section 410 are to receive funds in accordance with the apportionment formula in Section 23 U.S.C. 402(c)—75 percent in the ratio which the population of each State bears to the total population of all qualifying States and 25 percent in the ratio which the public road mileage in each State bears to the total public road mileage of all qualifying States. The funds available each fiscal year for separate grants to the ten States with the highest fatality rates are statutorily limited to not more than 15 percent of the funding for the entire Section 410 program for that fiscal year, with no single State receiving more than 30 percent of that amount. These funds, too, are to be distributed in accordance with the apportionment formula in 23 U.S.C. 402(c).

SAFETEA–LU provides that States may use grant funds for any of the eight identified alcohol-impaired driving prevention programs or to defray the following specified costs:

(1) Labor costs, management costs, and equipment procurement costs for the high visibility, Statewide law enforcement campaigns under subsection (c)(1).

(2) The costs of the training of law enforcement personnel and the procurement of technology and equipment, including video equipment and passive alcohol sensors, to counter directly impaired operation of motor vehicles.

(3) The costs of public awareness, advertising, and educational campaigns that publicize use of sobriety check points or increased law enforcement efforts to counter impaired operation of motor vehicles.

(4) The costs of public awareness, advertising, and educational campaigns that target impaired operation of motor vehicles by persons under 34 years of age.

(5) The costs of the development and implementation of a State impaired operator information system.

(6) The costs of operating programs that result in vehicle forfeiture or impoundment or license plate impoundment.

States are required to match the grant funds they receive. The Federal share may not exceed 75 percent of the cost of the State's activities under the Section 410 program in the first and second fiscal years and 50 percent in the third and fourth fiscal years. States must also maintain aggregate expenditures from all other sources for their alcohol-

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impaired driving prevention programs at or above the average level of such expenditures in fiscal years 2004 and 2005.

IV. Notice of Proposed Rulemaking

The agency published a notice of proposed rulemaking (NPRM) on January 3, 2006 (71 FR 29) to implement the new Section 410 program requirements under SAFETEA–LU. The proposal set forth the requirements for grant awards to States that satisfy the statutorily-specified minimum number of programmatic criteria, depending on the grant year. The proposal also set forth the requirements for grant awards to States that qualify as high or low fatality rate States. The proposal specified an annual application deadline of August 1 and required States to certify that they would conduct activities and use funds in accordance with the requirements of the Section 410 program and other applicable laws.

Consistent with the procedures in other highway safety grant programs administered by NHTSA, the proposal provided that, within 30 days after notification of award, States must submit an electronic HS Form 217 obligating the grant funds to alcohol-impaired driving prevention programs. The proposal also required States to identify their proposed use of grant funds in the Highway Safety Plans prepared under the Section 402 Program and to detail program accomplishments in the Annual Report submitted under that program. The proposal explained that these documenting requirements must continue each fiscal year until all grant funds have been expended.

To satisfy the statutory requirement that a State match grant funds, the agency proposed to accept a "soft" match in the administration of the Section 410 program, as it has in other grant programs (i.e., States could count other highway safety expenditures in the State, irrespective of whether those expenditures were made for this program). In addition, the agency proposed that States could use up to 10 percent of the total funds received under 23 U.S.C. 410 for planning and administration (P&A) costs. As with the Section 402 program, the proposal limited Federal participation in P&A activities to not more than 50 percent of the total cost of such activities.

V. Comments

The agency received submissions from twenty commenters in response to the NPRM—five from State agencies, thirteen from professional organizations, and two from ignition interlock manufacturers. The State comments were submitted by the Office of Traffic Safety of the Minnesota Department of Public Safety (Minnesota); the Bureau of Transportation Safety of the Wisconsin Department of Transportation, Division of State Patrol (Wisconsin); the West Virginia Highway Safety Program of the West Virginia Department of Transportation, Division of Motor Vehicles (West Virginia); and the Division of Traffic Safety of the Illinois Department of Transportation (Illinois). The Transportation Departments of the States of Idaho, Montana, North Dakota, South Dakota, and Wyoming submitted joint comments through their counsel (the Joint State Commenters). The professional organization comments were submitted by the National Traffic Law Center (NTLC); the Governor's Highway Safety Association (GHSA); Advocates for Highway and Auto Safety (Advocates); Mothers Against Drunk Driving (MADD); the Conference of State Court Administrators (COSCA); the Beer Institute; the Hospitality Resource Panel; the Maryland State Licensed Beverage Association; the New Jersey Licensed Beverage Association, Inc.; Techniques of Alcohol Management/Nevada; the Michigan Licensed Beverage Association; the Alaska Cabaret, Hotel, Restaurant and Retailer's Association; and Techniques of Alcohol Management. The last eight listed organizations submitted a substantially similar comment, and are referred to collectively below as the TAM Commenters when addressing that comment. The ignition interlock manufacturer comments were submitted by National Interlock Systems, Inc. and LifeSafer Interlock, Inc.

A. In General

The agency received a variety of comments in response to the NPRM. Illinois agreed with the proposal and thought that it provided "an appropriate outline" for deterring impaired driving in the State. Advocates stated that the agency "made reasonable decisions as to the requirements that must be met by 'programmatic States.'" MADD expressed general agreement with the regulation and each of the programmatic criteria.

In contrast, GHSA stated that "the regulations proposed * * * go beyond the statutory language," and expressed concern that "the requirements will make it difficult for states to qualify for 410 grants, particularly in the last two years of the grant program." The Joint State Commenters echoed this concern, asserting that "[b]ecause of regulatory add-ons, it will become more difficult for States to qualify for Section 410 funds on a programmatic basis. * * *" The Beer Institute asked the agency to reconsider inclusion of additional regulatory requirements in its proposal, but did not identify any specific requirements. Wisconsin and GHSA viewed the proposal as overly restrictive and believed its operation would not provide enough flexibility to deal with problems inherent to a particular State.

These and other more specific comments related to the requirements that States must meet to qualify for grants are addressed below, under the appropriate heading. The agency received at least one comment concerning each of the eight criteria States must meet to qualify as a programmatic State and the requirements that States must meet to qualify for a grant as a low or high fatality rate State.

B. Comments Regarding Programmatic Criteria

1. High Visibility Impaired Driving Enforcement Program

To qualify for a grant based on this criterion, SAFETEA–LU requires a State to have:

> A State program to conduct a series of high visibility, statewide law enforcement campaigns in which law enforcement personnel monitor for impaired driving, either through the use of sobriety check points or saturation patrols, on a nondiscriminatory, lawful basis for the purpose of determining whether the operators of the motor vehicles are driving while under the influence of alcohol—
>
> (A) If the State organizes the campaigns in cooperation with related periodic national campaigns organized by the National Highway Traffic Safety Administration, except that this subparagraph does not preclude a State from initiating sustained high visibility, Statewide law enforcement campaigns independently of the cooperative efforts; and
>
> (B) If, for each fiscal year, the State demonstrates to the Secretary that the State and the political subdivisions of the State that receive funds under this section have increased, in the aggregate, the total number of impaired driving law enforcement activities at high incident locations (or any other similar activity approved by the Secretary) initiated in such State during the preceding fiscal year by a factor that the Secretary determines meaningful for the State over the number of such activities initiated in such State during the preceding fiscal year.

The NPRM proposed that a State would be required to participate in the national impaired driving campaign organized by NHTSA, conduct a series of additional high visibility law enforcement campaigns within the State on a monthly basis throughout the year, and use sobriety checkpoints and/or saturation patrols during these efforts.

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To demonstrate compliance under the NPRM, the State would be required to submit a comprehensive plan that included guidelines, policies or procedures governing the Statewide enforcement program; dates and locations of planned law enforcement activities; a list of law enforcement agencies expected to participate (which must include agencies serving at least 50 percent of the State's population or serving geographic subdivisions that account for at least 50 percent of the State's alcohol-related fatalities in the first year, increasing thereafter); and a communications plan that includes a paid media buy plan, if the State buys media, and a description of anticipated earned media activities before, during and after planned enforcement efforts.

GHSA stated that small, rural States would have a difficult time meeting the requirement that participating law enforcement agencies cover either 50 percent of the population or a geographic area that accounts for 50 percent of the State's alcohol-related fatalities. GHSA also expressed concern that States might have to "enlist the support of every law enforcement agency in the geographic area" and compliance would be jeopardized if even one law enforcement agency declined to participate.

The proposed 50 percent population-based or fatality-based options for the first year of the new program mirror the requirement that existed in the regulation implementing the predecessor Section 410 program authorized under TEA–21, based on similar statutory language. (TEA–21 and SAFETEA-LU both require States to conduct a "Statewide" law enforcement effort.) All 34 States that received Section 410 programmatic grants in FY 2005 under the predecessor program, including several small, rural States, met this requirement. The agency believes that the 50 percent level is a generous interpretation of the statutory requirement for Statewide coverage and an achievable measure by all States.

Moreover, the proposal does not require States to include as participating agencies all law enforcement agencies operating within a certain geographic area for that area to count toward meeting the 50 percent requirement. The agency is mindful that overlapping jurisdictions exist at county and local levels. The State is required to include only a single law enforcement agency operating within a particular jurisdiction for that area (as determined by population or geography) to count toward the 50 percent requirement. The agency has revised the rule to include a definition of law enforcement agency. A law enforcement agency refers to an agency that is identified by the State and included in an enforcement plan for purposes of meeting the coverage requirements of the State during high visibility enforcement campaigns. While this clarifies the minimum requirement, we encourage States to include as many agencies as possible in their Statewide enforcement plans.

Minnesota questioned the agency's requirement that participating law enforcement agencies conduct checkpoints and saturation patrols on at least four nights during the National Campaign. Minnesota viewed the requirement as "extremely costly" and believed it would discourage smaller law enforcement organizations from voluntary participation in the program.

The impact of the High Visibility Impaired Driving Program Criterion on traffic safety is dependent on increasing high visibility enforcement efforts in the State. While such efforts are not without cost, the amount of funds available under the Section 410 program has tripled under the current statute, and these funds may be used to cover the costs of Statewide enforcement. Under these circumstances, the agency does not believe that a requirement for participation in enforcement campaigns on only four nights during the National Impaired Driving Crackdown that occurs once a year presents an unreasonable burden.

Moreover, within the proposal's definition of sobriety checkpoint and high saturation patrol, there is tremendous flexibility to accommodate mobile or "flexible" checkpoints and task force arrangements that are multi-jurisdictional. For smaller law enforcement agencies that may not be able to commit resources to four activities during the national campaign, States may use partnerships or task force arrangements between law enforcement agencies. Qualifying participation by a smaller law enforcement agency under a task force arrangement would be satisfied by involvement of one officer—a manageable level of effort. For these reasons, we decline to change the requirement for four-night participation.

The Joint State Commenters took issue with the proposed requirement that States conduct additional monthly activities outside the period of the national campaign. In their view, the statute precludes such a requirement and leaves this decision to the discretion of the States.

The agency's proposal that States participate in monthly enforcement activities as well as the national campaign derives from the statutory language directing a State to conduct "a series of" high visibility, Statewide law enforcement efforts. The agency believes that limiting State enforcement activities to the period of a single national campaign under this criterion does not meet the statutory requirement or intent for a "series" of efforts. Evidence has shown that sustained enforcement programs have produced the largest declines in alcohol-related crashes (e.g., Checkpoint Tennessee)—single short-term enforcement programs targeting impaired driving have not shown similar effects.

The agency recognizes, however, that some largely rural States may have difficulty conducting monthly law enforcement activities aimed at impaired drivers. In these States, it may be impracticable because of weather conditions and rural expanses for all participating law enforcement agencies to conduct an activity every month, placing them at a disadvantage when compared to other States. These concerns have been raised in the past, in response to experience under the predecessor Section 410 program. To address these concerns and increase the parity between States in varying geographic regions, we have revised the rule to require that a State provide at least quarterly law enforcement activities during the year. Under the revision, participating law enforcement agencies will have to conduct activities on four nights during the national campaign and conduct four additional efforts, one during each quarter of the year.

Under SAFETEA–LU, a State's continued compliance with the criterion requires that it increase the amount of impaired driving law enforcement activity over the previous year. The agency's proposal requires that a State submit a plan in each successive year of the program that increases the percent of the population reached by five percent. (The proposal inadvertently did not include language allowing the alternative option of an increase in the geographic area covered. We have amended the rule to provide that option, for consistency and conformity with the requirements at the 50 percent levels.) The increase is measured from the initial requirement that a State must use law enforcement agencies collectively serving at least 50 percent of the State's population or serving geographic areas that account for at least 50 percent of the State's alcohol-related fatalities. This approach mirrors the approach taken under the Strategic Evaluation States program.

The Joint State Commenters took exception to this approach, claiming

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that it ignored meaningful increases that occurred below 50 percent, such as an increase in law enforcement coverage from 20 percent to 40 percent. The Joint State Commenters urged the agency to accept such increases and also to consider meaningful any increase in the total number of law enforcement activities conducted in a State.

The comment ignores the threshold statutory requirement that the State conduct a "statewide" program. Law enforcement activity that covers only 20 percent or even 40 percent of the State does not satisfy this baseline requirement. The agency believes that a 50 percent floor is already generous in this regard, in view of the statutory language, and has made no change to the rule.

The agency does not believe that an increase in the total number of law enforcement activities conducted is a practicable measure under this criterion. Such an approach relies on State impaired driving law enforcement data, and States are currently experiencing difficulty in obtaining accurate data. Several comments highlighted this problem. Minnesota indicated that "a State does not fund all impaired driving enforcement activity conducted in the state and can't require a law enforcement agency to report data on an activity that is funded locally." According to Minnesota, "no state would be able to certify that the number they provided was accurate." GHSA stated that it is "extremely difficult for some states to provide such data for agencies that do not receive grants."

For these reasons, the agency declines to adopt the approach of using an increase in the number of law enforcement activities as a measure. Adding participating law enforcement agencies incrementally ensures an increase in law enforcement activity without the need to rely on data that may be hard for States to collect. States are still encouraged to collect data and make all due effort to record all of the impaired driving law enforcement activity that is conducted in the State in a given year.

West Virginia expressed concern that States with plans that initially cover 65 percent or more of the State's population or geographic areas would find it difficult to achieve an increase beyond that amount in subsequent years in order to maintain compliance. West Virginia requests that the agency consider a decrease in the impaired driving fatality rate as an alternative to the requirement that a State meaningfully increase its law enforcement activities.

Under the agency's proposal, compliance with this provision does not require a State to achieve increases above 65 percent. If a State submits a plan in a grant year that covers 65 percent or more of the State, it is not required to produce plans in subsequent grant years that demonstrate additional increases. This approach is intended to accommodate rural States with diffuse populations that may find it difficult to achieve increases beyond 65 percent. However, we encourage States to include in their enforcement plans as many law enforcement agencies as possible, as studies indicate that increasing the scope of a high visibility enforcement campaign will serve to reduce impaired driving fatalities faster than with a more limited effort. West Virginia's request that the agency consider a decrease in the impaired driving fatality rate as an alternative is inconsistent with the statute, which specifies an increase in the number of law enforcement activities as the measure. However, States that decrease their impaired driving fatality rate to .5 or less per 100,000,000 vehicles miles traveled are eligible to receive a Section 410 grant without the need to meet any programmatic criteria.

MADD requested that the agency define the term "high-incident locations". The term is not used in the rule and we decline to do so. The term is used as part of the statutory requirement that States meaningfully increase law enforcement at "high-incident locations." The agency's proposal largely obviates the need for a definition by requiring that a State's enforcement plan use law enforcement agencies that serve geographic areas that account for at least 50 percent of the State's alcohol-related fatalities. In this way, the plan would concentrate efforts on high-incident areas simply as a product of using law enforcement agencies in those areas. The agency is concerned that a set definition may inadvertently eliminate certain areas that could benefit from high visibility law enforcement. We are satisfied that States will naturally focus efforts in areas that have the greatest impact on traffic safety.

GHSA asserted that States could not submit detailed media and enforcement plans until they received notification of grant award. We do not expect a State to buy media in advance of the grant award. Rather, the State need only provide its intended media approach in a general plan. As GHSA recognizes, general plans could include information regarding the relative reach a State would expect to attain with the media buys or the type of audience the messaging would target. In addition to this information, the agency expects to receive information on the areas of the State that would be targeted and how the media approach will reach the intended audience. The agency's proposal is broad enough to accommodate this approach. We do not agree that States will be unable to provide a list of law enforcement agencies expected to participate in the effort. The planning requirement is necessary to ensure that States have created a Statewide plan. The same requirement existed under the predecessor Section 410 program and all States receiving grant funds in FY 2005 were able to provide this information in an application.

2. Prosecution and Adjudication Outreach Program

To qualify for a grant based on this criterion, SAFETEA–LU requires a State to have:

> A State prosecution and adjudication program under which—
> (A) The State works to reduce the use of diversion programs by educating and informing prosecutors and judges through various outreach methods about the benefits and merits of prosecuting and adjudicating defendants who repeatedly commit impaired driving offenses;
> (B) The courts in a majority of the judicial jurisdictions of the State are monitored on the courts' adjudication of cases of impaired driving offenses; or
> (C) Annual statewide outreach is provided for judges and prosecutors on innovative approaches to the prosecution and adjudication of cases of impaired driving offenses that have the potential for significantly improving the prosecution and adjudication of such cases.

Under the agency's proposal, to achieve compliance with this criterion, a State would be required to conduct educational outreach for court professionals that focuses on innovative sentencing techniques in the prosecution and adjudication of impaired drivers; conduct educational outreach that focuses on the negative aspects of using diversion programs; or use a court monitoring program that collects specific information from a majority of State courts.

The agency received several comments related to the prosecution and adjudication outreach programs that a State must conduct. As a general matter, commenters expressed concern about the level of agency review of course content and the perceived requirement to use NHTSA courses. GHSA recommended that NHTSA publish a list of acceptable programs and allow States to select from the list. The Joint State Commenters did not

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object to a review of course content by NHTSA, but thought States should have the "final say on the diversion and innovative approaches materials." Wisconsin requested further information on the types of programs that would be acceptable to the agency, including the required frequency of the training courses. Most of these commenters viewed the agency's proposal as reducing the States' flexibility to tailor course content to State needs.

The agency did not intend to impose specific course content requirements on States or to reduce State flexibility to design effective courses, nor did it intend to require States to use NHTSA or other particular training materials. The use of the term "NHTSA-approved courses" in the regulatory text was intended to denote State-submitted course material that the agency reviewed during the application process and approved for use under the Section 410 program. Similarly, the certification process was intended to assure that once material is approved for use it will not be changed at a later point in time without the knowledge of the agency.

In view of the confusion expressed by these commenters, the agency has deleted the term "NHTSA-approved courses" and replaced it with language that better clarifies this intent. Additionally, to respond to the comment that more guidance on program content be provided, we have revised the rule to provide a list of topics that each educational outreach program must address. The agency's approach ensures that States retain the flexibility to determine the specific course content used. States will not need to submit full course material to the agency for review and approval. Instead, States will submit a course syllabus and a certification that the outreach program covers the course topics listed in the rule.

For an outreach program that provides training on innovative sentencing techniques in the prosecution and adjudication of impaired drivers, the rule provides that the course topics must include: (1) The use of alcohol assessments and treatment; (2) vehicle sanctions (which may include impoundments, plate sanctions, ignition interlock installation use, etc., depending on the status of State law); (3) electronic monitoring and home detention; and (4) information on DWI courts and other types of treatment courts. For an outreach program that focuses on the negative aspects of using diversion programs, the rule provides that the course topics must include: (1) The State's impaired driving statutes and applicable case law; (2) searches, seizures and arrests (an examination of current statutes and case law); (3) admissibility of evidence in impaired driving cases; (4) biochemical and physiological information (covers effects of drugs and alcohol on the human body); and (5) sentencing of impaired drivers.

The agency has stopped short of requiring course materials for each program. However, States that are seeking additional guidance may choose to consult the NHTSA publications and funded training materials, Strategies for Addressing the DWI Offender: 10 Promising Sentencing Practices; Prosecuting the Impaired Driver: DUI/DWI Cases; and The Court's Role in Impaired Driving, for help in developing their own curriculum. The final rule continues to require that the education program be provided on an annual basis, but clarifies that it is to be provided at least once a year and to consist of eight hours of training, in response to Wisconsin's query. States may choose to include the training as part of a Statewide legal conference or grant continuing education credit for attendance.

Wisconsin and COSCA requested that the agency identify certain situations where diversion programs might be considered appropriate or beneficial, and therefore appropriate for inclusion in course content. We decline to do so. The statutory provision governing this criterion requires States to work to "reduce the use of diversion programs [for] defendants who repeatedly commit impaired driving offenses." In view of this specific requirement, it would be inappropriate for the agency to make recommendations that might lead to an increase in the use of diversion programs. As we explained in the NPRM, diversion programs that allow an offender to obtain a reduction or dismissal of an impaired driving charge or removal of an impaired driving offense from a driving record based on participation in an educational course or community service activity are problematic. Repeat offenders escape detection under these types of programs. States are free to discuss other programs that fall outside of the definition and, therefore, are not considered diversion programs under this criterion.

NTLC was concerned that the agency's proposal would create an "express partnership between judges and prosecutors," in contravention of their ethical duties. NTLC also disagreed with the agency's statement in the preamble to the NPRM urging judges and prosecutors to exercise oversight in using diversion programs to ensure that the records of impaired driving remain available for enhancement in the event of recidivism. NTLC views record availability as a legislative matter and not an obligation of a judge or a prosecutor.

Nothing in the agency's proposal requires judges and prosecutors to act in contravention of their ethical duties, and no changes are necessary. Diversion programs, as the agency has defined them in this rule, are programs that result in the removal of an impaired driving charge from a driving record. Although States may have specific laws or policies regarding the treatment of diverted defendants' records, prosecutors present the use of diversion programs and judges approve that use. In this way, prosecutors and judges have control over whether records are available for review in the event of an offender's recidivist behavior.

Commenters raised several issues about the use of a State Judicial Educator (SJE) under the proposal. Wisconsin asked the agency to provide a definition for the position and asked whether the use of a State Judicial Education Office would qualify. GHSA asked the agency to clarify the requirements.

The proposal did provide a definition. The proposal defined the SJE as an individual used by the State to provide support in the form of education and outreach programs and technical assistance to continuously improve personal and professional competence of all persons performing judicial branch functions. The agency agrees that a State Judicial Education Office is an acceptable alternative to the use of an individual to provide judicial education. The agency has revised the definition to allow the use of either an individual or an entity that provides judicial education. In response to GHSA's request for clarification, we believe that the definition is flexible enough to accept as qualifying any individual or office the State designates as responsible for judicial education statewide. The State may determine the type of qualifications and background necessary to carry out that role. Subject to these qualifications, current judges, retired judges, or judges with impaired driving case experience, for example, may serve as a State's SJE.

MADD suggested that the agency amend the proposal to ensure that a State use only full-time Traffic Safety Resource Prosecutors (TSRPs) and SJEs. The agency intended that these positions would be on a full-time basis. We have revised both of the definitions to make this clear.

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GHSA stated that highway safety offices would not receive additional funding over the course of SAFETEA–LU that would enable them to fund the SJE or TSRP positions. The agency has set no requirement on how these positions should be funded. However, provided that the positions offer impaired-driving-related educational programs to judges and prosecutors, they may be funded under Section 410, which provides substantially increased funds from previous years. In response to GHSA's comment, the agency has revised the rule to require that the State submit a list of impaired-driving-related educational programs offered by each position to ensure that States may use Section 410 funds for these activities. As almost all States already make use of an SJE position and do so without regard to this criterion, we do not believe that funding impediments are a significant issue.

The agency received a number of comments related to the court monitoring program. GHSA requested that the regulation more clearly define the court monitoring program, and asked whether a State tracking system that recorded the offender's arrest, conviction and disposition of the charges would qualify. COSCA thought that this program lacked explicit and defined performance criteria, and requested that the agency revise the terminology. NTLC was concerned that confusion would result between this criterion and other agency grant programs that involve court monitoring.

A significant goal of the prosecution and adjudication outreach program criterion is to inform States about how their courts treat impaired drivers. With the information collected, States should be able to identify jurisdictions that do not fully prosecute and adjudicate impaired drivers. To comply under the proposal, a State must collect data from at least 50 percent of its courts (consistent with the statutory requirement that a majority of the courts be covered) and the data collected must include the original charges filed against a defendant, the final charges presented by the prosecutor, and the disposition of the charges or the sentence provided. The appropriate method for collecting this information is not detailed in the rule and is left to the discretion of the individual States. The compliance requirements are straightforward and the agency does not believe that additional performance criteria need to be specified. The requirements of this criterion are separate from any other grant program of the agency, and there is no reason to believe that confusion might result.

3. BAC Testing Program

To qualify for a grant based on this criterion, SAFETEA–LU requires a State to have:

> An effective system for increasing from the previous year the rate of blood alcohol concentration testing of motor vehicle drivers involved in fatal crashes.

Under the NPRM, to demonstrate compliance with this criterion, a State would be required to increase its rate of blood alcohol testing from one year to the next. States under the testing average of 50 percent would be required to experience an increase of 5 percent each year and States over this average would be required to experience an increase of 5 percent of the untested drivers in the State. To determine compliance, the agency proposed to use FARS data. The agency did not specify particular elements of an effective system, choosing instead to rely on data as a measure of compliance with this criterion.

The Joint State Commenters asserted that the statute merely requires a State to have a "system" for increasing BAC testing, without the need to actually achieve increases, and that even decreases should be acceptable provided a system is in place. Alternatively, The Joint State Commenters took issue with the agency's requirement that States achieve a five percent increase in BAC testing each year to achieve compliance, asserting that the agency was not free to disregard small increases based on the statutory language. The Joint State Commenters requested that the agency count any percentage increase in BAC testing for purposes of compliance.

With respect to the first argument, we disagree. SAFETEA–LU requires a State to implement an "effective" system for increasing BAC testing. A system that does not produce increases or that results in decreases is not an "effective" system under the statute. We address the assertion that a system for increasing BAC, alone, should be sufficient in more detail in our response to comments from Advocates, below.

With respect to the second argument, we acknowledge that the statute does not specify the amount of increase required. In light of the comment, we have reviewed the FARS data that forms the basis for these calculations and determined that a one percent increase would be acceptable to meet the minimum intent of the statute. Amounts below one percent are not commensurate with a system that is "effective." We have revised and simplified the rule to require that all States, regardless of BAC testing level, achieve a one percent increase in the BAC testing rate over the previous year to be compliant with the criterion. We have also removed from the rule the conversion rate approach that would have required smaller incremental increases for States with BAC testing above 50 percent, in view of the overall decrease in the requirement.

To ensure uniform treatment of all States and consistency in the determination of BAC increases under this revised approach, the agency will make necessary calculations based on the final FARS data, determine each State's compliance, and notify the States each year. To accommodate this, we have made two changes to the proposed rule. First, we have included language indicating that the BAC rate determinations will be made by the agency. Second, we have removed the requirement for a State to certify that it has achieved the required BAC rate to demonstrate compliance, since the agency will make that determination. In its place, we have substituted a requirement for a simple statement that the State intends to apply on the basis of achieving the required BAC testing rate increase.

Wisconsin questioned the agency's requirement that States with BAC testing above the national average achieve additional increases. SAFETEA–LU amended the previous statutory requirement that allowed a State to comply with a testing rate equal to or above the national average. The new statutory language requires States to have systems that increase BAC testing rates over the previous year regardless of whether the rate exceeds the national average.

Minnesota stated that compliance would be much more difficult for states that already had a very high testing percentage, and recommended that any State testing above 85 percent be deemed automatically in compliance. The agency's revised approach under the final rule requires a one percent increase each year regardless of the State's testing average. For States with high testing rates, we agree that further increases may be more difficult to achieve. However, under a one percent increase requirement, States with higher testing levels need only report a small number of additional BAC tests each year. Even in States with the highest testing levels, we believe that this is a manageable requirement. We note that Minnesota's suggestion to cap required increases at 85 percent, which we do not adopt, would not impact any State, based on the most currently available BAC testing data. The highest reported

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testing rate for any State is just over 80 percent.

Advocates believe that the agency's regulation should provide system goals for States in addition to the performance requirements. At a minimum, according to Advocates, States should be required to enact and maintain laws that require mandatory BAC testing both for drivers who are killed in a fatal crash and for those who survive a crash in which a fatality occurs.

For the first two years of the Section 410 program under TEA–21, the agency allowed States to achieve compliance with a limited set of system goals. These goals included enacting laws that mandate testing or conducting annual statewide workshops that promote good testing and reporting practices. In spite of this approach, the national average for BAC testing remained relatively constant under TEA–21.

We understand, however, that determining compliance purely on achievement of performance goals may dissuade States from attempting any activities that achieve BAC testing increases. For this reason, in response to Advocates' comment, the agency has revised the proposal to include an alternative requirement (but not a requirement that operates in addition to the performance requirement, as Advocates suggests). A State may achieve compliance in FY 2006 and FY 2007 by submitting a plan for increasing its BAC testing rate. The plan must consist of approaches that the State will take under the grant to achieve an increase in BAC testing that would meet the performance requirements of the criterion. To achieve compliance, the plan must include a description of each approach, including how it will be implemented and the expected outcome as a result of implementation. Approaches may include, as Advocates suggests, the enactment of a law mandating BAC testing. A State may also include approaches that resolve failures in the reporting of BAC test results. Statewide symposiums and workshops may be used as long as they bring together key officials in the State such as law enforcement officials, prosecutors, hospital officials, medical examiners, coroners, physicians, and judges and discuss the medical, ethical and legal impediments to increasing BAC testing.

After FY 2007, a State may no longer use the planning requirement to satisfy this criterion, unless it has a law in place that requires the testing of drivers in all fatal crashes—it must instead meet the performance requirement of this criterion. The planning requirement will be available to States in these later years of the program, in lieu of the performance requirement, only if they also have a law mandating the testing of all drivers in all fatal crashes. A compliant law must require testing in all fatal crashes and may not condition the use of tests on the establishment of probable cause. We have amended the proposal to provide for this alternative. We believe that the performance requirement and the planning requirement alternative, taken together, strike the appropriate balance between the need for actual increases in testing and the recognition that an effective system requires time to affect the testing numbers. We have also amended the rule to require that States complying with the planning requirement in subsequent years must also submit information demonstrating that the plan was effectively implemented and an updated plan for increasing BAC testing.

Wisconsin stated that breath testing is legally equivalent to blood testing and asked whether the agency considered this in its approach. The agency's proposal accommodates Wisconsin's concern. It continues the approach taken in TEA–21 that defines BAC to mean grams of alcohol per deciliter or 100 milliliters of blood or grams of alcohol per 210 liters of breath.

4. High Risk Drivers Program

To qualify for a grant based on this criterion, SAFETEA–LU requires a State to have:

> A law that establishes stronger sanctions or additional penalties for individuals convicted of operating a motor vehicle while under the influence of alcohol whose blood alcohol concentration is 0.15 percent or more than for individuals convicted of the same offense but with a lower blood alcohol concentration. For purposes of this paragraph, "additional penalties" includes—
>
> (A) A 1-year suspension of a driver's license, but with the individual whose license is suspended becoming eligible after 45 days of such suspension to obtain a provisional driver's license that would permit the individual to drive—
>
> (i) Only to and from the individual's place of employment or school; and
>
> (ii) Only in an automobile equipped with a certified alcohol ignition interlock device; and
>
> (B) A mandatory assessment by a certified substance abuse official of whether the individual has an alcohol abuse problem with possible referral to counseling if the official determines that such a referral is appropriate.

The agency's proposal provides that a State suspend the license of an individual convicted of impaired driving with a blood alcohol concentration of 0.15 or higher for one year. The proposal provides that, after 45 days, the State may allow the individual to receive a restricted license that would permit the use of a vehicle equipped with an ignition interlock. Driving would be restricted to places of employment, school or treatment. A qualifying State must also require that offenders be subject to a mandatory assessment by certified substance abuse officials.

National Interlock Systems, Inc. expressed concern about language in the preamble to the NPRM directing the State's use of ignition interlocks that meet the agency's performance specifications for ignition interlocks (57 FR 11772). National stated that any update to the agency's specifications would impose a significant financial burden on the interlock industry unless they were phased-in over time. The agency's performance specifications are provided as guidance, and States have discretion to adopt the specifications or develop their own. The regulatory language does not impose a requirement to use the agency's specifications. As a matter of sound practice, however, we recommend that States adopt these specifications. The commenter's concerns about phase-in requirements under performance specifications are outside the scope of this action, and should be addressed to efforts under those specifications.

LifeSafer Interlock, Inc. asserted that the requirement that an offender install an ignition interlock in every vehicle owned and every vehicle operated "will only serve to economically force most offenders to opt out" of the ignition interlock program and thereby limit overall use of interlocks. The agency explained that its reason for imposing the requirement was to ensure that driving restrictions are not easily circumvented. LifeSafer's own comment acknowledges that "the majority of the recidivism while an interlock is installed is a result of the use of non-interlock equipped vehicles." While there are good and practicable reasons for requiring installation of interlocks in all vehicles, the statutory language identifies the interlock requirement as a sanction that attaches to the individual's license. Accordingly, the agency has revised the proposal to remove the requirement that an offender install interlocks in all vehicles owned and all vehicles operated. We are retaining, without change, the requirement that a State provide a license that restricts the offender to driving only vehicles that are equipped with interlocks.

LifeSafer requests that the agency include an exemption to the interlock requirement for employer-owned vehicles. This request appears to be based on the statutory language that

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restricts an offender to an interlocked-equipped vehicle when driving to places of employment. The commenter reasons that the language does not similarly restrict an offender's use of vehicles "while in the course employment," and that therefore the intent of the statute is not to force employers to install ignition interlocks. We agree that the statute does not require employers to install interlocks in their vehicles. However, the statute provides clear language that the offender is permitted to drive "only in an automobile equipped with a certified alcohol ignition interlock device." On this basis, the agency declines to revise the rulemaking to add a specific exemption for employer vehicles.

National and LifeSafer both noted that the agency's rule makes no provision for an offender to drive to an interlock service facility. We agree that travel to an interlock service facility is an inherent part of operating an interlock program, and have revised the proposal to allow for this.

The agency received one comment from one organization regarding the statutory requirement to provide alcohol assessments to high-risk offenders. GHSA recommended that the agency clarify the use of a certified substance abuse official and provide additional information regarding proper certification and training of these individuals. GHSA also requested that the agency provide examples of effective assessment tools.

The agency's proposal requires that a State use a certified substance abuse official to perform an alcohol assessment of a high BAC offender, but does not mandate the education or training background of these individuals or the process by which these individuals receive approval from the State to conduct alcohol assessments. The licensing of professionals is traditionally a function of the State and we see no reason to vary that approach in this rule. Most States already provide alcohol assessments to offenders and have developed the necessary infrastructure to implement these programs. A State is free to define a certification process, if it does not already have one, and to decide what level of education or training background a substance abuse official must have.

Assessment tools form the basis for appropriate treatment sentencing and the reduction of impaired driving recidivism. States have discretion to decide what type of assessment tools to use, and the agency takes no position about the relative value of any assessment method. However, in response to GHSA's query, the Addiction Severity Index (ASI) and the Structured Clinical Interview for Diagnosis (SCID) are two of the more well-known assessment tools. To minimize the effects of deficiencies in any one tool, we advocate the use of a combination of assessment tools.

5. Alcohol Rehabilitation or DWI Court Program

To qualify for a grant based on this criterion, SAFETEA–LU requires a State to demonstrate:

> A program for effective inpatient and outpatient alcohol rehabilitation based on mandatory assessment and appropriate treatment for repeat offenders or a program to refer impaired driving cases to courts that specialize in driving while impaired cases that emphasize the close supervision of high-risk offenders.

Under the agency's proposal, to demonstrate compliance with this criterion, the State would be required to institute either: An effective alcohol rehabilitation program that consists of mandatory assessment and treatment for repeat offenders, a statewide tracking system that monitors the progress of repeat offenders through treatment, and educational opportunities provided to court professionals that cover treatment approaches and sanctioning techniques; or a DWI court that abides by the Ten Guiding Principles of DWI Courts, as established by the National Drug Court Institute, and an increase of one DWI court each subsequent year of the program.

The agency received one comment regarding the proposed components of an effective rehabilitation program. The Joint State Commenters stated that the requirement to provide educational opportunities to court professionals was not referenced in the statute and that such a requirement should not be considered essential for an effective rehabilitation program. The agency believes that treatment sentencing is an important component of rehabilitating repeat offenders. We included the education requirement because court professionals do not always understand how to use the assessment information they are provided to apply the most effective treatment sanction. We acknowledge, however, that the requirement is somewhat redundant of the prosecution and adjudication outreach criterion listed above and that a training program conducted once a year is likely to result in only a marginal increase in the overall ability to use assessments. In view of the comment, we are also concerned that imposing this requirement may dissuade States from attempting compliance with the other more important components of the program. Although States are encouraged to provide educational opportunities to court professionals regarding the use of assessments and treatments, the agency has revised the rule to remove the requirement for an educational component.

The Joint State Commenters asserted that States should be free to set up their own DWI courts without having to meet the Ten Guiding Principles of DWI Courts. These commenters request that, at a minimum, the agency accept State courts that are in "substantial conformity" with the principles.

The Ten Guiding Principles of DWI Courts present a basis to understand the operation of DWI courts and to differentiate their use from general docket courts. Under the principles, DWI courts are required to target a population of offenders for the court; provide a clinical assessment and treatment plan for each offender; supervise the offender through treatment; forge partnerships with the agencies and organizations involved; develop case management strategies; address transportation issues; and evaluate outcomes and ensure that the program is sustainable. In addition, a judge takes responsibility for operation of the court. Many of these concepts are inherent to the operation of courts generally (*e.g.*, judicial leadership, cases managed with the involvement of all parties) and present no difficulty for State compliance. Other concepts are essential to operation of a treatment-based court (*e.g.*, providing treatments and assessments and monitoring offenders through treatment). All of them are fundamentally important to the proper operation of the court and none is impracticable or onerous. Consequently, the agency declines to take an approach that would allow a State to select among them. Allowing a court to stray from these principles provides no assurance that offenders will be processed using a treatment-based court.

The Joint State Commenters and GHSA commented that the statute does not support a requirement that a State increase the use of DWI courts each year of the program. GHSA further stated that the agency's proposed increase of one DWI court each year is not tailored to meet the needs of individual States.

For the first time under Section 410, States are eligible to receive grant funds based on using certain treatment methods. DWI courts represent a relatively new approach to sanctioning and treating repeat offenders. Although based on the noted success of drug courts, which are used extensively by

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all States, most States have yet to fully embrace the use of DWI courts to combat impaired driving. The agency's proposal intended to foster the development and use of DWI courts and set an achievable standard for all States. The soundness of this approach is confirmed by a recent survey of the National Drug Court Institute, documenting the number of drug courts operating in each State. Drug courts are functionally similar to DWI courts and, as the survey documents, even small States, determined by either geography or population, already make use of four or more of these courts. Specific examples from the survey include the States of Wyoming and Rhode Island, for example, which use 25 and 8 drug courts, respectively.

The commenters are correct that larger States, because of larger offender populations, may require the use of more courts. The agency's proposal in no way prevents a State from establishing more courts than the minimum specified. We do not believe, however, that the agency's proposal disadvantages smaller States at the required compliance levels.

The statute requires the development of a program to process high-risk offenders through DWI courts. Under the agency's proposal, a State achieves initial compliance with the development and implementation of one DWI court. The use of one court provides a minimal level of traffic safety benefit in a State of any size, given the limited amount of offenders that treatment courts process in a year. The requirement is not onerous, and we do not agree that the statutory intent is satisfied by a static effort that allows a State to receive grant funds year after year without further development of a program that uses courts.

In view of the comments, however, the agency has made two revisions to the proposal. In the NPRM, the number of courts required was a fixed number tied to the fiscal year of application (one court in FY 2006, two courts in FY 2007, and one additional court each year thereafter). The agency has revised the rule to allow the use of a minimum one court for initial compliance, regardless of the fiscal year of the application, a minimum of two courts for the second year of compliance, three courts for third year of compliance, and four courts for the fourth year of compliance. The revised approach removes any disincentive for a State that wishes to apply under this requirement, for the first time, in later years of the program. States that have four DWI courts are not required to demonstrate additional increases to remain compliant. We have also broadened the definition of a DWI court to allow a State to count toward compliance the use of hybrid courts that process both drug and high-risk DWI offenders.

6. Underage Drinking Prevention Program

To qualify for a grant based on this criterion, SAFETEA–LU requires a State to demonstrate:

> An effective strategy, as determined by the Secretary, for preventing operators of motor vehicles under age 21 from obtaining alcoholic beverages and for preventing persons from making alcoholic beverages available to individuals under age 21. Such a strategy may include—
>
> (A) The issuance of tamper-resistant drivers' licenses to individuals under age 21 that are easily distinguishable in appearance from drivers' licenses issued to individuals age 21 or older; and
>
> (B) A program provided by a nonprofit organization for training point of sale personnel concerning, at a minimum—
>
> (i) The clinical effects of alcohol;
>
> (ii) Methods of preventing second party sales of alcohol;
>
> (iii) Recognizing signs of intoxication;
>
> (iv) Methods to prevent underage drinking; and
>
> (v) Federal, State, and local laws that are relevant to such personnel; and
>
> (C) Having a law in effect that creates a 0.02 percent blood alcohol content limit for drivers under 21 years old.

Under the agency's proposal, to demonstrate compliance with this criterion, the State would be required to issue a tamper-resistant license to persons under the age of 21; conduct training through a nonprofit or public organization for alcohol beverage retailers and servers concerning the clinical effects of alcohol, methods of preventing second-party sales of alcohol, recognizing the signs of intoxication, methods to prevent underage drinking, and the relevant laws that apply to retailers and servers, and provide procedures that ensure program attendance; have a law that creates a blood alcohol limit of no greater than 0.02 percent for drivers under age 21; develop an enforcement plan that focuses on underage drivers' access to alcohol; and develop a communications strategy supporting the enforcement plan and includes media efforts and peer education.

The agency received several comments related to the training program for point-of-sale personnel. Wisconsin asked whether the training requirement applied to convenience stores and whether there is a standard curriculum for the course. Wisconsin also asked for information regarding the programs currently provided in other States. Minnesota stated that it was unclear how a State would be able to demonstrate program attendance for point-of-sale personnel.

Under the agency's proposal, compliant programs must provide training to all alcohol beverage retailers and servers. If a convenience store sells alcohol, then it must be included in the State's training program. The agency has not devised any required standard curriculum that must be used or cataloged the types of programs that States have used to comply with this requirement in the past. In response to Wisconsin's concerns, States wishing to receive more information regarding the practice of a particular State should contact the State directly.

The agency's proposal requires States to have procedures in place that ensure program attendance. Therefore, States must implement procedures that ensure every establishment retailing or serving alcohol receives the proper training. The agency did not intend, in the proposal, to require States to have procedures that track attendance by every individual employee of a retailer or to require proof of attendance in order to comply with the criterion. We have revised the rule to clarify these points. However, the State must provide a copy of the procedures it has put in place to ensure attendance.

The agency received two comments concerning point-of-sale training. The TAM commenters criticized the proposal's inclusion of public organizations as appropriate providers of the training, arguing that the term "public organizations" was omitted intentionally during the drafting of the statute to prevent local governments from establishing programs that might compete with non-profit programs. According to TAM, if public organizations are included, State and local governments will be forced to partner with a nonprofit organization in order to standardize point-of-sale training efforts nationwide. In contrast, Minnesota questioned why the agency's proposal limited point-of-sale training providers to only nonprofit or public organizations.

SAFETEA–LU specifies that the Secretary has discretion to devise the elements of an effective strategy that States adopt to confront the problem of underage drinking. While the statute makes specific reference to non-profit organizations, we disagree with TAM that its failure to reference public organizations precludes their participation. Under the predecessor Section 410 program, public organizations were considered appropriate providers of point-of-sale training. The agency included the term

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public organization in its proposal to make clear that a State may maintain compliance with this requirement using its own previously developed programs and training structures. Nothing in the statutory language suggests that Congress intended to dismantle these existing efforts. However, guided by the statutory language, the agency is not adopting Minnesota's suggestion that we further expand this group.

Several commenters questioned the agency's inclusion of peer education as a component of a compliant enforcement and communications strategy. GHSA objected to the requirement on grounds that peer education has not been proven effective and that its impact is questionable. Minnesota commented that it was not aware of any strong research that demonstrates peer education to be effective in altering behavior.

Peer education is a relatively new approach that uses youth-to-youth communication to highlight the problems of underage drinking. While we believe that studies are beginning to demonstrate the effectiveness of this approach, we agree with the commenters that further study and development should take place before making it a requirement of the Section 410 program. The agency has revised the rule to remove the requirement.

The Joint State Commenters argued against including any other program components under this criterion that are not expressly provided for in the statute, stating that they add costs to a criterion that is already expensive to meet and would impede State qualification for grants.

The underage drinking prevention program is not a new criterion under SAFETEA–LU. Elements of the agency's proposal continue requirements that were mandated by the agency under the predecessor Section 410 program. With the removal of the peer education component (discussed above), the program is nearly identical to the program that States complied with to receive a grant in FY 2005. Point-of-sale training, tamper proof licenses for individuals under the age of 21, an enforcement program and communication effort are not new requirements. The only changes from the previous requirements include a zero tolerance law that all 50 States (with the exception of Puerto Rico) already have and a shift in the communications strategy from providing general information on underage drinking to a program that specifically supports the enforcement of underage drinking laws. Thirty-three out of thirty-four States receiving Section 410 grants in FY 2005 complied with the criterion (including Idaho and North Dakota—2 of the 5 Joint State Commenters). (We note that in FY 2004, South Dakota, another of the Joint State Commenters, met the criterion as well). Considering that the amount of funds has greatly increased under SAFETEA–LU and that nearly all States that received awards complied with a substantially similar criterion, we do not agree with the Joint State Commenters that the agency's approach would impose undue costs on the States or impede State qualification for grants.

7. Administrative License Suspension or Revocation System

To qualify for a grant based on this criterion, SAFETEA–LU requires a State to demonstrate:

> An administrative driver's license suspension or revocation system for individuals who operate motor vehicles while under the influence of alcohol that requires that—
>
> (A) In the case of an individual who, in any 5-year period beginning after the date of enactment of the Transportation Equity Act for the 21st Century, is determined on the basis of a chemical test to have been operating a motor vehicle while under the influence of alcohol or is determined to have refused to submit to such a test as proposed by a law enforcement officer, the State agency responsible for administering drivers' licenses, upon receipt of the report of the law enforcement officer—
>
> (i) Suspend the driver's license of such individual for a period of not less than 90 days if such individual is a first offender in such 5-year period; except that under such suspension an individual may operate a motor vehicle, after the 15-day period beginning on the date of the suspension, to and from employment, school, or an alcohol treatment program if an ignition interlock device is installed on each of the motor vehicles owned or operated, or both, by the individual; and
>
> (ii) Suspend the driver's license of such individual for a period of not less than 1 year, or revoke such license, if such individual is a repeat offender in such 5-year period; except that such individual [may be allowed] to operate a motor vehicle, after the 45-day period beginning on the date of the suspension or revocation, to and from employment, school, or an alcohol treatment program if an ignition interlock device is installed on each of the motor vehicles owned or operated, or both, by the individual; and
>
> (B) The suspension and revocation referred to under clause (i) take effect not later than 30 days after the date on which the individual refused to submit to a chemical test or received notice of having been determined to be driving under the influence of alcohol, in accordance with the procedures of the State.

Under the agency's proposal, to demonstrate compliance with this criterion, the State would be required to provide that a BAC test refusal or failure would result in a 90-day license suspension for first offenders and a 1-year license suspension for second or subsequent offenders, and that suspensions would take effect within 30 days. The proposal would have permitted the State to provide limited driving privileges after 15 days to first offenders and after 45 days to second or subsequent offenders, if an ignition interlock device is installed on all vehicles owned and all vehicles operated by the offender and the offender's driving privileges are restricted to places of employment, school or treatment.

The agency received one comment regarding its approach to permit, but not require, States to grant interlock-restricted driving privileges. National Interlock Systems, Inc. commented that the statutory language requires the States to offer interlock restricted driving privileges in conjunction with this criterion. National cites the statutory language providing that an "individual may operate a motor vehicle * * * if an ignition interlock device is installed" to support its argument.

We disagree. This statutory language is permissive and allows the State to elect to offer interlocks to reduce the period of a license suspension an offender would otherwise face. Absent an interlock provision, the statute would simply require a full license suspension period to be served. There is no indication that Congress intended to mandate the use of interlocks in order for a State to comply with the criterion. Such an approach would likely render noncompliant many State programs that complied with nearly identical language under TEA–21.

National Interlock Systems, Inc. and LifeSafer Interlock, Inc. asserted that the requirements of this criterion conflict with those of the grant program the agency administers under 23 U.S.C. 164. The Section 410 program requires the State to apply an administrative license sanction to an offender as a result of BAC test refusals or failures. The Section 164 program requires the State to suspend the license of an individual for multiple impaired driving convictions. Because these programs apply to different classes of offenders, there is no conflict that would require a State to trade compliance in one grant program for another. The administrative license sanctions of the Section 410 program will apply up to the point the individual is convicted of impaired driving. The term "repeat offender" that appears in each grant program has been

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defined differently to make these distinctions clear.

The agency has made two revisions to this criterion. First, based on the discussion under the High-Risk Drivers Program (see Section V.B.4), the agency has revised the rule to remove the requirement that ignition interlocks must be installed in all vehicles owned and all vehicles operated by the offender, because similar statutory language applies to this criterion. The State is required instead to issue a restricted license that limits the offender to operating only interlocked vehicles. Second, the agency has revised the criterion to allow an offender to drive to an interlock service facility as a condition of the restricted license.

8. Self-Sustaining Impaired Driving Prevention Program

To qualify for a grant based on this criterion, SAFETEA–LU requires a State to have:

> A program under which a significant portion of the fines or surcharges collected from individuals who are fined for operating a motor vehicle while under the influence of alcohol are returned to communities for comprehensive programs for the prevention of impaired driving.

The agency's proposal provides that a State may qualify for a grant based on this criterion if it returns at least 90 percent of the fines or surcharges collected to communities for comprehensive impaired driving programs.

GHSA and the Joint State Commenters objected to this requirement. The Joint State Commenters believed that returning 50 percent should be considered a significant amount and the agency should revise the regulation accordingly. GHSA stated that the intent of the requirement is to encourage the development of self-sustaining programs and not to dissuade States from compliance because requirements are set too high. GHSA recommended that the agency significantly lower the level required for a qualifying program or, alternatively, that it continue the approach taken under the predecessor Section 410 program.

As the agency explained in the NPRM, the predecessor Section 410 program required that a State return the "actual" fines or surcharges collected in order to achieve compliance. That approach required 100 percent of the amounts collected to be returned to communities for comprehensive programs. The agency's proposal under SAFETEA–LU is more generous, allowing a State to divert 10 percent in order to cover planning and administration costs. We do not believe that additional lowering of the amount returned would encourage more programs to become self-sustaining. It simply would allow more programs to be determined compliant that return less fines or surcharges. Programs that do not return collected amounts to the collecting communities are not self-sustaining. The agency declines to change this requirement.

GHSA's assertion that the agency "does not fully support this statutory requirement" is inaccurate. In support of this assertion, GHSA points to the agency's statement in the preamble to the NPRM that some States may not be able to meet the requirement, but that would not necessarily preclude a State from receiving a grant. This statement simply acknowledges that these States may seek to achieve compliance using other criteria. The context for this statement, as noted in the NPRM, is that some States are prohibited either by their Constitution or by State law from having dedicated non-discretionary uses of fines and penalties. With these legal limitations in place, regardless of the percentage selected, a State would be unable to comply with the criterion, but is not precluded from seeking to comply with other criteria.

The agency wishes to make clear that, under the proposal, States may qualify by returning at least 90 percent of the fines or at least 90 percent of surcharges collected from impaired drivers. Compliance does not require that a State base the amount returned on the total of all fines and surcharges levied against an impaired driver. States may establish surcharges in law and return at least 90 percent of the surcharge amount collected in order to comply with the criterion, regardless of other fines or penalties that may apply to an offender.

C. Comments Regarding Low and High Fatality Rate States

The agency received one comment concerning the separate grants available to high fatality rate States. Advocates commented that States in the high fatality rate category should not automatically receive 15 percent of the total amount available each year under the Section 410 program. Advocates further stated that the agency should use its discretion to award less to States that have done a poor job of reducing the impaired driving fatality rate.

SAFETEA–LU provides high fatality rate States with a limited amount of funding to be used to address impaired driving issues. These grants are distinct from the basic incentive funding provided under Section 410 and subject to certain specific requirements. At least 50 percent of the funding must be used to conduct Statewide law enforcement aimed at impaired driving. Additionally, the State must submit and the agency must approve a plan detailing proposed grant expenditures before any funds are provided. To the extent that Advocates' comment suggests that the 15 percent level is too high for States with high fatality rates, we disagree. Rather, the important point is that the funds be used effectively to improve the statistics in these States. The agency intends to review carefully the plans submitted by high fatality rate States to ensure the sound expenditure of funds to address the fatality problems in the State. Funding for these States will be subject to all applicable statutory restrictions. We have restated in the regulation the statutory restriction that no one State is to receive more than 30 percent of the total amount provided for high fatality rate States. Just as with the other grants under this program, the agency will monitor the use of the funds to ensure appropriate use.

The agency received two comments regarding the availability of FARS data to determine high and low fatality rate State status. Minnesota stated that any delay in the publishing of FARS data would create a disincentive for States to seek grants based on performance. GHSA commented that late publication of FARS data would preclude States from receiving performance grants. Both commenters urged the agency to revert to prior year FARS data should there be any delay. Eligibility for performance grants is determined by the most recent final FARS data available at the time of the award. The statutory language does not permit the agency to use older data should more current data become available before award. The agency intends to make the final FARS data available in early June and there is no reason to indicate otherwise at this time. If there is a delay in publicizing particular data, performance grants would not be jeopardized. These grants are determined using the most recently available data at the time of award and would remain available to all qualifying States.

D. Comments Regarding Administrative Issues

The agency received one comment regarding the general administration of the grant program. GHSA objected to the requirement that States submit applications in August for grants in the same fiscal year, stating that such an approach is contrary to the intent of the consolidated application process required in statute and will interfere with State planning processes. The agency believes that setting the

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application deadline earlier under the program would interfere with State legislative efforts that may be necessary for compliance. Absent a statutory deadline, the agency is unwilling to decrease the States' flexibility in this regard.

We will continue to work toward the goal of consolidating the agency's grant opportunities into one application. However, under the Section 410 program, an early application deadline is not currently feasible and the agency is continuing the August deadline for applications established under TEA–21.

We received no other comments regarding grant administration issues. Therefore, those provisions of the agency's proposal are adopted without change.

VI. Statutory Basis for This Action

This final rule implements changes to the grant program under 23 U.S.C. 410 as a result of amendments made by Section 2007 of the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy For Users (SAFETEA–LU) (Pub. L. 109–59).

VII. Regulatory Analyses and Notices

A. Executive Order 12866 and DOT Regulatory Policies and Procedures

Executive Order 12866, "Regulatory Planning and Review" (58 FR 51735, October 4, 1993), provides for making determinations whether a regulatory action is "significant" and therefore subject to OMB review and to the requirements of the Executive Order. The Order defines a "significant regulatory action" as one that is likely to result in a rule that may:

(1) Have an annual effect on the economy of $100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or Tribal governments or communities;

(2) Create a serious inconsistency or otherwise interfere with an action taken or planned by another agency;

(3) Materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof; or

(4) Raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in the Executive Order.

We have considered the impact of this rulemaking action under Executive Order 12866 and the Department of Transportation's regulatory policies and procedures. This rulemaking document was not reviewed by the Office of Management and Budget under E.O. 12866, "Regulatory Planning and Review." The rulemaking action is also not considered significant under the Department's Regulatory Policies and Procedures (44 FR 11034; February 26, 1979).

For the following reasons, NHTSA concludes that this final rule will not have any quantifiable cost effect. The rulemaking action has no impact on the total amount of grant funds distributed and thus no impact on the national economy. All grant funds provided under Section 410 will be distributed each fiscal year among qualifying States (regardless of the number of States that qualify), using a statutorily-specified formula. The final rule does not alter this approach.

The rulemaking action also does not affect amounts over the significance threshold of $100 million each year. The final rule sets forth application procedures and showings to be made to be eligible for a grant. Under the statute, low fatality rate States will receive grants by direct operation of the statute without the need to formally submit a grant application. The agency estimates that these grants to low fatality rate States will account for more than 35 percent of the Section 410 funding provided annually under SAFETEA–LU. The funds to be distributed under the application procedures provided for in the final rule will therefore be well below the annual threshold of $100 million.

Because the economic effects of this final rule are so minimal, no further regulatory evaluation is necessary.

B. Regulatory Flexibility Act

Pursuant to the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*, as amended by the Small Business Regulatory Enforcement Fairness Act (SBREFA) of 1996), whenever an agency is required to publish a notice of rulemaking for any proposed or final rule, it must prepare and make available for public comment a regulatory flexibility analysis that describes the effect of the rule on small entities (*i.e.*, small businesses, small organizations, and small governmental jurisdictions). The Small Business Administration's regulations at 13 CFR Part 121 define a small business, in part, as a business entity "which operates primarily within the United States." (13 CFR 121.105(a)). No regulatory flexibility analysis is required if the head of an agency certifies the rulemaking action will not have a significant economic impact on a substantial number of small entities. SBREFA amended the Regulatory Flexibility Act to require Federal agencies to provide a statement of the factual basis for certifying that an action will not have a significant economic impact on a substantial number of small entities.

NHTSA has considered the effects of this proposal under the Regulatory Flexibility Act. States are the recipients of funds awarded under the Section 410 program and they are not considered to be small entities under the Regulatory Flexibility Act. Therefore, I certify that this rulemaking action will not have a significant economic impact on a substantial number of small entities.

C. Executive Order 13132 (Federalism)

Executive Order 13132, "Federalism" (64 FR 43255, August 10, 1999), requires NHTSA to develop an accountable process to ensure "meaningful and timely input by State and local officials in the development of regulatory policies that have federalism implications." "Policies that have federalism implications" are defined in the Executive Order to include regulations that have "substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government." Under Executive Order 13132, the agency may not issue a regulation with Federalism implications that imposes substantial direct compliance costs and that is not required by statute unless the Federal government provides the funds necessary to pay the direct compliance costs incurred by State and local governments or the agency consults with State and local governments in the process of developing the proposed regulation. The agency also may not issue a regulation with Federalism implications that preempts a State law without consulting with State and local officials.

The agency has analyzed this rulemaking action in accordance with the principles and criteria set forth in Executive Order 13132 and has determined that the final rule does not have sufficient Federalism implications to warrant consultation with State and local officials or the preparation of a Federalism summary impact statement. Moreover, the final rule will not preempt any State law or regulation or affect the ability of States to discharge traditional State government functions.

D. Executive Order 12988 (Civil Justice Reform)

This final rule does not have any preemptive or retroactive effect. This action meets applicable standards in sections 3(a) and 3(b)(2) of Executive

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Order 12988, Civil Justice Reform, to minimize litigation, eliminate ambiguity and reduce burden.

E. Paperwork Reduction Act

There are reporting requirements contained in the final rule that are considered to be information collection requirements, as that term is defined by the Office of Management and Budget (OMB) in 5 CFR Part 1320. Accordingly, these requirements have been submitted previously to and approved by OMB, pursuant to the Paperwork Reduction Act (44 U.S.C. 3501, *et seq.*) These requirements have been approved under OMB No. 2127–0501 through June 30, 2006. Although SAFETEA–LU revises the structure of the grant program under Section 410, the revision does not result in an increase in the amount of information States must provide to demonstrate compliance with the criteria.

F. Unfunded Mandates Reform Act

Section 202 of the Unfunded Mandates Reform Act of 1995 (UMRA) requires federal agencies to prepare a written assessment of the costs, benefits, and other effects of proposed or final rules that include a Federal mandate likely to result in the expenditure by State, local, or tribal governments, in the aggregate, or by the private sector, of more than $100 million annually (adjusted for inflation with a base year of 1995 (about $118 million in 2004 dollars)). This rulemaking action does not meet the definition of a Federal mandate, because the resulting annual State expenditures will not exceed the $100 million threshold. The program is voluntary and States that choose to apply and qualify will receive grant funds.

G. National Environmental Policy Act

NHTSA has reviewed this rulemaking action for the purposes of the National Environmental Policy Act (42 U.S.C. 4321, *et seq.*) and has determined that it will not have a significant impact on the quality of the human environment.

H. Executive Order 13175 (Consultation and Coordination With Indian Tribes)

The agency has analyzed this rulemaking action under Executive Order 13175, and has determined that the final rule will not have a substantial direct effect on one or more Indian tribes, will not impose substantial direct compliance costs on Indian tribal governments, and will not preempt tribal law. Therefore, a tribal summary impact statement is not required.

I. Plain Language

Executive Order 12866 requires each agency to write all rules in plain language. Application of the principles of plain language includes consideration of the following questions:

—Have we organized the material to suit the public's needs?
—Are the requirements in the rule clearly stated?
—Does the rule contain technical language or jargon that is not clear?
—Would a different format (grouping and order of sections, use of headings, paragraphing) make the rule easier to understand?
—Could we improve clarity by adding tables, lists, or diagrams?
—What else could we do to make this rulemaking easier to understand?

If you have any comments about the Plain Language implications of this final rule, please address them to the person listed under the **FOR FURTHER INFORMATION CONTACT** heading.

J. Regulatory Identifier Number (RIN)

The Department of Transportation assigns a regulation identifier number (RIN) to each regulatory action listed in the Unified Agenda of Federal Regulations. The Regulatory Information Service Center publishes the Unified Agenda in April and October of each year. You may use the RIN contained in the heading at the beginning of this document to find this action in the Unified Agenda.

K. Privacy Act

Please note that anyone is able to search the electronic form of all comments received into any of our dockets by the name of the individual submitting the comment (or signing the comment, if submitted on behalf of an association, business, labor union, etc.). You may review DOT's complete Privacy Act Statement in the **Federal Register** published on April 11, 2000 (Volume 65, Number 70; Pages 19477–78), or you may visit *http://dms.dot.gov.*

List of Subjects in 23 CFR Part 1313

Alcohol abuse, Drug abuse, Grant programs—transportation, Highway safety, Reporting and recordkeeping requirements.

■ In consideration of the foregoing, the agency amends title 23 of CFR part 1313 as follows:

PART 1313—INCENTIVE GRANT CRITERIA FOR ALCOHOL-IMPAIRED DRIVING PREVENTION PROGRAMS

■ 1. The citation of authority for part 1313 continues to read as follows:

Authority: 23 U.S.C. 410; delegation of authority at 49 CFR 1.50.

■ 2. Section 1313.3 is amended by removing paragraphs (c) and (g), redesignating paragraphs (d) through (f) as paragraphs (c) through (e) and adding new paragraphs (f) and (g) to read as follows:

§ 1313.3 Definitions.

* * * * *

(f) *Other associated costs permitted by statute* means labor costs, management costs, and equipment procurement costs for the high visibility enforcement campaigns under § 1313.6(a); the costs of training law enforcement personnel and procuring technology and equipment, including video equipment and passive alcohol sensors, to counter directly impaired operation of motor vehicles; the costs of public awareness, advertising, and educational campaigns that publicize use of sobriety check points or increased law enforcement efforts to counter impaired operation of motor vehicles or that target impaired operation of motor vehicles by persons under 34 years of age; the costs of the development and implementation of a State impaired operator information system; and the costs of operating programs that result in vehicle forfeiture or impoundment or license plate impoundment.

(g) *State* means any one of the fifty States, the District of Columbia, Puerto Rico, the Virgin Islands, Guam, American Samoa, and the Commonwealth of the Northern Mariana Islands.

■ 3. Sections 1313.4 through 1313.8 are revised to read as follows:

§ 1313.4 General requirements.

(a) *Qualification requirements.* To qualify for a grant under 23 U.S.C. 410, a State must, for each fiscal year it seeks to qualify:

(1) Meet the requirements of § 1313.5 or § 1313.7 concerning alcohol-related fatalities, as determined by the agency, and submit written certifications signed by the Governor's Representative for Highway Safety that it will—

(i) Use the funds awarded under 23 U.S.C. 410 only for the implementation and enforcement of alcohol-impaired driving prevention programs in § 1313.6 and other associated costs permitted by statute;

(ii) Administer the funds in accordance with 49 CFR part 18 and OMB Circular A–87; and

(iii) Maintain its aggregate expenditures from all other sources for its alcohol-impaired driving prevention programs at or above the average level of such expenditures in fiscal years

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2004 and 2005 (either State or Federal fiscal year 2004 and 2005 can be used); or

(2) By August 1, submit an application to the appropriate NHTSA Regional Office identifying the criteria that it meets under § 1313.6 and including the certifications in paragraph (a)(1)(i) through (a)(1)(iii) of this section and the additional certification that it has an alcohol-impaired driving prevention program that meets the requirements of 23 U.S.C. 410 and 23 CFR part 1313.

(b) *Post-approval requirements.* (1) Within 30 days after notification of award, in no event later than September 12 of each year, a State must submit electronically to the agency a Program Cost Summary (HS Form 217) obligating the funds to the Section 410 program; and

(2) Until all Section 410 grant funds are expended, the State must document how it intends to use the funds in the Highway Safety Plan it submits pursuant to 23 U.S.C. 402 (or in an amendment to that plan) and detail the program activities accomplished in the Annual Report it submits for its highway safety program pursuant to 23 CFR 1200.33.

(c) *Funding requirements and limitations.* A State may receive grants, beginning in FY 2006, in accordance with the apportionment formula under 23 U.S.C. 402 and subject to the following limitations:

(1) The amount available for grants under § 1313.5 or § 1313.6 shall be determined based on the total number of eligible States for these grants and after deduction of the amount necessary to fund grants under § 1313.7.

(2) The amount available for grants under § 1313.7 shall not exceed 15 percent of the total amount made available to States under 23 U.S.C. 410 for the fiscal year, with no State receiving more than 30 percent of this amount.

(3) In the first or second fiscal years a State receives a grant under this part, it shall be reimbursed for up to 75 percent of the cost of its alcohol-impaired driving prevention program adopted pursuant to 23 U.S.C. 410.

(4) In the third and fourth fiscal years a State receives a grant under this part, it shall be reimbursed for up to 50 percent of the cost of its alcohol-impaired driving prevention program adopted pursuant to 23 U.S.C. 410.

§ 1313.5 Requirements for a low fatality rate state.

To qualify for a grant as a low fatality rate State, the State shall have an alcohol related fatality rate of 0.5 or less per 100,000,000 vehicle miles traveled (VMT) as of the date of the grant, as determined by NHTSA using the most recently available final FARS data. The agency plans to make this information available to States by June 1 of each fiscal year.

§ 1313.6 Requirements for a programmatic state.

To qualify for a grant as a programmatic State, a State must adopt and demonstrate compliance with at least three of the following criteria in FY 2006, at least four of the following criteria in FY 2007, and at least five of the following criteria in FY 2008 and FY 2009:

(a) *High Visibility Enforcement Campaign*—(1) *Criterion.* A high visibility impaired driving law enforcement program that includes:

(i) State participation in the annual National impaired driving law enforcement campaign organized by NHTSA;

(ii) Additional high visibility law enforcement campaigns within the State conducted on a quarterly basis at high-risk times throughout the year; and

(iii) Use of sobriety checkpoints and/or saturation patrols at high-risk locations throughout the State, conducted in a highly visible manner and supported by publicity.

(2) *Definitions.* (i) *Sobriety checkpoint* means a law enforcement activity during which law enforcement officials stop motor vehicles on a non-discriminatory, lawful basis for the purpose of determining whether or not the operators of such motor vehicles are driving while impaired by alcohol and/or other drugs.

(ii) *Saturation patrol* means a law enforcement activity during which enhanced levels of law enforcement are conducted in a concentrated geographic area (or areas) for the purpose of detecting drivers operating motor vehicles while impaired by alcohol and/or other drugs.

(iii) *Law enforcement agency* means an agency identified by the State and included in an enforcement plan for purposes of meeting coverage and other requirements listed in § 1313.6(a)(3)(i)–(ii).

(3) *Demonstrating compliance.* (i) To demonstrate compliance in the first fiscal year under this criterion, the State shall submit a comprehensive plan for conducting a high visibility impaired driving law enforcement program under which:

(A) State Police and local law enforcement agencies collectively serving at least 50 percent of the State's population or serving geographic subdivisions that account for at least 50 percent of the State's alcohol-related fatalities will participate in the State's high visibility impaired driving law enforcement program;

(B) Each participating law enforcement agency will conduct checkpoints and/or saturation patrols on at least four nights during the annual National impaired driving campaign organized by NHTSA and will conduct checkpoints and/or saturation patrols on at least four occasions throughout the remainder of the year;

(C) The State will coordinate law enforcement activities throughout the State to maximize the frequency and visibility of law enforcement activities at high-risk locations Statewide; and

(D) Paid and/or earned media will publicize law enforcement activities before, during and after they take place, both during the National campaign and on a sustained basis at high risk times throughout the year.

(ii) To demonstrate compliance in subsequent fiscal years, the State shall submit information documenting that the prior year's plan was effectively implemented and an updated plan for conducting a current high visibility impaired driving law enforcement program containing the elements specified in § 1313.6(a)(3)(i) and (a)(3)(iii), except that the level of law enforcement agency participation must reach at least 55 percent of the State's population or cover geographic subdivisions that account for at least 55 percent of the State's alcohol-related fatalities in the second year the State receives a grant based on this criterion, 60 percent of either of these two measures in the third year and 65 percent of either of these two measures in the fourth year.

(iii) For the purposes of paragraph (a) of this section, a comprehensive plan shall include:

(A) Guidelines, policies or procedures governing the Statewide enforcement program;

(B) Approximate dates and locations of planned law enforcement activities;

(C) A list of law enforcement agencies expected to participate; and

(D) A paid media buy plan, if the State buys media, and a description of anticipated earned media activities before, during and after planned enforcement efforts;

(b) *Prosecution and Adjudication Outreach Program*—(1) *Criterion.* A prosecution and adjudication program that provides for either:

(i) A statewide outreach effort that reduces the use of diversion programs through education of prosecutors and

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court professionals and includes the following topics—

(A) State impaired driving statutes and applicable case law;

(B) Searches, seizures and arrests;

(C) Admissibility of evidence;

(D) Biochemical and physiological information; and

(E) Sentencing of impaired drivers; or

(ii) A statewide outreach effort that provides information to prosecutors and court professionals on innovative approaches to the prosecution and adjudication of impaired driving cases and includes the following topics—

(A) Alcohol assessments and treatment;

(B) Vehicle sanctioning;

(C) Electronic monitoring and home detention; and

(D) DWI courts; or

(iii) A Statewide tracking system that monitors the adjudication of impaired driving cases that—

(A) Covers a majority of the judicial jurisdictions in the State; and

(B) Collects data on original criminal and traffic-related charge(s) against a defendant, the final charge(s) brought by a prosecutor, and the disposition of the charge(s) or sentence provided.

(2) *Definitions.* (i) *Diversion Program* means a program under which an offender is allowed to obtain a reduction or dismissal of an impaired driving charge or removal of an impaired driving offense from a driving record based on participation in an educational course, community service activity, or treatment program.

(ii) *Traffic Safety Resource Prosecutor* means an individual or entity used by the State on a full-time basis to provide support in the form of education and outreach programs and technical assistance to enhance the capability of prosecutors to effectively prosecute across-the-State traffic safety violations.

(iii) *State Judicial Educator* means an individual or entity used by the State on a full-time basis to enhance the performance of a State's judicial system by providing education and outreach programs and technical assistance to continuously improve personal and professional competence of all persons performing judicial branch functions.

(3) *Demonstrating compliance.* (i) To demonstrate compliance in the first fiscal year under this criterion, the State shall submit:

(A) A course syllabus for a Statewide outreach and education program and a certification that its program is provided on an annual basis (a minimum of once a year and a minimum of eight hours of training) and covers the required topics in either § 1313.6(b)(1)(i) or (b)(1)(ii); or

(B) Information indicating its use of a State sanctioned Traffic Safety Resource Prosecutor and State Judicial Educator and a list of impaired-driving-related educational programs offered by each position; or

(C) The names and locations of the judicial jurisdictions covered by a Statewide tracking system and the type of information collected.

(ii) To demonstrate compliance in a subsequent fiscal year for an outreach and education program, the State must certify that the outreach and education program continues to be conducted on an annual basis and covers the required topics in either § 1313.6(b)(1)(i) or (b)(1)(ii) and provide a new course syllabus if the program has been altered from the previous year.

(iii) To demonstrate compliance in a subsequent fiscal year for use of a Traffic Safety Resource Prosecutor and State Judicial Educator, the State must certify the continued existence of these positions and provide updated information if there has been a change in the status of these positions or the list of impaired-driving-related educational programs offered.

(iv) To demonstrate compliance in a subsequent fiscal year for use of a Statewide tracking system that monitors the adjudication of impaired driving cases, the State must provide an updated list of the courts involved and updated data collection information if there has been a change from the previous year.

(c) *BAC Testing Program*—(1) *Criterion.* An effective system for increasing the percentage of BAC testing among drivers involved in fatal motor vehicle crashes, subject to § 1313.6(c)(3), under which:

(i) The State submits a plan identifying approaches that will be taken during the fiscal year to achieve a BAC testing increase specified under § 1313.6(c)(1)(iii);

(ii) The State's law provides for mandatory BAC testing for drivers involved in fatal motor vehicle crashes and the State submits a plan in accordance with § 1313.6(c)(1)(i); or

(iii) The State's percentage of BAC testing among drivers involved in fatal motor vehicle crashes is greater than the previous year by at least 1 percentage point (1.0, as rounded to the first decimal place), as determined by the agency. The most recently available final FARS data as of the date of the grant will be used to determine a State's BAC testing rate.

(2) *Definition. Drivers involved in fatal motor vehicle crashes* includes both drivers who are fatally injured in motor vehicle crashes and drivers who survive a motor vehicle crash in which someone else is killed.

(3) *Demonstrating compliance.* Subject to the additional requirements of § 1313.6(c)(4), to demonstrate compliance under this criterion, that State shall:

(i) In FY 2006 and FY 2007, submit a plan, as required in § 1313.6(c)(1)(i), that describes approaches that are to be implemented during the fiscal year that will result in an increase in the State's BAC testing rate. The plan must include information on how each approach will be implemented and the expected outcome from implementation, and the plan must be updated each subsequent year it is submitted;

(ii) In FY 2008 and FY 2009, submit a plan, as required in § 1313.6(c)(1)(i), that describes approaches that are to be implemented during the fiscal year that will result in an increase in the State's BAC testing rate and submit a copy of its law as described in § 1313.6(c)(1)(ii). The plan must include information on how each approach will be implemented and the expected outcome from implementation, and the plan must be updated each subsequent year it is submitted; or

(iii) In any fiscal year, submit a statement that it intends to apply on the basis of an increase from the previous year in the percentage of BAC testing among drivers involved in fatal motor vehicle crashes in the State, in accordance with § 1313.6(c)(1)(iii) (the agency will determine compliance with this requirement).

(4) *Implementation of plan.* A State electing to demonstrate compliance under § 1313.6(c)(3)(i) or (c)(3)(ii) shall, in every fiscal year except the first fiscal year it seeks to comply, submit information demonstrating that the prior year's plan was effectively implemented.

(d) *High Risk Drivers Program*—(1) *Criterion.* A law that establishes stronger sanctions or additional penalties for individuals convicted of operating a motor vehicle with a high BAC that requires:

(i) In the case of an individual who, in any five-year period beginning after June 9, 1998, is convicted of operating a motor vehicle with a BAC of 0.15 or more—

(A) A suspension of all driving privileges for a period of not less than one year, or not less than 45 days followed immediately by a period of not less than 320 days of a restricted, provisional or conditional license, if such license restricts the individual to operating only vehicles equipped with an ignition interlock. A restricted, provisional or conditional license may be issued only to permit the offender to operate a motor vehicle to and from

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employment, school, an alcohol treatment program or an interlock service facility; and

(B) A mandatory assessment by a certified substance abuse official, with possible referral to counseling if determined appropriate.

(2) *Demonstrating Compliance.* (i) To demonstrate compliance in the first fiscal year under this criterion, the State shall submit a copy of the law that provides for each element of this criterion.

(ii) To demonstrate compliance in subsequent fiscal years, a State shall submit a copy of any changes to the State's law or, if there have been no changes, the State shall submit a statement certifying that there have been no changes in the State's law.

(e) *Alcohol Rehabilitation or DWI Court Program*—(1) *Criterion.* A treatment program for repeat or high-risk offenders in a State that provides for either:

(i) An effective inpatient and outpatient alcohol rehabilitation system for repeat offenders, under which—

(A) A State enacts and enforces a law that provides for mandatory assessment of a repeat offender by a certified substance abuse official and requires referral to appropriate treatment as determined by the assessment; and

(B) A State monitors the treatment progress of repeat offenders through a Statewide tracking system; or

(ii) A DWI Court program, under which a State refers impaired driving cases involving high-risk offenders to a State-sanctioned DWI Court for adjudication.

(2) *Definitions.* (i) *DWI Court* means a court that specializes in driving while impaired cases, or a combination of drug-related and driving while impaired cases, and abides by the Ten Guiding Principles of DWI Courts in effect on the date of the grant, as established by the National Association of Drug Court Professionals.

(ii) *High-risk offender* means a person who meets the definition of a repeat offender or has been convicted of driving while intoxicated or driving under the influence with a BAC level of 0.15 or greater.

(iii) *Repeat offender* means a person who has been convicted of driving while intoxicated or driving under the influence of alcohol more than once in any five-year period.

(3) *Demonstrating Compliance.* (i) To demonstrate compliance in the first fiscal year under this criterion, the State shall submit:

(A) A copy of its law that provides for mandatory assessment and referral to treatment and a copy of its tracking system for monitoring the treatment of repeat offenders; or

(B) A certification that at least one State-sanctioned DWI court is operating in the State, which includes the name and location of the court.

(ii) To demonstrate compliance in subsequent fiscal years, the State shall submit:

(A) Information concerning any changes to the alcohol rehabilitation program that was previously approved by the agency, or if there have been no changes, a statement certifying that there have been no changes to the materials previously submitted; or

(B) A certification, in the second year, that at least two State-sanctioned DWI courts are operating in the State, in the third year, that at least three State-sanctioned DWI courts are operating in the State, and in the fourth year, that at least four State-sanctioned DWI courts are operating in the State, with each certification including the names and locations of all of the courts; or a certification, in any year, that at least four State-sanctioned DWI courts are operating in the State, which includes the names and locations of all of the courts.

(f) *Underage Drinking Prevention Program*—(1) *Criterion.* An effective underage drinking prevention program designed to prevent persons under the age of 21 from obtaining alcoholic beverages and to prevent persons of any age from making alcoholic beverages available to persons under the age of 21, that provides for:

(i) The issuance of a tamper resistant driver's license to persons under age 21 that is easily distinguishable in appearance from a driver's license issued to persons 21 years of age and older;

(ii) A program, conducted by a nonprofit or public organization that provides training to alcoholic beverage retailers and servers concerning the clinical effects of alcohol, methods of preventing second-party sales of alcohol, recognizing signs of intoxication, methods to prevent underage drinking, and relevant laws that apply to retailers and servers and that provides procedures to ensure program attendance by appropriate personnel of alcoholic beverage retailers and servers;

(iii) A law that creates a blood alcohol content limit of no greater than 0.02 percent for drivers under age 21;

(iv) A plan that focuses on underage drivers' access to alcohol by those under age 21 and the enforcement of applicable State law; and

(v) A strategy for communication to support enforcement designed to reach those under age 21 and their parents or other adults and that includes a media campaign.

(2) *Definition. Tamper resistant driver's license* means a driver's license that has one or more of the security features listed in the Appendix.

(3) *Demonstrating Compliance.* (i) To demonstrate compliance in the first fiscal year under this criterion, the State shall submit sample drivers' licenses issued to persons both under and over 21 years of age that demonstrate the distinctive appearance of licenses for drivers under age 21 and the tamper resistance of these licenses. States shall also submit a plan describing a program for educating point-of-sale personnel that covers each element of § 1313.6(f)(1)(ii). States shall submit a copy of their zero tolerance law that complies with 23 U.S.C. 161. In addition, States shall submit a plan that provides for an enforcement program and communications strategy meeting § 1313.6(f)(1)(iv) and (v).

(ii) To demonstrate compliance in subsequent fiscal years, States need only submit information documenting any changes to the State's driver's licenses or underage driving prevention program, or a certification stating there have been no changes since the State's previous year submission.

(g) *Administrative License Suspension or Revocation System*—(1) *Criterion.* An administrative driver's license suspension or revocation system for individuals who operate motor vehicles while under the influence of alcohol that requires that:

(i) In the case of an individual who, in any five-year period beginning after June 9, 1998, is determined on the basis of a chemical test to have been operating a motor vehicle while under the influence of alcohol or is determined to have refused to submit to such a test as proposed by a law enforcement officer, the State entity responsible for administering driver's licenses, upon receipt of the report of the law enforcement officer, shall—

(A) For a first offender, suspend all driving privileges for a period of not less than 90 days, or not less than 15 days followed immediately by a period of not less than 75 days of a restricted, provisional or conditional license, if such license restricts the offender to operating only vehicles equipped with an ignition interlock. A restricted, provisional or conditional license may be issued only to permit the offender to operate a motor vehicle to and from employment, school, an alcohol treatment program or an interlock service facility; and

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(B) For a repeat offender, suspend or revoke all driving privileges for a period of not less than one year, or not less than 45 days followed immediately by a period of not less than 320 days of a restricted, provisional or conditional license, if such license restricts the offender to operating only vehicles equipped with an ignition interlock. A restricted, provisional or conditional license may be issued only to permit the offender to operate a motor vehicle to and from employment, school, an alcohol treatment program or an interlock service facility; and

(ii) The suspension or revocation shall take effect not later than 30 days after the day on which the individual refused to submit to a chemical test or received notice of having been determined to be operating a motor vehicle while under the influence of alcohol, in accordance with the procedures of the State.

(2) *Definitions.* (i) *First offender* means an individual who a law enforcement officer has probable cause under State law to believe has committed an alcohol-related traffic offense, and who is determined on the basis of a chemical test to have been operating a motor vehicle while under the influence of alcohol or who refused to submit to such a test, once in any five-year period beginning after June 9, 1998.

(ii) *Repeat offender* means an individual who a law enforcement officer has probable cause under State law to believe has committed an alcohol-related traffic offense, and who is determined on the basis of a chemical test to have been operating a motor vehicle while under the influence of alcohol or who refused to submit to such a test, more than once in any five-year period beginning after June 9, 1998.

(3) *Demonstrating compliance for Law States.* (i) To demonstrate compliance in the first fiscal year under this criterion, a Law State shall submit a copy of the law, regulation or binding policy directive implementing or interpreting the law or regulation that provides for each element of this criterion.

(ii) To demonstrate compliance in subsequent fiscal years, a Law State shall submit a copy of any changes to the State's law, regulation or binding policy directive or, if there have been no changes, a statement certifying that there have been no changes to the State's laws, regulations or binding policy directives.

(iii) For purposes of paragraph (g) of this section, Law State means a State that has a law, regulation or binding policy directive implementing or interpreting an existing law or regulation that provides for each element of this criterion.

(4) *Demonstrating compliance for Data States.* (i) To demonstrate compliance in the first fiscal year under this criterion, a Data State shall submit a copy of the law, regulation or binding policy directive implementing or interpreting the law or regulation that provides for an administrative license suspension or revocation system, and data showing that the State substantially complies with each element of this criterion not specifically provided for in the State's law, regulation or binding policy directive.

(ii) To demonstrate compliance in subsequent fiscal years, a Data State shall submit, in addition to the information identified in § 1313.6(g)(3)(ii), data showing that the State substantially complies with each element of this criterion not specifically provided for in the State's law, regulation or binding policy directive.

(iii) The State can provide the necessary data based on a representative sample, on the average number of days it took to suspend or revoke a driver's license and on the average lengths of suspension or revocation periods, except that data on the average lengths of suspension or revocation periods must not include license suspension periods that exceed the terms actually prescribed by the State, and must reflect terms only to the extent that they are actually completed.

(iv) For purposes of paragraph (g) of this section, *Data State* means a State that has a law, regulation or binding policy directive implementing or interpreting an existing law or regulation that provides for an administrative license suspension or revocation system, but the State's laws, regulations or binding policy directives do not specifically provide for each element of this criterion.

(h) *Self-Sustaining Impaired Driving Prevention Program*—(1) *Criterion.* A self-sustaining impaired driving prevention program under which a significant portion of the fines or surcharges collected from individuals who are fined for operating a motor vehicle while under the influence of alcohol are returned to communities for use in a comprehensive impaired driving prevention program.

(2) *Definitions.* (i) *A comprehensive drunk driving prevention program* means a program that includes, at a minimum, the following components:

(A) Regularly conducted, peak-hour traffic enforcement efforts directed at impaired driving;

(B) Prosecution, adjudication and sanctioning resources that are adequate to handle increased levels of arrests for operating a motor vehicle while under the influence of alcohol;

(C) Programs directed at prevention other than enforcement and adjudication activities, such as school, worksite or community education; server training; or treatment programs;

(D) A public information program designed to make the public aware of the problem of impaired driving through paid and earned media and of the State's efforts to address it.

(ii) *Fines or surcharges collected* means fines, penalties, fees or additional assessments collected.

(iii) *Significant portion* means at least 90 percent of the fines or surcharges collected.

(3) *Demonstrating compliance.* (i) To demonstrate compliance in the first fiscal year under this criterion, a State shall submit:

(A) A copy of the law, regulation or binding policy directive implementing or interpreting the law or regulation that provides—

(*1*) For fines or surcharges to be imposed on individuals apprehended for operating a motor vehicle while under the influence of alcohol; and

(*2*) For such fines or surcharges collected to be returned to communities with comprehensive drunk driving prevention programs; and

(B) Statewide data (or a representative sample) showing—

(*1*) The aggregate amount of fines or surcharges collected;

(*2*) The aggregate amount of revenues returned to communities with Comprehensive drunk driving prevention programs under the State's self-sustaining system; and

(*3*) The aggregate cost of the State's comprehensive drunk driving prevention programs.

(ii) To demonstrate compliance in subsequent fiscal years, the State shall submit, in addition to the data identified in paragraph (h)(3)(i)(B) of this section, a copy of any changes to the State's law, regulation or binding policy directive or, if there have been no changes, a statement certifying that there have been no changes in the State's laws, regulations or binding policy directives.

§ 1313.7 Requirements for a high fatality rate state.

To qualify for a grant as a high fatality rate State, the State shall be among the ten States that have the highest alcohol-related fatality rates, as determined by the agency using the most recently available final FARS data as of the date of the grant. The agency plans to make this information available to States by June 1 of each fiscal year.

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(1) *Demonstrating compliance.* To demonstrate compliance in each fiscal year a State qualifies as a high fatality rate State, the State shall submit a plan for grant expenditures that is approved by the agency and that expends funds in accordance with § 1313.4. The plan must allocate at least 50 percent of the funds to conduct a high visibility impaired driving enforcement campaign in accordance with § 1313.6(a) and include information that satisfies the planning requirements of § 1313.6(a)(3)(iii).

§ 1313.8 Award procedures.

In each Federal fiscal year, grants will be made to eligible States that satisfy the requirements of § 1313.4(a), subject to the requirements of § 1313.4(b) and (c). The release of grant funds under this part shall be subject to the availability of funding for that fiscal year.

■ 4. Appendix to part 1313 is being republished to read as follows:

Appendix to Part 1313—Tamper Resistant Driver's License

A tamper resistant driver's license or permit is a driver's license or permit that has one or more of the following security features:

(1) Ghost image.
(2) Ghost graphic.
(3) Hologram.
(4) Optical variable device.
(5) Microline printing.
(6) State seal or a signature which overlaps the individual's photograph or information.
(7) Security laminate.
(8) Background containing color, pattern, line or design.
(9) Rainbow printing.
(10) Guilloche pattern or design.
(11) Opacity mark.
(12) Out of gamut colors (i.e., pastel print).
(13) Optical variable ultra-high-resolution lines.
(14) Block graphics.
(15) Security fonts and graphics with known hidden flaws.
(16) Card stock, layer with colors.
(17) Micro-graphics.
(18) Retroreflective security logos.
(19) Machine readable technologies such as magnetic strips, a 1D bar code or a 2D bar code.

Issued on: April 17, 2006.

Jacqueline Glassman,

Deputy Administrator.

[FR Doc. 06–3781 Filed 4–20–06; 8:45 am]

BILLING CODE 4910–59–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 117

[CGD05–06–040]

RIN 1625–AA–09

Drawbridge Operation Regulations; Potomac River, Between Maryland and Virginia

AGENCY: Coast Guard, DHS.

ACTION: Notice of temporary deviation from regulations.

SUMMARY: The Commander, Fifth Coast Guard District, has approved a temporary deviation from the regulations governing the operation of the Woodrow Wilson Memorial (I–95) Bridge, mile 103.8, across the Potomac River between Alexandria, Virginia and Oxon Hill, Maryland. This deviation allows the drawbridge to remain closed-to-navigation from 8 p.m. on June 9, 2006, until 5 a.m. on June 12, 2006; and from 8 p.m. on July 14, 2006, until 5 a.m. on July 17, 2006, to facilitate the Outer and Inner Loop shifts of vehicular traffic for the new Woodrow Wilson Bridge construction project.

DATES: This deviation is effective from 8 p.m. on June 9, 2006, until 5 a.m. on July 17, 2006.

ADDRESSES: Materials referred to in this document are available for inspection or copying at Commander (dpb), Fifth Coast Guard District, Federal Building, 1st Floor, 431 Crawford Street, Portsmouth, VA 23704–5004 between 8 a.m. and 4 p.m., Monday through Friday, except Federal holidays. The telephone number is (757) 398–6222. Commander (dpb), Fifth Coast Guard District maintains the public docket for this temporary deviation.

FOR FURTHER INFORMATION CONTACT: Waverly W. Gregory, Jr., Bridge Administrator, Fifth Coast Guard District, at (757) 398–6222.

SUPPLEMENTARY INFORMATION: The existing Woodrow Wilson Memorial (I–95) Bridge has a vertical clearance in the closed position to vessel of 50 feet at mean high water and 52 feet at mean low water.

Coordinators for the construction of the new Woodrow Wilson Bridge Project requested a temporary deviation from the current operating regulation for the existing Woodrow Wilson Memorial (I–95) Bridge set out in 33 CFR 117.255(a). The coordinators requested the temporary deviation to close the existing drawbridge to navigation to accommodate the shifting of vehicular traffic on the Outer and Inner Loops of the Capital Beltway/I–95 North. The Outer and Inner Loops of the Capital Beltway/I–95 North will be reduced from three lanes to only one lane between the Route 1 Interchange and the Wilson Bridge. Project traffic engineers anticipate traffic impacts to peak on Saturday afternoon, with 10 to 15 mile backups and delays of 60 to 90 minutes. Maintaining the existing drawbridge in the closed-to-navigation position from 8 p.m. on Friday, June 9, 2006, through 5 a.m. on Monday, June 12, 2006 and from 8 p.m. on Friday, July 14, 2006, through 5 a.m. on Monday, July 17, 2006, will help reduce the impact to vehicular traffic during these phases of new bridge construction.

The Coast Guard has informed the known users of the waterway of the closure period for the bridge so that these vessels can arrange their transits to minimize any impact caused by the temporary deviation.

In accordance with 33 CFR 117.35(c), this work will be performed with all due speed in order to return the bridge to normal operation as soon as possible. This deviation from the operating regulations is authorized under 33 CFR 117.35.

Dated: April 13, 2006.

Waverly W. Gregory, Jr.,

Chief, Bridge Administration Branch, Fifth Coast Guard District.

[FR Doc. 06–3783 Filed 4–20–06; 8:45 am]

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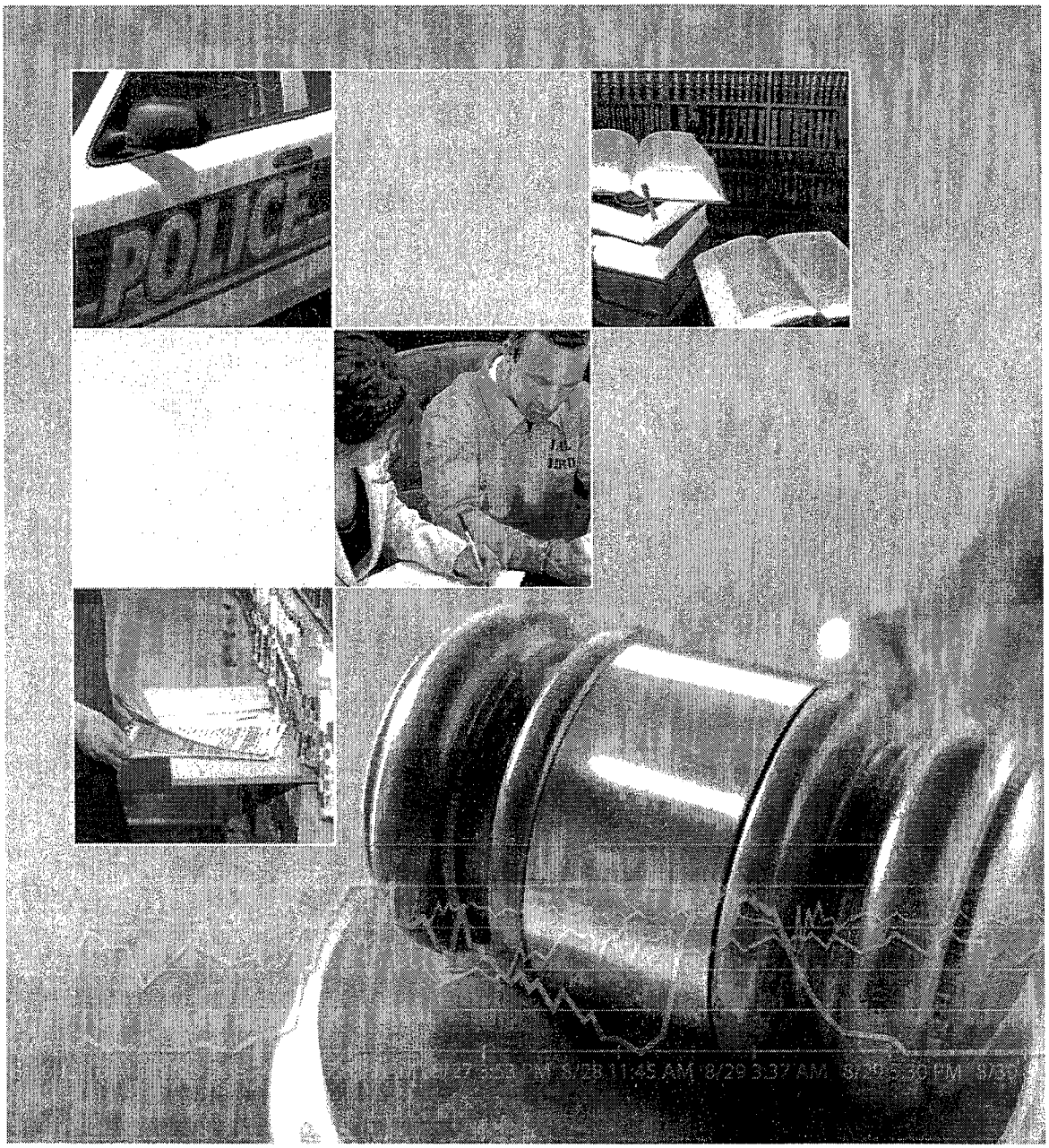

Continuous Transdermal Alcohol Monitoring:

A Primer for Criminal Justice Professionals

TRAFFIC INJURY RESEARCH FOUNDATION
A DRIVING FORCE FOR SAFETY

DUI Commission 2009
8-6-09
Attachment 8

Continuous Transdermal Alcohol Monitoring:

A Primer for Criminal Justice Professionals

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The Traffic Injury Research Foundation

The mission of the Traffic Injury Research Foundation (TIRF) is to reduce traffic-related deaths and injuries. TIRF is an independent, charitable road safety institute. Since its inception in 1964, TIRF has become internationally recognized for its accomplishments in identifying the causes of road crashes and developing programs and policies to address them effectively.

This report was made possible by a contribution from **Alcohol Monitoring Systems, Inc.**

TRAFFIC INJURY RESEARCH FOUNDATION

A DRIVING FORCE FOR SAFETY

www.trafficinjuryresearch.com

December 2007

ISBN: 978-0-920071-60-1

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TIRF gratefully acknowledges the assistance provided
by the following individuals who reviewed
and commented on earlier drafts:

Paul Biderman
Director, Institute of Public Law
University of New Mexico, School of Law
A Past President of the National Association
of State Judicial Educators

Zachary Dal Pra
Deputy Chief
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Judge Harvey Hoffman
District Court Judge, Eaton County, Michigan
Michigan Representative
Congress of State Drug Courts of the National Association of
Drug Court Professionals

Drew Molloy
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Executive Summary

Research

- Ensuring offender compliance with court orders of abstinence has been an elusive goal and a notoriously difficult condition to enforce using standard alcohol testing devices.
- New technology that permits continuous monitoring of alcohol consumption provides a means to overcome this problem.
- After more than 70 years of research and 22 peer-reviewed studies into the science underpinning this new technology, it has been clearly established that ingested alcohol can be validly measured in perspiration through the process of transdermal alcohol testing, i.e., testing of alcohol that is excreted through the skin.

- Research studies over the past 10 years have demonstrated that transdermal alcohol readings or results are correlated to blood alcohol concentrations. There is a recognized and measurable delay in the absorption and elimination of alcohol, so *simultaneous breath or blood and transdermal alcohol readings should not be expected to produce similar results at a specific point in time.*
- Transdermal alcohol testing is a valid way of determining whether an individual has consumed a small, moderate, or large amount of alcohol, and is designed to be used as a screening device to determine alcohol use. This testing method is not designed to produce a specific blood alcohol concentration (BAC) reading.
- Research studies conducted by the University of Colorado Health Science Center, the Michigan Department of Corrections, and Alaska Justice Statistical Analysis Center, involving testing with probation officers and offenders, conclude the SCRAM device is a valid and reliable way of testing for alcohol consumption and is a "fast-acting deterrent".
- While preliminary findings from these latter studies are promising, more research involving large scale quantitative surveys and case-control studies are needed to corroborate these initial findings.

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Technology

- The SCRAM device is a passive, non-invasive tool that reliably and continuously monitors and measures alcohol consumption 24/7 for an extended period.
- The SCRAM device is a tamper- and water-resistant bracelet, containing an electrochemical sensor that is attached to the offender using a durable strap. The device captures transdermal alcohol readings from continuous samples of vaporous or insensible perspiration collected from the air above the skin.
- The SCRAM device has a number of anti-circumvention features including: a tamper clip or strap, obstruction sensor, temperature sensor, and communication monitoring to ensure that the bracelet is functioning normally and capturing and transmitting information related to the designated offender.
- The bracelet transmits testing information daily on a pre-determined schedule to a modem installed in the offender's residence or place of work using a radio-frequency (RF) signal. This information is encrypted and transferred via a standard analog phone line to a secure central website (SCRAMNET) managed by Alcohol Monitoring Systems (AMS).

- Criminal justice professionals can access SCRAMNET at their convenience, using a standard internet browser, to obtain a variety of progress reports specific to their caseload, and receive customized notifications of events and alerts.
- As with any alcohol testing device, some substances containing alcohol in sufficient quantities can act as an environmental interferant and produce a positive alcohol reading. AMS staff can generally distinguish between readings due to interferants and readings due to alcohol consumption (true alcohol readings) based on a comparison between the curve produced and the standard alcohol curve, and a comparison of absorption and elimination rates.

Program Applications

- Continuous transdermal alcohol monitoring is primarily intended to deter offenders from violating the terms of court-ordered abstinence

through the constant monitoring of alcohol consumption and swift notification of violations.

- Criminologists and criminal justice practitioners are currently designing implementation guidelines to assist courts, probation, treatment, and correctional agencies with the use of SCRAM technology. These guidelines will emphasize accountability, streamlined practices and procedures, good communication and information exchange, and contain a structured evaluation that will assist agencies in developing evidence-based practices.
- Most challenges to the SCRAM device have occurred in evidentiary hearings in lower courts and resulted in unpublished opinions. SCRAM evidence and testimony have been ruled admissible in cases where AMS was permitted to provide evidentiary support, and SCRAM testimony has met the Frye standard of admissibility in Florida and Georgia and the Daubert standard in Louisiana. In general, the SCRAM technology has been and continues to be validated in bond and probation-revocation hearings.
- SCRAM technology is used to supervise a variety of offender populations including: impaired driving and domestic violence offenders, offenders actively tested for drugs, underage drinking offenders, adult offenders who supervise minors, and licensed, practicing professionals. Goals of implementation include: supervision of offenders and licensed professionals, and prison depopulation.

- SCRAM is relevant to a number of programs including: pre-trial, probation supervision, specialty courts, treatment, and re-entry and parole.
- Costs include an installation fee ($50.00-100.00) and daily monitoring fees ($10.00-12.00). This is less than the costs of incarceration and home arrest systems incorporating alcohol monitoring. Funding arrangements are generally offender-pay and often include some accommodation of indigent offenders.

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Background

Almost all offenders convicted of impaired driving are ordered to abstain from consuming alcohol as a condition of sentencing or probation. Despite the variety of alcohol testing methods (e.g., blood, breath, urine) available to monitor compliance with this condition, compelling offenders to remain sober has been an elusive goal and a notoriously difficult condition to enforce.

Existing blood, breath, and urine testing protocols are used infrequently and are not consistently applied because of significant staffing, resource and cost implications. Recent findings from a national survey of 890 probation officers in 41 states revealed that officers spend less than 10% of their time engaged in random testing of offenders (Robertson and Simpson 2003). As such, the ability of officers to enforce this condition is limited, and, not surprisingly, offenders are able to engage in undetected drinking behavior.

In the past decade, alcohol testing technology has evolved, giving rise to a new generation of testing devices. To date, the most promising commercially available technology is Secure Continuous Remote Alcohol Monitoring (SCRAM). This device uses transdermal alcohol monitoring and allows for continuous monitoring of offenders 24 hours a day, seven days a week for the duration of the supervision period.

The rapid proliferation of these devices has created a need among criminal justice professionals for information about the research on continuous transdermal alcohol testing and monitoring, and its role in dealing with offenders. This document seeks to fulfill that need. It provides a comprehensive review of existing research on transdermal testing, describes current technologies, and identifies the various ways in which transdermal alcohol testing can enhance the supervision of substance abusing offenders, providing accurate assessments of alcohol use and compliance with court-ordered abstinence.

Research

Measuring alcohol consumption through perspiration

Since 1930, it has been well known and scientifically established that ingested alcohol diffuses throughout water in the body and is present in various bodily substances, including blood, breath, urine, and sweat (Swift 2000). Once

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alcohol has been ingested, most of it is metabolized in the liver, some is removed through exhaled air or breath, and some leaves the body unchanged in the urine. Only about 1% of ingested alcohol crosses the skin (Nyman and Palmlov 1936), either as sensible perspiration (sweat in the liquid phase) or insensible perspiration (constant, unnoticeable sweat in the vapor phase). This phenomenon, first studied and understood as early as 1936 (Nyman and Palmlov 1936), and later investigated in other studies (Brusilow and Gordes 1966; Pawan and Grice 1968; Johnson and Maibach 1971; Scheuplein 1978; Brown 1985a, 1985b), is known as *transdermal excretion of alcohol* or excretion through the skin.

Results obtained from the scientific research into measuring transdermal excretion of alcohol in the 1970s and early 1980s were also promising. It was concluded that the concentration of alcohol in the collected sweat rose with the amount of alcohol consumed and with the mean concentration of alcohol in the blood (Phillips 1980; Phillips and McAloon 1980; Phillips 1982; Phillips 1984a). Further research in the 1980s drew comparable conclusions, highlighting that the blood alcohol concentration at a specific point in time cannot be accurately estimated using sweat samples due to a time delay between absorption of alcohol in the blood and excretion through the skin (Brown 1985a, 1985b). Due to this time delay, it is recommended that transdermal alcohol testing be regarded primarily as a screening method for detecting and monitoring episodes of alcohol use (Brown 1985b; Giles et al. 1987), rather than for determining precise levels of alcohol in the body at specific points in time.

In the 1990s, when the most recent generation of test devices, the transdermal alcohol bracelet, became available, earlier findings regarding the accuracy of transdermal testing were again corroborated (e.g., Swift et al. 1992).

After more than 70 years of research and 22 independent, peer-reviewed studies, it has been established that ingested alcohol can be validly measured in perspiration through the process of transdermal alcohol testing. Research about the dynamics of *transdermal alcohol testing* is still ongoing (e.g., Swift 1993; Anderson and Hlastala 2006) and the dynamics of transdermal alcohol testing may vary both between subjects (Anderson and Hlastala 2006) and within subjects (Swift 1993). This means that some variation in repeated measures taken from a single subject can occur as the human body is not static, and that some variation in measurements from different subjects can occur, as no two people are alike. Such biological differences between and

among individuals is not uncommon. For example, there are variations in blood partition ratios (used in blood alcohol testing) between individuals.

Studies over the past 10 years do conclude that transdermal alcohol concentrations reflect blood alcohol concentrations accurately, but with a measurable delay in absorption and elimination (Davidson et al. 1997; Swift 2003). *As such, simultaneous breath or blood and transdermal alcohol readings should not be expected to produce similar results at a specific point in time.*

"On average, the device shows discriminative validity as a semi-quantitative measure of alcohol consumption [...]" (Sakai et al. 2006, p.26). This means that this technique is a valid way of determining whether someone has consumed a small, moderate, or large amount of alcohol and to gauge compliance with orders of abstinence.

Collection and testing of transdermal alcohol

Transdermal alcohol can be collected in the liquid phase (sensible perspiration) or the gaseous phase (insensible perspiration). Collection in the liquid phase may occur using a sweat patch (Phillips et al. 1977; 1978, 1995; Phillips 1984a, 1984b) or an alcohol band-aid (Roizman et al. 1990) applied to the skin to trap ethyl alcohol eliminated in perspiration. Collection in the gaseous phase can occur using a wide variety of techniques to capture an air sample directly above human skin (Brown 1985a; 1985b), or biological fluids (Giles et al. 1986; 1987).

Both liquid and gaseous perspiration samples can be analyzed or tested for ethyl alcohol using a variety of scientifically accepted techniques, including electrochemical sensors, colorimetric or integral, enzymatic, and chromatographic methods.

In the 1990s, technological advances led to the development of more sophisticated and practical methods of measuring transdermal alcohol by means of transdermal alcohol bracelets (Hawthorne and Wojcik 2006). These devices can be easily attached to an individual for extended periods and continuously collect insensible perspiration samples just above the skin. These samples are analyzed by an electrochemical sensor in the bracelet to estimate the concentration of alcohol in the body, and, thereby, provide an indication of alcohol use.

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Comparing alcohol test results

Results from transdermal alcohol testing can be compared to the results of other alcohol tests such as blood or breath. While alcohol pharmacokinetics (the manner in which alcohol is metabolized in the body) in humans may be complex, the principle of transdermal testing is easily understood and not different from the principles that govern breath testing.

There is a general consensus that blood analysis is the "gold standard" because it provides the most reliable measure of blood alcohol concentration (BAC) and because behavioral impairment is most strongly correlated with the level of alcohol in blood (Verstraete and Puddu 2000).

Breath alcohol concentration (BrAC) measurements are accepted as surrogate blood alcohol measurements because of the scientifically established correlation between the concentration of alcohol in blood and in breath. This proven correlation has permitted the use of breath as a reliable estimate of blood alcohol concentrations by the police, courts, and probation since the 1970s (Swift 2003).

Transdermal alcohol testing relies on the same principle. Since alcohol is excreted unchanged wherever water is removed from the body (breath, urine, perspiration, and saliva), there also exists a correlation between the alcohol concentration in perspiration (i.e., transdermal alcohol concentration or TAC) and the alcohol concentration in the bloodstream (e.g., Davidson et al. 1997; Buono 1999).

It has been established that individual transdermal alcohol readings cannot be considered equivalent to blood alcohol concentrations. The main difference between blood or breath alcohol testing and transdermal alcohol testing is a time delay in the absorption, peak, and elimination of alcohol that occurs with transdermal testing. As noted previously, *simultaneous breath or blood and transdermal alcohol readings should not be expected to produce similar results at a specific time* (see Appendix II).

However, rather than using this method to quantitatively estimate precise alcohol levels, research shows that transdermal alcohol testing may be validly used as a method to qualitatively identify drinking episodes (Sakai et al. 2006).

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Comparing alcohol test protocols

Transdermal testing compares favorably with other test protocols. Table 1 summarizes the advantages and disadvantages of testing blood, breath, and sweat, and their monitoring protocols (random vs continuous). Blood and breath testing are invasive and require active participation by the offender. Conversely, the transdermal collection of sweat is both non-invasive and passive - offenders are not actively involved in delivering a sample; nor are officers involved to collect the sample.

Blood and breath testing have a higher cost per test whereas transdermal alcohol testing has a lower cost per test -- the ease of transdermal alcohol testing enables more tests in a given time period for the same cost. For example, instead of one test per week with a probation officer or physician, or instead of several breath tests per day at home with an electronic test protocol, transdermal testing can occur every hour throughout the day, at any location. Although breath testing can be used as a random protocol (e.g., multiple times daily, weekly), a high frequency of testing rarely occurs due to associated staffing and resource costs. Conversely, transdermal monitoring of sweat is a continuous protocol, making it very difficult for the offender to avoid detection for non-compliance.

Finally, while each of the test protocols described has the power to discriminate between the consumption of small, moderate, and large quantities of alcohol and gauge alcohol use, only blood and breath testing provide a precise alcohol concentration at a specific point in time.

Table 1: Comparison of test protocols for different substances

	Blood (BAC)	Breath (BrAC)	Sweat (TAC)
Level of intervention	invasive/active	invasive/active	non-invasive/passive
Cost per test	high	medium/low	low
Number of tests	low	medium/low	high
Frequency of testing	intermittant	daily/weekly	hourly
Automated	no	no/yes (EAM)*	yes
Remote testing	no	at offender's home	anywhere
Continuous monitoring	no	no	yes
Discriminative power	yes	yes	yes
Measure	quantitative	quantitative	semi-quantitative/ qualitative

*Electronic Alcohol Monitoring

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Another technology worth mentioning is the actigraphy-based substance abuse screening. Research demonstrates that alcohol consumption disrupts sleep (Dement 2000; Brower and Kirk 2001). Once baseline measures of normal sleep have been collected, sleep patterns are monitored using actigraphy for evidence of possible intoxication episodes. However, this approach is less than continuous because testing only occurs when sleep patterns occur and because possible intoxication episodes have to be confirmed using a corroborating source of evidence or, more precisely, biomarkers collected from the offender's blood or urine (e.g., ethylglucuronide or EtG). The advantages of the continuous monitoring element (the continuously monitored sleep disruptions) may be compromised by the disadvantages of the non-continuous monitoring element (taking of blood or urine samples at predetermined points in time).

Conclusions from the scientific research

As discussed previously, the scientific conclusions regarding transdermal alcohol testing in general are:

- Ingested alcohol can be validly measured in perspiration through the process of transdermal alcohol testing.
- TACs reflect BACs accurately and reliably, but with a measurable delay in absorption and elimination (see Appendix II). TAC readings can distinguish qualitatively between consumption of small, moderate or large amounts of alcohol; however, they are not intended to provide precise, quantitative estimates of alcohol consumption similar to evidential tests.
- The current validity and the level of accuracy of transdermal alcohol testing permit it to be used as a screening tool to verify compliance with orders of abstinence.

Effectiveness of transdermal bracelets

The following paragraphs provide a brief summary of the scientific research into transdermal alcohol testing using transdermal alcohol monitoring bracelets.

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a) WrisTAS

The first prototype of the Transdermal Alcohol Sensor/Recorder (TAS), developed by Giner, Inc., was tested in the 1990s (Swift et al. 1992). It is a wearable device that senses ethanol vapor at the surface of the skin, using an electrochemical cell that produces a continuous current signal proportional to ethanol concentration. It served as a precursor for WrisTAS, the bracelet version of TAS, worn on the wrist.

The scientific evaluation results for TAS show that the transdermal sensor utilized by this product closely followed the pattern of the blood alcohol concentration curve, but with a time delay (Davidson et al. 1997; Swift et al. 1992; Swift 1993; Swift 2000). These promising results lead to the development of the bracelet version, which is not yet commercially available. It has been clinically tested, but is not currently designed for real-world settings. To date, it cannot withstand water submersion, is not resistant to tamper or circumvention attempts, and has no automated data collection or reporting capability.

b) Secure Continuous Remote Alcohol Monitoring (SCRAM)

The SCRAM device became commercially available in 2003 and, to date, it is the only available continuous transdermal alcohol monitoring bracelet on the market. The University of Colorado Health Science Center, under funding from the National Institute on Drug Abuse (NIDA), the National Institute of Mental Health (NIMH), and Alcohol Monitoring Systems, Inc. (AMS), conducted a scientific evaluation of the SCRAM device (Sakai et al. 2006). A total of 44 subjects participated in this study and wore the SCRAM anklet. This study corroborated the validity of transdermal alcohol testing as a screening method. On average, the device showed discriminative power to distinguish between sobriety and drinking and appeared to be comfortable for most users. Individual readings, however, often were not equivalent to simultaneous breath alcohol concentrations due to the recognized delay alcohol experiences when migrating through the skin.

An evaluation study by the National Highway Traffic Safety Administration (NHTSA) to obtain laboratory data on the precision and accuracy of transdermal alcohol devices (including SCRAM and WrisTAS described above) is being conducted. Results were not available at the time this 'primer' was published.

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In addition to the experimental studies in laboratories discussed in previous sections, some promising results are available from a BETA test of the SCRAM System, carried out by the Michigan Department of Corrections (Bock 2003). Michigan officers and a select number of offenders wore the SCRAM Bracelet for a period of several weeks. Results from the BETA test indicate that "the product is able to detect circumvention of alcohol test sampling, reliably ensures that test samples are from the intended test subjects, and detects drinking episodes around the clock regardless of a subject's schedule or location" (Bock 2003, p.4). The Michigan Department of Corrections concluded that, overall, officers genuinely felt the SCRAM technology "has significant merit, is easy to use and has benefits over other monitoring equipment on the market" (Bock 2003, p.6). Response from offenders was very positive as well -- they reported that the system was "a fast-acting deterrent and a preferred method of testing because of the freedom to maintain work and family schedules" (Bock 2003, p.6).

A small pilot project in Alaska, proposed as a National Law Enforcement and Corrections Technology Center-Northwest (NLECTC-NW) project, and conducted by the Alaska Justice Statistical Analysis Center as an alternative approach to chronic alcohol abuse, turned into a full implementation with 176 participants in the first half of 2005. Overall, 319 clients conducted about 453,000 tests in 2003-2005 during a total of 18,787 monitored days. There were 408 confirmed alerts and the compliance rate with the orders of abstinence was 56%. Interviews conducted with the involved agencies and probation officers confirmed no failures of the equipment, even in extreme cold and other inclement conditions (McKelvie 2005).

In summary, findings from these initial studies conclude that SCRAM is a valid and reliable way of testing clients for alcohol use. It is not designed to provide a precise measure of an offender's alcohol concentration at a specific point in time, but it is a valid and reliable method to determine compliance with court-ordered abstinence.

Caveats to the research on transdermal alcohol testing

The technology that is available today has been developed with the sole purpose to use it as a *qualitative* screening device, i.e., to verify whether an

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offender is compliant with orders of abstinence and to estimate alcohol use. It is not intended to provide a precise, quantitative alcohol concentration or BAC result. If there would be a demand to use this technology as a quantitative screening device to provide a precise estimation of alcohol use, more *laboratory* and *clinical* research findings are needed to provide further insight into pharmacological differences between and within individuals.

The results from the University of Colorado study (Sakai et al. 2006), the BETA test on SCRAM from the Michigan Department of Corrections (Bock 2003) and the NLECTC-NW project (McKelvie 2005) are positive and encouraging. *Additional large scale, quantitative surveys and case-control studies should be conducted to corroborate these initial findings.* Agencies that have fully implemented the SCRAM device should undergo process and impact evaluations to answer questions regarding other issues, such as the extent of behavior modification, compliance rates, tampering, length of time required to moderate alcohol consumption, and influence on recidivism in the real world.

Technology

The SCRAM System

To date, only one continuous transdermal alcohol monitoring system (SCRAM) has been fully implemented and designed to withstand real-life circumstances. As such, this document mainly focuses on the SCRAM System.

The SCRAM System is a passive, non-invasive tool that reliably and continuously monitors and measures alcohol consumption 24 hours a day, 7 days a week for an extended period. It is based on transdermal alcohol detection and measures alcohol excreted through the skin in the form of constant, unnoticeable perspiration.

SCRAM Bracelet or Anklet. This tamper- and water-resistant bracelet or anklet contains an analog and a digital component that are attached to the offender using a durable strap (a custom engineered polypropylene blend). The strap houses electronic circuitry that allows the analog and digital sides to communicate.

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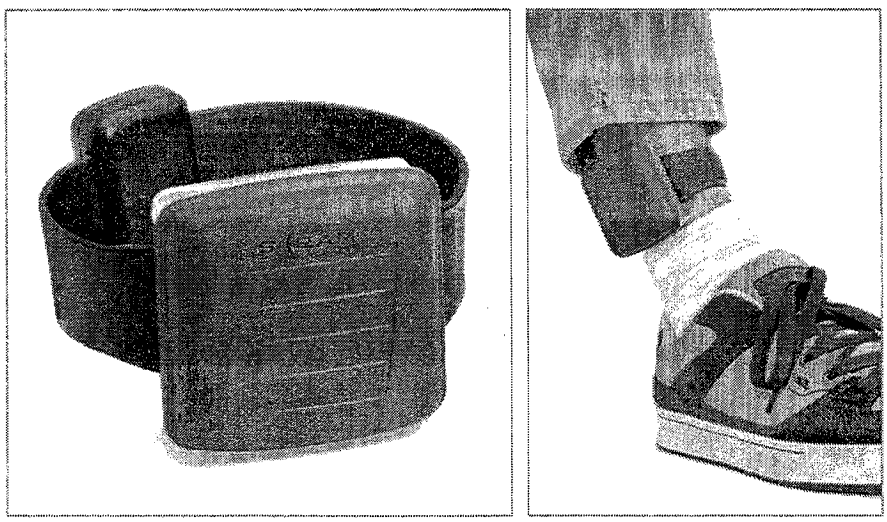
The analog component is an electrochemical alcohol sensor -- the same sensor that is generally approved by the courts and found in some evidential breath testing devices, preliminary breath testing devices, and passive sensors. This sensor must be calibrated annually, according to the Draeger manufacturer. In most instances, the device is calibrated every 3-6 months when the bracelet is returned for regular servicing. This internal detector draws a sample of insensible perspiration every half hour from the air above an offender's skin into a chamber containing an electrochemical alcohol sensor. The sample is analyzed and measured for ethyl alcohol.

The digital component contains a flash memory chip to store alcohol readings, a circumvention detection device to monitor body temperature and detect tampers, and uplink features that can transfer these readings, via a wireless radio frequency (RF) signal, to the SCRAM Modem (RF signals are also used in most electronic monitoring equipment). At scheduled times set by the court or probation agency, the anklet will transfer these data to the modem.

Figure 1: The SCRAM Bracelet



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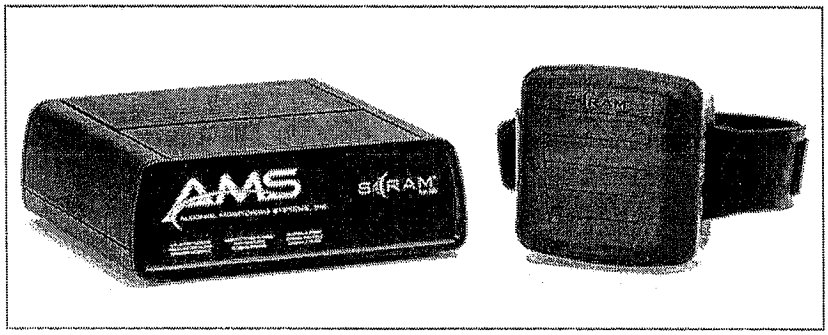
SCRAM Modem. This standard modem requires access to a conventional phone line within the offender's residence or at work and can be easily connected. It communicates with the bracelet using RF signals, similar to home monitoring equipment. Once daily, or up to six times daily at a predetermined time, the bracelet sends its data to the modem. The offender must be within 30 feet of the modem for data transmission to occur. In addition to receiving the test data, the modem can also download monitoring protocols and reporting schedules to the SCRAM Bracelet.

Figure 2: The SCRAM modem and the SCRAM bracelet



SCRAM Internet Website (SCRAMNET). Alcohol Monitoring Systems, Inc. (AMS) manages a web-based application (SCRAMNET) that receives encrypted data (alcohol tests, tamper/circumvention attempts, servicing information) from the modem of every offender and stores it in a secured database. These data sets are reviewed and analyzed by trained and certified AMS staff[1], and any events (positive alcohol readings, tampers, malfunctions) are confirmed through data interpretation and analysis using conservative, well-defined criteria, and subsequently forwarded to court or probation staff. Authorized users can also easily login to access information about their respective caseload from any location using an Internet-accessible computer with a standard web browser. Agencies do not require software or information technology (IT) support to use this secure site.

1 Typically, AMS staff go through an intensive level of product training of up to 40 hours. Subsequently, staff will be mentored and trained for 3-6 months by senior monitoring personnel before alerts can be confirmed independently.

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Judges, probation officers, or treatment professionals can access SCRAMNET at their convenience to customize the supervision of individual offenders. They can also receive automatic notifications of confirmed events and a variety of customized reports of compliance/non-compliance for every offender, caseload, and agency upon request.

Alcohol positive readings

The reliance of transdermal alcohol testing on an electrochemical sensor ensures that false positive readings due to organic hydrocarbon solvents or contaminants do not occur. Moreover, because it measures alcohol through the skin, this technology will not produce false positive readings due to the presence of mouth alcohol.

Some foods (e.g., chocolate donuts, certain types of breads) can produce endogenous (internally produced) alcohol. This alcohol is unlikely to be produced in sufficient quantities to result in a positive reading on a transdermal alcohol measuring device. For example, an article published in the Journal of Analytical Toxicology reported that an individual would be required to consume 3 lbs of bread to reach a BAC equivalent to that of a single 12 oz beer with 4% alcohol. As such, "the likelihood of anyone testing positive for alcohol from cooked bread consumption, let alone becoming intoxicated, is therefore remote" (Logan and Distefano 1998, p. 183). Similarly, certain medical conditions, such as diabetes, can also result in the internal production of alcohol. Individuals with diabetes are prone to vascular diseases in the extremities and are potentially at greater risk of discomfort and potential adverse side effects as a result of wearing the SCRAM bracelet. At this time, it is recommended that individuals with diabetes not use SCRAM.

There are many substances containing alcohol (e.g., perfume, hand sanitizers) that can act as environmental interferants and produce a positive alcohol reading. More research is needed to further measure the absorption and elimination rates exhibited by these interfering substances and the alcohol curves that are produced.

As a preventive measure, offenders are instructed to avoid such substances and provided with a list of common product interferants. However, when offenders

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do come into contact with interfering substances, the alcohol curve that is generated assists trained AMS staff in identifying the source of the alcohol. Positive alcohol curves that are generated by interferants are often clearly distinguished from true positive alcohol curves that occur due to consumption, based on differences in absorption and burnoff rates.

A true alcohol reading that results from consumption often occurs over a longer period and is more gradual (see Figure 3); a positive reading due to an interferant may be much shorter and steeper, especially in the absorption phase (see Figure 4). Hence, while environmental interferants result in positive alcohol readings, these positive readings are generally not falsely identified as occurring due to alcohol consumption, and do not result in a confirmed alert to supervising agencies. Supervising agencies are only notified of confirmed, true alcohol readings, although records of all alcohol readings are retained by and available from AMS.

Figure 3: Standard BAC absorption and elimination curve

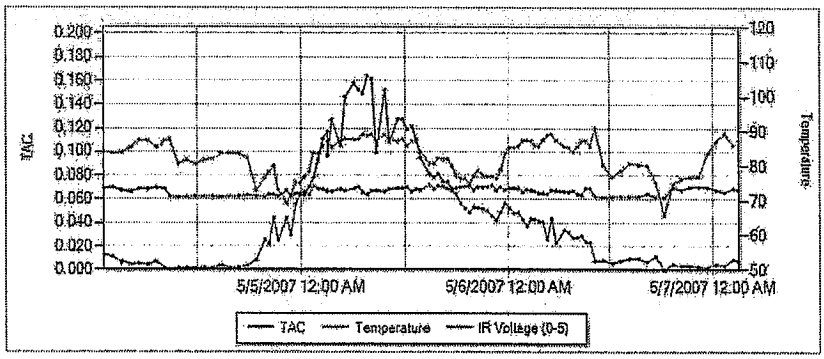
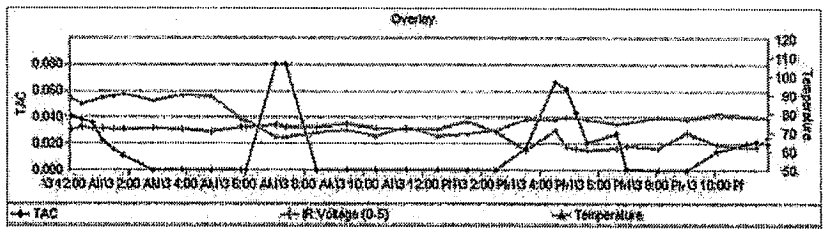


Figure 4: Interferant absorption and elimination curve



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Anti-circumvention features

SCRAM has incorporated a number of anti-circumvention features to ensure that alcohol readings are accurate, that they are from the proper offender, and that they are transmitted to SCRAMNET.

Tamper clip or strap. The SCRAM device is attached to the offender by the service provider or court/probation agency using a special clip. Damaging, removing, or destroying the clip or strap once it is in place triggers anti-circumvention features.

Obstruction sensor. The obstruction sensor is an infra red (IR) sensor that measures the reflective intensity of an IR beam between the analog component of the bracelet and the offender's leg. It ensures the bracelet is continuously worn by the offender, and detects materials inserted between the bracelet and the leg through comparison with baseline IR readings taken when the device is first attached. Substantial changes in IR readings generate a potential tamper alert. Moreover, AMS staff can typically classify materials used to block the device (e.g., socks, plastic, bed sheets, etc.).

Temperature sensor. The temperature of the surrounding atmosphere of the offender's leg is also measured and compared to baseline readings taken at the time the bracelet is attached. A potential removal alert will be generated if a significant drop in temperature (suggesting removal of the device) combined with a significant change in IR readings occur for a period of time. In addition, the temperature sensor has been successfully tested under extreme weather conditions, such as those found in Alaska.

Communication monitoring. Communication between the bracelet and the modem and between the modem and the network is scheduled to occur at least once every 24 hours. A critical communication alert is generated and sent to the supervising officer if an offender misses a scheduled communication time, and has not uploaded the bracelet information for over 48 hours.

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Program Applications

Offenders

Many substance abusing offenders are monitored using transdermal technology:

- first and repeat impaired driving offenders;
- domestic violence offenders where alcohol is identified as a contributing factor;
- illicit drug offenders who often return to alcohol when they are being actively tested for illicit drugs;
- underage drinking offenders who demonstrate reckless behavior;
- adults with a substance abuse issue who are responsible for the supervision of minors; and,
- licensed, practicing professionals with substance abuse issues.

Programs using transdermal alcohol monitoring technology

Agencies may incorporate continuous transdermal alcohol monitoring into a variety of supervision programs to accomplish one of three possible objectives:

- **Offender supervision** - monitoring offender drinking behavior and tailoring supervision through adjustments in testing and reporting schedules.
- **Prison/jail depopulation** - releasing incarcerated offenders while providing constant supervision and monitoring of drinking behavior.
- **Supervision of licensed professionals** - allowing licensed professionals with an alcohol problem to continue practicing without jeopardizing client safety.

Programs that can benefit from continuous transdermal alcohol monitoring include:

- **Pre-trial programs** - Continuous transdermal alcohol monitoring is a risk assessment tool that can provide clear indications of an

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offender's drinking behavior and guidance on sentencing issues based on objective evidence.

- **Probation supervision programs** - Supervision of specialized or mixed offender caseloads can benefit from tailored testing and reporting schedules (e.g., daily vs. weekly) and accommodate different levels of supervision as needed. Moreover, this tool can assist probation officers with identifying high-risk probationers through the regular reporting of non-compliance, attempted circumvention, and tampers, which would otherwise remain undetected.
- **Specialty court programs** - Offenders in these court settings may be higher-risk offenders with a serious substance abuse issue or may have custody of minor children. Continuous monitoring can reduce risk, act as an incentive for compliance, and provide an assessment of progress in treatment.
- **Treatment programs** - Continuous transdermal alcohol monitoring can provide an accurate and objective assessment of an offender's compliance with, and progress in, a treatment setting and allow professionals to tailor conditions based on progress. It can also promote rapid intervention when violations occur.
- **Re-entry, parole, or prison de-population programs** - Continuous monitoring of offenders for alcohol consumption can assist officers in identifying low-risk offenders, and ensuring that supervision conditions are tailored according to the level of risk an offender poses. It also allows officers to devote their attention to those offenders posing the highest-risk and requiring the greatest supervision.

Principles of sentencing

Continuous transdermal alcohol monitoring is primarily intended to deter offenders from violating the terms of court-ordered abstinence through the constant monitoring of alcohol consumption. *When non-compliance and drinking events are detected, agencies are promptly notified to allow for a swift and certain response -- i.e., specific deterrence. This facilitates proper action to prevent continued or future drinking events.* In turn, this assists with the rehabilitative process by providing constant monitoring of alcohol

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consumption. This gives courts and treatment agencies an assessment of compliance with, and progress in, treatment, as opposed to being forced to rely on self-reports from the offender.

Although continuous transdermal alcohol monitoring devices possess no inherent rehabilitative benefits, they have the potential to complement and facilitate behavior change by providing a continuous, independent assessment of compliance with, and progress in, a treatment program. These devices create opportunities for officers and treatment professionals to confirm instances of offender compliance and use positive reinforcement to encourage the desired changes in behavior, as well as to take action in instances when offenders demonstrate non-compliance. Probation officers report that it can be as important to "catch offenders doing things right" to encourage change as it is to "catch them doing things wrong."

There are also punitive qualities associated with continuous transdermal alcohol monitoring. In addition to inconvenience and financial costs, it provides a constant deterrent and reminder to offenders of the problem behavior that needs correction. However, it still permits offenders to remain employed, fulfill family obligations and responsibilities, maintain ties and support within the community, and participate in treatment.

Evidence-based practices

Criminologists and criminal justice practitioners are currently designing guidelines to assist courts, probation, treatment, and correctional agencies with the implementation of SCRAM devices. This set of guidelines will assist agencies in identifying critical steps in the implementation process and create a comprehensive supervision system that is compatible with existing practices. The guidelines will emphasize accountability, streamlined practices and procedures, and good communication and information exchange.

These guidelines will be continually refined and improved through an agency process evaluation that allows administrators and line staff to provide feedback to researchers. This serves to inform and improve the implementation of SCRAM, and ensure that the system meets the needs of criminal justice professionals. Agencies will also be provided with a framework

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that allows them to conduct their own independent impact evaluation. This evaluation can determine the effectiveness of the SCRAM System, and its impact on the agency's ability to supervise offenders in terms of the quality of supervision, the level of compliance, costs associated with the program, and any savings that have accrued. Such information is critical to allow agencies to make informed and objective decisions about the value of continuous transdermal alcohol monitoring to their respective programs.

Legal challenges

As with any new science or technology that is introduced in the criminal justice system, legal challenges are common. For example, despite the proven reliability of alcohol breath-testing instruments, these devices continue to be challenged in court. Both the science associated with transdermal alcohol testing as well as the technology of the SCRAM System have been challenged on multiple occasions in numerous jurisdictions. These challenges have been considered in evidentiary hearings in lower courts and have generated unpublished opinions (see Appendix III for a list of case law citations).

In general, the large majority of these decisions have been supportive of the science of transdermal testing as well as the technology of the SCRAM device. The SCRAM technology has been and continues to be validated in both bond and probation-revocation hearings across the U.S. Testimony about SCRAM has met the Frye standard of admissibility in both Florida and Georgia and the Daubert standard in Louisiana. Evidence and testimony regarding SCRAM have been ruled admissible in all of the cases where AMS was permitted to provide evidentiary support. Of some interest, AMS is currently developing a program that would allow probation officers to become certified in providing expert testimony about the SCRAM data in court hearings.

As of December 2007, there have been 49 evidentiary hearings involving offenders denying confirmed violations of the SCRAM System. AMS expert witnesses provided direct testimony for the prosecution when permitted. In each case involving AMS evidentiary support, SCRAM evidence and testimony were ruled admissible. In summary, there have been a total of 49 evidentiary hearings. Of these, 1 case was dismissed, 4 rulings are still

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pending, 39 rulings have supported the technology and 5 rulings have been against the technology -- although in 2 of these cases the defendant was ordered to remain on the device.

Length of monitoring period

The length of the monitoring period can vary according to the needs of the offender. Shorter periods in a pre-trial situation can provide the judge with information pertinent to sentencing. Longer periods are appropriate in a post-conviction supervision program depending on the ability of the offender to refrain from consuming alcohol. A performance-based approach is strongly recommended when applying the technology, as opposed to imposing a standard statutory period regardless of the offender's level of compliance. Agencies should tailor the length of the monitoring period based on risk/needs assessments, substance abuse assessments, and other pertinent factors. Agencies can reward good behavior by reducing the period of monitoring and respond to non-compliance by extending the period of monitoring. AMS typically recommends a minimum period of 90 days based on research on deficits in executive cognitive functioning following alcohol use (Zinn et al. 2004).

Costs

This technology relies on an offender-pay arrangement in which offenders bear the costs associated with the use of the technology. This scheme is consistent with the use of other technologies such as electronic monitoring and breath alcohol ignition interlocks. Such costs are frequently justified on the basis that offenders are able to afford alcohol, and the direct public safety benefits that occur when offenders refrain from alcohol consumption.

Indigent funding arrangements can be organized in cooperation with the vendor and should be encouraged. To date, different programs have been very creative in how they obtain additional funding and defer costs to offenders. Also, it should not be forgotten that offenders are able to afford the costs to purchase alcohol.

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Some courts, depending on funding arrangements, may be willing to consider reducing or partially vacating fines in lieu of offenders accepting the SCRAM technology and demonstrating compliance with court orders. Due to the myriad of financial obligations already levied on offenders, courts are encouraged to be strategic in ordering fines and fees. It is noted that many states have mandated what costs and fines courts must include in sentencing, leaving courts few alternatives.

In general, fines and fees collected by a collection agency are more likely to be collected. In the case of continuous alcohol monitoring, SCRAM service providers are responsible for fee collection and generally report a high rate of collection. A survey of 890 probation officers in 41 states found that an estimated 42% of impaired driving probationers currently fail to pay fines and fees (Robertson and Simpson 2003). Collection by the service provider has benefits in that it allows courts and probation agencies to reduce costs associated with the collection process.

For a system like SCRAM, the offender may pay an initial installation fee averaging $50- 100, and a daily monitoring fee averaging $10-12/day. It should be noted that offender fees vary by court, service provider, and the offender's ability to pay. Additional costs may be incurred by some offenders not equipped with a conventional phone line or in case they willingly damaged or did not return the equipment. Over time, fees can also be reduced with high compliance rates and graduated programs.

By comparison, a home arrest system, incorporating an alcohol testing component, has an average installation fee of $150 and a daily cost of $10-15 per day (Barrasse 2005; BI Incorporated 2006). The average daily cost of incarceration in a state or federal prison is about $62 per day (Stephen, 2004). These costs should be weighed in relation to the value that offenders and communities derive from regular supervision and sobriety.

Conclusions

Research on transdermal testing for alcohol has been ongoing since the 1930s. Today, research findings continue to be accumulated and researchers are confident that transdermal alcohol testing can provide valid and reliable estimates of alcohol consumption, allowing supervision professionals to discriminate between consumption of small, moderate, and large amounts of alcohol, and gauge compliance with orders of abstinence.

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Technological advances in the 1990s and the development of transdermal alcohol bracelets using electrochemical sensors have made the continuous testing of insensible perspiration for alcohol a reality. Today, offenders can be monitored 24 hours a day, 7 days a week to gauge their compliance with court-ordered abstinence. The transdermal bracelet is a unique tool that provides justice professionals with objective measures of alcohol consumption and evidence of compliance, allowing probation officers to tailor supervision to the needs of the individual.

To date, the research findings about transdermal alcohol testing bracelets are promising and encouraging. More research in the form of large-scale quantitative surveys and case-control studies is needed to further confirm and extend these initial findings and agencies should consider incorporating an evaluation component when implementing this technology.

This tool can be applied in a range of settings, including pre-trial, post-conviction, treatment, re-entry, and professional settings. It serves a valuable risk-assessment function that allows judges, probation officers, and treatment professionals to measure an offender's compliance with court-ordered abstinence, and can provide insight into an individual's potential to re-offend and the threat posed to public safety. Of considerable interest, the information collected by this device permits officers to reward compliance and good behavior by reducing restrictions or the level of monitoring, providing an incentive to offenders to remain compliant.

It can also provide guidance to officers and administrators regarding the allocation of limited resources - ensuring that only those offenders who require closer scrutiny or more intensive supervision receive it. Furthermore, it permits probation officers to place a greater emphasis on community integration and rehabilitation, allowing offenders to remain employed and maintain close relationships with family and positive role models.

Many states have already moved to implement SCRAM. Guidelines are essential to ensure that this technology is implemented in a consistent manner that will minimize loopholes in supervision, and allow the technology to reach its full potential and provide the greatest benefit to agencies. These evidence-based guidelines can inform the decision-making process and ensure that agencies receive solid evidence supporting their use of the technology.

**Guidelines for criminologists and criminal justice practitioners were presented in a subsequent document released in the fall of 2007.*

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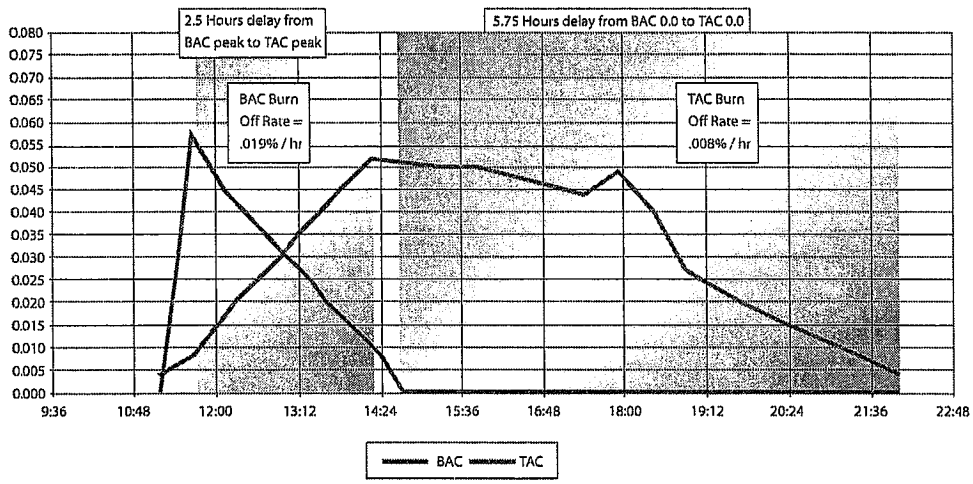
Appendix I: States using SCRAM

States listed below and shown in green on the map are using SCRAM.
(As of September 2006)

Alabama	Georgia	Maryland	New York	Tennessee
Alaska	Idaho	Michigan	North Carolina	Texas
Arizona	Illinois	Minnesota	North Dakota	Utah
Arkansas	Indiana	Mississippi	Ohio	Vermont
California	Iowa	Missouri	Oklahoma	Washington
Colorado	Kansas	Montana	Oregon	West Virginia
Connecticut	Kentucky	Nebraska	Pennsylvania	Wisconsin
Delaware	Louisiana	Nevada	South Carolina	Wyoming
Florida	Maine	New Mexico	South Dakota	

Appendix II: Time delay between breath and transdermal test readings

Readings taken from a 180lb male dosed to a .06% BAC.



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Appendix III: Case law citations

	Court	Date	Jurisdiction	Case #
1	22nd Circuit Court	5/7/2003	Michigan	01-1909-FH
2	58th District Court	2/20/2004	Michigan	03-16029-SD
3	47th District Court	4/22/2004	Michigan	03C412666
4	29th District Court of Common Pleas	8/15/2004	Pennsylvania	211303
5	Kotzebue, Alaska Municipal Court	4/16/2004	Alaska	2KB-04-147CR
6	Cobb County Drug Court	Apr-04	Georgia	04-9-0975
7	Anchorage Superior Court	10/6/2004	Alaska	3AN-S04-4652
8	3rd Judicial District Court	12/3/2004	Utah	55100007
9	Superior Court, Maricopa County	12/13/2004	Arizona	CR2002-020361
10	Superior Court, Maricopa County	12/13/2004	Arizona	CR2003-027284
11	52-1 District Court	12/15/2004	Michigan	04-003877-FY
12	22nd District Court	12/16/2004	Michigan	CRW-04691-FH
13	382nd District Court	2/3/2005	Texas	02-00-28
14	Superior Court, Maricopa County	3/7/2005	Arizona	CR2003-035106-001
15	Superior Court, Maricopa County	5/9/2005	Arizona	CR2003-021561-001
16	West Juvenile Drug Court	7/8/2005	Florida	0404379
17	48th District Court	9/2/2005	Michigan	0420922
18	Circuit Court Okaloosa County	9/13/2005	Florida	04-224CFA 04-225CFA
19	Cherokee County State Court	9/28/2005	Georgia	04T3536
20	Escambia County Court/Div.2	10/5/2005	Florida	04-20282-MMA
21	County Court at Law #11	11/9/2005	Texas	CC 850837
22	22nd District Court	11/17/2005	Michigan	041875FH
23	Denver County Court	2/3/2006	Colorado	05MO0543
24	Greeley Municipal Court	4/25/2006	Colorado	M191882
25	Lycoming DUI Court	5/16/2006	Pennsylvania	05891
26	Dallas County District Court	6/23/2006	Texas	F9823306-FT
27	Fairfield County Common Pleas Court	7/28/2006	Ohio	2005CR00252
28	Superior Court #3	Aug-06	Indiana	32D03-0506-CM-290
29	Fourth District	Aug-06	Minnesota	02064356
30	20th Judicial Circuit Court	Aug-06	Florida	05-001317CT-(ECT)
31	Wayne County Municipal Court	Sep-06	Ohio	TRC06021454
32	16th Judicial District Court	Sep-06	Louisiana	434-39-0993

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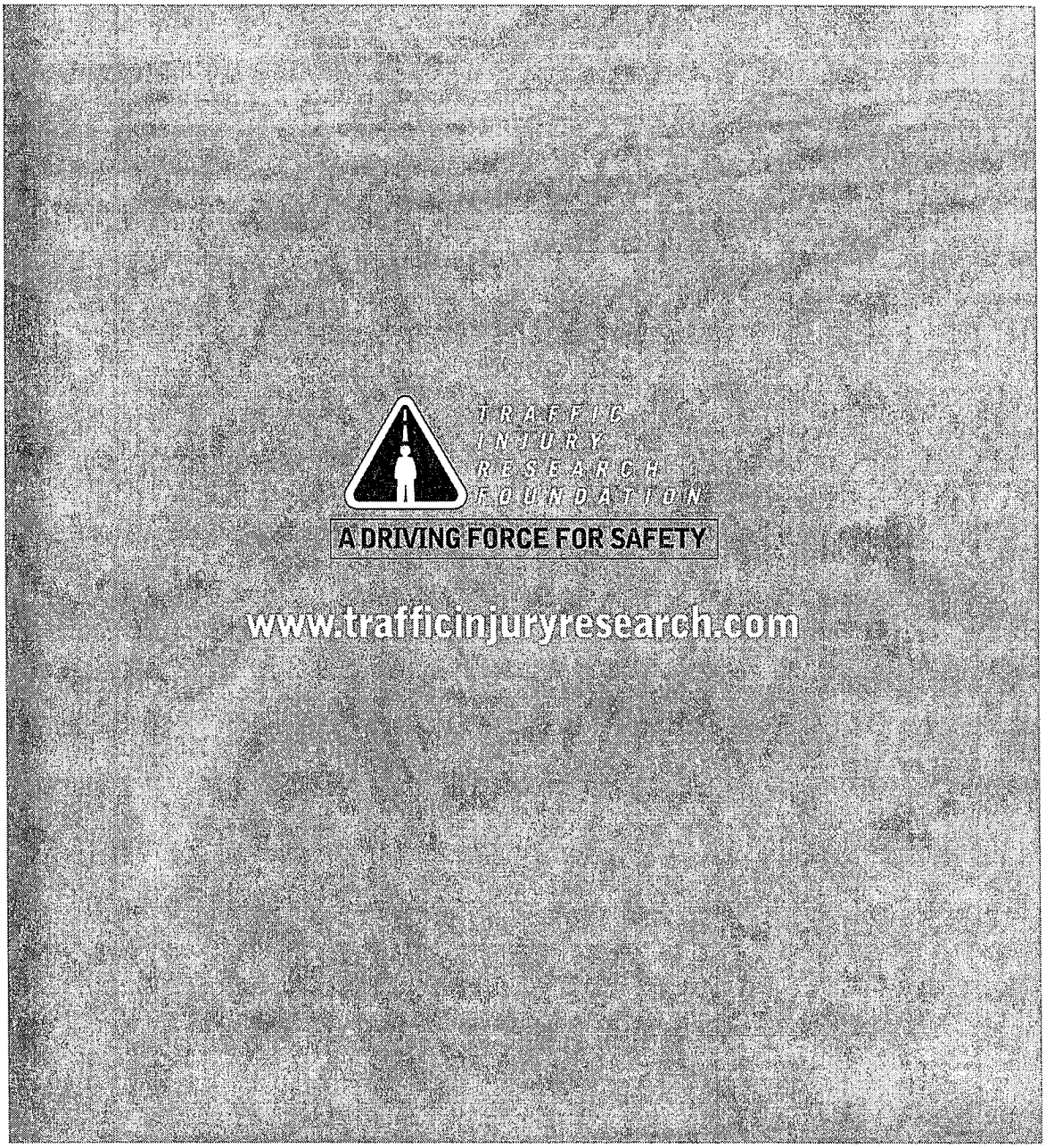

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EVALUATING TRANSDERMAL ALCOHOL MEASURING DEVICES

Final Report

November 2007

NHTSA

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Technical Report Documentation Page

1. Report No.	2. Government Accession No.	3. Recipient's Catalog No.

4. Title and Subtitle	5. Report Date
Evaluating Transdermal Alcohol Measuring Devices	November 2007
	6. Performing Organization Code

7. Author(s)	8. Performing Organization Report No.
Paul R. Marques and A. Scott McKnight	

9. Performing Organization Name and Address	10. Work Unit No. (TRAIS)
Pacific Institute for Research and Evaluation 11720 Beltsville Drive, Suite 900, Calverton, MD 20705 Phone: 301-755-2700 Fax: 301-755-2799	11. Contract or Grant No. DTNH22-02-D-95121

12. Sponsoring Agency Name and Address	13. Type of Report and Period Covered
National Highway Traffic Safety Administration 1200 New Jersey Avenue SE., Washington, DC 20590	Final Report (8/31/04 - 2/28/06)
	14. Sponsoring Agency Code

15. Supplementary Notes

James F. Frank, initial COTR; DeCarlo Ciccel, final COTR

16. Abstract

This report is an evaluation study of two types of transdermal devices that detect alcohol at the skin surface representing two types of electrochemical sensing technology. The AMS SCRAM™ ankle device and the Giner WrisTAS™ wrist device were worn concurrently for the evaluation by 22 paid research subjects (15 males, 7 females), for a combined total of 96 weeks. Each subject participated in both laboratory drinking to .08 grams per deciliter (g/dL) BAC and normal drinking on their own. A total of 271 drinking episodes with BAC ≥.02 g/dL were logged: 60 were from laboratory dosing, and 211 were from self-dosed drinking. Both devices detected alcohol at the skin surface. The SCRAM™ unit has security features and automated reporting protocols that make it suitable for the offender market, whereas the WrisTAS™ unit is a research prototype that has had trials as an aid to detection for alcohol treatment settings. Neither unit had false-positive problems when true BAC was <.02 g/dL. False negatives were defined as TAC (transdermal alcohol concentration) response <.02 g/dL when true BAC ≥.02 g/dL. Overall, the true-positive hit rate detected by WrisTAS™ was 24 percent. The low detection rate for the WrisTAS™ was largely due to those devices' erratic output or not recording during nearly 67 percent of all episodes. SCRAM™ correctly detected 57 percent across all BAC events, with another 22 percent (total 79%) detected, but as <.02 g/dL. SCRAM™ devices were more accurate earlier than later in the trials and may have had problems with water accumulation that reduced sensitivity. When subjects dosed themselves to BAC ≥ .08 g/dL, SCRAM™ correctly detected 88 percent of these events. The report summarizes comments from research subjects, offenders, and vendors who manage transdermal detection programs.

17. Key Words	18. Distribution Statement
Alcohol, Transdermal, Detection, Laboratory, Field	Copy available from the NHTSA Web page: www.nhtsa.dot.gov

19 Security Classif. (of this report)	20. Security Classif. (of this page)	21 No. of Pages	22. Price
Unclassified	Unclassified		

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Executive Summary

The objective of this research was to evaluate the accuracy and precision of two types of electrochemical transdermal alcohol sensors.

Introduction

There is only a very sparse research literature directly relevant to electrochemical transdermal alcohol detection. This includes papers published between 1992 and 2003 by project consultant Robert Swift, M.D., Ph.D., and his colleagues at Brown University reporting on the WrisTAS™ device; and a 2006 paper by Joseph Sakai, M.D., and his colleagues at the University of Colorado, who evaluated the SCRAM™ device. In addition, a biophysical model of transdermal alcohol measurement was published in 2006 by Anderson and Hlastala, biophysicists from University of Washington. These papers plus a few additional abstracts from recent scientific meeting presentations constitute the published literature on transdermal alcohol devices. In addition to these directly relevant papers, this report also provides some context for transdermal alcohol estimation by summarizing some background literature related to other nontraditional means of estimating alcohol exposure such as alcohol biomarkers, sweat patches, and noninvasive approaches to estimating blood alcohol concentration (BAC) such as, near infrared spectroscopy.

With respect to transdermal alcohol, Swift (2003) reported that approximately 1 percent of consumed alcohol is lost through the skin as a vapor. The concentration of alcohol at the skin surface reflects the concentration of alcohol in the blood (BAC), but curves plotted to represent the change at the skin surface show a delay of 2 or more hours on the ascending side and often somewhat more on the descending side relative to BAC.

Methods

Two devices, the Alcohol Monitoring Systems (AMS) Secure Continuous Remote Alcohol Monitor (SCRAM™), and the Giner Inc Wrist Transdermal Alcohol Sensor (WrisTAS™) were used in combined laboratory and field trials for 96 total weeks of wear (an average of 4.3 weeks per subject) by 22 subjects (15 males, 7 females). The SCRAM™ device locks onto the ankle and is worn 24/7 for the full duration of the study, including showering, and cannot be removed by the subjects without activating an alert condition. The WrisTAS™ device is a research prototype that affixes with a Velcro strap to the wrist and must be removed for showering. Neither device can be fully immersed.

In the laboratory, subjects were dosed in the morning based on weight and sex to a BAC calculated to reach .08 grams per deciliter (g/dL); in 60 such dosing trials, the average BAC attained was .083 g/dL. In the subjects' own field-initiated drinking, the mean BAC attained was .077 g/dL during 211 trials when the minimal BAC was ≥ .02 g/dL. The 271 episodes with BAC ≥ .02 g/dL formed the "signal" for detection analyses. All subjects had to provide daily drinking and eating logs, and each was given a handheld portable breath-test device to use for the study duration that enabled them to record BACs when drinking on their own.

Transdermal alcohol detection evaluation proceeded in three ways: (1) coded judgments of response magnitude based on visual inspection of the device data, (2) alerts issued by the AMS Scramnetwork server denoting that an alcohol-positive event had occurred (SCRAM™ only), and (3) through use of an automated algorithm that smoothed spikes from the data and accommodated to shifting baselines. Alerts issued by the Scramnetwork showed a 93.5 percent concordance with the judged

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coding of human investigators for true positives, and a 91.5 percent concordance with false-negative judgments. This strong agreement represents a kappa=.85 (p=.000). Although there was no comparable alert system for WrisTAS™, this degree of concordance between judged events and automated alerts for SCRAM™ serves to endorse the accuracy of the coded judgments against an external referent. The judged detection of alcohol by the transdermal devices relative to BAC forms the primary outcome data in this evaluation.

Results

The results demonstrated neither device has problems with false positives, but both had problems with false negatives and/or with unreadable data. The SCRAM™ false-negative rate due to complete response failure was 15 percent, and across all BACs, the SCRAM™ overall true-positive rate was 57 percent. The difference between the sum of those numbers and 100 percent represents some coding uncertainty explained in the report (another 22.5% was detected but as less than .02 g/dL BAC). Overall, the true-positive detection rate increased as the BAC increased from .02 to .08 g/dL. BAC episodes of .08 g/dL or greater that were attained during normal drinking were detected at a true-positive rate of .88 by SCRAM™. The WrisTAS™ sensor had a false-negative rate due to complete response failure of 8 percent (defined as on and working but not responding to ethanol), and an overall true-positive rate of 24 percent. The difference between the sum of those two numbers and 100 percent represent WrisTAS's™ missing or erratic data; 67 percent of the positive BAC episodes were either missing or unreadable from the WrisTAS™ data. This aspect of WrisTAS™ is the largest concern, and it has been suggested by the manufacturer that the problem is a consequence of a faulty chipset that controls data I/O functions. The WrisTAS™ device tested, version 5, has now been replaced with version 6. We have no evaluation data on version 6.

The SCRAM™ system's sensitivity and accuracy declined over the duration of wear; an aggregate near-perfect accuracy and high rates of sensitivity during the first period of wear declined as a function of time in service. This finding emerged as the largest concern with SCRAM™. The most likely cause of this problem is a consequence of water accumulation inside the sensor housing: as water accumulates the sensor's ability to detect ethanol is reduced. The SCRAM™ device that was tested has now been replaced by a device with less dead airspace for holding water, and this has reportedly solved the problem of water accumulation. We have no evaluation data on this newer version of SCRAM™.

Results showed that laboratory studies in which the calculated dose of alcohol was consumed in a 30-minute period yielded lower transdermal responses than when subjects dosed themselves (in normal self-initiated drinking). This was more of a problem with SCRAM™, which samples every 30 to 60 minutes, than with WrisTAS™, which samples continuously. In self-paced normal drinking, (self-dosed) subjects' consumption ordinarily proceeded for several hours and this manner of intake provided for a more sustained BAC signal detectable by SCRAM™ than was possible with a brief spike following rapid dosing.

Transdermal signals of female subjects were generally measured as lower than those of males relative to the BAC attained. This was the case for both types of transdermal sensors. Anderson and Hlastala (2006) have shown that the thickness of the stratum corneum, the outermost layer of the epidermis, and the hydration state of the subject are factors in the movement of ethanol across dermal barriers to the skin surface. The proportional body water content differs between the sexes, and this may partially explain this finding.

9-7

Discussion

In evaluation of circumvention protection, the SCRAM™ system performed well. It may be possible for a highly motivated offender who is familiar with the SCRAM™ design to devise a procedure to temporarily block alcohol without blocking the infrared sensor that detects obstructions or the temperature sensor that monitors temperature near the skin surface. However, it seems unlikely that circumvention by obstruction can constitute a real threat to the integrity of this system while drinking because it would require constant vigilance by the offender. The communication protocols built into SCRAM™ that combine daily automated upload of data and the issuance of daily alerts to a program monitor will likely prevent most offenders from beating this system. The Scramnetwork server works well and proved to be a sophisticated and stable authorization and data-tracking system.

User comments allude to some discomfort, especially among females, and one female research subject showed evidence of bruising after a week of wear. Court-ordered users (including women) who were part of a focus group found SCRAM™ to be occasionally annoying but acceptable, and a tolerable alternative to jail time. Two commented that it helped goad them toward sobriety in a way that other motivators were unable to do. Vendors and others who manage SCRAM™ programs were generally positive about their experiences with it. Alcohol Monitoring Systems (AMS) staff commented that about 20 percent of the offenders seemed unable to control their drinking and had to be removed from the SCRAM™ program. However, we can provide no external corroboration of this estimate.

Overall, these devices performed more poorly than we expected with respect to sensitivity and accuracy; however, with independent evaluations, the manufacturers can improve their products. The attainable accuracy, however, may only be an approximation of BAC due to subject-specific factors that influence ethanol gas concentration at the skin surface. There is no doubt that the transdermal concept is valid as long as expectations of quantitative parity with BAC are moderated.

There is a parallel in these early findings about the accuracy of transdermal devices that is reminiscent of the early accuracy of alcohol ignition interlock devices. First generation interlock devices were often criticized for failing to match the performance characteristics of more conventional breath-test devices, despite interlocks having to operate in an often hostile automotive environment of heat, cold, dust, and vibration. Similarly, TAC is not BAC, and the expectation of parity is an impractical expectation to place on this nascent technology. Both interlocks and transdermal sensing need to be judged first on their potential contributions to public safety. Moreover, just as interlock devices have improved in the 20 years since their first adoption, it is reasonable to expect that the transdermal-sensing equipment will also improve. These devices warrant further development and further study.

Substance Abuse Treatment
ADVISORY
News for the Treatment Field
September 2006
Volume 5
Issue 4

The Role of Biomarkers in the Treatment of Alcohol Use Disorders

What are alcohol biomarkers?

Alcohol biomarkers are physiological indicators of alcohol exposure or ingestion and may reflect the presence of an alcohol use disorder. Most readily measurable biomarkers are indirectly correlated with *alcohol problems*, such as alcohol dependence or chronic heavy alcohol consumption. Some of the newer biomarker tests can directly measure *alcohol exposure or use*. This *Advisory* addresses both types of alcohol biomarkers. The *Advisory* does not discuss the measurement of the physical presence of alcohol in expired air, blood, saliva, or sweat; nonoxidative alcohol metabolites in hair or other tissues; or behavioral and cognitive performance measures that may be affected by alcohol use.

Key characteristics of the biomarkers discussed in this *Advisory* are presented in Exhibit 1 on page 2. Exhibit 1 also provides a rough index of *sensitivity* (among the individuals *with* the condition of interest, the ability of the test to correctly identify those individuals) and *specificity* (among the individuals *without* the condition of interest, the ability of the test to correctly identify those individuals) with *low* representing values approximately 40 percent or less and *high* representing values usually above 70 percent. Sensitivity and specificity also depend on what defines the condition of interest and the cutoff value being used for the test.

Why are alcohol biomarkers needed?

Alcohol biomarkers are not a substitute for self-report measures or information that would otherwise be gathered from a comprehensive patient history and physical by an appropriately trained health professional. They can, however, make a unique and important contribution in serving as *objective* measures and are helpful as (1) *outcome measures* in studies to evaluate new medications or behavioral interventions for alcohol problems, (2) *screens* for possible alcohol problems in individuals unwilling or unable to provide accurate self-reports of their drinking or its effects, and (3) *evidence of abstinence* in individuals prohibited from drinking.

Alcohol biomarkers and self-report measures of drinking (e.g., the National Institute on Alcohol Abuse and Alcoholism single-question screen, the Alcohol Use Disorders Identification Test, Michigan Alcoholism Screening Test, and CAGE) should be considered *complementary* because self-report measures and biomarkers may identify somewhat different individuals.[1] Thus, their use in combination is often desirable.

Currently, the use of an EtG test in determining abstinence lacks sufficient proven specificity for use as primary or sole evidence that an individual prohibited from drinking, in a criminal justice or a regulatory compliance context, has truly been drinking. Legal or disciplinary action based solely on a positive EtG, or other test discussed in this *Advisory,* is inappropriate and scientifically unsupportable at this time. These tests should currently be considered as potential valuable clinical tools, but their use in forensic settings is premature.

U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES
Substance Abuse and Mental Health Services Administration
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Exhibit 1: Characteristics of Several Alcohol Biomarkers				
Biomarker	**Type of Drinking Characterized**	**Sensitivity/ Specificity**	**Examples of Possible Sources of False Positives**	**General Comments**
Gamma Glutamyl Transferase (GGT)	Probably at least 5 drinks/day for several weeks	Moderate/ Moderate (as screen for alcohol dependence)	Liver and biliary disease, smoking, obesity, and medications inducing microsomal enzymes.	Most commonly used traditional biomarker. Primarily reflects liver damage that is often related to alcohol consumption. Performs best in adults ages 30 to 60.
Aspartate Amino Transferase (AST) Alanine Amino Transferase (ALT)	Unknown, but heavy and lasting for several weeks	Moderate/ Moderate (somewhat lower than GGT as screen for alcohol dependence)	See GGT. Excessive coffee consumption can lower values.	Primarily reflects liver damage that is often related to alcohol. ALT seems less sensitive than AST. Ratios of AST to ALT>2 may suggest liver damage that is alcohol related. Performs best in adults ages 30 to 70.
Mean Corpuscular Volume (MCV)	Unknown, but heavy and lasting at least a few months	Low/Moderate-[1] High (sensitivity somewhat below GGT as screen for dependence)	Liver disease, hemolysis, bleeding disorders, anemia, folate deficiency, and medications reducing folate.	Poor biomarker for relapse because of sluggish response to drinking. Accuracy does not seem to show a gender effect, whereas other traditional biomarkers often perform better for men than women.
Carbohydrate-Deficient Transferrin (CDT)	Probably at least 5 drinks/day for 2 weeks or so	Moderate/High (as screen for alcohol dependence)	Iron deficiency, hormonal status in women, carbohydrate-deficient glycoprotein syndrome, fulminant hepatitis C, and severe alcohol disease.	Equal to, or possibly slightly better than, GGT but much more specific. Very good biomarker of relapse to drinking following a period of abstinence. Likely less sensitive for women and younger people.
Ethyl Glucuronide (EtG) Ethyl Sulfate (EtS)	Perhaps as little as a single drink	High/Unknown (as indicator of relapse)	Unknown, but alcohol is often in medications, hygiene products, cosmetics, foods, etc. Research is needed to determine whether incidental alcohol exposure can substantially influence the biomarkers.	As direct analytes of nonoxidative breakdown of alcohol, highly sensitive. Probably little gender, age, or ethnicity effect. A new, but promising biomarker; more research is warranted.
Phosphatidyl Ethanol (PEth)	Possibly 3 or 4 drinks/day for a few days	High/Unknown (as indicator of relapse)	None likely but still unknown due to paucity of research.	Probably little gender, age, or ethnicity effect. Linear dose–response relationship with recent drinking levels. A new, but promising biomarker; more research is warranted.

10-2

What are the primary alcohol biomarkers?

Traditional alcohol biomarkers have generally been of an *indirect* nature because they suggest heavy alcohol consumption by detecting the toxic effects that alcohol may have had on organ systems or body chemistry. Included in this class are the blood-based measures of gamma glutamyltransferase (GGT), aspartate aminotransferase (AST), alanine aminotransferase (ALT), and mean corpuscular volume (MCV). The first three are serum enzymes produced by the liver. GGT elevation is caused by liver enzyme induction by alcohol or by many other drugs including prescription drugs. AST and ALT elevations, on the other hand, indicate injury and death of liver cells. Such elevations may be a result of heavy drinking, but none of these tests are specific for alcohol. MCV refers to the average size of red blood cells and is measured in whole blood. Elevated MCV can be caused by many things, including heavy drinking. These tests are not very sensitive, and many heavy drinkers do not have elevations.

A newer indirect alcohol biomarker, carbohydrate-deficient transferrin (CDT), is now widely available in the United States. Although the mechanisms responsible for elevation of CDT are not clearly understood, moderately heavy to heavy alcohol consumption for about 2 weeks can cause the transferrin molecule to be lacking in carbohydrate residue in some of its terminal chains. To "normalize" differences in total transferrin levels across individuals, CDT is usually measured in serum as the *percentage* of total transferrin that is carbohydrate deficient rather than as the absolute amount of CDT. CDT and GGT are approximately equal in their ability to identify alcohol problems. The particular advantage of CDT over GGT is that fewer factors other than alcohol use can cause elevation. However, CDT is also quite insensitive to heavy alcohol use, resulting in false negatives.

Direct biomarkers of drinking have recently been developed. They are termed "direct" because they are analytes of alcohol metabolism. Although most alcohol that is consumed is metabolized by oxidative processes in the liver, a very small amount is broken down nonoxidatively, thereby creating analytes that can be measured for a longer period than when alcohol itself remains in the body and could be measured in the breath, blood, or urine.

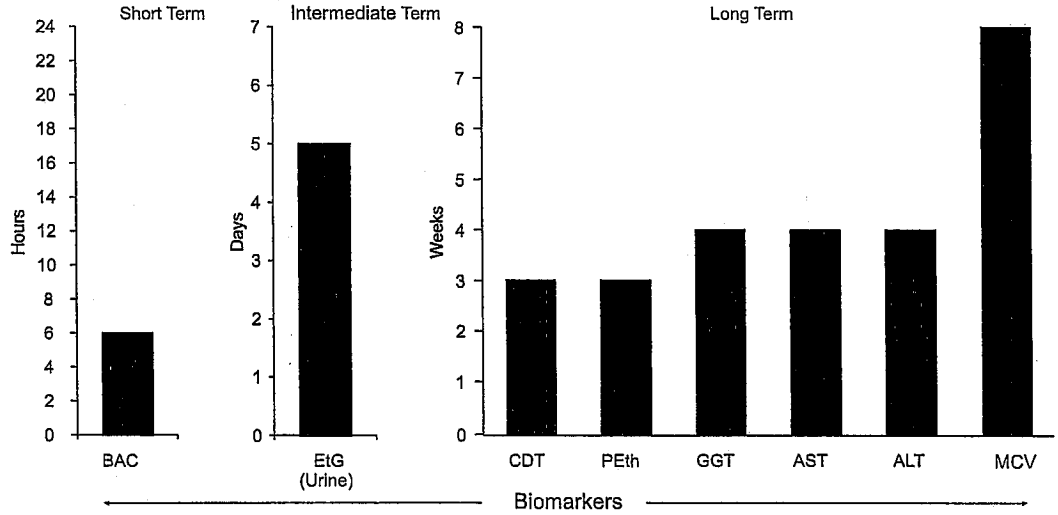
Among the more recently available direct biomarker laboratory tests are tests for ethyl glucuronide (EtG) and ethyl sulfate (EtS). Although present in all body fluids and tissues, EtG and EtS are usually measured in urine. EtG and EtS tests may become positive shortly after even low-level exposure to alcohol and may remain detectable in urine for several days. Because of the purported high sensitivity of these tests, exposure to alcohol that is present in many daily use products might also result in a positive laboratory test for these biomarkers. EtG is becoming widely available in the United States, and some laboratories have also begun to test for EtS. At the current time, EtG and EtS testing may have a supportive role in therapeutic interventions in an environment where breath or blood alcohol tests are used to monitor abstinence. However, until further research has been conducted, the high sensitivity of the EtG and EtS tests does not permit the distinction between alcohol exposure and alcohol consumption at lower levels of possible biomarker detection.

Phosphatidyl ethanol (PEth) is a direct serum-based biomarker. A test for PEth is promising because of PEth's persistence in blood for as long as 3 weeks after even only a few days of moderately heavy drinking (about four drinks per day). There is still little research on PEth, and it is only beginning to be offered commercially to practitioners.

These direct markers of alcohol consumption do not have a strong research base, however. The most extensively studied marker, EtG, has been tested primarily in one laboratory in Europe. Although the results published by this laboratory show promise, it is prudent to await replication of results from another independent investigator. Furthermore, it is not known at this time how the test results might be affected by the presence of physical diseases, ethnicity, gender, time, or the use of other drugs. Until considerable more research has occurred, use of these markers should be considered experimental.

Because biomarkers have differing strengths and weaknesses, they are often used together, especially for screening for alcohol use problems. Common combinations include simultaneous use of CDT and GGT,[2] sequential use of biomarkers,[3] and mathematical combinations of various blood constituents.[4] Biomarkers for monitoring abstinence that can be used in combination include urine alcohol, EtG,

Exhibit 2: Windows of Assessment for Various Alcohol Biomarkers



BAC=Blood alcohol concentration

and/or EtS. EtG and EtS when used together seem to offer greater sensitivity to alcohol use than either biomarker alone.[5]

Respective *windows of assessment* (i.e., the period during which the level of the biomarker may remain high after it originally rose and assuming that no further drinking has occurred) are presented in Exhibit 2.

How can alcohol biomarkers be used in treatment?

Alcohol biomarkers can be used in several ways. Their major uses are—

- **Screening for alcohol problems.** The role of alcohol in either causing or exacerbating medical problems is often missed even in medical care contexts where the prevalence of alcohol misuse is quite high, such as hospital emergency departments, psychiatric practices, and internal medicine clinics. Physician awareness of a possible co-occurring alcohol problem can improve differential diagnosis and treatment.[6,7] Biomarkers also may assist in differential diagnosis by determining the possible role of alcohol use in a disease process (e.g., hypertension or diabetes).[8]
- **Motivating change in drinking behavior.** An important goal of alcohol treatment is motivating a patient to reduce or cease drinking. Giving feedback on elevations in biomarkers and reviewing with the patient declines in biomarker levels as treatment proceeds provide objective evidence of the patient's personal need for and benefit of stopping or reducing alcohol use. Feedback focusing on levels of the traditional biomarkers may be especially compelling for drinking reduction because biomarker elevation can tangibly demonstrate serious physiological consequences.[9] In a classic study, Kristenson, Trell, and Hood found that providing individuals recurrent feedback on their levels of GGT led to reduction not only in subsequent GGT levels but also in alcohol use, rates of hospitalization, days absent from work, and mortality.[10]
- **Identifying relapse to drinking.** Relapse is unfortunately rather common in alcohol treatment, especially in the early stages of recovery. Frequent monitoring of the patient's abstinence and addressing relapses as early as possible are important aspects of alcohol treatment. CDT has been shown to perform particularly well as a relapse biomarker, often elevating before the patient acknowledges a return to drinking.[11] Curiously, CDT seems to reelevate with lower amounts of alcohol use after a period of abstinence than the levels of drinking initially required to raise it.[11]

10-4

- **Evaluating interventions for alcohol problems.** Alcohol biomarkers provide objective outcome data in clinical trials of new medications[12] or of behavioral treatments to treat alcohol use disorders. Although in other instances alcohol biomarkers must accurately identify specific individuals with alcohol problems, in clinical trials or evaluations of community alcohol treatment programs, identification of the drinking status of particular subjects is usually not a primary issue; rather, the goal is determination of average differences between the experimental group and the control group. Thus, with a sufficiently large sample size, even biomarkers with fairly low accuracy can provide useful information about treatment efficacy.
- **Documenting abstinence.** Several population groups may be mandated to sign abstinence contracts or agreements or are required to be abstinent by social convention or laws. These groups include—
  - Individuals younger than age 21, especially in the armed services;
  - Individuals on probation, including adolescents, who have committed alcohol-related crimes (e.g., minor in possession);
  - Individuals who have previous alcohol-related problems but have been allowed visitation with or custody of children with the stipulation that they remain abstinent;
  - Some motorists who have had alcohol-related traffic convictions and who are now required to abstain as a condition of maintaining driving privileges; and
  - Medical personnel, pilots, attorneys, and others who, because of previous alcohol- or drug-related problems, have agreed to abstinence and ongoing monitoring as conditions for continued licensure or employment.

What cautions should be observed in reviewing positive biomarker results of individuals mandated to be abstinent?

Biomarkers provide an important indication of drinking status when used appropriately, but they must always be used with a clear understanding of their strengths and potential weaknesses. This is especially true when the consequences of misidentification of alcohol consumption are grave, such as for a healthcare provider whose license, livelihood, and reputation depend on demonstration of abstinence or for an individual who will be ordered to return to jail because of a positive test. Medical review officers and others who investigate positive test results should be especially cognizant of two issues:

- **Understanding the difference between a test's sensitivity and positive predictive value.** Interpreting even a very good test requires considerable knowledge of both the patient and the population of individuals similar to the patient. Tests should help a provider make a decision based on a variety of sources of information gathered about the patient. The first step is to precisely define the condition that is to be detected by the test, such as early relapse, as defined by specific criteria related to alcohol consumption or drinking status. As noted earlier, a test's sensitivity refers to the percentage of individuals with the condition that the test correctly identifies, for example, early relapse. On the other hand, determination of the *positive predictive value* of the test requires knowledge of its specificity (the percentage of people who have not relapsed and are negative on the test) as well as knowledge of the prevalence of relapse in the group under consideration. The *positive predictive value* refers to the percentage of positive tests in which relapse has actually occurred. For completeness, a test's *negative predictive value* refers to the percentage of negative tests in which relapse has not occurred.

  The critical role played by prevalence in determining positive predictive value may be illustrated. Although the base rate of drinking among healthcare professionals required to refrain from drinking to maintain their license to practice is unknown, it is likely quite low.[13] Assume a new test has perfect 100-percent sensitivity and an excellent specificity of 90 percent for identifying early relapse among this population. If the prevalence of early relapse is in fact 50 percent, the test will have a positive predictive value of 91 percent. However, in keeping with the "quite low" assumption, if the prevalence of drinking is in fact 10 percent, the positive predictive value falls to 53 percent. If, indeed, the true prevalence is as low as 1 percent, the positive predictive value drops to 9.2 percent. In this last scenario almost 91 percent of those who had positive test results would be erroneously labeled as relapsing when, in fact, they had not. Note that in this

scenario, with 100-percent sensitivity, the test's negative predictive value is also 100 percent so a negative test will correctly predict an individual has not relapsed. For determining the drinking status of an individual who no longer has alcohol physically present in the body, there is no known lab test that has the research required to achieve a 100-percent positive predictive value.

- **Potential sources of false positives.** Although sources of false positives have been identified for the traditional biomarkers and CDT, as yet there has been little research on the new direct biomarkers, particularly on the very sensitive biomarkers, EtG and EtS. At issue is whether exposure to alcohol or to the vapors of alcohol in many commercial products, such as personal care items, over-the-counter medications, cleaning products, desserts, wine vinegar, and the like or combinations of these products may cause elevation in EtG or EtS that could appear to be a return to drinking. Exposure to these products combined with possible influences of individual variables such as gender, age, and health status on alcohol biomarker responses has not been adequately studied to date.

How should a test cutoff value be chosen?

The cutoff value selected to distinguish specimens as positive or negative should consider the base rate of problem drinking in the population being evaluated, the individual's likely exposure to products containing nonbeverage alcohol, and the consequences for the individual and society of the individual's being erroneously labeled. Establishing a reliable cutoff with high positive predictive value requires research in the population and discussion of the various contexts in which the test might be applied.

What recommendations can be made for using biomarkers most effectively in monitoring drinking?

Although positive biomarker results should be taken seriously, use of certain biomarkers, such as EtG, is not warranted as stand-alone confirmation of relapse because research has not yet established an acceptable standard to distinguish possible exposure to alcohol in various commercial products from consumption of alcoholic beverages. (A helpful list of many of these products is available at **www.householdproducts.nlm.nih.gov/cgi-bin/household/brands?tbl=chem&id=26.**)

The response to positive tests in questionable cases should be reasonable and include—

- Consideration of clinical and other information about the individual that may or may not be suggestive of drinking;
- Possibly increasing the frequency of testing to monitor drinking status;
- Following up by using additional biomarkers, especially CDT (PEth, when it becomes more available in the United States, would also be a good followup test. GGT might be used as a followup test because it is readily available. However, there are many sources for false positives on GGT, and GGT elevates only with considerable drinking.);
- Perhaps inviting the individual to undergo a controlled trial of exposure to the product or products he or she believes may explain the positive result; and
- Possible monitoring by means of a transdermal alcohol-sensing device (when it becomes more available). Transdermal-sensing devices capture and record the vapors of alcohol extruded through the skin in sweat. Their availability is somewhat limited. Testing for the presence of alcohol in expired air, blood, or urine would provide direct information on drinking, but the windows of assessment are limited to the small number of hours when alcohol is physically present in the system; hence, monitoring would likely need to be done frequently and randomly.

Establishing rapport and trust between the treatment provider or monitor and the client is essential to encourage candor on the part of the client. It is important for individuals in safety-sensitive positions to have supervisors who understand that fair evaluation, treatment, and eventual reinstatement are possible options. Although violations of abstinence must be taken very seriously, consideration may be given to a standard less rigid than "one strike, you're out." Reasonable consequences will encourage openness and earlier reporting of problems. The determination of drinking and the safeguarding of one's livelihood ultimately involve informed human judgment based on all available relevant information. A cornerstone of recovery is honesty.

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A biomarker that is positive because of exposure or unintentional consumption, which results in an allegation of use or misuse, casts a cloud on the recovery process. False allegations provide incentive to disregard the intent of abstinence monitoring and may even provide incentives to use because the individual has "nothing to lose."

What research is needed on direct alcohol biomarkers?

Direct measurement of the nonoxidative metabolites of the breakdown of alcohol is an emerging and exciting technology but several lines of research are still needed. These include—

- Establishment of a cutoff that can clearly distinguish consumption of beverage alcohol from exposure to alcohol in other products;
- Identification of possible factors, such as genetic differences, gender, age, physical diseases, and use of other medications, that may influence an individual's biomarker response to alcohol;
- Identification of the window of assessment associated with varying levels of alcohol use;
- Determination of the reliability of laboratory testing procedures; and
- Determination of products that may give a positive test result at specific cutoffs.

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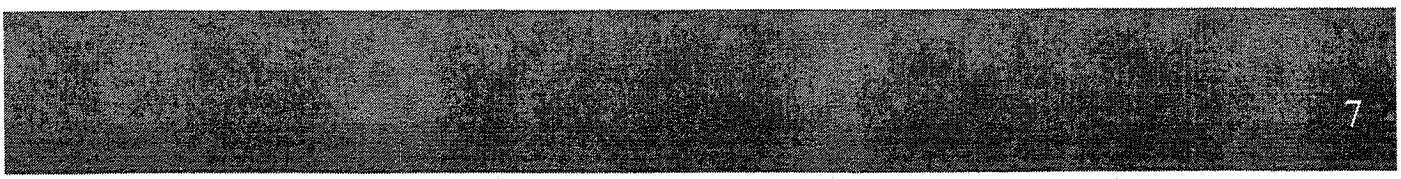

September 2006, Volume 5, Issue 4

Substance Abuse Treatment
ADVISORY

Substance Abuse Treatment Advisory

Substance Abuse Treatment Advisory was written and produced under contract number 270-04-7049 by the Knowledge Application Program (KAP), a Joint Venture of JBS International, Inc., and The CDM Group, Inc., for the Center for Substance Abuse Treatment (CSAT), Substance Abuse and Mental Health Services Administration (SAMHSA), U.S. Department of Health and Human Services (HHS). The content of this publication does not necessarily reflect the views or policies of SAMHSA or HHS.

Electronic Access and Copies of Publication: This publication can be accessed electronically at www.kap.samhsa.gov. Additional free print copies can be ordered from SAMHSA's NCADI at 800-729-6686.

Recommended Citation: Center for Substance Abuse Treatment. The Role of Biomarkers in the Treatment of Alcohol Use Disorders. *Substance Abuse Treatment Advisory*. Volume 5, Issue 4, September 2006.

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Substance Abuse and Mental Health Services Administration
U.S. Department of Health and Human Services

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DHHS Publication No. (SMA) 06-4223
NCADI Publication No. MS996
Printed 2006

Athena Andaya

From: Carrie Mcginley [mcginleyc@kscourts.org]
Sent: Thursday, July 30, 2009 1:33 PM
To: Athena Andaya
Subject: DUI Municipal filings
Attachments: Municipal DUI Filings.xlsx

Hi Athena,
I am attaching a spreadsheet with the DUI Filings in Municipal Court information you requested. There were 385 Municipal Courts reporting in the FY2008 report. Let me know if you have any questions.
Thanks!
Carrie

Kansas Municipal Court Statistics

Fiscal Year	DUI Filings
2004	12,166
2005	11,757
2006	11,318
2007	11,207
2008	11,077

DUI Commission 2009
8-6-09
Attachment 11

n R. Sherwood
Assistant Finney County Attorney
Finney County
DUI Commission Testimony
August 6, 2009

Introduction

Greetings, thank you for allowing me to provide a western / southwestern Kansas perspective on DUI's. My name is Brian R. Sherwood. I am an Assistant County Attorney here in Garden City, Finney County, Kansas. I became an Assistant Finney County Attorney back in December of 1990. The Finney County Attorney is John P. Wheeler, Jr. We have eight attorneys in the Finney County Office who prosecute all types of criminal, juvenile, child in need of care, traffic, and care and treatment cases. While each attorney in our office is quite capable and qualified to handle DUI and traffic cases, for the most part, I have been considered the traffic prosecutor. Along with my general criminal caseload, my responsibilities include reviewing and charging traffic cases, consulting with law enforcement, prosecuting traffic cases in court and pursuing any appeals, if necessary. In addition, I am the prosecutor in our office who oversees traffic diversions. As part of my caseload, I have tried DUI cases before a jury, and many other DUI/traffic cases to the Court.

Recently, I was approached by Richard Samaniego of the Kansas County & District Attorney Association to provide a western/southwestern Kansas prosecutor perspective to this DUI Commission. It was identified that the DUI Commission may be interested in the following topics:

1. Use of immobilization/impoundment statutes in your region
2. Any statutes that are difficult to comply with or need revision
3. Any suggestions on uniformly applicable DUI statutes
4. Input on treatment programs in your jurisdiction
5. Input or suggestions on the central repository (2009 HB 2096 requires prosecutors to check the repository and Dept of rev. records before charging)

Before I prepared this testimony I contacted different prosecutors in western / southwestern Kansas to get their views and opinions regarding DUI's. In this written testimony I have attempted to provide you a mixture of opinions on the topics above. Respectfully, if you have any questions about DUI's in western / southwestern Kansas I would be glad to answer those questions at anytime.

Testimony

1. **Use of impoundment/immobilization statutes.**

K.S.A. 8-1567(k) states "the court may order the convicted person's motor vehicle or vehicles be impounded or immobilized for a period not to exceed one year and that the person pay all towing, impoundment and storage fees or other immobilization costs".

K.S.A. 8-1567(k) (3) (A) further instructs the court "to consider if such impoundment or immobilization would result in the loss of employment by the convicted person or member of such person's family and whether this ability of such convicted person or member of such person's family to attend school or obtain medical care would be impaired."

Early on, our office attempted to use this section. From my experience, I discovered judges were reluctant to impound motor vehicles or take vehicles away from the offender or his / her family. This option was hardly used by the Court. Recently, some prosecutors here in southwestern Kansas have suggested the DUI statutes would be better served if it allowed seizure and forfeiture of vehicles of a person who is convicted of a felony DUI.

In using this impoundment section, there appears to be some logistical problems associated with this section. Once the Court orders impoundment what happens next? How does the Court ensure the convicted offender delivers the vehicle

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to impoundment lot and enforces such impoundment? What private or public impoundment lots would actually take such vehicles? In each county, where would these cars be impounded? What cost and other consequences are associated with impoundment?

While it appears there were good intentions designed for this section, there is no procedure in making sure impoundment takes place or can actually take place. On one occasion, I had an operator of a private tow company/impoundment lot call me and express dissatisfaction with law. He emphatically told me that his business would not take such vehicles. There was little space in the City or the County to impound vehicles as well. Subsequently, impounding vehicles became a problem in Finney County. There was no realistic place or procedure to impound cars here in Finney County.

In addition, I have also noticed this impoundment section could easily be manipulated and avoided. On some cases, the defendant's attorney prior to sentencing would transfer the vehicle's title of ownership to a family member or friend. By doing so, an offender could avoid the Court from ordering impoundment for that vehicle.

So in the end, impoundment of a vehicle has not been a useful tool. Unless the statute somehow provides a real solution and a procedure in making sure impoundment lots are available in each county, a procedure in making sure such impoundment takes place, and a willingness by the courts to use this section- then this section remains an unused option by the Courts and prosecutors.

2. Statutes which are difficult to comply with or need revision.

For the most part, I do not see a problem with the DUI statutes. But then again, I have been using the statutes for some time. However, what I do hear from

judges, prosecutors and other lawyers is that the statutes are long and complex, and constantly being changed. I do believe that if the statutes were simplified and clarified it would help us all.

Sections of the statutes that are not used or ineffective need to be eliminated. For example, as of now I am not aware of any Court using the provisions for felony DUI's that allow a court to order the term of imprisonment be served in a state facility in the custody of the secretary of corrections in order for the offender to obtain treatment. While the economy may have affected this program, this part of the statute remains confusing and is no use to the Courts.

A couple of changes I would like to see happen would be, first, as to the 90 days minimum mandatory jail time required for a third DUI conviction, or fourth or more DUI conviction it should read "90 *consecutive* days imprisonment". While there may be case law that suggests that the legislature intended the 90 days to be served consecutively I believe the statute should clearly state this. Previously I had the expierence of one court allowing an offender to serve his "90 days" on weekends. I believe we need to make clear that the offender must serve the full 90 days consecutively (except when work release is granted and offender has served the minimum time required before work release granted). I would also recommend that this apply to the newly amended DUI statute that goes in effect July of 2010 (Section 6 of Chapter 107 of the 2009 Session Laws of Kansas). For a fourth or more offense, it should be "180 consecutive days imprisonment" (except when the court allows the offender to use work release program after serving 144 consecutive hours of imprisonment).

I believe that the recent amendment to the DUI statute, imposing a minimum mandatory of 180 days for a fourth or more offense, is a step in the right direction. I

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support increased penalties for offenders' of fourth or more offenses. We will also need some time to monitor the effectiveness of these changes. The continued use of the DUI Commission in the future would help us determine how effective the DUI laws are in the State of Kansas and what changes are needed to improve the statutes.

3. **Suggestions on uniformly applicable DUI statutes.**

One section of the statute that needs to be addressed is how we choose to handle the offender who refuses to submit to a breath test that helps determine the presence of alcohol or drugs [K.S.A. 8-1001(a)]. It is my opinion, one who refuses to provide a breath or blood sample should suffer harsher consequences or penalties. For example, a person who refuses to submit to and complete any test of breath, blood or urine is only suspended for one year for the first occurrence. This suspension is the same for one who provided a sample that has .15 or great alcohol concentration. For one that refuses to submit to breath, blood, or urine test the suspension should be longer than one who provided a test sample.

A growing problem in Garden City, Finney County, Kansas, is the offender who has four or more DUI convictions. This offender may already be suspended, or revoked and yet continues to drink and drive. So the question is: how are we going to deal with these multiple offenders? These offenders are the ones who don't care about whether they have valid driving privileges and continue to drink and drive. When they are stopped by law enforcement officers for a DUI they refuse any requested breath, blood, or urine test. In prosecuting these offenders we are able to present to the court or jury that offender has refused the requested test, however my concern is this concept now days has been "watered down" or become less effective. A "refusal of test" needs to carry more weight. Some have suggested allowing the statute to include that if one refuses an alcohol test on a felony DUI offense, that it be

prime facie evidence that the Defendant is under the influence of alcohol. While t. may be a bold position, there is no constitutional right to refuse a test. There needs to be review of the laws regarding whether or not there should be harsher penalties or consequences for one who refuses to provide a breath, blood, or urine test.

4. Input on treatment program in this part of State

In discussing this topic with fellow prosecutors here in southwest Kansas, it was the general thought that prosecutors have very little information on how successful treatment is on a convicted offender. Usually a prosecutor or the Court will obtain an ADSAP evaluation (Alcohol and Drug Safety Action Program evaluation pursuant to K.S.A. 8-1008) and present to the Court the given recommendations for treatment. Yet, for the most part there is no follow up on how successful the offender was with that program or treatment. There is no information how the effective the treatment programs are over a period of time. As prosecutors, we simply do not know if treatment is working or not. There seems to be little regulation or any reasonable standards by which to evaluate these programs.

It's hard to say whether we need more treatment for DUI individuals or not. We currently provide up to 18 months of supervised probation and treatment for felony drug offenders however, we do not do the same for felony DUI offenders.

Interestingly enough, here in Finney County we have no inpatient treatment programs. It appears at times, the best available treatment programs needed for certain individuals do not exist in this community, and one is required to travel elsewhere to obtain treatment. In addition, with the many different cultures and languages that exist here in southwest Kansas, it appears we are in short supply of bilingual treatment providers, interpreters or personnel to handle the various cultures.

I do believe the DUI commission needs to look at the treatment programs provided to DUI offenders and determine whether or not changes need to be made.

5. Input or suggestions on the central repository

Recently, the legislature enacted K.S.A. 8-1567 (m) (1) and (2) which requires that prior to filing a complaint the prosecutor shall request and shall receive from the division a record of all prior convictions obtained against such person for any violations of any of the motor vehicle laws of this state and in subsection (2) prior to filing a complaint alleging a violation of K.S.A. 8-1567, a prosecutor shall request and shall receive from the Kansas Bureau of Investigation central repository all criminal history record information concerning such person.

In talking to other prosecutors from western / southwest Kansas most are in agreement that a special repository or central repository is needed and helpful in accessing information about an offender's prior DUI conviction history. While I believe the KBI does a good job in keeping track of an offender's criminal history sometimes we have no information as to the disposition of a prior case. We are then tasked in locating that Court or other county/city, then finding out whether or not that person was actually convicted. The problem we face is that some jurisdictions keep minimal records, some jurisdictions have failed to keep records or have destroyed records, and some jurisdictions are slow to respond or do not respond at all.

While the statute requires the prosecutor to check the division records or the Kansas Bureau of Investigations central repository for an offender's criminal history it also depends on whether that information and the disposition of those cases are accurately and promptly recorded. What we need to stress to all counties and Courts in the State of Kansas is that the Kansas Adult Disposition Reports needs to be fully completed and promptly submitted to the KBI. We need all counties and Courts in

Kansas to cooperate with this process or else the repository serves no purpose. If there is a better way to record information, specifically DUI convictions, then we should strive to achieve that goal.

While the Kansas Bureau of Investigations central repository can be a helpful tool for the prosecutors in the State of Kansas a problem we face here in southwest Kansas is obtaining records regarding an offender's criminal history from surrounding states such as Oklahoma, Colorado, New Mexico, Texas, and Nebraska. That process of obtaining information about an offender's DUI conviction history in these other states is challenging and sometimes difficult to obtain.

While we can obtain this information and make charging decisions, the problem comes later when we have to present this evidence to the court during a preliminary hearing. Sometimes we have to wait for that jurisdiction to send us a certified and authenticated journal entry of the conviction and/or certified driving record. One way to help prosecutors in this area is to: 1) allow faxed copies of journal entries of convictions to be used at the preliminary hearings; and/or 2) to clearly allow by statute, certified driving records (CDR) from Kansas and certified driving records from similar agencies in other states be allowed into evidence at preliminary hearings. This process could be similar to K.S.A. 22-2902a; use of reports from forensic examiners for preliminary examinations.

As mentioned before, a central repository is a good idea. However, here in western / southwestern Kansas there are some concerns with the mandatory requirement that prosecutors be required to request and receive all criminal history from the division of records and/or Kansas Bureau of Investigations prior to filing a complaint alleging a violation of K.S.A. 8-1567. While the Finney County Attorney's Office is fortunate to have a NCIC (National Crime Information Center)

terminal in the office where we can do record checks, many smaller counties here in western / southwestern Kansas do not have that luxury. The smaller counties have to rely on law enforcement to provide that information. These smaller counties have asked that the statute be amended to require law enforcement to provide such information when submitting a case to the County Attorney.

Another concern is the delay that may result from waiting to charge an individual before obtaining all criminal history. If a prosecutor is trying to ensure a high bond on a multiple DUI offender for the purpose of protecting their community, then this delay may allow a multiple DUI offender to be released before charges could be filed. I believe most prosecutors do their best in charging the DUI offenders appropriately and amend their complaints when they need arises.

Conclusion

Once again I would like to thank you for allowing me to present my opinions and views on these important issues. I would strongly encourage you to also reach out to other prosecutors across the State of Kansas and obtain their views on this important subject. In dealing with my fellow prosecutors I have come to learn they are a very valuable asset to the legislative process. If you have any additional questions please contact me anytime.

Thank You,

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ael J. Nichols
Assistant District Attorney
Wyandotte County
DUI Commission Testimony
August 6, 2009

Introduction

I began my career in prosecution as an intern in the Sedgwick County District Attorney's Office between my second and third years of law school. After graduating in May, 2007 I accepted a position as an Assistant District Attorney in that office. During my short time in Sedgwick County I was one of three attorneys assigned exclusively to the traffic division handling only traffic cases. As part of our responsibilities we handled all misdemeanor DUIs from the Sedgwick County Sheriff's Department and the Kansas Highway Patrol. My experience in that office was only with misdemeanor DUIs because felony DUIs were handled by an attorney in the criminal division.

In late December, 2007, I accepted my current position as an Assistant District Attorney in the Wyandotte County District Attorney's Office. Although I was hired to handle a general criminal caseload, I also assumed the responsibilities of traffic prosecutor because the previous traffic prosecutor left the office not long after I started. This office does not have a traffic division that handles exclusively traffic cases. There are six attorneys who handle the traffic dockets in addition to their criminal or juvenile caseloads. However, there is a docket for misdemeanor DUI cases only and as the traffic prosecutor I was assigned to handle that docket and set traffic policy for the other attorneys in the office who handle traffic cases. In August, 2008, another attorney in the office assumed the role of traffic prosecutor, however, I continue to help him in any way I can and continue to handle other traffic cases as well as some misdemeanor DUI trials. I have also handled felony DUIs as a part of my general criminal caseload throughout my entire time in this office.

Testimony

1. Use of impoundment/immobilization statutes

I have had no experience with the application 8-1567(k), which provides for the impoundment or immobilization of an offender's vehicle in certain circumstances. To my knowledge that subsection was never utilized in Sedgwick County during my short stay there and has not been used in this jurisdiction since I started more than a year and a half ago. It appears to be clearly and concisely written and may be a useful tool for prosecutors in certain circumstances. I find it unlikely that it will be utilized often, if at all, in this jurisdiction.

The subsection specifically provides that the judge must take into consideration "whether the impoundment or immobilization of the motor vehicle would result in the loss of employment by the convicted person or a member of such person's family." K.S.A. 8-1567(k)(3)(A). My belief is that the judges in this jurisdiction would almost always find that impoundment or immobilization would create such a hardship. Even before the most recent economic downturn many of our offenders had little to no income and that continues to be the case. I think it would be difficult for our judges to order impoundment or immobilization when balancing the deterrent effect of such an order against the hardship it would create in an offender's ability to complete the conditions of probation including payment of mandatory fines, ADSAP fees and costs of treatment.

2. Statutes that are difficult to comply with or need revision

As a general observation I would suggest that the primary DUI statute, 8-1567, covering approximately eight pages in the statute book, is entirely too long to be quickly and easily referenced. It would be helpful if the statute could be divided into separate statutes that more concisely state: definitions; prohibited conduct; mandatory criminal penalties; discretionary criminal penalties; administrative penalties, and; other considerations in DUI cases. There is simply too much law to be condensed into a single statute.

As a matter of policy, I would suggest that the commission reconsider the mandatory fines imposed in all DUI cases. I am by no means trying to reduce the penalties imposed on DUI offenders but I see very little anecdotal evidence to suggest that it is actually a deterrent. If, in fact, there is evidence out there that suggests that the fines imposed in DUI cases actually reduce the likelihood of recidivism I wholeheartedly support imposing them as mandatory penalties. However, if the fines are merely imposed to provide revenue to the State I think they should be reconsidered, especially if that revenue is going to be used to support substance abuse treatment programs for the Department of Corrections that most DUI offenders will never have access to under the current law. Currently, only those who have been convicted of a felony DUI can participate in any Department of Corrections substance abuse treatment programs and I know of no case in which a person convicted of a felony DUI has been transferred to a state facility for that purpose. If the goal of this commission is to combat drunk driving with a focus on repeat offenders, it should closely examine what penalties could be

put in place to reach that end and whether the penalties currently in place are successful in addressing the problem.

Also as a matter of policy, I believe the DUI laws should be more consistent in the treatment of felony DUI cases. Currently, 3rd time offenders are imprisoned for a period of not less than 90 days and then are released on probation for a period of time during which a violation of that probation could result in that probation being revoked and the offender being ordered to serve the entire underlying sentence. However, 4th time DUI offenders are imprisoned for a period of not less than 90 days and upon release are immediately turned over to the Department of Corrections to serve a one year period of postrelease supervision without having had to serve a period of probation. I suggest that all felony DUI cases should be treated like any other felony case. An offender should be sentenced to an underlying sentence and if probation is granted it should be for a mandatory term similar to the terms imposed in other felony cases. If probation is granted it should only be after the offender has served a mandatory term of imprisonment and a period of postrelease supervision should be required in every case similar to the terms imposed in other felony cases. If felony DUIs continue to be treated differently than other felony cases it only serves to perpetuate the idea that felony DUIs are not "real" felonies.

The one specific statute that has generated the most questions from law enforcement in this jurisdiction is 8-1001. The statute, among other things, provides authority for law enforcement officers, under certain circumstances, to obtain a blood sample from someone who has otherwise refused to provide a blood sample for testing. It allows an officer to obtain a blood sample from a person who has refused to provide a blood sample for testing if the person was operating a vehicle that was involved in an accident resulting in serious injury or death to any person if the person operating the vehicle could be cited for any traffic offense. However, it was only upon a close reading of the statute that I was able to reach that conclusion and, at least in theory, I should be better equipped to interpret a statute than the ordinary law enforcement officer. Nevertheless, law enforcement officers must navigate the long and confusing language of this statute before determining if they are able to utilize the most valuable investigative tool in their arsenal; all under the extreme circumstances of an accident where serious injury or death is involved. A law enforcement officer should not have to make a call to his local county or district attorney before determining if he is authorized to take a blood sample. If the

commission hopes to create a statutory framework through which DUI offenders may be brought to justice, especially in these extreme cases, the statute must be made much clearer and more concise than it is now. I would suggest a separate statute devoted only to defining the circumstances under which a law enforcement officer may obtain a blood sample from a person who has refused consent. The law, as it exists now, is simply not good enough.

3. Suggestions on uniformly applicable DUI statutes

It is imperative that the administrative penalties for refusing to submit to a breath or blood test remain much harsher than those imposed on offenders who submit to testing and produce a sample that is over the legal limit. It not only reinforces the public policy goal that driver's cooperate with law enforcement officers in their DUI investigations; it also helps in the prosecution of DUI cases. Obviously my job as a prosecutor in DUI cases is much easier if the offender submits to testing and produces a sample over the legal limit. However, an offender's refusal to submit to testing is a much stronger piece of evidence if I can also present to the judge or jury that the offender was advised of the harsh penalties that result from a refusal before he or she made the decision to refuse testing. As it is now, an offender's license is suspended for the same period of time whether he or she submits to testing and produces a sample over .15 or refuses testing altogether. I can only assume that the legislature intended to punish those offenders more harshly because it believes those offenders are more culpable than those who produce a sample that is under .15 but nevertheless over the legal limit. Even if that is the intended result it has the exact opposite effect unless the legislature's goal is only to impose administrative penalties and not to produce successful prosecutions. Under current law, those who are seen as the most egregious offenders are the ones with the least incentive to submit to testing that could be used at a trial. If the penalties for refusing a test are the same or only marginally worse than those for taking the test and producing a sample over the legal limit, there is no logical reason an offender would ever submit to testing and a jury of his or her peers would not see the refusal as such a strong indication of guilt.

4. Input on treatment programs in this region

I have very little input to provide the commission on treatment programs in this region. Fortunately I have never required their services but it is perhaps unfortunate that I have never visited any of their facilities just to get a glimpse into their operations. The very nature of my job makes it unlikely that I will ever get any meaningful feedback about any of the programs from those who I have prosecuted. Those who successfully complete treatment I never see again. Those who are unsuccessful because of their own actions in not participating as directed usually come back in front of me for purposes of a motion to revoke his or her probation at which they rarely have much constructive feedback about the program. It is currently the responsibility of the chief judge of a judicial district to approve treatment providers in that district. Perhaps it would be useful for that judge to appoint a committee of judges, prosecutors, probation officers and other interested individuals to evaluate the providers and report its findings to the chief judge.

5. Input or suggestions on the central repository

One of the most frustrating aspects of prosecuting DUI cases is tracking down an offender's prior convictions. In this jurisdiction especially, we often deal with prior DUI convictions from both sides of the state line. Some jurisdictions keep minimal records, some jurisdictions have destroyed older records or have had their records destroyed by natural disasters, and some jurisdictions are just uncooperative. There are many times that we are unable to charge an offender as a repeat offender simply because we cannot prove the prior convictions. The problem is compounded by the fact that a number of offenders in this jurisdiction are undocumented aliens who may use different names each time they are arrested. The commission should consider mandating a uniform sentencing journal entry for all DUI cases that would provide sufficient identifying information to be used in future prosecutions. I make that suggestion with some hesitation because the sentencing journal entry required to be used in all felony cases continues to be updated and added to with the result that it resembles a longer version of the IRS 10-40 tax return form. However, if every jurisdiction in Kansas were using the same form and providing the same information to Driver Control I believe it would streamline the process of finding and proving prior DUI convictions. In addition, although there is case law on the point, I suggest that the commission codify the evidentiary principle that a Certified Driving Record (CDR) from either the Kansas Department of Revenue or similar agency in

another state is sufficient to prove prior DUI convictions at least for purposes of the preliminary hearing in a felony DUI case.

It should also be noted that the Kansas Supreme Court, in State v. Elliott, 281 Kan. 583, 133 P.3d 153 (2006), held that third or subsequent DUIs prosecuted in municipal court cannot be used to enhance an offender's sentence in a subsequent DUI case. Basically what that means is even if I know when I charge a DUI that the offender has six prior convictions but none of them were charged as a felony in district court, I can only charge the offender as a third time offender because only the first two convictions which were properly heard in municipal court can be used to enhance the offender's sentence. I bring that to your attention so that you know that it is not always because we, as prosecutors, are negligent in searching for prior DUI convictions that we allege fewer prior convictions than the offender actually has. It is no more frustrating to you than it is to us but we are bound not only by the laws enacted by the state legislature but also by the laws handed down by the Kansas courts of appeals.

Conclusion

It is my hope that this establishment of this commission is evidence of a desire to take a cautious and well-informed approach to revising DUI laws in Kansas. I appreciate that you have included prosecutors on the commission and have invited other prosecutors from throughout the state to testify before you. I understand that DUI laws are a matter of great statewide interest but it is my opinion that our DUI laws have too often been written as a response to public outrage over a few tragic cases. I may be wrong but I would bet that our DUI laws have been modified with much more frequency than any other law on the books. Let me be clear that I do not believe that the public outrage has been misplaced. Let me also be clear that I am reminded each time I announce my appearance in court that I represent the people of the State of Kansas and I take that responsibility very seriously. However, effective and uniformly enforceable laws cannot be enacted by kneejerk reaction. I am confident that all of the time and effort put forth by the members of this commission will result in laws that will help us better address the problem of driving under the influence in Kansas and I am hopeful that any changes or modifications of those laws in the future will be approached with the same amount consideration you all have exercised in undertaking this difficult task.

IMPACT DWI

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Testimony on Kansas Legislature on HB 2315
By Richard Roth, PhD March 2, 2009

I am a DWI Research Consultant and have been doing research on the effectiveness and cost-effectiveness of interlock laws for over ten years. As a citizen lobbyist, I drafted and successfully lobbied for the interlock laws in New Mexico. My vitae is attached. Links to many of my publications and conference presentations are available at our website, www.ImpactDWI.org.

I have been asked to provide research and statistics in support of HB 2315 by Mr. Matt Strausz of the Smart Start Interlock Company and I am being compensated for my time in preparing this testimony.

.....

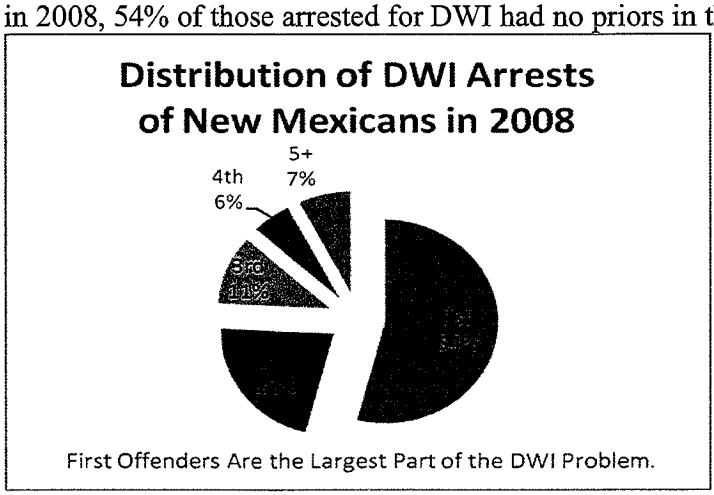
HB 2315

This bill provides a way for DWI offenders to learn and to demonstrate that they can drive sober before they are eligible for an unrestricted license. The required interlock driving periods increase with the number of priors and the severity of the offense. HB 2315 could be titled: "Graduated Re-Licensing For Drunk Drivers". HB 2315 substitutes the behavior-modifying opportunity to drive legally when sober for part of the strictly punative license suspension time.

Why Should First Offenders Be Included?

I. First offenders are the majority of the drunk driving problem.

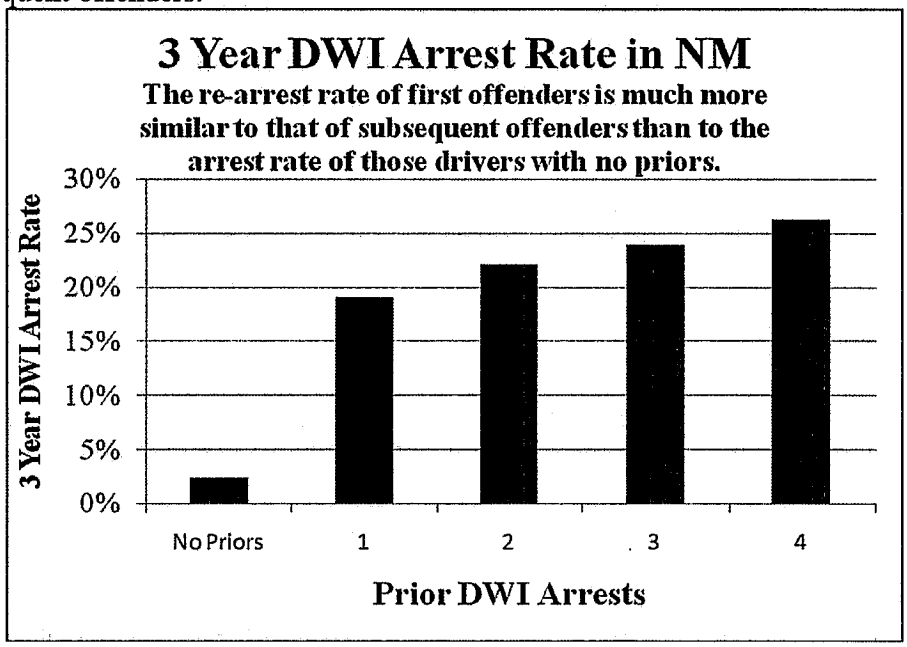
In New Mexico in 2008, 54% of those arrested for DWI had no priors in the last 25 years.



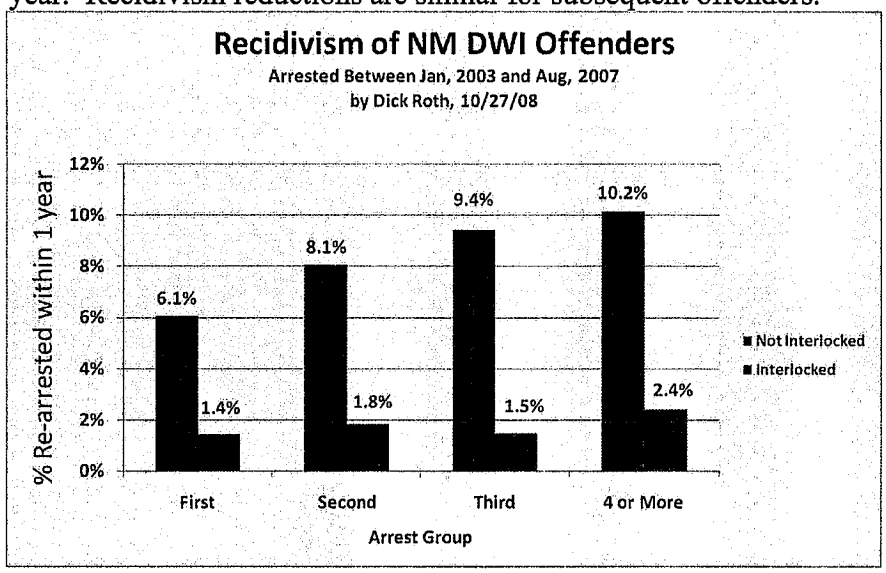
First Offenders Are the Largest Part of the DWI Problem.

According to the National Highway Traffic Safety Administration (NHTSA) over 90% of Alcohol-Impaired Driver Fatalities in the US involve drivers who have no priors in the previous 3 years[1]. Most of those arrested for DWI have no prior arrests and are labeled first offenders[2]. But first arrest is usually not first time drunk driving[3].

II. First Offenders Are Just As Dangerous To the Public As Subsequent Offenders.
The figure below shows that the re-arrest rate of first offenders is almost as high as that of subsequent offenders.



III. Interlocks Are Effective At Reducing Recidivism
Interlocked offenders have much less recidivism than non-interlocked offenders. 1.4% vs 6.1% per year. Recidivism reductions are similar for subsequent offenders.

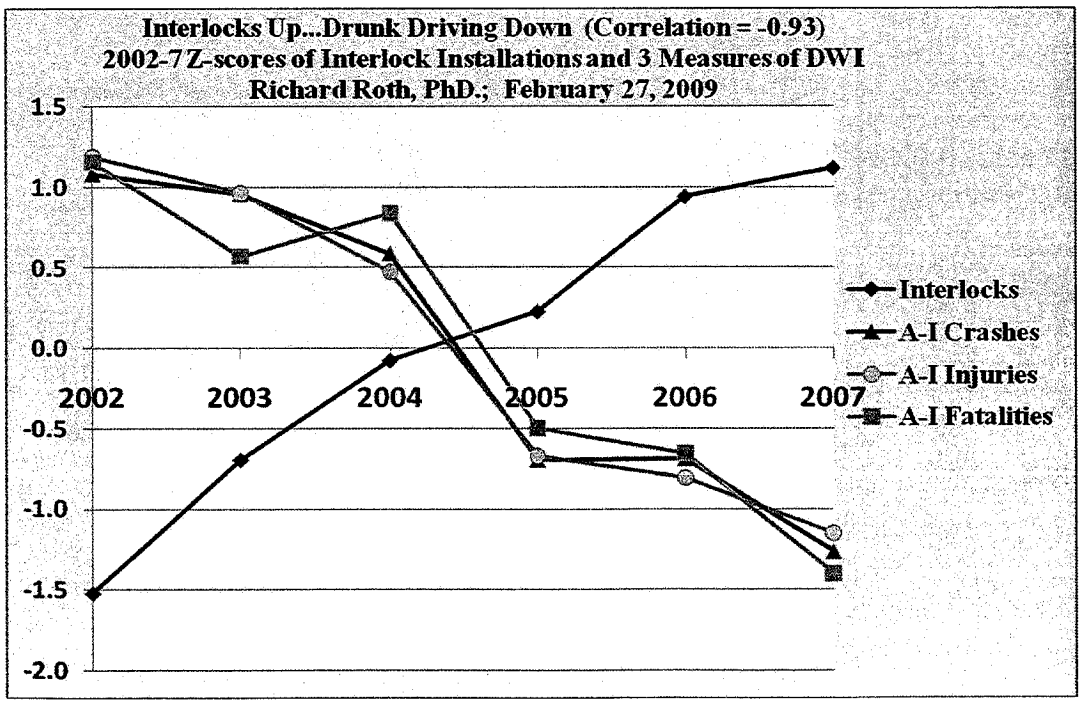


[1] http://www-nrd.nhtsa.dot.gov/Pubs/810616.PDF pg 5
[2] In New Mexico, 58% of those arrested for DWI have no priors in the previous 25 years. See Figure 1
[3] Surveys of convicted drunk drivers at DWI Victim Impact Panels in New Mexico indicate that they have driven after drinking a median of 100 times and an average of 500 times before their DWI arrest.

Appendix 1
More Interlocks, Less Drunk Driving in NM[1]
Dr. Richard Roth[2], March 2, 2008

This appendix illustrates what has been achieved since January 1, 2003 when the first mandatory interlock law went into effect in New Mexico. The next page contains eight figures that that are described below.

- Figure 1 shows that **Interlocks installations have increased** from 191 in 2002 to 6592 in 2007.
- Figure 2 shows that **interlocked offenders have a 75% lower re-arrest rate** than non-interlocked offenders.
- Figure 3 shows that **DWI arrests stayed relatively constant** in spite of increased enforcement[3].
- Figure 4 shows that **Alcohol-Involved Crashes are down 31%** from 3566 in 2002 to 2471 in 2007.
- Figure 5 shows that **Alcohol-Involved Injury Crashes are down 39%** from 1774 in 2002 to 1080 in 2007.
- Figure 6 shows that **32% Fewer people were injured in DWI crashes,** 2921 in 2002 and 1789 in 2007.
- Figure 7 shows that Alcohol-Involved **Fatal Crashes** are down 22% from 198 in 2002 to 155 in 2007.
- Figure 8 shows that **Alcohol-Involved Fatalities are down 35%** from 219 in 2004 to 143 in 2008.
- The Figure below summarizes what has been achieved by showing interlock installations and three measures of drunk driving on the same Z-score scale.



[1] Other contributors to the decline in drunk driving include: Increased Publicity, Increased Enforcement, Drunkbusters Hotline, Prevention Programs, and Forfeiture Ordinances.

[2] For additional information please contact me at RichardRoth2300@msn.com or 471-4764

[3] Data for figures 3-8 is from the yearly NM Traffic Safety Bureau Publications, "DWI New Mexico"and the original NM Crash files. Caution: Two competent researchers, Jim Davis and Steven Flint, think that some A-I crashes are missing from the official 2005 Crash Data, but the 2006 and 2007crash data substantiates the decline in measures of DWI.

Interlock Installations Up, Drunk Driving Down

But only 35% of arrested offenders are installing interlocks.
Closing legislative loopholes would get interlocks into more offender vehicles.

Fig.1

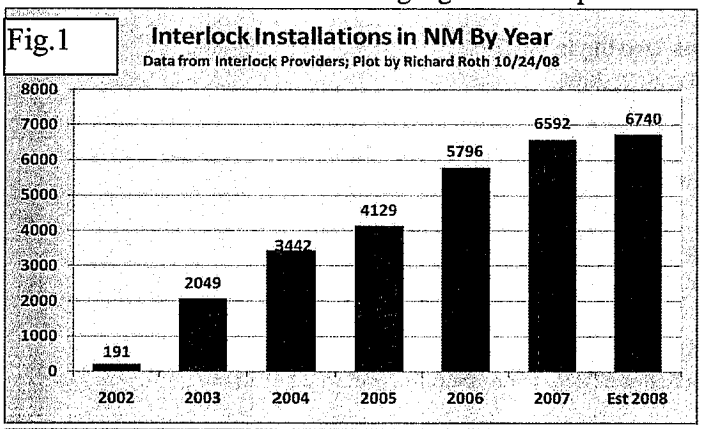


Fig. 2

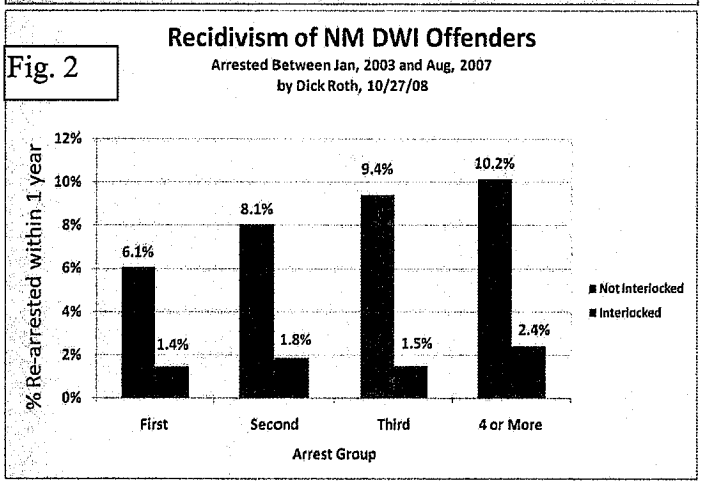


Fig. 3

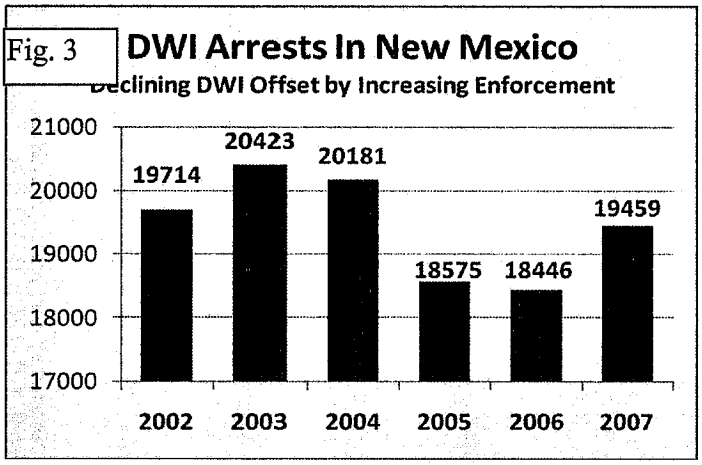
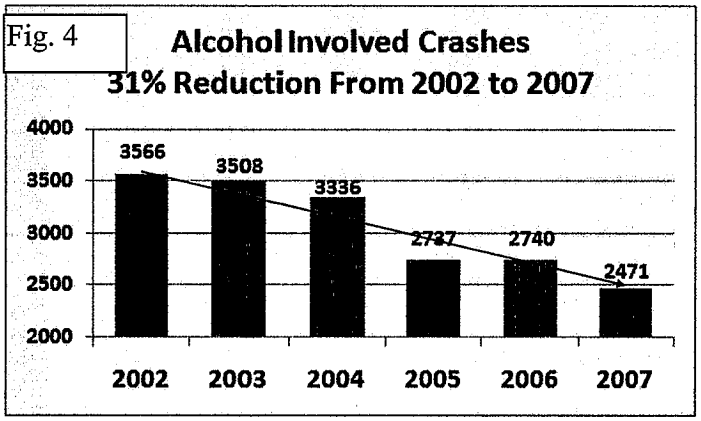


Fig. 4



Data from TSB, MVD, DGR and Interlock Providers.

Fig. 5

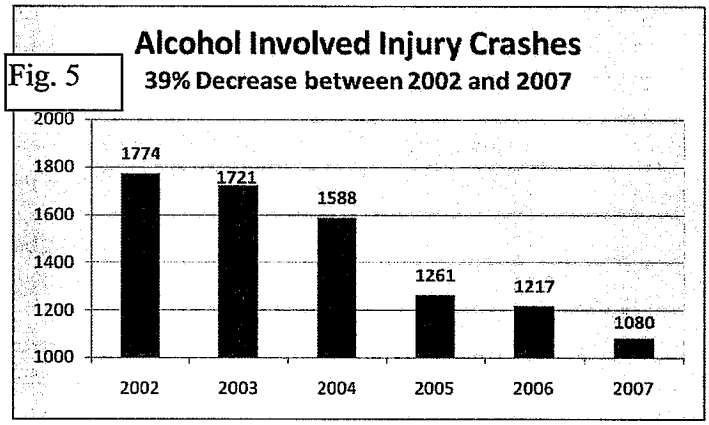


Fig. 6

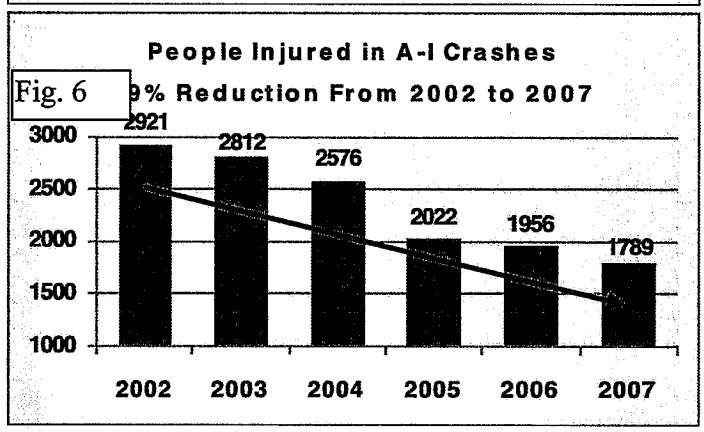


Fig 7

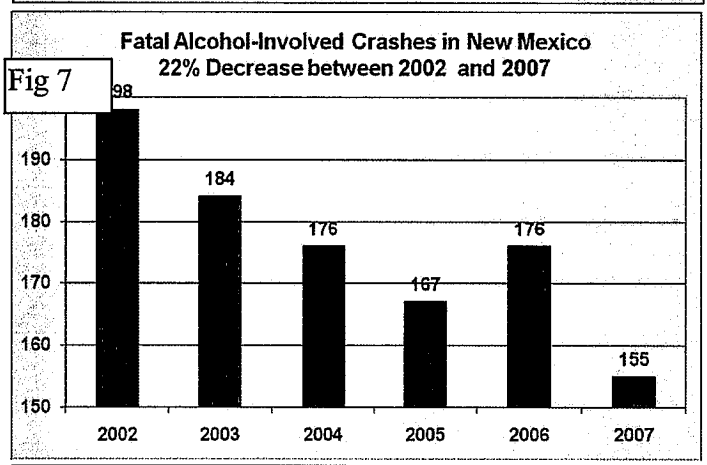
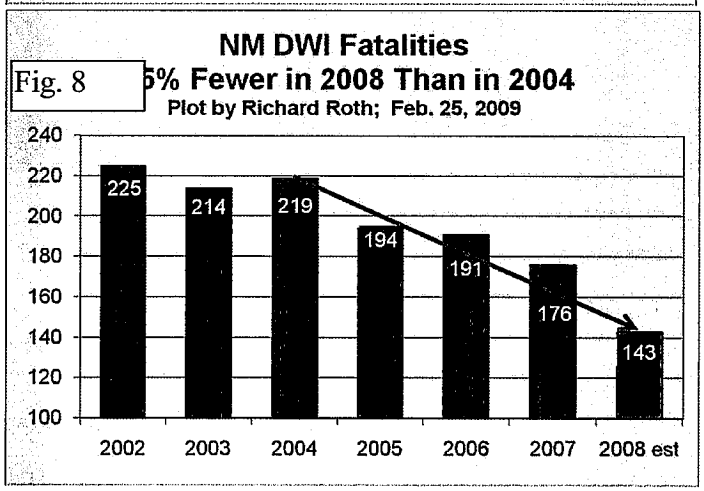


Fig. 8



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14-4

Funding cut may elevate DUIs

BY TIM CARPENTER
Created August 6, 2009 at 2:00pm
Updated August 7, 2009 at 12:10am

The incidence of chronic drunken driving in Kansas is likely to escalate because of a dramatic reduction in state spending on treatment programs, members of a state DUI Commission said Thursday.

Les Sperling, chief executive officer the Central Kansas Foundation in Salina and a member of the DUI Commission, said last year's $1.2 million in state financing for substance abuse treatment was clipped to $416,000 in the current year. Retrenchment of treatment services and withdrawal of care providers is likely to undermine state initiatives that made a dent in DUI recidivism the past eight years, he said.

"It's going to be very difficult without the resources to do the job we've been doing," he said.

The 2009 Legislature, Gov. Kathleen Sebelius and her replacement, Gov. Mark Parkinson, approved spending reductions to resolve a state budget crisis.

The DUI Commission is conducting a series of meetings to evaluate options for reforming the state's system of identifying, tracking, sanctioning and rehabilitating people arrested while driving under the influence. The objective is to complete a set of recommendations for consideration by the 2010 Legislature in January, including the possibility of broadening services to people arrested for a first, second and third conviction.

Commission member Dalyn Schmitt, chief executive officer of the Heartland Regional Alcohol and Drug Assessment Center in Roeland Park, said nearly 500 people who had been found guilty of four or more DUIs were assigned to the new abbreviated treatment regimen in the past 30 days.

She said the number of treatment centers in Kansas under contract with the state was likely to fall from 50 to less than 20 in response to the drop in state financing.

"Service covered under this funding is not going to be the same service that we have had the opportunity to utilize in the past," Schmitt said.

Roger Werholtz, secretary of the Kansas Department of Corrections, said the state currently had 944 people on parole who had been convicted of a fourth DUI. That accounts for 16 percent of the 5,900 Kansans on parole from state prison, said Werholtz, who also serves on the DUI Commission.

During the legislative session, members of the House and Senate slashed state expenditures to balance the budget during a period of declining state tax revenue. Gov. Mark Parkinson approved additional cuts in state agency spending to bring the budget into the black on July 1.

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