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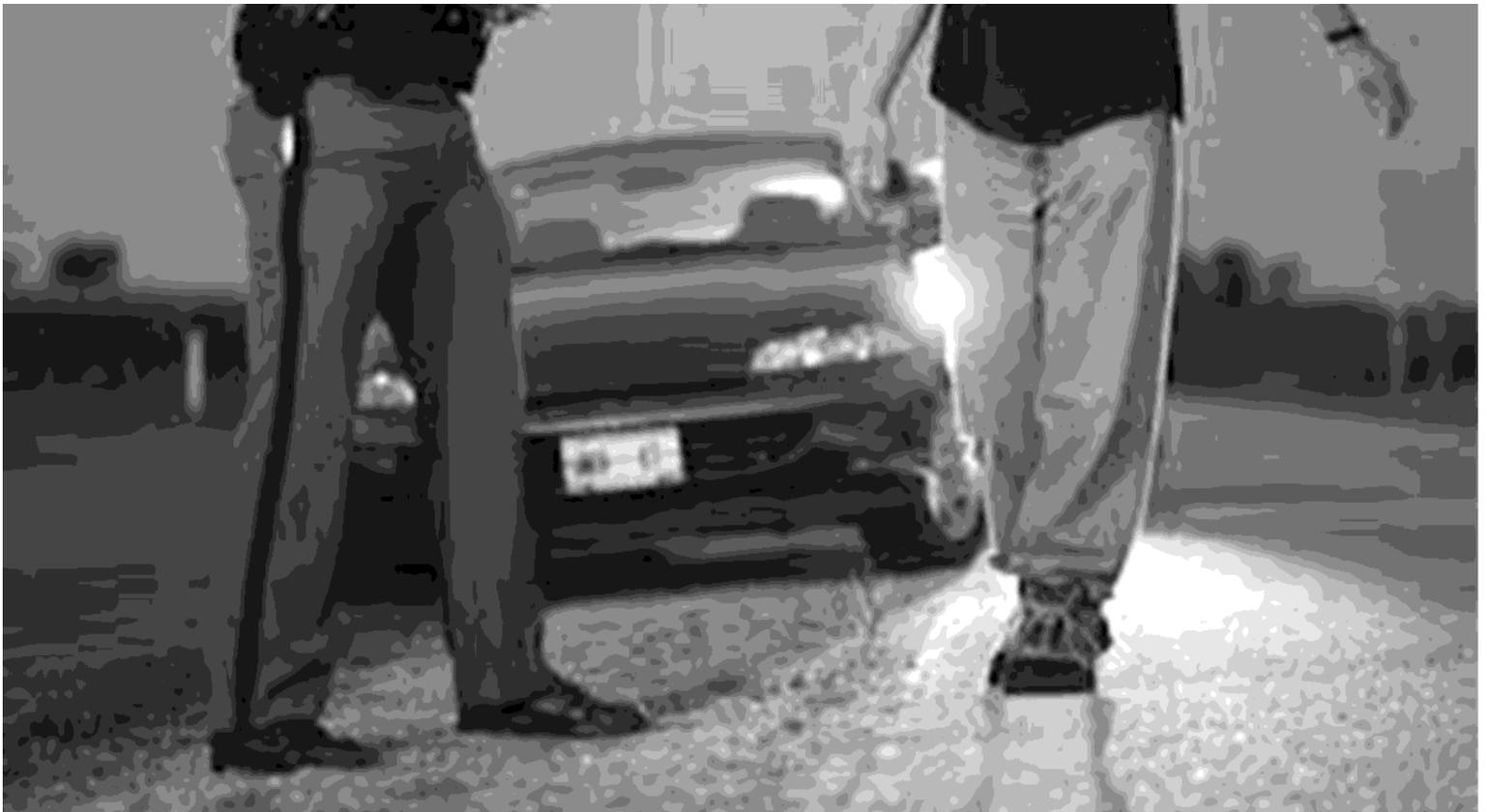
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## DUI MANUAL

2020 UPDATE



Commonwealth of Kentucky  
Department of Public Advocacy  
Damon Preston, Public Advocate

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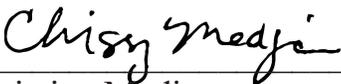
## INTRODUCING THE DUI MANUAL, 3RD EDITION

Introducing the Department of Public Advocacy DUI Manual, 3rd Edition. This is an update from the 2<sup>nd</sup> Edition which was issued in 2019. This Edition highlights changes to the law which went into effect July 1, 2020.

Updates to this manual include: a discussion of the presumption of intoxication; additional information on per se DUI offenses including information on valid prescription as a defense, and a chart of generic drug names; a chart of the 7 categories of drugs; instruction on penalties associated with DUI offenses; stop information related to motorcycles and checkpoints; field sobriety testing; implied consent; discovery issues; and experts.

The field of DUI practice is ever-evolving and the Education Branch strives to provide up-to-date guidance to practitioners. To that end, if there are sections that need elaboration, errors needing correction, or sections that have been inadvertently not included, please contact Chrissy Madjar at [christine.madjar@ky.gov](mailto:christine.madjar@ky.gov) so these updates and changes can be incorporated in the future editions.

A special thanks to Aaron Riggs, Staff Attorney with the DPA LaGrange Trial Office, who served as a contributing researcher, author, and editor of this edition.

  
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Christine Madjar

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**THE DUI STATUTE (EFFECTIVE JULY 1, 2020)****Note: Modified Portions Highlighted in Green**

**189A.010 Operating motor vehicle with alcohol concentration of or above 0.08, or of or above 0.02 for persons under age twenty-one, or while under the influence of alcohol, a controlled substance, or other substance which impairs driving ability prohibited -- Admissibility of alcohol concentration test results -- Presumptions -- Penalties --Aggravating circumstances.**

- (1) A person shall not operate or be in physical control of a motor vehicle anywhere in this state:
- (a) Having an alcohol concentration of 0.08 or more as measured by a scientifically reliable test or tests of a sample of the person's breath or blood taken within two (2) hours of cessation of operation or physical control of a motor vehicle;
  - (b) While under the influence of alcohol;
  - (c) While under the influence of any other substance or combination of substances which impairs one's driving ability;
  - (d) While the presence of a controlled substance listed in subsection (12) of this section is detected in the blood, as measured by a scientifically reliable test, or tests, taken within two (2) hours of cessation of operation or physical control of a motor vehicle;
  - (e) While under the combined influence of alcohol and any other substance which impairs one's driving ability; or
  - (f) Having an alcohol concentration of 0.02 or more as measured by a scientifically reliable test or tests of a sample of the person's breath or blood taken within two (2) hours of cessation of operation or physical control of a motor vehicle, if the person is under the age of twenty-one.

- (2) With the exception of the results of the tests administered pursuant to KRS 189A.103(7),
- (a) if the sample of the person's blood or breath that is used to determine the alcohol concentration thereof was obtained more than two (2) hours after cessation of operation or physical control of a motor vehicle, the results of the test or tests shall be inadmissible as evidence in a prosecution under subsection (1)(a) or (f) of this section. The results of the test or tests, however, may be admissible in a prosecution under subsection (1)(b) or (e) of this section.

**OR**

**(b) If the sample of the person's blood that is used to determine the presence of a controlled substance was obtained more than two (2) hours after cessation of operation or physical control of a motor vehicle, the results of the test or tests shall be inadmissible as evidence in a prosecution under subsection (1)(d) of this section. The results of the test or tests, however, may be admissible in a prosecution under subsection (1)(c) or (e) of this section.**

- (3) In any prosecution for a violation of subsection (1)(b) or (e) of this section in which the defendant is charged with having operated or been in physical control of a motor vehicle while under the influence of alcohol, the alcohol concentration in the defendant's blood as determined at the time of making analysis of his blood or breath shall give rise to the following presumptions:

- (a) If there was an alcohol concentration of less than 0.05 based upon the definition of alcohol concentration in KRS 189A.005, it shall be presumed that the defendant was not under the influence of alcohol; and
- (b) If there was an **alcohol concentration of 0.04 or greater but less than 0.08** based upon the definition of alcohol concentration in KRS 189A.005, that fact shall not constitute a presumption

that the defendant either was or was not under the influence of alcohol, but that fact may be considered, together with other competent evidence, in determining the guilt or innocence of the defendant.

The provisions of this subsection shall not be construed as limiting the introduction of any other competent evidence bearing upon the questions of whether the defendant was under the influence of alcohol or other substances, in any prosecution for a violation of subsection (1)(b) or (e) of this section.

(4) (a) Except as provided in paragraph (b) of this subsection, the fact that any person charged with violation of subsection (1) of this section is legally entitled to use any substance, including alcohol, shall not constitute a defense against any charge of violation of subsection (1) of this section.

(b) A laboratory test or tests for a controlled substance shall be inadmissible as evidence in a prosecution under subsection (1)(d) of this section upon a finding by the court that the defendant consumed the substance under a valid prescription from a practitioner, as defined in KRS 218A.010, acting in the course of his or her professional practice. However, a laboratory test for a controlled substance may be admissible as evidence in a prosecution under subsection (1)(c) or (e) of this section.

(5) Any person who violates the provisions of paragraph (a), (b), (c), (d), or (e) of subsection (1) of this section shall:

(a) For the first offense within a ten (10) year period, be fined not less than two hundred dollars (\$200) nor more than five hundred dollars (\$500), or be imprisoned in the county jail for not less than forty-eight (48) hours nor more than thirty (30) days, or both. Following sentencing, the defendant may apply to the judge for permission to enter a community labor program for not less than forty-eight (48) hours nor more than thirty (30) days in lieu of fine or imprisonment, or both. If any of the aggravating circumstances listed in subsection (11) of this section are present while the person was operating or in physical control of a motor vehicle, the mandatory minimum term of imprisonment shall be four (4) days, which term shall not be suspended, probated, conditionally discharged, or subject to any other form of early release;

(b) For the second offense within a ten (10) year period, be fined not less than three hundred fifty dollars (\$350) nor more than five hundred dollars (\$500) and shall be imprisoned in the county jail for not less than seven (7) days nor more than six (6) months and, in addition to fine and imprisonment, may be sentenced to community labor for not less than ten (10) days nor more than six (6) months. If any of the aggravating circumstances listed in subsection (11) of this section are present, the mandatory minimum term of imprisonment shall be fourteen (14) days, which term shall not be suspended, probated, conditionally discharged, or subject to any other form of early release;

(c) For a third offense within a ten (10) year period, be fined not less than five hundred dollars (\$500) nor more than one thousand dollars (\$1,000) and shall be imprisoned in the county jail for not less than thirty (30) days nor more than twelve (12) months and may, in addition to fine and imprisonment, be sentenced to community labor for not less than ten (10) days nor more than twelve (12) months. If any of the aggravating circumstances listed in subsection (11) of this section are present, the mandatory minimum term of imprisonment shall be sixty (60) days, which term

shall not be suspended, probated, conditionally discharged, or subject to any other form of early release;

(d) For a fourth or subsequent offense within a ten (10) year period, be guilty of a Class D felony. If any of the aggravating circumstances listed in subsection (11) of this section are present, the mandatory minimum term of imprisonment shall be two hundred forty (240) days, which term shall not be suspended, probated, conditionally discharged, or subject to any other form of release; and

(e) For purposes of this subsection, prior offenses shall include all convictions in this state, and any other state or jurisdiction, for operating or being in control of a motor vehicle while under the influence of alcohol or other substances that impair one's driving ability, or any combination of alcohol and such substances, or while having an unlawful alcohol concentration, or driving while intoxicated, but shall not include convictions for violating subsection (1)(f) of this section. A court shall receive as proof of a prior conviction a copy of that conviction, certified by the court ordering the conviction.

(6) Any person who violates the provisions of subsection (1)(f) of this section shall have his driving privilege or operator's license suspended by the court for a period of no less than thirty (30) days but no longer than six (6) months, and the person shall be fined no less than one hundred dollars (\$100) and no more than five hundred dollars (\$500), or sentenced to twenty (20) hours of community service in lieu of a fine. A person subject to the penalties of this subsection shall not be subject to the penalties established in subsection (5) of this section or any other penalty established pursuant to KRS Chapter 189A, except those established in KRS 189A.040(1).

(7) If the person is under the age of twenty-one (21) and there was an alcohol concentration of 0.08 or greater based on the definition of alcohol concentration in KRS 189A.005, the person shall be subject to the penalties established pursuant to subsection (5) of this section.

(8) For a second or third offense within a ten (10) year period, the minimum sentence of imprisonment or community labor shall not be suspended, probated, or subject to conditional discharge or other form of early release. For a fourth or subsequent offense under this section, the minimum term of imprisonment shall be one hundred twenty (120) days, and this term shall not be suspended, probated, or subject to conditional discharge or other form of early release. For a second or subsequent offense, at least forty-eight (48) hours of the mandatory sentence shall be served consecutively.

(9) When sentencing persons under subsection (5)(a) of this section, at least one (1) of the penalties shall be assessed and that penalty shall not be suspended, probated, or subject to conditional discharge or other form of early release.

(10) In determining the ten (10) year period under this section, the period shall be measured from the dates on which the offenses occurred for which the judgments of conviction were entered.

(11) For purposes of this section, aggravating circumstances are any one (1) or more of the following:

- (a) Operating a motor vehicle in excess of thirty (30) miles per hour above the speed limit;
- (b) Operating a motor vehicle in the wrong direction on a limited access highway;
- (c) Operating a motor vehicle that causes an accident resulting in death or serious physical injury as defined in KRS 500.080;

- (d) Operating a motor vehicle while the alcohol concentration in the operator's blood or breath is 0.15 or more as measured by a test or tests of a sample of the operator's blood or breath taken within two (2) hours of cessation of operation of the motor vehicle;
- (e) Refusing to submit to any test or tests of one's blood, breath, or urine requested by an officer having reasonable grounds to believe the person was operating or in physical control of a motor vehicle in violation of subsection (1) of this section; **except it shall not be considered an aggravating circumstance for a first offense under subsection (5)(a) of this section;** and
- (f) Operating a motor vehicle that is transporting a passenger under age of twelve (12) years old.

(12) The substances applicable to a prosecution under subsection (1)(d) of this section are:

- (a) Any Schedule I controlled substance except marijuana;
- (b) Alprazolam;
- (c) Amphetamine;
- (d) Buprenorphine;
- (e) Butalbital;
- (f) Carisoprodol;
- (g) Cocaine;
- (h) Diazepam;
- (i) Hydrocodone;
- (j) Meprobamate;
- (k) Methadone;
- (l) Methamphetamine;
- (m) Oxycodone;
- (n) Promethazine;
- (o) Propoxyphene; and (p) Zolpidem.

## **ELEMENTS OF THE DUI OFFENSE**

### **General**

Evaluation of any DUI charge begins with analysis of the first phrase of KRS 189A.010(1): A person shall not **operate** or **be in physical control** of a **motor vehicle anywhere in this state**. Challenging the definitions in this phrase may be the first line of defense.

### ***Operation / In Physical Control***

Most DUI offenses involve a police officer observing an individual driving/operating a motor vehicle. However, the circumstances surrounding the DUI, such as a stationary vehicle and a sleeping driver, raise the question: Is the element of “operation” or “in physical control” satisfied?

The cornerstone case addressing operation of a vehicle is Wells v. Commonwealth, 709 S.W.2d 847 (Ky. Ct. App. 1986). The argument in a pretrial *Wells* motion, and the dismissal sought as the appropriate remedy, is that there is a lack of probable cause to arrest someone for DUI because there is insufficient evidence to prove the “operation or in physical control” element. *Wells* states the factors used “in determining whether a person operated or was in actual physical control of a motor vehicle includ[e]:

- (1) whether or not the person in the vehicle was asleep or awake;
- (2) whether or not the motor was running;
- (3) the location of the vehicle and all of the circumstances bearing on how the vehicle arrived at that location; and
- (4) the intent of the person behind the wheel.”

*Wells* at 849. See also, 93 A.L.R.3d 7 (1979)(superseded in part by 96 A.L.R.6th 355 (2014)).

The *Wells* test has been successfully applied to a number of varying fact patterns. In the fairly-recent case Commonwealth v. Crosby, 518 S.W.3d 153 (Ky. Ct. App. 2017), the Court of Appeals determined, based on the evidence presented in Oldham County District Court at a *Wells* hearing, that no probable cause existed for the defendant’s arrest for DUI. Analyzing the facts under the four factors of *Wells*, the court determined that although the defendant was sitting in her vehicle, smoking a cigarette, and texting on her cellphone, no evidence was presented that the defendant *had driven* the vehicle or *intended to drive* the vehicle from the parked location. *Id.*

Furthermore, in Commonwealth v. Armstrong (unpublished), the Court of Appeals affirmed the lower court’s ruling that the police officer lacked probable cause to believe that the defendant was operating or in physical control of a vehicle. The Commonwealth argued that the defendant returned to his vehicle intoxicated, started the vehicle, and pushed down the gas pedal—that he was one step away (putting the vehicle in gear) from driving and thus committing the offense of DUI. However, the Court found that there was a “fair probability” that the defendant returned to his car, started the engine to stay warm, fell asleep, and inadvertently pushed his foot on the gas pedal. “As in *Wells*, we do not ‘believe that merely starting the [vehicle’s] engine ... [constituted] an exercise of actual physical control[.]’” Commonwealth v. Armstrong, 2011-CA-000931-MR, 2013 WL 645979, at \*6 (Ky. App. Feb. 22, 2013), unpublished (quoting *Wells* at 850).

The Court of Appeals in Harris v. Com., 709 S.W.2d 846, (Ky. Ct. App. 1986), took the *Wells* analysis one step further. They concluded:

“In the instant case, the circumstances surrounding the appellant’s arrest provide more compelling grounds for concluding that the appellant did not operate the truck than those present in *Wells*. It is undisputed that the appellant was not intoxicated when he first arrived at the McDonald’s and that during the two hours he was there, the truck did not move. The truck’s motor was not running at the time of his arrest, although the key was in the ignition and turned to “on.” The appellant was asleep and difficult for the police to awaken. These facts do not show that he exercised any control over his truck while

intoxicated in reaching its present location nor do they show that appellant was attempting to control the vehicle. In view of the circumstances, we do not find that the appellant was “operating” his truck for purposes of KRS 189A.010(1).” *Id.* at 847.

The *Wells* factors, however, are not exclusively dispositive. The courts have relied on a “totality of the circumstances” and “fair probability” analysis to determine if a defendant was in physical control of a vehicle. In Commonwealth v. Ratliff, No. 2011-CA-001853-DG, 2013 WL 4710330 (Ky. Ct. App. Aug. 30, 2013)(unreported), the Court of Appeals reversed and remanded a Jefferson District Court Order dismissing a DUI following a *Wells* hearing. The Court of Appeals’ reasoned that “the court must not examine the *Wells* factors in a vacuum, but instead must consider the totality of the circumstances... The court is to deduce from the facts, the surrounding circumstances, and suggested *Wells* factors, whether there was a ‘fair probability’ that the defendant operated or was in physical control of the vehicle while under the influence.” *Id.* at \*2.

This analysis has been applied to various fact patterns. In White v. Commonwealth, 132 S.W.3d 877 (Ky. Ct. App. 2003), the court determined that although no one had observed the defendant in the vehicle and the vehicle was unoccupied, stationary, and without the engine running when it was found, circumstances surrounding the incident satisfied probable cause to charge the defendant with driving under the influence: Mainly that the officers had information that the defendant was intoxicated, that he had left the vehicle to walk to a home to call for his wife to pick him up, and that his wife arrived in the wrecker.

In Tejeda v. Commonwealth, the District Court initially dismissed the charge of driving under the influence when it determined that the defendant became intoxicated after the vehicle had stalled and he was waiting for police to arrive. However, on appeal the Circuit Court remanded the case back to the District Court when it determined that additional circumstances surrounding the incident gave rise to probable cause that the defendant had operated the vehicle while under the influence. These circumstances included: (1) the earlier complaint of a vehicle matching the defendant's was driven erratically; (2) the officer witnessing the defendant's vehicle being pushed to the side of a road by a semi-tractor trailer; (3) the officer's belief that he smelled alcohol on the defendant's breath when he first approached him; (4) the second officer's detection of alcohol on the defendant's breath; and (5) considering the totality of the circumstances. Tejeda v. Commonwealth, No. 2008-CA-000663-DG, 2009 WL 4060176, at \*3 (Ky. Ct. App. Nov. 25, 2009).

Remember that the Commonwealth must show either “operation” **OR** “in physical control.” The Court of Appeals distinguished these terms in its opinion in DeHart v. Gray, 245 S.W.2d 434 (Ky. 1952). The court stated, “an automobile is not being *operated* where it remains stationary and no attempt is made to put it in motion.” *Id.* at 435. In determining “in physical control”, however, the court determined that “*was in physical control* of the truck when he left it with the engine running and the lights on. He continued the exercise of this control when he returned to the vehicle with the pronounced intention of driving it.” DeHart v. Gray, 245 S.W.2d 434, 435 (Ky. 1952). In short, the defendant was not operating a motor vehicle, but he was in physical control of a motor vehicle.

#### **PRACTICE TIP: WELLS (PROBABLE CAUSE) HEARINGS**

- Your judge may hear the word “*Wells*” and not allow you to proceed (some judges think it is inefficient to “try the case twice” - once at a *Wells* hearing and once at trial), so you should frame *Wells* hearings as a simple “probable cause hearing”, which is always ripe for review. RCr 2.04; 3.02(2).
- While the element of “operating” a vehicle seems to require some *movement* of the vehicle, the element of “physical control” focuses more on the *intent* of the defendant to move.
- If a vehicle is not operable (i.e. ran out of gas) and incapable of movement, make the argument that probable cause did not exist to charge the client with a DUI. However, if the defendant has caused a wreck and the vehicle was inoperable *only after or because of the wreck*, (s)he may still be charged with a DUI.
- During a *Wells* hearing, highlighting that a defendant, recognizing his or her inability to safely drive home, pulled over his vehicle and attempted to sleep it off, creates a strong public safety argument for leniency.

### **Motor Vehicle**

KRS 189A.010 does not provide a definition of “motor vehicle,” even though “motor vehicle” is defined in other sections of the KRS.

The argument, often unsuccessful, has been made that the definition of “motor vehicle” used in other sections of KRS such as KRS 186.020 to KRS 186.1911 *Motor Vehicle Licenses* and KRS 186.020 to 186.260 *Operator’s Licenses* should be applied to interpretations of the DUI statute (KRS 189A.010). Although “motor vehicle” is defined eight different times in Title XVI Motor Vehicles, the courts have consistently rejected these definitions to be used in correlation with the DUI statute. See Adams v. Commonwealth, 275 S.W.3d 209 (stating that the legislature did not intend the definition in KRS 186.010(4) to apply to KRS 189A).

Therefore, the Court of Appeals reasoned in Nemeth v. Commonwealth that, “Since there is no specific statutory definition of ‘motor vehicle’ in KRS Chapter 189A, we should construe that term in accordance with its common and approved usage.” 944 S.W.2d 871, 872 (Ky. Ct. App. 1997) *citing* Kentucky Unemployment Ins. Commonwealth v. Jones, 809 S.W.2d 715 (1991).

#### Is it a Motor Vehicle for Purposes of a DUI?

**Farm Tractor:** Yes, determined to be a “motor vehicle.” “Since a farm tractor is a vehicle, has a motor, and is frequently operated on public roads and highways, common sense tells us that a farm tractor is a ‘motor vehicle’ as that term is used in KRS Chapter 189A.” Nemeth v. Commonwealth, 944 S.W.2d 871, 872 (Ky. Ct. App. 1997)

**Moped:** Yes, a moped is a “motor vehicle.” Although mopeds are exempt from registration, licensing, and insurance requirements, they are within the purview of the DUI statute so an individual can be charged with a DUI for operating or being in physical control of a moped. State v. Singleton, 460 S.E.2d 573 (1995).

Additionally, “Since a moped can carry a person or property and has a motor, it is a ‘motor vehicle’ in accordance with common and approved usage, and within the meaning of KRS 189A.010.” Adams v. Commonwealth, 275 S.W.3d 209 (Ky. Ct. App. 2008).

Moped is defined in 186.010(5) as having the following characteristics:

1. Either:
  - Motorized bicycle whose frame design may include one or more horizontal crossbars supporting a fuel tank so long as it has pedals **OR**
  - Motorized bicycle with a step-through type frame which may or may not have pedals rated no more than two brake horsepower
2. A cylinder capacity not exceeding fifty (50) cubic centimeters
3. An automatic transmission not requiring clutching or shifting by the operator after the drive system is engaged; **AND**
4. Capable of maximum speed not more than thirty (30) miles per hour.

**Golf cart:** Yes, a golf cart is a “motor vehicle” despite the argument that a golf cart is not properly equipped for use on public highways. The Grayson County Circuit Court held that “the common usage of the word ‘motor vehicle’ encompasses golf carts operated on private subdivision roads.” Mattingly v. Commonwealth. 2009 WL 1098111, at \*2 (Ky. Ct. App. Apr. 24, 2009). See also, ***Anywhere in the State***.

**Boat/watercraft:** Offenses stemming from the operation of boats, watercrafts, waterskies, surfboard, or similar devices while intoxicated or drugged are covered under KRS 235.240. Section 4 states that the elements of the offense are established in KRS 189A.010(1) to (4), however, penalties are described in KRS 235.990. Note that refusing a breath alcohol test is an offense under KRS 235.240(3).

## KRS 235.240 Penalties for Boat/watercraft DUIs

- First Offense → \$200-\$250 fine
- Second Offense → \$350-\$500 fine
- Third or subsequent offense → \$600-\$1000 fine or incarceration for not less than thirty (30) days, or both
- Successful completion of a safe-boating course which carries a \$100 fee for materials and instruction.

**Non-motor vehicle DUI:** KRS 189.520 allows for the prosecution of operating a vehicle which is not a motor vehicle while under the influence. Under this statute the definition for vehicle is found in KRS 189.010(19)(a): “All agencies for the transportations of persons or property over or upon the public highways of the Commonwealth; and all vehicles passing over or upon the highways.” Such DUIs under this statute include man-powered transportations such as bicycles. Surfboards are covered under KRS 235.240. See ***Boat/watercraft***.

***Anywhere in the State***

The term “anywhere in the state” should be given its plain and ordinary meaning, which includes both private and public areas.

While an argument can be made for the defendant’s constitutional right to privacy and the right to do what one pleases on his/her own property, the Supreme Court held in Lynch v. Commonwealth, 902 S.W.2d 813 (Ky. 1995), the right to privacy as it related to KRS 189A.010 must be balanced with the public interest and welfare. There is a vast difference between mere intoxication on one’s own property and intoxication accompanied by the operation of a motor vehicle. The law regards the latter as criminal conduct because the potential for harm is so great. *Id.* at 817 (J. Lambert concurring opinion).

The defendant in Mattingly v. Commonwealth sought to dismiss one count of DUI, arguing that the golf cart she was operating was not a vehicle under KRS 189A.010 because a golf cart cannot be operated on a public highway. The Grayson County Circuit Court ruled that although the golf cart was operated on a private road, that private road was located in a platted subdivision, which was accessible to residents, guests, and others. “By driving the golf cart while under the influence of alcohol, Mattingly placed all surrounding persons in risk of harm.” Mattingly v. Commonwealth. No. 2008-CA-000610-DG, 2009 WL 1098111, at \*2 (Ky. Ct. App. Apr. 24, 2009).

## THE DIFFERENT DUI OFFENSES

KRS 189A.010(1)(a) - (f) outlines six different ways an individual can be charged with a DUI in Kentucky. Note that a prosecutor may charge a defendant under more than one subsection if the evidence permits. However, regardless of the subsections the defendant may be guilty of, (s)he can only receive one conviction and one set of penalties.

***Continuing Course of Action***

While the Commonwealth can prosecute a defendant under multiple theories and subsections of KRS 189A.010, the defendant may be convicted under only ***one offense per driving event***. KRS 505.020. The test to consider is the “continuing course of action” test. Therefore, a client cannot be charged for multiple DUIs for driving on different roads, but also, cannot be charged for driving under the influence of alcohol AND a second DUI for having in their system a controlled substance listed in section 12 of KRS 189A.010, if it was part of the same driving event.

### BAC of .08 or Greater

To prosecute an individual under KRS 189A.010(1)(a), the prosecutor must prove each element of the offense. Unlike other subsections of the KRS 189A.010(1) statute, subsection (1)(a) requires a showing of a blood alcohol concentration of 0.08 or greater, making the BAC number an element of the offense. The Kentucky Supreme Court held in Lopez v. Commonwealth, 173 S.W.3d 905 (Ky. 2005) that to convict an individual of operating a motor vehicle with an alcohol concentration of or above 0.08, the Commonwealth must prove that the defendant's blood alcohol concentration was 0.08 **at the time he was operating a motor vehicle**.

However, even though the Commonwealth must prove a BAC of .08 or greater to prosecute under section (1)(a), in Mattingly v. Commonwealth, 98 S.W.3d 865, 866 (Ky.Ct.App. 2002), the Court of Appeals affirmed that the defendant was entitled to introduce "any evidence which tended to impugn the results of the breath- and blood-alcohol concentration test, including evidence of his performance on field sobriety tests." Such evidence includes the number and rate of consumption of alcohol beverages, or any proof that may show that the test was in error. See, **Relation Back Defense** and **Field Sobriety Tests**.

#### Scientifically Reliable Tests

Because this section of the statute requires an actual BAC evaluation, the blood or breath test administered must be scientifically reliable. Breath testing is sufficiently reliable. Commonwealth v. Wirth, 936 S.W.2d 78, 83 (Ky. 1996) ("While breath testing may not be flawless, it has been determined to have sufficient reliability to be admissible in evidence and to sustain a conviction.")

It is the Commonwealth's burden to prove that such tests were correctly administered. At a minimum, they must show that:

- The officer who administered the breathalyzer was properly trained
- The officer who administered the breathalyzer was certified to operate the machine
- The test was administered according to standard operating procedures
- The machine had undergone periodic pre-operation checks
- The machine was functioning satisfactorily.

See Marcum v. Commonwealth, 483 S.W.2d 122 (1972) and Owens v. Commonwealth, 487 S.W.2d 897, 900-901 (1972).

This remains the standard. Additional requirements found in KRS 189A.103(3), KRS 189A.103(4), and 500 KAR 8:020(2) can show compliance using business or public records, making it unnecessary to provide testimony from the technician who serviced and calibrated the machine. Commonwealth v. Wirth, 936 S.W.2d 78, 82 (Ky. 1996).

**PRACTICE TIP:** Obtain the breathalyzer calibration records in advance as well as the training manual for officers in your county. The reliability of the breathalyzer is a treasure trove of challenges that is not utilized enough. See also, **Breathalyzer**.

#### Taken within Two (2) Hours

Under KRS 189A.010(2), the defendant's alcohol concentration must be obtained within two (2) hours of the cessation of operating or being in physical control of a motor vehicle. However, this is true only when the defendant is being charged under section 1(a) or (f). See also, **Under 21 DUI**. Therefore, if the defendant is charged with an alcohol DUI under section 1(b) or a combination of alcohol and substance DUI under section 1(e), the two hour timeframe is admissible. See, Little v. Commonwealth, No. 2007-SC-000620-MR, 2009 WL 1110336, at \*5-6 (Ky. Apr. 23, 2009) (The Kentucky Supreme Court affirmed the trial court decision to admit into evidence a blood test showing a 0.29 BAC taken three hours after a car accident, reasoning that the Commonwealth was

prosecuting the defendant under section KRS 189A.010(1)(b) and therefore, not required to show proof of administration of the test within two hours).

QUICK LOOK: OUTSIDE TWO (2) HOURS OF CESSATION OF OPERATION	
INADMISSIBLE	ADMISSIBLE
<p><u>(1)(a) and (1)(f)</u></p> <p>(a) Having an alcohol concentration of 0.08 or more as measured by a scientifically reliable test or tests;</p> <p>(f) Having an alcohol concentration of 0.02 or more as measured by a scientifically reliable test or tests ... if the person is under the age of twenty-one.</p>	<p><u>(1)(b) and (1)(e)</u></p> <p>(b) While under the influence of alcohol;</p> <p>(e) While under the combined influence of alcohol and any other substance which impairs one's driving ability; or</p>

**PRACTICE TIP:** As part of discovery, ask the prosecutor to elect which section of 189A.010, (s)he plans to use going forward. However, you may need to be prepared to defend against multiple sections of 189A.010(1) if the prosecutor refuses to make this election. Remember that if the Commonwealth cannot prove that the BAC was 0.08 or greater, it can always opt to prosecute under another section of the statute during trial if the evidence permits.

### Under the Influence

If there is no alcohol concentration determined to prosecute an individual under section (1)(a), the prosecutor may still attempt to prove that the individual was operating a motor vehicle *under the influence*. Without a BAC determination, there is no presumption that the defendant was under the influence under section (1)(b). Therefore, to successfully prosecute under this section the Commonwealth has to prove two essential elements: (1) operation of a motor vehicle and (2) while under the influence of alcohol.

Similar to “motor vehicle,” there is no statutory definition for the phrase “under the influence.” The Black’s Law Dictionary gives a general foundation for the term: “The offense of operating a motor vehicle in a physically or mentally impaired condition, especially after consuming alcohol or drugs. Generally, this is a lesser offense than driving while intoxicated. But in a few jurisdictions the two are synonymous.” Black’s Law Dictionary (10th ed. 2014).

“Under the influence” is different than mere consumption of alcohol. *Bridges v. Commonwealth*, 845 S.W.2d 541 (Ky. 1993). The prosecution has to prove that the operator of the vehicle was “under the influence” **at the time of operating the vehicle**, not at the time that the test was administered.

Furthermore, there is no such requirement that the Commonwealth prove an impaired ability to drive due to the influence of alcohol. “Although evidence of impaired driving and/or impaired driving ability is often present in a DUI trial, neither are an essential element of the offense.” *Hayden v. Commonwealth*, 766 S.W.2d 956, 957 (1989).

**PRACTICE TIP:** Neither the prosecution nor defense can define “under the influence” in jury instructions. Therefore, it is of utmost importance to educate the jurors during voir dire to the difference between “consumption of alcohol” and “under the influence.” See, *Jury Instructions*.

### **Presumption of Intoxication**

The presumption of intoxication is different depending on which subsection of KRS189A.010 your client is prosecuted under.

Subsection (1)(b) or (e) → If charged under subsection (1)(b) or (e), a BAC level less than .05 creates a presumption of sobriety. KRS 189A.010(3)(a). When the BAC is between .04 and .08 then there is no presumption that the individual was or was not under the influence of alcohol. KRS 189A.010(3)(b). However, that fact may be considered, along with other competent evidence in determining the guilt or innocence of a defendant. KRS 189A.010(3)(b).

Subsection (1)(a) → If the BAC is over .08 and the defendant is prosecuted under KRS 189A.010(1)(a), there is a presumption of being under the influence simply based on the BAC level itself.

This distinction was described in Lopez v. Commonwealth, 173 S.W.3d 905, 908 (Ky. 2005); *See also* King v. Commonwealth, 875 S.W.2d 902, 902 (Ky. Ct. App. 1993). The Lopez court held that under subsections (1)(b) and (d), [Note this is in direct contrast with the text of KRS 189A.010(3)(a)], the BAC creates only an evidentiary presumption of intoxication which is in contrast to section (1)(a), where the BAC is an element of the offense. Therefore, if the Commonwealth cannot prove that the BAC was 0.08 or greater, it can always opt to prosecute under another section of the statute.

Commonwealth v. Collins, 821 S.W.2d 488 (Ky. 1991), stands for the proposition that legal presumptions are designed to enable the Commonwealth to overcome a motion of directed verdict. They should not be used to compel an inference from a jury or to suggest that the Commonwealth need not prove its case beyond a reasonable doubt. *See also*, Wells v. Commonwealth, 561 S.W.2d 85 (Ky. 1978). Trial Law Notebook pp. 89-90.

### **Under the Influence of Any Substance or Combination of Substances**

**\*\* This section covers any substances NOT listed in KRS 189A.010(12). See *Drug DUIs*.**

#### ***Legal Use of a Substance/ Valid Prescription***

Even drugs that are legal, such as prescription drugs or over-the-counter medications, can be misused and form the basis of a DUI charge. The mere fact that an individual “is legally entitled to use any substance, including alcohol, shall NOT constitute a defense against any charge of violation of subsection (1) of this section.” KRS 189A.010(4)(a).

The law makes a distinction between subsections when it comes to valid prescriptions. KRS 189A.010(4)(b) states that “upon a finding by the court that the defendant consumed the substance under a valid prescription from a practitioner, as defined in KRS 218A.010, acting in the course of his or her professional practice,” then laboratory tests are inadmissible as evidence in a prosecution under subsection (1)(d). However, laboratory tests are admissible in the prosecution under subsection (1)(c) or (e). KRS 189A.010(4)(b).

PRESCRIPTION & LABORATORY TESTS	
INADMISSIBLE	ADMISSIBLE
Subsection (1)(d)  (d) While the presence of a controlled substance listed in subsection (12) of this section is detected in the blood ... within two (2) hours of cessation of operation or physical control of a motor vehicle.	Subsection (1)(c) and (e)  (c) While under the influence of any other substance or combination of substances which impairs one's driving ability.  (e) While under the combined influence of alcohol and any other substance which impairs one's driving ability.

**PRACTICE TIP:** Because a valid prescription is not in itself a defense, the defense can rest on evidence that the quantity of the prescribed substance taken did not impair the defendant's ability to operate a motor vehicle.

The unique characteristics of the individual as well as the quantity taken can affect the ability to operate a vehicle. The court in Cruse v. Commonwealth recognized this idea in what has been termed the "Kentucky stewed prune rule":

"Stewed prunes might impair one person's ability to drive and might not affect another person's ability; while on the other hand, a cup of stewed prunes might not affect a particular driver, but a quart of stewed prunes might impair his ability." 712 S.W.2d 356, 357 (Ky. Ct. App. 1986)

Any Particular Combination of Drugs may Produce Four General Kinds of Effects:

- **Null:** Neither drug has an effect on the individual.
- **Overlapping:** Each drug may effect the individual in some different way. In combination, both effects may appear.
- **Additive:** The two drugs may independently produce some similar effects. In combination, these effects may be enhanced.
- **Antagonistic:** The two drugs may produce some effects that are exactly opposite. In combination, these effects may mask each other.
  - Example of Antagonistic Effect: A Central Nervous System Stimulant (i.e. methamphetamine) usually causes pupil dilation while a narcotic usually causes pupil constriction. It is possible that someone who is simultaneously under the influence of a stimulant and narcotic may have pupils that are nearly normal in size. It is also possible that the pupils will change as the effects of one drug diminishes while the other increases.

### **Marijuana**

A marijuana DUI presents some unique challenges. While there is no requirement that the Commonwealth has to prove an impaired ability to drive due to the influence of alcohol, Hayden v. Commonwealth, 766 S.W.2d 956 (1989), the opposite is true for convictions if driving under the influence of marijuana. The Court of Appeals in Kidd v. Commonwealth, 146 S.W.3d 400 (Ky. Ct. App. 2004) stated, "We agree that in order to establish a violation of KRS 189A.010(1)(c), the Commonwealth was required to prove that Kidd was operating a motor vehicle while under the influence of marijuana to such a degree that his **driving ability** was impaired." *Id.* at 403. Be aware, however, that the Court of Appeals upheld Kidd's marijuana DUI conviction, reasoning:

“Evidence that a driver's speech was slurred, that his blood-shot eyes did not react to light, and that he could not perform the simple physical tasks involved in a field sobriety test sufficed to establish that his **ability** to drive was impaired—despite the absence of erratic driving. This evidence, coupled with the evidence of marijuana in his urine, was sufficient to sustain the jury's verdict that Kidd was guilty of DUI (marijuana).” *Id.*

In Pemberton v. Commonwealth, the Court of Appeals narrowly decided the issue of whether information surrounding the time marijuana was consumed was relevant information to suppress the results of a urinalysis: “The fact that Pemberton ingested marijuana within 36 hours of driving is a useful fact in the determination of whether or not he was driving while impaired. The weight to be assigned to that evidence is a matter for the trier of fact to determine.” Pemberton v. Com., No. 2007-CA-001016-DG, 2008 WL 4530906, at \*2 (Ky. Ct. App. Oct. 10, 2008)(*not published*).

#### Specific Challenges with Marijuana DUIs

- Marijuana is detectable in the blood or urine approximately 30 days after use
- Active v. Inactive Metabolites: Consult or hire an expert to testify as to meaning and consequences between the two results
- Marijuana effects an individual's system differently than other illegal substances, therefore, they have different effects on one's ability to perform field sobriety tests. *See, Field Sobriety Tests* and *Drug DUIs*.
- Police officers are NOT experts when it comes to marijuana.

### **Per Se DUI: Controlled Substances listed in Section 12**

KRS 189A.010(d) states “While the presence of a controlled substance listed in subsection (12) of this section is detected in the blood, as measured by a scientifically reliable test, or tests, taken within two (2) hours of cessation of operation or physical control of a motor vehicle.”

KRS 189A.010(12) lists the following drugs:

- (a) Any Schedule I controlled substance **except marijuana**;  
*See Marijuana*
- (b) Alprazolam
- (c) Amphetamine
- (d) Buprenorphine
- (e) Butalbital
- (f) Carisoprodol
- (g) Cocaine
- (h) Diazepam
- (i) Hydrocodone
- (j) Meprobamate
- (k) Methadone
- (l) Methamphetamine
- (m) Oxycodone
- (n) Promethazine
- (o) Propoxyphene and
- (p) Zolpidem.

When one of these drugs is present in the blood during operation or physical control of a motor vehicle, as reliably tested without two hours of operation, **guilt has been established**. Because there is no requirement to show actual impairment and mere presence of the drug in the blood is enough to establish guilt, these DUIs are often called “Per Se” DUIs. Furthermore, **any** trace of these substances can establish guilt; there is no threshold amount for a DUI charge under this section.

*Valid Prescriptions Under Subsection (1)(d)*

The exception to this rule is in 189A.010(4)(b). If the defendant had a “valid prescription from a practitioner, as defined in KRS 218A.010, acting in the course of his or her professional practice,” then the tests will be excluded “upon a finding by the court that the defendant consumed the substance under a valid prescription.” Remember that the defendant must have been taking the prescription as prescribed for the prescription to have validity.

Often times these substances go by their generic name and have been validly prescribed as treatment.

NAME OF DRUG	GENERIC DRUG NAMES	USED TO TREAT
Alprazolam	Xanax	Anxiety, panic disorders
Amphetamine	Adzenys, Dyanavel, Evekeo	ADHD, obesity, narcolepsy
Buprenorphine	Cizdol, suboxone, Subutex	Opioid addiction
Butalbital	Axotal, Fiorinal, Tencon, Allzital, Phrenilin, Fioricet, Esgic, Vanatol	Often combined with acetaminophen or aspirin for treatment of pain and headaches
Carisoprodol	Soma	Muscle relaxer
Cocaine		
Diazepam	Valium	Anxiety, muscle spasms, and seizures; alcohol withdrawal
Hydrocodone	Anexsia, Dicodid, Hycodan, Hycomine, Lorcet, <b>Lortab</b> , Norco, Tussionex and <b>Vicodin</b>	moderate to severe pain; cough suppressant
Meprobamate	tranquilizer, Miltown, Equanil, Mesropan, Amepromat, Quivet, Zirponand	Anxiety disorders; short-term relief of anxiety
Methadone	Diskets, Methadose	Moderate to severe pain; treat narcotic drug addiction
Methamphetamine	Desoxyn	ADHD
Oxycodone	Roxicodone, Oxaydo, Xtampza ER	Moderate to severe pain
Promethazine	Phenaedoz, Promethegan, Phenergan	Prevent and treat nausea/vomiting, allergies (rash, itching, runny nose)
Propoxyphene	Darvon, Dolene (weaker than morphine)	Mild or moderate pain
Zolpidem	Ambien, Ambien CR, Edluar, Intermezzo	Insomnia

		(to fall asleep, or fall back asleep in the middle of the night)
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### Combined Influence of Alcohol and Any Other Substance

Under 189A.010(1)(e) the Commonwealth must prove:

- The existence of BOTH alcohol and a substance (illegal or prescription) in the client's system;
- That the defendant was under the "combined influence" of both alcohol and a substance; AND
- Being under this combined influence impaired his/her driving ability.  
*See also, **Under the Influence of Any Substance or Combination of Substances** and **Under the Influence.***

**NOTE:** The prosecutor can charge your client under multiple sections if the evidence allows.

**PRACTICE TIP:** This type of DUI is perfect for use of an expert. Consider using an expert not only to testify at trial, but also, in preparation for voir dire so you can understand potential jurors' misperceptions or misunderstandings of this type of DUI. *See **Voir Dire** and **Experts.***

Any Particular Combination of Alcohol and an Illegal or Prescription Drug May Produce these Effects:

- **Null:** Neither drug has an effect on the individual. Depends on dosage, time of consumption and human factors such as gender, weight, height, and tolerance.
- **Overlapping:** Each drug/alcohol may affect the individual in some different way. In combination, both effects may appear.
- **Additive:** The two drugs/alcohol may independently produce some similar effects. In combination, these effects may be enhanced.
- **Antagonistic:** The two drugs/alcohol may produce some effects that are exactly opposite. In combination, these effects may mask each other.
  - See **Drug DUIs.**

### DUI Under the Age of 21 Years Old

If a defendant is under the age of twenty-one and is operating a motor vehicle with an alcohol concentration of 0.02, the Commonwealth could charge him/her under 189A.010(1)(f).

- This type of DUI is called by various names → Under 21 DUI or Baby DUI are more common.
- Age is determined at the time of the commission of the offense KRS 189A.005(10). Previously this statute was KRS 189A.005(9).

Here, there are similar requirements to the "adult" DUIs in KRS 189A.010(1)(a) through (e). All DUIs include these elements:

1. The individual was operating or in physical control of a motor vehicle;
2. A scientifically reliable test of breath or blood must be administered; AND
3. That test must be taken within two (2) hours of operation or physical control of the motor vehicle.

The major difference is that the presumption of intoxication is lesser, from 0.02 rather than .08.

The Kentucky Supreme Court upheld the constitutionality of KRS 189A.010(f) in Commonwealth v. Howard, 969 S.W.2d 700 (Ky. 1998). Even if the defendant is under twenty-one (21) years old at the time of alleged DUI, the Commonwealth is **not** required to prosecute under this section to the exclusion of all others. The Commonwealth

can choose to prosecute an under 21-year-old defendant under multiple sections as long as such evidence for each section is presented and proper notice is given to the defendant. Commonwealth v. Wirth, 936 S.W.2d 78 (Ky. 1996); *See also*, Commonwealth v. Howard, 969 S.W.2d 700 (Ky. 1998); Commonwealth v. Reynolds, 136 S.W. 442 (Ky. 2204). This may be a strategic decision by the Commonwealth. Remember, however, that if convicted under KRS 189A.010(a) through (e), the penalties found in KRS 189A.010(5) would then apply. KRS 189A.010(7); *See also*, Commonwealth v. Reynolds, 136 S.W.3d 442 (Ky. 2004).

Penalties for DUIs convictions under section (1)(f) are less harsh than other DUI penalties and are not enhanceable. *See Penalties for DUI Under 21 Years Old*. However, if an individual under 21 years old has a BAC of 0.08 or greater based on the definition of alcohol concentration in KRS 189A.005, “the person **SHALL** be subject to the penalties established pursuant to subsection (5) of this section.

**PRACTICE TIP:** Negotiate any Under 21 DUIs to remain under section (1)(f). Penalties will be less harsh and less burdensome to comply with. To assure that your client will be prosecuted under only section (1)(f), ask the prosecutor through discovery practice to elect this section. Remember Under 21 DUIs are not enhanceable.

### Drug DUIs

Not all DUIs are the same. DUIs where drugs are suspected require different defense strategies and litigation techniques than a typical alcohol DUI.

“Drug DUIs” can be found in three different sections of KRS 189A.010(1):

- KRS 189A(1)(c): “While under the influence of any other substance or combination of substances which impairs one’s driving ability”
- KRS 189A(1)(d): “While the presence of a controlled substance listed in subsection (12) of this section is detected in the blood, as measured by a scientifically reliable test, or tests, taken within two (2) hours of cessation of operation or physical control of a motor vehicle”
- KRS 189A(1)(e): “While under the combined influence of alcohol and any other substance which impairs one’s driving ability”

Sometime before trial, the prosecution has a duty to notify the defendant under which section or sections the defendant is being charged. *See Commonwealth v. Wirth*, 936 S.W.2d 78, 81 (Ky. 1996). *See The Uniform Citation*.

#### Lab Tests for Drugs DUIs

Much like alcohol DUIs, the time that the sample was taken will determine admissibility of the results. KRS 189A.010(2)(b) states:

If the sample of the person’s blood that is used to determine the presence of a controlled substance was obtained more than two (2) hours after cessation of operation or physical control of a motor vehicle, the results of the test or tests shall be inadmissible as evidence in a prosecution under subsection (1)(d) of this section. The results of the test or tests, however, may be admissible in a prosecution under subsection (1)(c) or (e) of this section.

<b>QUICK LUCK: OUTSIDE TWO (2) HOURS</b>	
INADMISSIBLE	ADMISSIBLE
Subsection (1)(d) - While the presence of a controlled substance listed in subsection (12) of this section is detected in the blood ... within two (2) hours of cessation of	Subsection (1)(c) and (e) - (c) While under the influence of any other substance or combination of substances which impairs one’s driving ability & (e) While under the combined

operation or physical control of a motor vehicle.	influence of alcohol and any other substance which impairs one's driving ability.
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The NHTSA Trains Officers to Recognize these Seven Categories of Drugs				
DRUG	EFFECT	EXAMPLES	CONSUMPTION METHOD	EFFECTS ON FIELD SOBRIETY TESTS
Central Nervous System Depressants (CNS)	slows down the operations of the brain, and usually depresses the heartbeat, respiration, and many other processes controlled by the brain	<ul style="list-style-type: none"> <li>Alcohol</li> <li>Barbiturates → Seconal and Luminal</li> <li>Non-barbiturates → GHN-gamma-hydroxybutyrate and Soma</li> <li>Anti-Anxiety Tranquilizers → Valium, Librium, Xanax, and Rohypnol</li> <li>Anti-Depressants → Prozac and Elavil</li> <li>Muscle relaxants → Soma</li> </ul>	Orally in the form of pills, capsules, liquids.	<p>Individuals under the influence of CNS depressants look and act like people under the influence of alcohol.</p> <p>General indicators of CNS Depressant influence are:</p> <ul style="list-style-type: none"> <li>“Drunken” behavior and appearance</li> <li>Uncoordinated</li> <li>Drowsy</li> <li>Sluggish</li> <li>Disoriented</li> <li>Thick, slurred speech</li> </ul> <p>Eye indicators of CNS Depressant influence are:</p> <ul style="list-style-type: none"> <li>Horizontal gaze nystagmus usually will be present</li> <li>Vertical nystagmus may be present (with high doses)</li> <li>Pupil size usually will not be effected, except that Methaqualone and Soma may cause pupil dilation</li> </ul>
Central Nervous System Stimulants	Accelerates the heartbeat, respiration, and many other processes of the body	Cocaine Methamphetamine	Cocaine: <ul style="list-style-type: none"> <li>Snorting</li> <li>Smoking (crack)</li> <li>Injection</li> <li>Orally</li> </ul>	People under the influence of CNS Stimulants tend to be hyperactive, indicated by nervousness, extreme talkativeness and an inability to sit still. They also are usually unable to

			<p>Meth:</p> <ul style="list-style-type: none"> <li>• Injection</li> <li>• Orally</li> <li>• Snorting</li> <li>• Smoked (“ice”)</li> </ul>	<p>concentrate, or to think clearly for any length of time.</p> <p>General indicators of CNS Stimulant influence are:</p> <ul style="list-style-type: none"> <li>• restlessness</li> <li>• talkative</li> <li>• excitation</li> <li>• euphoria</li> <li>• exaggerated reflexes</li> <li>• loss of appetite</li> <li>• anxiety</li> <li>• grinding teeth</li> <li>• redness in the nasal area (if snorted)</li> <li>• body tremors</li> </ul> <p>Eye indicators of CNS Stimulant influence are:</p> <ul style="list-style-type: none"> <li>• neither HGN nor VGN will be present</li> <li>• pupils generally dilated pupil size usually not affected</li> </ul>
Hallucinogens	<p>Affects a person’s perceptions, sensations, thinking, self-awareness and emotions.</p> <p>One common type of hallucination caused by these drugs is</p>	<p>Some hallucinogenic drugs come from natural sources:</p> <ul style="list-style-type: none"> <li>• Peyote is a hallucinogen found in a particular specie of cactus.</li> <li>• Psilocybin is an hallucinogen found in a number of species of mushroom.</li> </ul> <p>Other hallucinogens are synthetically manufactured:</p>	<p>Hallucinogen abusers usually take their drugs orally; however, some hallucinogens can be smoked, or injected or “snorted”.</p>	<p>General indicators of hallucinogens influence are:</p> <ul style="list-style-type: none"> <li>• Hallucinations</li> <li>• Dazed appearance</li> <li>• Body tremors</li> <li>• Uncoordinated</li> <li>• Perspiring</li> <li>• Disorientation</li> <li>• Paranoia</li> <li>• Difficulty in speech</li> </ul>

	called synesthesia, which means a transposing of the senses. i.e. Sounds may be transposed into sights. Sights may be transposed into odors or sounds.	<ul style="list-style-type: none"> <li>• LSD (Lysergic Acid Diethylamide)</li> <li>• MDA (3, 4-Methylene-dioxyamphetamine)</li> <li>• MDMA (Ecstasy)</li> </ul>		<ul style="list-style-type: none"> <li>• Nausea</li> <li>• Piloerection (goose bumps)</li> </ul> <p>Eye indicators of hallucinogen influence:</p> <ul style="list-style-type: none"> <li>• Neither horizontal nor vertical nystagmus should be present</li> <li>• The pupils usually will be noticeably dilated</li> </ul>
Dissociative Anesthetics (PCP)	Induces hallucinations and produces a feeling of detachment from oneself and one’s surroundings	PCP, it’s various analogs (like angel dust), and Dextromethorphan (DXM)  Ketamine (chemical cousin to PCP)	Smoking by using it to adulterate tobacco, marijuana, or other substances  Orally Injection Inhaling	<p>General indicators of PCP influence are:</p> <ul style="list-style-type: none"> <li>• Warm to the touch</li> <li>• Perspiring</li> <li>• Blank stare</li> <li>• Repetitive speech</li> <li>• Incomplete verbal responses</li> <li>• Confused</li> <li>• Muscle rigidity</li> <li>• Possibly violent &amp; combative</li> </ul> <p>Eye Indicators of Dissociative Anesthetic influence:</p> <ul style="list-style-type: none"> <li>• Horizontal gaze nystagmus generally will be present, often with very early onset and very distinct jerking.</li> <li>• Vertical nystagmus generally will be present.</li> <li>• Pupil Size usually will not be affected.</li> </ul>
Narcotic Analgesics	Works by binding to receptors in the brain to block feelings of pain	Narcotic Analgesics include a large number of drugs that share three important characteristics: <ul style="list-style-type: none"> <li>• They will relieve pain.</li> </ul>	Tolerance is easily build for these drugs with prolonged use	<p>General indicators of Narcotic Analgesic influence:</p> <ul style="list-style-type: none"> <li>• “On the nod”</li> <li>• Droopy eyelids</li> <li>• Depressed reflexes</li> </ul>

		<ul style="list-style-type: none"> <li>• They will produce withdrawal signs and symptoms, when the drug is stopped after chronic administration.</li> <li>• They will suppress the withdrawal signs and symptoms of chronic morphine administration.</li> </ul> <p>Some drugs classified as Narcotic Analgesics are natural derivatives of opium:</p> <ul style="list-style-type: none"> <li>• Heroin</li> <li>• Morphine</li> <li>• Codeine Some are synthetic narcotic analgesics, such as:             <ul style="list-style-type: none"> <li>○ Demerol</li> <li>○ Methadone</li> <li>○ Numorphan</li> <li>○ Fentanyl</li> <li>○ OxyContin</li> </ul> </li> </ul>		<ul style="list-style-type: none"> <li>• Dry mouth</li> <li>• Facial itching</li> <li>• Low, raspy speech</li> <li>• Fresh puncture marks may be evident</li> </ul> <p>Eye indicators of Narcotic Analgesic influence:</p> <ul style="list-style-type: none"> <li>• Neither horizontal nor vertical nystagmus will be present</li> <li>• Pupils generally will be constricted</li> </ul>
<p>Inhalants</p>	<p>Inhalants are breathable chemicals that produce mind-altering results</p>	<p>Inhalants include many familiar household materials, such as glue (“Toluene”), paint, gasoline, aerosol sprays, etc. that produce volatile fumes.</p> <p>Some drugs that are classified as Inhalants include:</p> <ul style="list-style-type: none"> <li>• Glue (i.e., model airplane glue, Toluene)</li> <li>• Paint</li> <li>• Gasoline</li> </ul>		<p>General indicators of Inhalant influence:</p> <ul style="list-style-type: none"> <li>• Disorientation</li> <li>• Slurred speech</li> <li>• Residue of substance on face, hands, clothing</li> <li>• Confusion</li> <li>• Possible nausea</li> </ul> <p>Eye indicators of Inhalant influence:</p> <ul style="list-style-type: none"> <li>• Horizontal gaze nystagmus generally will be present.</li> </ul>

		<ul style="list-style-type: none"> <li>• Aerosol sprays (i.e., vegetable frying pan lubricants, hair sprays, insecticides)</li> <li>• Nitrous Oxide</li> <li>• Ether</li> <li>• Amyl Nitrate certain anesthetics also may be used as inhalants.</li> </ul>		<ul style="list-style-type: none"> <li>• Vertical nystagmus may be present (especially with high doses).</li> <li>• Pupil size generally will not be effected.</li> </ul>
Cannabis	Physical and psychological effects from harm and discomfort to pain relief and relaxation	<p>The category Cannabis includes the various products of the Cannabis Sativa plant, including:</p> <ul style="list-style-type: none"> <li>• Marijuana</li> <li>• Hashish</li> <li>• Hash oil</li> <li>• Synthetic THC (Marinol or Dronabinol)</li> <li>• Synthetic cannabinoid products (Spice, K2, JWH-18, etc.)</li> </ul>	Cannabis products generally are smoked, although they also can be ingested orally	<p>General Indicators of Cannabis Influence:</p> <ul style="list-style-type: none"> <li>• Marked reddening of the Conjunctiva (white part of the eyeball)</li> <li>• Body tremors</li> <li>• Odor of marijuana</li> <li>• Disoriented</li> <li>• Relaxed inhibitions</li> <li>• Difficulty in dividing attention</li> </ul> <p>Eye indicators of Cannabis Influence:</p> <ul style="list-style-type: none"> <li>• Neither horizontal nor vertical nystagmus will be present</li> <li>• Pupil size generally will be dilated, but also may not be effected</li> </ul>

## PRIOR OFFENSES

### 10 Year Look Back

In determining the ten (10) year period, the period shall be measured from the dates on which the offenses occurred. KRS 189A.010(10).

Since the prior look-back period was five (5) years, this new law has been challenged. Unfortunately, the Supreme Court of Kentucky held that this change did not violate the terms of the defendant's plea agreement, violate the prohibition against ex post facto laws, nor implicate *Boykin* requirements regarding the knowing and intelligent waiver of rights. Commonwealth v. Jackson, 529 S.W.3d 739 (Ky. 2017). Therefore, this 10-year look-back period stands.

### How to Calculate Prior Offenses with Two Pending DUI Charges

The leading case for determining prior DUI convictions for purposes of enhancement is Ballinger v. Commonwealth, 459 S.W. 3d 349 (Ky. 2015). The defendant in *Ballinger* had a prior DUI conviction and was charged with two new DUI charges. While these two were still pending, he received another DUI charge. This newest charge was indicated by the grand jury as a DUI 4<sup>th</sup> offense, a Class D felony. The Supreme Court of Kentucky determined that prior DUI convictions that were **entered after** the current alleged offense **but before conviction** of the current offense, can be used to enhance the current offense.

### Out of State Convictions

Prior offenses shall include all convictions in Kentucky and any other out-of-state convictions for: (1) operating or being in control of a motor vehicle while under the influence of alcohol or other substances that impair one's driving ability, or (2) any combination of alcohol and such substances, or (3) while having an unlawful alcohol concentration or driving while intoxicated. KRS 189A.010(5)(e). This is a catch-all because different states may charge and/or define DUI differently. However, any conviction under KRS 189A.010(1)(f) Under 21 DUI cannot be used to enhance. KRS 189A.010(5)(e).

In order to use prior convictions as enhancement, the court MUST receive a copy of the prior convictions, each certified by the court ordering the conviction.

Proof of prior convictions must be certified by the court ordering the conviction. The certified copy of that prior judgment of conviction is required as the "best evidence" of that conviction. A certified copy of the defendant's DOT driving history is **NOT** the "best evidence" of a prior DUI conviction and cannot be used a substitute. Commonwealth v. Willis, 719 S.W.2d 440 (Ky. 1986).

**PRACTICE TIP:** Object to prosecutors who attempt to admit prior convictions without the proper certification. This is more common with out-of-state convictions.

## PENALTIES

An individual who enters a plea or is found guilty of violating KRS 189A.010(1)(a)–(e) is subject to the consequences listed in KRS 189A.010(5). Penalties include serving jail time, paying a service fee, license suspension, completing Alcohol and Drug Education classes, paying fines and court costs, and in some jurisdictions attending a class known as the Victim Impact Panel. Individuals who have a Commercial Driver's License or are convicted under KRS 189A.010(f)(Under 21 DUI) will face different penalties. See **Commercial Driver's License Consequences** and **Penalties of DUI Under 21 Years Old**.

	First	Second	Third	Fourth or Subsequent	Under 21 DUI CANNOT be used to enhance. KRS 189A.010(1)(f)
<b>Jail Time</b>	48 hrs to 30 days	7 days to 6 months	30 days to 12 months	120 days	
<b>Fines</b>	\$200 - \$500	\$350 - \$500	\$500 - \$1000	\$1,000 to \$5,000 fine (waveable for indigent clients)	\$100- \$500 <b>OR</b> 20 hours comm. service
<b>Fees (Prior to April 15, 2020 it was \$375)</b>	Court Costs Service Fee \$425	Courts Costs Service Fee \$425	Courts Costs Service Fee \$425	Court Costs Service Fee \$425	Court Costs but No Service Fee
<b>Alcohol Drug Education</b>	90 days	1 year	1 year	1 year	
<b>License Suspension (Prior to July 1, 2020)</b>	30 days - 120 days	12 months - 18 months	24 months - 36 months	60 months	30 days to 6 months (suspension may change for under 18 years old)

\*\* For a DUI 1<sup>st</sup>, fine **OR** imprisonment. DUI Seconds and subsequent require fine **AND** imprisonment.

<b>NEW REQUIREMENTS EFFECTIVE JULY 1, 2020**</b>	<b>Meeting all Ignition Interlock Device Requirements</b>	<b>Failure to Meet Ignition Interlock Device Requirements</b>
Under 21	4 months (if they meet the 90 consecutive days requirement within first four months)	6 months
First Offense	4 months (if they meet the 90 consecutive days requirement within first four months)	6 months
Second Offense	12 months (if they meet the 120 consecutive days requirement within the first 12 months)	18 months
Third Offense	18 months (if they meet the 120 consecutive days requirement within the first 18 months)	36 months
Fourth or Subsequent Offense	30 months (if they meet the 120 consecutive days requirement within the first 30 months)	60 months

\*\*KRS 189A.070

Under KRS 189A.010(9) at least one penalty shall be assessed and may not be suspended, probated or subjected to conditional discharge or early release.

## First Offense

**Fine/Incarceration:** For a DUI First Offense within a ten (10) year period, the court may impose a fine of \$200 to \$500 **OR** imprisonment of 48 hours to 30 days. KRS 189A.010(5)(a) also permits the defendant, following sentencing, to request permission to enter a community labor program in lieu of paying the fine or serving time in the jail. The community labor program must be within the time periods allowed for DUI First Offense, 48 hours to thirty (30) days. KRS 189A.010(5)(a). See ***Community Labor Program***.

**With an Aggravator:** If an aggravating circumstance from KRS 189A.010(11) exists, the mandatory incarceration for a DUI first offense is no less than four (4) days to serve. This time **MUST** be served and cannot be suspended, probated, conditionally discharged, or subject to any other form of early release. See ***Aggravating Circumstances***.

**License Suspension:**

**PRIOR TO JULY 1, 2020:** The client's license will be suspended for a period not less than 30 days but no more than 120 days. KRS 189A.070(1)(a). The client is required to surrender the physical driver's license to the court. KRS 189A.070(5). If they are not in possession of their physical license, a peace officer may seize the license and deliver it to the court. KRS 189.070(6). Failure to surrender the driver's license may result in additional penalties. A client cannot have his driving privileges reinstated until (s)he has completed ADE classes and the statutory suspension period has passed. KRS 189A.070(3). Because the initial 30 day license suspension may expire prior to completion of ADE classes, the court may order expedited classes.

**EFFECTIVE JULY 1, 2020:** For a first offense within ten (10) years, the license is suspended for four (4) months if they meet the ninety (90) days consecutive requirement with an ignition interlock device. For someone who is issued an ignition interlock device and does not meet the consecutive ninety (90) day requirement within the first four months of the issuance of the Ignition Interlock License, then the license is suspended until the person meets the ninety (90) consecutive day requirement or six (6) months, whichever is shorter. Six (6) months for all others. KRS 189A.070(1)(a)(2)(a)(i). See, ***Ignition Interlock Licenses and Ignition Interlock Devices*** and ***License Suspension***.

The client is required to surrender the physical driver's license to the court. KRS 189A.070(3). If they are not in possession of their physical license, a peace officer may seize the license and deliver it to the court. KRS 189.070(3)(a). Failure to surrender the driver's license may result in additional penalties.

**ADE Classes:** For a first offense, ADE classes must be completed over a period of 90 days and the program must provide an assessment of the individual's alcohol or other substance abuse problems. KRS 189A.040(1). The client will not be eligible to get his/her license reinstated if (s)he has not completed the required ADE classes. KRS 189A.070(2). Therefore, the mandatory 30-day license suspension may lapse before they complete their classes. If the client has completed the program before the ninety (90) day expiration date, with written documentation, the judge may release him/her from this obligation early. The client must pay for these classes but can do so on a sliding scale. KRS 189A.040(1)(b). Failure to complete ADE classes or pay the amount specified by the court for education or treatment may result in a contempt of court charge and courts **SHALL** reinstitute all penalties which were previously suspended. KRS 189A.040(1)(d).

## Second Offense

**Fine/Incarceration:** For a DUI Second Offense within a ten (10) year period, the court may impose a fine of \$350 to \$500 **AND** incarceration of seven (7) days to six (6) months. In the judge's discretion, the client may also be sentenced to community labor for not less than ten (10) days but no more than six (6) months. KRS 189A.010(5)(b).

The minimum sentence of incarceration or community labor **CANNOT** be suspended, probated, or subject to conditional discharge or any other form of early release. KRS 189A.010(8). At least 48 hours of the mandatory sentence must be served consecutively.

With an Aggravator: If an aggravating circumstance from KRS 189A.010(11) is present, the mandatory incarceration for a DUI second offense increases to fourteen (14) days to serve. This time **MUST** be served and cannot be suspended, probated, conditionally discharged, or subject to any other form of early release. Each period of incarceration must be at least 24 hours in length. KRS 189A.030(1). See **Aggravating Circumstances**.

License Suspension:

**PRIOR TO JULY 1, 2020:** The client's license will be suspended for a period not less than twelve (12) months but no more than eighteen (18) months. KRS 189A.070(1)(b). The client is required to surrender the physical driver's license to the court. KRS 189A.070(5). If they are not in possession of their physical license, a peace officer may seize the license and deliver it to the court. KRS 189.070(6). Failure to surrender the driver's license may result in additional penalties.

A client cannot have his driving privileges reinstated until he has completed his ADE classes and the statutory suspension period has passed. KRS 189A.070(3). KRS 189A.070(7) lays out the requirements for reinstatement of a revoked license if an ignition interlock device had been installed.

**EFFECTIVE JULY 1, 2020:** For a second offense within ten (10) years, the license is suspended for twelve (12) months for a person who is issued an ignition interlock license and who meets the one hundred twenty (120) consecutive day requirement within the first twelve (12) months of the issuance of the ignition interlock license. For an individual who is issued an ignition interlock device and does not meet the one hundred and twenty day (120) day consecutive requirement within the first twelve (12) months of the issuance of the Ignition Interlock License, then the license is suspended until the clients meets the one hundred and twenty consecutive (120) consecutive day requirement or eighteen (18) months, whichever is shorter. Eighteen (18) months for all others. KRS 189A.070(1)(a)(2)(c). See, **Ignition Interlock Licenses and Ignition Interlock Devices** and **License Suspension**.

The client is required to surrender the physical driver's license to the court. KRS 189A.070(3). If they are not in possession of their physical license, a peace officer may seize the license and deliver it to the court. KRS 189.070(3)(a). Failure to surrender the driver's license may result in additional penalties.

ADE Classes: For a second offense, ADE classes must be completed over a period of one (1) year and the program must provide an assessment of the individual's alcohol or other substance abuse problems. KRS 189A.040(2). The client will not be eligible to get his/her license reinstated if (s)he has not completed the required ADE classes. KRS 189A.070(2). The treatment program must provide an alcohol and drug assessment. If the client has completed the program before the one (1) year expiration date, with written documentation, the judge may release him/her from this obligation early. KRS 189A.040(2)(a). The client must pay for these classes but may do so on a sliding scale. KRS 189A.040(2)(b). Failure to complete ADE classes will result in a contempt of court charge and the court SHALL reinstitute all penalties previously imposed by suspended or delayed. KRS 189A.040(2)(d).

### Third Offense

Fine/Incarceration: For a DUI Third Offense within a ten (10) year period, the court may impose a fine of \$500 to \$1000 **AND** incarceration of thirty (30) days to twelve (12) months. In the judge's discretion, the client may also be sentenced to community labor for not less than ten (10) days but no more than twelve (12) months. KRS 189A.010(5)(c). The minimum sentence of incarceration or community labor **CANNOT** be suspended, probated,

or subject to conditional discharge or any other form of early release. KRS 189A.010(8). At least 48 hours of the mandatory sentence must be served consecutively.

With an Aggravator: If an aggravating circumstance from KRS 189A.010(11) is present, the mandatory incarceration for a DUI third offense is sixty (60) days to serve. This time **MUST** be served and cannot be suspended, probated, conditionally discharged, or subject to any other form of early release. KRS 189A.010(5)(c). See **Aggravating Circumstances**.

License Suspension:

**PRIOR TO JULY 1, 2020:** The client's license will be suspended for a period not less than twenty-four (24) months but no more than thirty-six (36) months. KRS 189A.070(1)(c). The client is required to surrender the physical driver's license to the court. KRS 189A.070(5). If they are not in possession of their physical license, a peace officer may seize the license and deliver it to the court. KRS 189.070(6). Failure to surrender the driver's license may result in additional penalties.

A client cannot have his driving privileges reinstated until (s)he has completed the ADE classes and the statutory suspension period has passed. KRS 189A.070(3). KRS 189A.070(7) lays out the requirements for reinstatement of a revoked license if an ignition interlock device had been installed.

**EFFECTIVE JULY 1, 2020:** For a third offense within ten (10) years, the license is suspended for eighteen (18) months for a person who is issued an ignition interlock license and who meets the one hundred twenty (120) consecutive day requirement within the first eighteen (18) months of the issuance of the ignition interlock license. For an individual who is issued an ignition interlock device and does not meet the one hundred and twenty day (120) day consecutive requirement within the first eighteen (18) months of the issuance of the ignition interlock license, then the license is suspended until the clients meets the one hundred and twenty (120) consecutive day requirement or thirty-six (36) months, whichever is shorter. Thirty-six (36) months for all others. KRS 189A.070(1)(a)(2)(c). See, **Ignition Interlock Licenses and Ignition Interlock Devices** and **License Suspension**.

The client is required to surrender the physical driver's license to the court. KRS 189A.070(3). If they are not in possession of their physical license, a peace officer may seize the license and deliver it to the court. KRS 189.070(3)(a). Failure to surrender the driver's license may result in additional penalties.

ADE Classes: For a DUI third offense, ADE classes must be completed over a period of one (1) year and may be an inpatient or residential-type program. KRS 189A.040(3). The client will not be eligible to get his/her license reinstated if (s)he has not completed the required ADE classes. KRS 189A.070(2). The client must pay for these classes but may do so on a sliding scale. KRS 189A.040(3)(b). The treatment program must provide an alcohol and drug assessment. If the client has completed the program before the one (1) year expiration date, upon written recommendation to the court, the client may be released from the inpatient or residential treatment program **BUT** must be enrolled in an outpatient treatment program for the remainder of the one (1) year period. KRS 189A.040(3)(c). Failure to complete ADE classes will result in a contempt of court charge **AND** any penalties, which were previously suspended, will be reinstated. KRS 189A.040(3)(d).

### Fourth or Subsequent Offense

A fourth or subsequent DUI conviction is a Class D felony and punishable by one (1) to five (5) years incarceration.

Fine/Incarceration: For the DUI Fourth Offense within a ten (10) year period, the court will impose incarceration of a minimum of 120 days to serve. KRS 189A.010(8). This term shall not be suspended, probated, or subject to

conditional discharge or other form of early release. Because this is a felony offense, it is punishable from one (1) to five (5) years incarceration.

With an Aggravator: If an aggravating circumstance from KRS 189A.010(11) is present, the mandatory incarceration for a DUI fourth offense is two hundred forty (240) days to serve. This time **MUST** be served and cannot be suspended, probated, conditionally discharged, or subject to any other form of early release. KRS 189A.010(5)(d). See **Aggravating Circumstances**.

License Suspension:

**PRIOR TO JULY 1, 2020:** The client's license will be suspended for a period of sixty (60) months. KRS 189A.070(1)(d). The client is required to surrender the physical driver's license to the court. KRS 189A.070(5). If the client is not in possession of their physical license, a peace officer may seize the license and deliver it to the court. KRS 189.070(6). Failure to surrender the driver's license may result in additional penalties.

A client cannot have his/her driving privileges reinstated until (s)he has completed his ADE classes and the statutory suspension period has passed. KRS 189A.070(3). KRS 189A.070(7) lays out the requirements for reinstatement of a revoked license if an ignition interlock device had been installed.

**EFFECTIVE JULY 1, 2020:** For a fourth or subsequent offense within ten (10) years, the license is suspended for thirty (30) months for a person who is issued an ignition interlock license and who meets the one hundred twenty (120) consecutive day requirement within the first thirty (30) months of the issuance of the ignition interlock license. For an individual who is issued an ignition interlock device and does not meet the one hundred and twenty day (120) day consecutive requirement within the first thirty (30) months of the issuance of the ignition interlock license, then the license is suspended until the client meets the one hundred and twenty (120) consecutive day requirement or sixty (60) months, whichever is shorter. Sixty (60) months for all others. KRS 189A.070(1)(a)(2)(d). See, **Ignition Interlock Licenses and Ignition Interlock Devices** and **License Suspension**.

The client is required to surrender the physical driver's license to the court. KRS 189A.070(3). If they are not in possession of their physical license, a peace officer may seize the license and deliver it to the court. KRS 189.070(3)(a). Failure to surrender the driver's license may result in additional penalties.

ADE Classes: The new statute has the same ADE requirement for **THIRD OR SUBSEQUENT** offences. ADE classes must be completed over a period of one (1) year and may be an inpatient or residential-type program. KRS 189A.040(3). The client must pay for these classes but may do so on a sliding scale. KRS 189A.040(3)(b). The treatment program must provide an alcohol and drug assessment. The client will not be eligible to get his/her license reinstated if (s)he has not completed the required ADE classes. KRS 189A.070(2). If the client has completed the program before the one (1) year expiration date, upon written recommendation to the court, the client may be released from the inpatient or residential treatment program **BUT** must be enrolled in an outpatient treatment program for the remainder of the one (1) year period. KRS 189A.040(3)(c). Failure to complete ADE classes will result in a contempt of court charge **AND** any penalties, which were previously suspended, will be reinstated. KRS 189A.040(3)(d).

### Penalties for DUI Under 21 Years Old

The penalties for a client convicted under KRS 189A.010(f) are different than those for other DUI convictions. KRS 189A.060(6) specifically states that the penalties listed in subsection (5) do not apply. KRS 189A.010(6) lists the penalties as the following:

1. License suspension KRS 189A.070(3):

- a. If issued an ignition interlock license and meets the 90 consecutive day requirement within the first four (4) months, then the license is suspended for four months;
  - b. If issued an ignition interlock license and **DOES NOT** meet the 90 consecutive day requirement within four (4) months, then the license is suspended until the individual meets the 90 day requirement or six (6) months, whichever is shorter.
2. Fine of not less than \$100 but not more than \$500; **OR**
  3. Twenty (20) hours of community service in lieu of a fine; **AND**
  4. Ninety (90) days of Alcohol and Drug Education Classes as described in KRS 189A.040(1)

### *BAC for Baby DUIs*

Subsection (1)(f) requires a BAC of .02 or more but less than .08. Thus, if an individual under 21 years old has a BAC of 0.08 or greater based on the definition of alcohol concentration in KRS 189A.005, “the person **SHALL** be subject to the penalties established pursuant to subsection (5) of this section.”

### License Suspension for DUI Under 21 Years Old

**PRIOR to JULY 1, 2020:** Under KRS 189A.070(4) if a client is younger than eighteen (18) years old and convicted of a DUI under KRS 189A.010(a) through (e), his/her license shall be revoked until (s)he reaches the age of 18 **OR** within the penalties set for in KRS 189A.070(1), **whichever is longer:**

- First Offense → 30 days to 120 days
- Second Offense → 12 months to 18 months
- Third Offense → 24 months to 36 months
- Fourth or Subsequent Offense → 60 months

**EFFECTIVE JULY 1, 2020:** Under the revised KRS 189A.070(3), if an individual is convicted under KRS 189A.010(1)(f), their license will be suspended in one of the following ways:

#### **Option 1:** KRS 189A.070(3)(a)

- if they were issued an ignition interlock license under KRS 189A.340 **AND**
- Meets the ninety (90) consecutive day requirement within the first four (4) months **THEN**  
→ Suspended for four (4) months

#### **Option 2:** KRS 189A.070(3)(b)

1. If they were issued an ignition interlock license under KRS 189A.340 **AND**
2. They **DID NOT MEET** the ninety (90) consecutive day requirement within the first four (4) months **THEN**  
→ Suspended until they meet the requirement **OR** six (6) months, whichever is shorter

Under 18 Years Old License Suspension: If the individual is 18 years old or younger, in addition to the penalties described in KRS 189A.010, their license will be suspended until they reach the age of eighteen (18) or must follow either of the two options listed directly above, WHICHEVER PENALTY will result in the LONGER period of suspension. KRS 189A.070(1)(b).

### Alcohol and Drug Education Classes for DUI under 21 years old

**PRIOR to JULY 1, 2020:** Under KRS 189A.040(1) the ADE program for an under 21 DUI is for a period of ninety (90) days. The client must pay for these classes but may do so on a sliding scale. If the client has completed the program before the ninety (90) day expiration date, with written documentation, the judge may release him/her early from

this obligation. Failure to complete ADE classes may result in a contempt of court charge. KRS 189A.189A.040(1)(d). IF the client fails to complete ADE it shall constitute a contempt and the court shall reinstitute all penalties which were previously imposed but suspended. KRS 189A.040(1)(d).

**EFFECTIVE JULY 1, 2020:** For an under 21 DUI, ADE classes must be completed over a period of 90 days and the program must provide an assessment of the individual's alcohol or other substance abuse problems. KRS 189A.040(1). If the client has completed the program before the ninety (90) day expiration date, with written documentation, the judge may release him/her from this obligation early. The client must pay for these classes but can do so on a sliding scale. KRS 189A.040(1)(b). Failure to complete ADE classes or pay the amount specified by the court for education or treatment may result in a contempt of court charge. KRS 189A.189A.040(1)(d). Furthermore, courts SHALL reinstitute all penalties which were previously suspended.

Under 21 DUIs Quick Look:

- The client is exempt from paying the service fee.
- Aggravating circumstances do NOT apply to convictions under section(f).
- Convictions under section (1)(f) are not enhanceable so they are not considered within the 10-year lookback.

### **Note on License Suspension Under New IIL Statutes**

Under the new Ignition Interlock Device and licensing statutes, there is either a ninety (90) or one hundred twenty (120) consecutive day requirement, which requires compliance. Any of the following constitute a failure of compliance:

KRS 189A.340(4)(b)(2)(b):

- (i) Failure to take any random breath alcohol concentration test unless a review of the digital image confirms that the motor vehicle or motorcycle was not occupied by a driver at the time of the missed test;
- (ii) Failure to pass any random retest with a breath alcohol concentration of 0.02 or lower unless a subsequent test performed within ten (10) minutes registers a breath alcohol concentration lower than 0.02, and the digital image confirms the same person provided both samples;
- (iii) Failure of the person, or his or her designee, to appear at the ignition interlock device provider when required for maintenance, repair, calibration, monitoring, inspection, or replacement of the device;
- (iv) Failure of the person to pay fees established pursuant to subsection (7) of this section;
- (v) Tampering with an installed ignition interlock device with the intent of rendering it defective; **OR**
- (vi) Altering, concealing, hiding, or attempting to alter, conceal, or hide, the person's identity from the ignition interlock device's camera while providing a breath sample.

### **Pretrial License Suspension**

**EFFECTIVE July 1, 2020:** KRS 189A.220 governs the rule for pretrial license suspension.

In any judicial review of a pretrial suspension imposed for refusal to take an alcohol concentration or substance test under KRS 189A.200(1)(a), if the court determines, by the preponderance of the evidence, that:

- (1) The person was charged and arrested by a peace officer with violation of KRS 189A.010(1);
- (2) The officer had reasonable grounds to believe that the person was operating or in physical control of a motor vehicle in violation of KRS 189A.010(1);

(3) The person was advised of the implied consent law pursuant to KRS 189A.105;

(4) The peace officer requested the person to take the test or tests pursuant to KRS 189A.103; AND

(5) The person refused to take a test requested by a peace officer pursuant to KRS 189A.103;

then the court shall continue the suspension of the person's operator's license or privilege to operate a motor vehicle during the pendency of the proceedings, but in no event for a period longer than the license suspension period applicable to the person under KRS 189A.070 and 189A.107.

### **Community Labor Program**

Community Labor Programs are outlined in KRS 189A.020.

All community labor shall be under the supervision of the court and subject to the following:

- (1)
  - (a) No period of labor shall be less than four (4) hours to qualify for satisfaction of a sentence;
  - (b) A "day" shall mean eight (8) hours of labor;
  - (c) A "month" shall mean twenty (20) days of labor;
  - (d) Periods of labor four (4) hours or longer may be cumulated to meet the requirements under this section;
- (2) Labor shall be done for public agencies, nonprofit corporations or eleemosynary institutions only;
- (3) Any agency for whom a person works shall agree to supervise such person and report to the court:
  - (a) The hours worked,
  - (b) The quality of the work,
  - (c) The nature of the work;
- (4) An agency may refuse to accept persons under this program or to accept any particular person or persons sent by the court;
- (5) The court shall maintain a list of agencies willing to accept and supervise persons sentenced under this program;
- (6) The court may contract, at no cost to the state or participant, with any public agency or nonprofit corporation or eleemosynary institution for the supervision of persons in the program;
- (7) No work performed under this program shall be deemed employment for any purpose nor shall the person performing such work be considered an employee;
- (8) Failure to complete the community labor ordered by the court, to perform diligently at that labor, or to pay the fee required shall constitute contempt of court and the court shall, in addition to any other remedy for contempt, reinstitute all penalties which were previously imposed but suspended or delayed pending completion of the community labor

### **Aggravating Circumstances**

KRS 189A.010(11) lists six different aggravating factors:

- Driving 30 mph above the posted speed limit
- Traveling in the wrong direction on a limited access highway
- Causing an accident resulting in death or serious injury
- Having a blood or breath alcohol content of 0.15 or higher
- Refusing to submit to any test of one's blood, breath, or urine as requested by an officer (but is NOT considered an aggravator on a DUI first offense)

- Operating a vehicle while transporting a passenger under twelve (12) years old

If one or more of these aggravators are found, the minimum period of incarceration increases. It is a mandatory sentence that must be served and cannot be suspended, probated, conditionally discharged, or subject to any other form of early release. KRS 189A.010(5).

	First Offense	Second Offense	Third Offense	Fourth (or subsequent) Offense
<b>Mandatory Minimum Jail Service if Aggravator(s) present</b>	4 days	14 days	60 days	240 days

\*\* These aggravating circumstances do not apply to DUIs under KRS 189A.010(1)(f) (Under 21 DUIs). In Commonwealth v. Gaitherwright, 70 S.W.3d 411 (Ky. 2002), the Supreme Court held that a refusal is not an aggravating circumstance for first offenses.

**PRACTICE TIP:** If possible, negotiate with the prosecutor to dismiss the aggravating circumstance. This will lessen jail time for your client and the costs they incur for incarceration alternatives such as home incarceration or weekend jail service.

### Additional Penalties

#### **Service Fee**

For any conviction for KRS 189A.010(1)(a) through (e), a service fee of \$425 will be assessed. KRS 189A.050. This is imposed in all cases, including DUI Fourth (or subsequent) offenses but is subject to KRS 524.020 (Fines) and KRS 534.60, so installment payments are permitted. Beane v. Commonwealth, 736 S.W.2d 317 (Ky. 1987), determined that the service fee is a penalty not specifically designated as a waivable fine. Cole v. Commonwealth, 578 S.W.3d 353 (Ky. App. 2019). The DUI service fee is not a “fine” for purposes of RCr 4.58 and therefore, is not subject to the daily credit for pre-conviction incarceration. The court reaffirmed Commonwealth v. Moore, 545 S.W.3d 848 (Ky. 2018) which ruled that the service fee imposed by KRS 189A.050 is an administrative function and cannot be equated with fines or court costs.

\*\* As of April 15, 2020, the Service Fee increased from \$375 to \$425.

#### **Alcohol and Drug Education Classes**

These programs must be approved by the Cabinet for Health and Human Services. KRS 189A.040(6) and (7). Criteria developed by the Cabinet for Health and Family Services include: (a) manner of assessment; (b) appropriate education and treatment plans; and (c) referrals to other treatment providers. KRS 189A.040(7).

If your client decides to take ADE classes in another county or out of state, verify that it will be accepted by your judge and jurisdiction. If it is not, the client MUST complete a Kentucky program, which will cost more time, money, and resources.

To find the providers, fees, and types of treatment provided in your county visit:

<http://dbhdid.ky.gov/dbh/dui.aspx> Click on Section 3: Providers by County With Services and Max Fee.

Your client has ten (10) days from the entry of the judgment of conviction to enroll in an Alcohol and Drug Education program. KRS 189A.045. Once the client is enrolled, (s)he has five (5) days to give the court a certificate

of enrollment. In order to enroll, (s)he must complete an assessment, which costs approximately \$50. If the court does not receive this certificate of enrollment within twenty (20) days of enrollment, the judge will hold a hearing to inquire as to why the client did not enroll. KRS 189A.045(3).

**NEW SECTION: KRS 189A.045(1)(b):** A defendant may choose to enroll in an alcohol or substance abuse education or treatment program PRIOR TO conviction. If a defendant chooses to enroll prior to conviction, the alcohol or substance abuse education or treatment completed prior to conviction shall count towards the period of alcohol or substance abuse education or treatment required pursuant to KRS 189A.040.

Once the client has completed the ADE classes, (s)he must notify the court and the Transportation Cabinet. (S)he should receive a certificate of completion. Be sure that if your jurisdiction has an agency, which will verify this certificate, that your client knows to notify them first. Most often this agency will then notify the court on the client's behalf. If an individual drops out of ADE or does not maintain sufficient attendance, the program administrator will notify the court and a contempt hearing will be held. KRS 189A.045(4) and (5).

**NEW SECTION: KRS 189A.040(5):** For defendants who are Medicaid-eligible, alcohol or substance abuse treatment under this section shall be authorized by the Department for Medicaid Services and its contractors as Medicaid-eligible services and shall be subject to the same medical necessity criteria and reimbursement methodology as for all other covered behavioral health services.

### *Substance Abuse Treatment Programs*

Under KRS 532.120, time spent at an intensive secured substance abuse recovery program may be counted as "incarceration time." This, however, is at the discretion of the sentencing court. Even if the individual does not complete such a program, the court may award partial credit for days spent in treatment.

### *Surrendering of License Plate(s)*

Unless the client shows proof of compliance with KRS 189A.420 (Ignition Interlock Devices), (s)he must surrender any license plate(s) on all vehicles owned by him/her. KRS 189A.085. This applies for second or subsequent offenses. The suspension of the license plates shall not exceed the license suspension period. If the defendant jointly owns the vehicle on which the plate is being suspended, the judge may grant a hardship license to the other individual. KRS 189A.085(2).

**EFFECTIVE JULY 1, 2020:** Unless an individual has been issued an ignition interlock license under KRS 189A.340 or a hardship license under KRS 189A.410, their license plates shall be impounded. KRS 189A.085. This applies to all vehicles in which they solely or jointly own. At the final sentencing or within forty-five (45) days, the individual shall physically surrender their license plate to the court. Suspension of the license plate shall not exceed the time of the suspension period.

### *Family Hardship Exception*

The court may grant hardship exceptions for family members effected by the license plate surrender, "only if the family members or other affected individuals prove to the court's satisfaction that their inability to utilize the surrendered motor vehicles or motorcycles would pose an undue hardship upon the family members or other affected individuals." KRS. 189A.085(2). The offender will not be able to operate this vehicle unless they are issued a valid ignition interlock license under KRS 189A.340 or a hardship license under KRs 189A.410.

If the vehicle is jointly owned, the license plate can be transferred to a non-offender. KRS 189A.085(3). If the license plate is impounded, the vehicle can be transferred. KRS 189A.085(4).

## *Alternatives to Incarceration*

### Home Incarceration

KRS 532.210(1) states “Any misdemeanor or a felon who has not been convicted of, pled guilty to, or entered an Alford plea to a violent felony offense may petition the sentencing court for an order directing that all or a portion of a sentence of imprisonment in the county jail be served under conditions of home incarceration. Such petitions may be considered and ruled upon by the sentencing court prior to and throughout the term of the defendant's sentence.”

The Kentucky Supreme Court took one step further in Rice v. Commonwealth, 492 S.W.3d 563 (Ky. 2016) holding that non-violent felons, such as those charged with DUI fourth offense are eligible to petition the trial court for home incarceration.

Certain conditions must be met on home incarceration. KRS 532.220. Note that there may be a financial obligation associated with home incarceration supervision that our clients may not be able to afford. Be sure to address such issues at the time you make the petition to the court for home incarceration. Failure to pay any fees associated with home incarceration must result in a revocation of this privilege.

### Weekend Jail Service

First or second offenders may request to serve their jail sentence on weekends. KRS 189A.030(1). However, no individual period of incarceration may be less than twenty-four (24) hours. An additional fee may be imposed for the “privilege” of serving on weekends. The jurisdiction will require payment for the weekend when the client turns themselves in at the jail. If the client cannot pay, they will be incarcerated for the remainder of their sentence and will not be permitted to continue on weekends. If a client is late to jail service, even five minutes, the jail may refuse to accept them and may seek additional punishments of contempt or revoking weekend service privileges. Therefore, it is important that if an emergency should arise that causes the client to miss weekend service (i.e. emergency medical issue), (s)he obtain documentation of their absence, which can be presented to the judge the following court date.

**PRACTICE TIP:** Find out the rules and procedures for weekend jail service or delayed reporting times from your local jail. Some may be stricter than others.

## *Alternatives to License Suspension*

### Hardship Licenses

**PRIOR TO JULY 1, 2020:** A hardship license is available only to clients guilty under KRS 189A.010(1)(c) and (d), and non-aggravated DUIs under KRS 189.010(1)(a),(b), and (e). Under KRS 189A.410(3) a court CANNOT issue a hardship license for those offenders who have refused an alcohol or substance test offered by an officer and contested this refusal by seeking judicial review of the refusal suspension under KRS 189A.220. However, if a first time offender refuses and is convicted of the DUI first offense before contesting the refusal, (s)he is eligible for a hardship license. Thus, the determining factor is if and when the refusal was contested.

**EFFECTIVE JULY 1, 2020:** A hardship license is available only to clients guilty under KRS 189A.010(1)(c) and (d). Under KRS 189A.410(3) a court **CANNOT** issue a hardship license for those offenders who have refused an alcohol or substance test offered by an officer.

- Individuals convicted of DUI fourth offense or greater are not eligible for a hardship license.
- First time offenders of a drug related DUI are eligible for a hardship license for the balance of his or her suspension, if no aggravator is present.

### Jurisdiction of Hardship Licenses

**PRIOR TO JULY 1, 2020:** Since the **District Court** has exclusive jurisdiction over issuance of hardship licenses, the county attorney will review applications and may object to their issuance. KRS 189A.400.

**EFFECTIVE JULY 1, 2020:** The **sentencing court** shall have jurisdiction over the issuance of hardship licenses. The Commonwealth's or county attorney shall review applications submitted to the sentencing court and may object to the issuance of hardship licenses. KRS 189A.400

### Purpose of a Hardship License

After the client petitions the court in writing for a hardship license, the court may, in its discretion, grant a hardship license if they have reasonable grounds to believe that revocation would hinder the person's ability to:

1. Continue his/her employment;
2. Continue attending school or an educational institution;
3. Obtain necessary medical care;
4. Attend driver improvement, alcohol, or substance abuse education programs; AND/OR
5. Attend court-ordered counseling or other programs .

KRS 189A.410(1)

### How to Obtain a Hardship License

Before a court will grant a request for a hardship license, the client must file a written petition and must comply with any relevant subsections of KRS 189A.410(2). The client **MUST**:

- (a) Provide the court with proof of vehicle insurance
- (b) **EMPLOYMENT** → If necessary, provide the court with a written, sworn statements from his/her employer, on a form provided by the cabinet, detailing:
  - a. His/her job
  - b. Hours of employment **AND**
  - c. The necessity for the client to use the employer's vehicle either in his or her work at the direction of the employer during working hours, **OR**
  - d. In travel to and from work if the license is sought for employment purposes;
- (c) **SELF-EMPLOYMENT** → If the client is self-employed, to provide the information required in paragraph (b) of this subsection together with a sworn statement as to its truth;
- (d) **EDUCATION** → Provide the court with a written, sworn statement from the school or educational institution which (s)he attends, of:
  - a. His/her class schedule
  - b. Courses being undertaken, and
  - c. The necessity for the client to use a motor vehicle in his/her travel to and from school or other educational institution if the license is sought for educational purposes.
  - d. Licenses for educational purposes shall **NOT** include participation in sports, social, extracurricular, fraternal, or other non-educational activities;
- (e) **MEDICAL** → Provide the court with a written, sworn statement from a physician, or other medical professional licensed but not certified under the laws of Kentucky, attesting to the client's normal hours of treatment, and the necessity to use a motor vehicle to travel to and from the treatment if the license is sought for medical purposes;

- (f) **ADE CLASSES/ TREATMENT** → Provide the court with a written, sworn statement from the director of any alcohol or substance abuse education or treatment program as to the hours in which the client is expected to participate in the program, the nature of the program, and the necessity for the person to use a motor vehicle to travel to and from the program if the license is sought for alcohol or substance abuse education or treatment purposes;
- (g) **COURT-ORDERED PROGRAMS** → Provide the court with a copy of any court order relating to treatment, participation in driver improvement programs, or other terms and conditions ordered by the court relating to the person, which require him or her to use a motor vehicle in traveling to and from the court-ordered program. The judge shall include in the order the necessity for the use of the motor vehicle; AND
- (h) Provide to the court any information as may be required by administrative regulation of the Transportation Cabinet.

Permit Card and Window Decal

**PRIOR TO JULY 1, 2020:** If a hardship license is issued, the clerk will issue a hardship permit card noting the times, purposes, and conditions of the new license. KRS 189A.430. These privileges are conditioned on the defendant having the permit in his possession at all times during the operating or authorized operation of the motor vehicle. Furthermore, the client must pay a service fee to the Transportation Cabinet in an amount not to exceed the actual cost to the Cabinet for issuing the permit card and decal but not to exceed two hundred dollars (\$200). KRS 189A.450

**EFFECTIVE JULY 1, 2020:** KRS 189A.450 REPEALED

Restrictions to Hardship Licenses

**SAME PROVISION PRIOR TO AND AFTER JULY 1, 2020:** Per KRS 189A.440, if issued a hardship license, the client can only use it as authorized under KRS 189A.410. A violation will result in the charge of a Class A misdemeanor and an additional license suspension of six (6) months under KRS 189A.070. Furthermore, anyone assisting a person in making a false application statement will be guilty of a Class A misdemeanor and have his or her own license suspended for six (6) months.

## IGNITION INTERLOCK LICENSES AND IGNITION INTERLOCK DEVICES

Issue	Law PRIOR TO July 1, 2020	Law EFFECTIVE July 1, 2020
<b>Definitions</b>	<p><u>Ignition Interlock Device:</u> KRS 189A.005(2) An Ignition Interlock device is:</p> <ol style="list-style-type: none"> <li>1) A device</li> <li>2) Certified by the Transportation Cabinet for use in this Commonwealth under KRS 189A.500 (1)</li> <li>3) That connects a motor vehicle ignition system or motorcycle ignition system</li> <li>4) To a breath alcohol analyzer and</li> <li>5) Prevents a motor vehicle ignition or motorcycle ignition from starting, and from continuing to operate</li> <li>6) If a driver’s breath alcohol concentration exceeds 0.02.</li> <li>7) As measured by the device.</li> </ol> <p><u>Ignition Interlock Certification of Installation:</u> KRS 189A.005(3): means a certificate providing that the installed ignition interlock device is certified for use in the Commonwealth under KRS 189A.500(1)</p> <p><u>Ignition Interlock Device Provider:</u></p>	<p><u>Ignition Interlock Device:</u> KRS 189A.005(3) An Ignition Interlock device is:</p> <ol style="list-style-type: none"> <li>1) A device</li> <li>2) Certified by the Transportation Cabinet for use in this Commonwealth under KRS 189A.350 that             <ol style="list-style-type: none"> <li>a)                 <ol style="list-style-type: none"> <li>3) Connects a motor vehicle ignition system or motorcycle ignition system</li> <li>4) To a breath alcohol analyzer and</li> <li>5) Prevents a motor vehicle ignition or motorcycle ignition from starting, and from continuing to operate</li> <li>6) If a driver’s breath alcohol concentration exceeds 0.02.</li> <li>7) As measured by the device</li> </ol> </li> <li>AND</li> <li>b)                 <ol style="list-style-type: none"> <li>1) Has a fully functional camera</li> <li>2) That is equipped to record the date, time, and photo of all persons providing breath samples to the device</li> </ol> </li> </ol> </li> </ol> <p><u>Ignition Interlock Certification of Installation:</u> KRS 189A.005(4): a certificate providing that the installed ignition interlock device has been installed and is certified for use in the Commonwealth under KRS 189A.350</p> <p><u>Ignition Interlock Device Provider/ Provider:</u> KRS 189A.005(5): means any person or company certified by the Transportation Cabinet to engage in the business of manufacturing, selling, leasing, servicing, or monitoring ignition interlock devices within the Commonwealth</p> <p>According to the drive.ky.gov website the list of Certified Ignition Interlock Providers includes:</p> <ul style="list-style-type: none"> <li>o Guardian (800) 499-0994</li> </ul>

	<p>KRS 189A.005(4): means any person or company engaged in the business of manufacturing, selling, leasing, servicing, or monitoring ignition interlock devices within the Commonwealth.</p> <p><u>Ignition Interlock License:</u> KRS 189A.005(5): means a motor vehicle or motorcycle operator's license issued or granted by the laws of the Commonwealth of Kentucky that, with limited exceptions, permits a person to drive only motor vehicles or motorcycles equipped with a functioning ignition interlock device.</p>	<ul style="list-style-type: none"> <li>○ Lifesafer (800) 634-3077</li> <li>○ Smart Start (844) 206-2867</li> <li>○ Intoxalock (844) 837-3850</li> <li>○ LowCost Interlock (800) 352-4872</li> </ul> <p><u>Ignition Interlock License:</u> KRS 189A.005(6): means a motor vehicle or motorcycle operator's license issued or granted by the laws of the Commonwealth of Kentucky that, except for those with an employer exemption under KRS 189A.340, permits a person to drive only motor vehicles or motorcycles equipped with a functioning ignition interlock device.</p>
<p><b>Cost</b></p>	<p style="text-align: center;"><u>Cost</u></p> <p>KRS 189A.360: All persons applying for an ignition interlock license shall pay a nonrefundable application fee to the Transportation Cabinet in an amount not to exceed the actual cost to the cabinet for issuing the ignition interlock license, but not to exceed two hundred dollars (\$200).</p> <p>KRS 189A.420 (7): The court shall require the person to pay the reasonable cost of leasing or buying, installing, servicing, and monitoring the device. If the court determines that a defendant is indigent, the court may, based on a sliding scale established by the Supreme Court of Kentucky by rule, require the</p>	<p style="text-align: center;"><u>Cost</u></p> <p>KRS 189A.360 is repealed.</p> <p>A non-refundable application processing fee of \$105.00 is required with the completed application. This amount is due IN FULL regardless of indigent status! All other costs are through the provider/installer.</p> <p>KRS 189A.340(7): Except as provided in paragraph (c) of this subsection, an ignition interlock device provider MAY charge the following fees:</p> <ol style="list-style-type: none"> <li>1. An installation fee for an alternative fuel vehicle or a vehicle with a push button starter not to exceed one hundred thirty dollars (\$130), an installation fee for all other vehicles not to exceed one hundred dollars (\$100);</li> <li>2. A monthly fee not to exceed one hundred dollars (\$100);</li> <li>3. A removal fee not to exceed thirty dollars (\$30);</li> <li>4. A reset fee not to exceed fifty dollars (\$50); <b>OR</b></li> <li>5. A missed appointment fee not to exceed thirty-five dollars (\$35)</li> </ol>

	<p>defendant to pay the costs imposed under this section in an amount that is less than the full amount of the costs associated with the lease, purchase, or installation of an ignition interlock device and associated servicing and monitoring fees. If a defendant pays to an ignition interlock provider the amount ordered by the court under this subsection, the provider shall accept the amount as payment in full. Neither the Commonwealth, Transportation Cabinet, or any unit of state or local government shall be responsible for payment of any costs associated with an ignition interlock device</p>	<p>(b) person may have to pay fees as established in the lease agreement but cannot be more than stated in paragraph (a)</p>																										
<p><b>Sliding Adjustment Poverty Scale</b></p>	<p><u>Sliding Adjustment Poverty Scale</u></p> <table border="1" data-bbox="331 813 856 1105"> <thead> <tr> <th>Federal Poverty Guidelines</th> <th>Percentage Respondent is to pay</th> </tr> </thead> <tbody> <tr> <td>200%</td> <td>100%</td> </tr> <tr> <td>175%</td> <td>75%</td> </tr> <tr> <td>150%</td> <td>50%</td> </tr> <tr> <td>125%</td> <td>25%</td> </tr> <tr> <td>100%</td> <td>0%</td> </tr> </tbody> </table> <p><u>2017 Federal Poverty Guidelines for the 48 Continuous States</u></p> <table border="1" data-bbox="331 1284 856 1429"> <thead> <tr> <th>Persons in the Family</th> <th>Poverty Guideline</th> </tr> </thead> <tbody> <tr> <td>1</td> <td>\$12,060</td> </tr> <tr> <td>2</td> <td>\$16,240</td> </tr> </tbody> </table>	Federal Poverty Guidelines	Percentage Respondent is to pay	200%	100%	175%	75%	150%	50%	125%	25%	100%	0%	Persons in the Family	Poverty Guideline	1	\$12,060	2	\$16,240	<p><u>Sliding Adjustment Poverty Scale</u></p> <p>KRS 189A.350(4): Provider must accept reduced payments from persons to be determined to be at or below two hundred percent (200%) of the federal poverty guidelines by the Transportation Cabinet as provided in KRS 189A.340(7)(c)</p> <p>Under KRS 189A.340(7)(c):</p> <table border="1" data-bbox="961 1024 1749 1243"> <thead> <tr> <th>Federal Poverty Guidelines as established in KRS 205.5621</th> <th>Percentage Respondent is to pay for fees established in KRS 189A.340(7)(a)</th> </tr> </thead> <tbody> <tr> <td>150% &lt; x ≤ 200%</td> <td>75%</td> </tr> <tr> <td>100% &lt; x ≤ 150%</td> <td>50%</td> </tr> <tr> <td>X ≤ 100%</td> <td>25%</td> </tr> </tbody> </table>	Federal Poverty Guidelines as established in KRS 205.5621	Percentage Respondent is to pay for fees established in KRS 189A.340(7)(a)	150% < x ≤ 200%	75%	100% < x ≤ 150%	50%	X ≤ 100%	25%
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<p><b>Ignition Interlock License</b></p>	<p><u>Ignition Interlock License</u></p> <p>The ignition Interlock device is secondary in importance to the ignition interlock license. The installation of an ignition interlock device on a motor vehicle or motorcycle is useless <b>unless and until</b> a person has been granted an ignition interlock license.</p> <p>KRS 189A.005(5) Ignition interlock license means a motor vehicle or motorcycle operator’s license issued or granted by the laws of the Commonwealth of Kentucky that, with limited exceptions, permits a client to drive only motor vehicles or motorcycles equipped with a functioning ignition interlock device.</p> <p>The District Court shall have exclusive jurisdiction over the issuance of ignition interlock and hardship licenses. KRS 189A.400; See <u>Fledge v. Commonwealth</u>, 556 S.W.3d 38 (Ky. Ct. App. 2018) (The Circuit Court lacked jurisdiction to review the defendant’s motion for an application for an ignition interlock</p>	<p><u>Ignition Interlock License</u></p> <p>The ignition Interlock device is secondary in importance to the ignition interlock license. The installation of an ignition interlock device on a motor vehicle or motorcycle is useless <b>unless and until</b> a person has been granted an ignition interlock license.</p> <p>KRS 189A.005(6) Ignition interlock license means a motor vehicle or motorcycle operator’s license issue or granted by the laws of the Commonwealth of Kentucky that, except for those with an employer exemption under KRS 189A.340 permits a person to drive only motor vehicles or motorcycles equipped with a functioning ignition interlock device.</p> <p>KRS 189A.400 states the sentencing court shall have jurisdiction over the issuance of hardship licenses but does not mention ignition interlock devices or licenses.</p> <p>KRS 189A.340(4): Ignition Interlock licenses restricts a person from operating only a motor vehicle equipped with a functioning ignition interlock device.</p> <p><b>OUT OF STATE RESIDENTS:</b> Per KRS 189A. 340(8), the KY Transportation Cabinet MAY accept an ignition interlock certificate of installation from an ignition interlock device provider in that state if it meets the requirements of that state.</p>												

	<p>device even though the Circuit Court accepted a plea agreement on a DUI 4<sup>th</sup> offense. Any of interpretation of KRS 189A.400 is improper.)</p>	
<p><b>Who is eligible for an ignition interlock license?</b></p>	<p><u>Ineligibility under KRS 186.560:</u></p> <p>Under KRS 186.560(1)(a)</p> <ol style="list-style-type: none"> <li>1) Murder or manslaughter resulting from the operation of a motor vehicle;</li> <li>2) Driving a vehicle which is not a motor vehicle while under the influence of alcohol or any other substance which may impair one’s driving ability;</li> <li>3) Perjury or the making of a false affidavit under KRS 186.400 to 186.640 or any law requiring the registration of motor vehicles or regulating their operation on highways;</li> <li>4) Any felony in the commission of which a motor vehicle is used;</li> <li>5) Conviction or forfeiture of bail upon three (3) charges of reckless driving within the proceeding twelve (12) months;</li> <li>6) Conviction of driving a motor vehicle involved in an accident and failing to stop and disclose his/her identity at the scene of an accident;</li> <li>7) Conviction of theft of a motor vehicle or any of its parts, including the conviction of any person under the age of eighteen (18) years;</li> <li>8) Failure to have in full force and effect the security required by Subtitle 39 of</li> </ol>	<p><u>Who is Eligible for an Ignition Interlock License?</u></p> <p>KRS 189A.340(a): If the initial violation license suspension was for a violation of KRS 189A.010(1)</p> <ol style="list-style-type: none"> <li>(a) DUI with BAC of 0.08 or greater</li> <li>(b) while under the influence of alcohol</li> <li>(e) while under the combined influence of alcohol and any other substance which impairs one’s driving ability</li> </ol> <p>OR</p> <ol style="list-style-type: none"> <li>(f) under 21 DUI (alcohol concentration of 0.02 or greater)</li> </ol> <p>The <b>SOLE</b> license the person shall be eligible for is the Ignition Interlock License.</p> <p>KRS 189A.340(b): if the initial suspension was for violation of KRS 189A.010(1)</p> <ol style="list-style-type: none"> <li>(c) while under the influence of any other substance or combination of substances which impairs one’s driving ability;</li> </ol> <p>OR</p> <ol style="list-style-type: none"> <li>(d) while the presence of a controlled substance listed in subsection (12) of this section</li> </ol> <p>Person is eligible for an ignition interlock license and may be eligible for a hardship license pursuant to KRS 189A.410.</p> <p>KRS 186.560(1)(a). The following convictions render you <b>ineligible</b> for an IIL:</p> <ol style="list-style-type: none"> <li>1. Murder or manslaughter from the operation of a vehicle;</li> <li>2. DUI with something other than a motor vehicle;</li> </ol>

	<p>KRS Chapter 304 upon conviction of a second and each subsequent offense within any five (5) year period;</p> <p>9) Conviction for fraudulent use of a driver’s license or use of a fraudulent driver’s license to purchase or attempt to purchase alcoholic beverages, as defined in KRS 241.010 in violation of KRS 244.085(4); and</p> <p>10) Conviction of operating a motor vehicle, motorcycle, or moped without an operator’s license as required by KRS 186.410; or</p> <p>Under KRS 186.560(1)(b) Being found incompetent to stand trial under KRS Chapter 504.</p>	<ol style="list-style-type: none"> <li>3. Perjury involving the registration or regulation of vehicle;</li> <li>4. Felony in which the motor vehicle is used;</li> <li>5. Conviction of three (3) charges of reckless driving within a twelve (12) month period;</li> <li>6. Conviction of a hit and run;</li> <li>7. Conviction of theft of a motor vehicle or parts (also includes under 18 years of age);</li> <li>8. No proof of insurance, upon conviction of second and subsequent offense;</li> <li>9. Conviction for fraudulent use of a driver license to (attempt) purchase of alcoholic beverages;</li> <li>10. Conviction of operating a motor vehicle, motor cycle or moped without an operator’s license; or</li> <li>11. Being found incompetent to stand trial pursuant to KRS Chapter 504</li> </ol> <p>The following conditions or events may also render you ineligible for an Ignition Interlock license or subject to revocation of an existing Ignition Interlock License pursuant to KRS 186.570:</p> <ul style="list-style-type: none"> <li>• Committing of an offense under KRS 186.560</li> <li>• Mandatory license revocation due to a finding of the medical review board (MRB);</li> <li>• Causing or contributing to, by reckless or unlawful operation of a motor vehicle, an accident resulting in death, injury, or property damage;</li> <li>• Mental or physical disability, including seizures (MRB);</li> <li>• Habitual reckless or negligent driving (KRS 13B);</li> <li>• Obtaining a license without submitting a proper application;</li> <li>• Presenting false or misleading information regarding residency, citizenship, religious convictions, immigration status;</li> <li>• Failure to take and pass an examination required by KRS 186.480 (KSP examination);</li> <li>• Conviction of assault and battery resulting from the operation of a motor vehicle;</li> <li>• Failure to appear in response to a summons or citation issued by a law enforcement officer;</li> </ul>
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		<ul style="list-style-type: none"> <li>• Failure to appear pursuant to an order of the court to demonstrate proof of security (insurance);</li> <li>• Failure to provide proof of insurance, upon three (3) or more convictions within a five (5) year period;</li> <li>• Child support arrearage of six (6) months or more pursuant to KRS 205.712;</li> <li>• Failure to respond to a subpoena or warrant relating to child support or paternity;</li> <li>• Ineligibility to operate a vehicle pursuant to KRS 532.536;</li> <li>• Ordered to pay reimbursement for incarceration, restitution or unpaid judgments pursuant to KRS 532.356;</li> <li>• Taxpayer delinquency, upon written notification from Revenue; or</li> <li>• Conviction in any other state of an offense that would be grounds for suspension or revocation in this state, except speeding offenses – unless they hold a CDL and unless the conviction is more than five (5) years old, excluding felony traffic offenses or habitual violator offenses</li> </ul>
<p><b>How to Obtain an Ignition Interlock License</b></p>	<p><u>How to Obtain an Ignition Interlock License</u></p> <p>KRS 189A.420(2)(a) through (c) requires that before a client can apply for this license, the court mandates the client to (1) show proof of motor vehicle insurance and (2) “provide such other information as may be required by administrative regulation of the Transportation Cabinet. “This is more of a catch all provision.</p> <p>The individual may apply for an ignition interlock device on his/her work vehicle. KRS 189A.420(2)(b) states:                  “if necessary, provide the court with a written, sworn statement from his employer, on a form provided by the cabinet, detailing the necessity for the defendant to use the employer’s motor</p>	<p><u>How to Obtain an Ignition Interlock License</u></p> <p>KRS 189A.340(2): A person may apply after getting notice under KRS 189A.105 or after his/her license was suspended</p> <p>The person is permitted to drive to an Ignition Interlock Provider for installation and the Transportation Cabinet to obtain the Ignition Interlock license – this permission is granted for only fourteen (14) days of the date printed on the ignition interlock approval letter issued by the Transportation Cabinet and if the person has this letter in their vehicle.</p> <p>KRS 189A.340(3): To obtain an ignition interlock license, the person must:</p> <ol style="list-style-type: none"> <li>1. Submit an application</li> <li>2. Provide proof of insurance</li> <li>3. Provide an ignition interlock certificate of installation issued by an ignition interlock device provider; <b>AND</b></li> <li>4. Provide any other necessary info as required in KRS 189A.350.</li> </ol> <p><b>See <i>Process of Applying for and Completion of an Ignition Interlock License and Device (effective July 1, 2020)</i> (after chart)</b></p>

	<p>vehicle in his work at the direction of the employer during working hours, and acknowledging that the person is restricted from using an employer’s non-ignition interlock-equipped vehicle until the expiration of thirty (30) days from the date of issuance of an ignition interlock license for a first offense or twelve (12) months from the date of issuance of an ignition interlock license for a second or subsequent offense in violation of KRS 189A.010.”</p> <p>Furthermore, according to KRS 189A.420(3)(a) and (b), the individual <b>MUST</b>: (1) provide proof that (s)he has been issued or has filed a completed application with the Transportation Cabinet for issuance of an ignition interlock license pursuant to KRS 189A.500; and (2) provide a certificate of installation of an ignition interlock device issued by a certified ignition interlock device provider pursuant to KRS 189A.500.</p>	
<p><b>Requirements of the Ignition Interlock License</b></p>	<p><u>Mandatory Ignition Interlock Periods</u></p> <p>First Offense (with aggravator): “The first time in a ten (10) year period, a functioning ignition interlock device shall be installed for a period of six (6) months, if at the time of offense, any of the aggravating circumstances listed under KRS 189A.010(11) were present while the person</p>	<p><u>Mandatory Ignition Interlock Periods</u></p> <p>Allows for those that install an ignition interlock device to have a shorter driver licenses suspension period than those that opt out of installing an ignition interlock device. KRS 189A.070.</p> <p>KRS 189A.070(1)(a)(2)(a)</p>

<p>was operating or in physical control of a motor vehicle.” KRS 189A.340(1)(b)(1). See Aggravating Circumstances.</p> <p>Second offense: “The second time in a ten (10) year period, a functioning ignition interlock device shall be installed for a period of twelve (12) months.” KRS 189A.340(1)(b)(2).</p> <p>Third or subsequent offense: “The third or subsequent time in a ten (10) year period, a functioning ignition interlock device shall be installed for a period of thirty (30) months.” KRS 189A.340(1)(b)(3)</p> <table border="1" style="margin-left: auto; margin-right: auto; border-collapse: collapse; text-align: center;"> <thead> <tr> <th style="width: 50%;"></th> <th style="width: 50%;">Mandatory Ignition Interlock Periods</th> </tr> </thead> <tbody> <tr> <td>First offense (with aggravator)</td> <td>6 months</td> </tr> <tr> <td>Second offense</td> <td>12 months</td> </tr> <tr> <td>Third or subsequent</td> <td>30 months</td> </tr> </tbody> </table>		Mandatory Ignition Interlock Periods	First offense (with aggravator)	6 months	Second offense	12 months	Third or subsequent	30 months	<p>First Offense: The first offense in a ten (10) year period the Transportation Cabinet shall suspend a person’s license to operate a motor vehicle or a motorcycle as follows:</p> <ul style="list-style-type: none"> <li>a) Issued an ignition interlock device under KRS 189A.340 <b>AND</b> who meets the ninety (90) consecutive day requirement within the first four (4) months of the issuance of the ignition interlock license, four (4) months</li> <li>b) Issued an ignition interlock device under KRS 189A.340 <b>AND</b> who does <b>NOT</b> meet the ninety (90) consecutive day requirement within the first four (4) months of the issuance of the ignition interlock license, until the person meets the ninety (90) consecutive day requirement or six (6) months, whichever is shorter <b>OR</b></li> <li>c) For all others, six (6) months</li> </ul> <p>KRS 189A.070(1)(a)(2)(b).</p> <p>Second offense: The second offense in a ten (10) year period the Transportation Cabinet shall suspend a person’s license to operate a motor vehicle or a motorcycle as follows:</p> <ul style="list-style-type: none"> <li>a) Issued an ignition interlock license under KRS 189A.340 <b>AND</b> who meets the one hundred twenty (120) consecutive day requirement within the first twelve (12) months of the issuance of the ignition interlock license, twelve (12) months</li> <li>b) Issued an ignition interlock license under KRS 189A.340 <b>AND</b> who does <b>NOT</b> meet the one hundred and twenty (120) consecutive day requirement within the first twelve (12) months of the issuance of the ignition interlock license, until the person meets the one hundred twenty (120) consecutive day requirement or eighteen (18) months, whichever is shorter <b>OR</b></li> <li>c) For all others eighteen (18) months</li> </ul> <p>KRS 189A.070(1)(a)(2)(c)</p> <p>Third offense: the third offense in a ten (10) year period the Transportation Cabinet shall suspend a person ‘s license to operate a motor vehicle or a motorcycle as follows:</p> <ul style="list-style-type: none"> <li>a) Issued an ignition interlock license under KRS 189A.340 <b>AND</b> who meets the one hundred twenty (120) consecutive day requirement within the first eighteen (18) months of the issuance of the ignition interlock license, eighteen (18) months</li> <li>b) Issued an ignition interlock license under KRS 189A.340 <b>AND</b> who does <b>NOT</b> meet the one hundred twenty (120) consecutive day requirement within the first eighteen (18) months of the issuance of the ignition interlock license, until the</li> </ul>
	Mandatory Ignition Interlock Periods								
First offense (with aggravator)	6 months								
Second offense	12 months								
Third or subsequent	30 months								

		<p>person meets the one hundred twenty (120) consecutive day requirement or thirty-six (36) months, whichever is shorter <b>OR</b></p> <p>c) For all others thirty-six (36) months</p> <p>KRS 189A.070(1)(a)(2)(d) Fourth or subsequent offense: “The fourth or subsequent offense in a ten (10) year period the Transportation Cabinet shall suspend a person’s license to operate a motor vehicle or a motorcycle as follows:</p> <p>a) Issued an ignition interlock license under KRS 189A.340 <b>AND</b> who meets the one hundred twenty (120) consecutive day requirement within the first thirty (30) months of the issuance of the ignition interlock license, thirty (30) months</p> <p>b) Issued an ignition interlock license under KRS 189A.340 <b>AND</b> who does <b>NOT</b> meet the one hundred twenty (120) consecutive day requirement within the first thirty (30) months of the issuance of the ignition interlock license, until the person meets the one hundred twenty (120) consecutive day requirement or sixty (60) months, whichever is shorter, <b>OR</b></p> <p>c) For all others sixty (60) months</p> <p><b>NOTE:</b> What is defined as an aggravated circumstance is define the same except under KRS 189A.010(11)(e). “it shall not be considered an aggravated circumstance for a first offense under KRS 189A.010(5)(a)”</p>
<p><b>Compliance with the 90 or 120 consecutive day Requirement</b></p>	<p><u>Compliance with the 90 or 120 Consecutive Day Requirement</u></p> <p>Not applicable prior to July 1, 2020</p>	<p><u>Compliance with the 90 or 120 Consecutive Day Requirement</u></p> <p>Under the new Ignition Interlock Device and licensing statutes, there is either a ninety (90) or one hundred twenty (120) consecutive day requirement of compliance. Any of the following constitute a failure of compliance:</p> <p>KRS 189A.340(4)(b)(2)(b):</p> <p>(i) Failure to take any random breath alcohol concentration test unless a review of the digital image confirms that the motor vehicle or motorcycle was not occupied by a driver at the time of the missed test;</p>

		<ul style="list-style-type: none"> <li>(ii) Failure to pass any random retest with a breath alcohol concentration of 0.02 or lower unless a subsequent test performed within ten (10) minutes registers a breath alcohol concentration lower than 0.02, and the digital image confirms the same person provided both samples;</li> <li>(iii) Failure of the person, or his or her designee, to appear at the ignition interlock device provider when required for maintenance, repair, calibration, monitoring, inspection, or replacement of the device;</li> <li>(iv) Failure of the person to pay fees established pursuant to subsection (7) of this section;</li> <li>(v) Tampering with an installed ignition interlock device with the intent of rendering it defective; <b>OR</b></li> <li>(vi) Altering, concealing, hiding, or attempting to alter, conceal, or hide, the person's identity from the ignition interlock device's camera while providing a breath sample;</li> </ul>
<p><b>Calculating Credit Towards Suspension Period</b></p>		<p style="text-align: center;"><u>Day for Day Credit Towards Suspension Period</u></p> <p>189A.340(5) (a) The time period a person:</p> <ul style="list-style-type: none"> <li>1. Holds a valid ignition interlock license pursuant to this section;</li> </ul> <p style="text-align: center;"><b>OR</b></p> <ul style="list-style-type: none"> <li>2. Receives alcohol or substance abuse treatment in an inpatient residential facility;</li> </ul> <p>shall apply on a day-for-day basis toward satisfying the suspension periods detailed in subsection (4) of this section.</p> <p>(b) Except as provided in paragraph (c) of this subsection, the Transportation Cabinet shall give the person a day-for-day credit for any time period the person:</p> <ul style="list-style-type: none"> <li>1. Held a valid ignition interlock license; <b>OR</b></li> </ul>

		<p>2. Received alcohol or substance abuse treatment in an inpatient residential facility.</p> <p>(c) A person shall not receive day-for-day credit for days the person utilized the employer exemption in accordance with subsection (6) of this section and drove an employer's motor vehicle or motorcycle not equipped with a functioning ignition interlock device.</p>
<p><b>Refusal Allegation</b></p>	<p><u>Refusal Allegation Under KRS 189A.107(1)</u></p> <p>Under KRS 189A.107, if a person is alleged to have refused “to submit to an alcohol or substance abuse test requested by an officer...” that person “shall have his driver’s license suspended by the court during the pendency of the action under <u>KRS 189A.200</u> unless,</p> <ol style="list-style-type: none"> <li>1) At the time of the arraignment,</li> <li>2) The person files a motion with the court waiving the right to judicial review of the suspension,</li> <li>3) After which court, in its discretion, may authorize the person to apply to the cabinet for issuance of an ignition interlock license under KRS 189A.420 for the period of the suspension.</li> </ol> <p>“if the person complies with the requirements of <u>KRS 189A.420</u> and is otherwise eligible, the cabinet shall issue the person an ignition interlock license for the remainder of the suspension period and apply the court-determined credit on a day-for-day basis for any subsequent ignition interlock requirement arising from the same incident.”</p>	<p><u>Refusal Allegation Under KRS 189A.107(1)</u></p> <p>Under KRS 189A.107, if a person is alleged to have refused “to submit to an alcohol or substance abuse test requested by an officer....” that person “shall have his/her driver’s license suspended by the court during the pendency of the action” under <u>KRS 189A.200</u>.</p> <p>KRS 189A.105 states that when an officer asks for them to submit to a test, the person shall be informed</p> <ol style="list-style-type: none"> <li>(3) that although his or her license will be suspended, he or she may be eligible immediately for an ignition interlock license allowing him or her to drive during the period of suspension and, if he or she is convicted, he or she will receive a credit toward any other ignition interlock requirement arising from this arrest.</li> </ol>

<p><b>Effect of license plate impoundment requirement</b></p>	<p><u>Effect on License Plate Impoundment Requirement</u></p> <p>If a person provides proof to the court at sentencing for a second or subsequent offense that he or she has met the requirements of KRS 189A.420, then the requirement of surrendering license plates is waived. KRS 189A.085(1).</p>	<p><u>Effect on License Plate Impoundment Requirement</u></p> <p>Unless a person has been issued an ignition interlock license under KRS 189A.340 or a hardship license under KRS 189A.410 at sentencing for an offense under KRS 189A.010, then they shall have their license plates impounded. KRS 189A.085(1).</p>
<p><b>Employment Vehicle Exception</b></p>	<p><u>Employment Vehicle Exception</u></p> <p>The individual may apply for an ignition interlock device on his/her work vehicle. KRS 189A.420(2)(b) states:                  “if necessary, provide the court with a written, sworn statement from his employer, on a form provided by the cabinet, detailing the necessity for the defendant to use the employer’s motor vehicle in his work at the direction of the employer during working hours, and acknowledging that the person is restricted from using an employer’s non-ignition interlock-equipped vehicle until the expiration of thirty (30) days from the date of issuance of an ignition interlock license for a first offense or twelve (12) months from the date of issuance of an ignition interlock license for a second or subsequent offense in violation of KRS 189A.010.”</p>	<p><u>Employment Vehicle Exception</u></p> <p>KRS 189A.340(6)(a): A person with an ignition interlock license may operate a motor vehicle or motorcycle not equipped with a functioning ignition interlock device if:</p> <ol style="list-style-type: none"> <li>1. The person is required to operate an employer's motor vehicle or motorcycle in the course and scope of employment; AND</li> <li>2. The business entity that owns the motor vehicle or motorcycle is not owned or controlled by the person.</li> </ol> <p>(b) To qualify for the employer exemption, the person shall provide the Transportation Cabinet with a sworn statement from his or her employer stating that the person and business entity meet the requirements of paragraph (a) of this subsection.</p>

	<p>Furthermore, according to KRS 189A.420(3)(a) and (b), the individual <b>MUST</b>: (1) provide proof that (s)he has been issued or has filed a completed application with the Transportation Cabinet for issuance of an ignition interlock license pursuant to KRS 189A.500; and (2) provide a certificate of installation of an ignition interlock device issued by a certified ignition interlock device provider pursuant to KRS 189A.500.</p>	
<p><b>Penalties</b></p>	<p style="text-align: center;"><u>Penalties</u></p> <p>KRS 189A.345:</p> <p>(1) No person shall operate a motor vehicle or motorcycle without a functioning ignition interlock device when prohibited to do so under KRS 189A.420.</p>	<p style="text-align: center;"><u>Penalties</u></p> <p>KRS 189A.345:</p> <p>(1) (a) No person who is issued an ignition interlock license under KRS 189A.340 shall operate a motor vehicle or motorcycle without a functioning ignition interlock device or at any time, place, or for any purpose other than authorized under KRS 189A.340.</p> <p>(b) Class A misdemeanor and shall have his/her license suspended for an additional six (6) months.</p> <p><b>Asking Someone Else to Start the Vehicle Equipped with IID for someone else:</b></p> <p>(2)(a) No person who is issued an ignition interlock license under KRS 189A.340 shall request, permit, or allow another person to:</p> <ol style="list-style-type: none"> <li>1. Start a motor vehicle or motorcycle equipped with an ignition interlock device; or</li> <li>2. Take a subsequent breath alcohol concentration test; for the purpose of providing an operable motor vehicle or motorcycle for that person subject to the ignition interlock license to drive in violation of KRS 189A.340.</li> </ol> <p>(b) First Offense → Class B misdemeanor</p>

	<p><b>Starting the Vehicle Equipped with IID for someone else:</b></p> <p>(2)(a) No person shall start a motor vehicle or motorcycle equipped with an ignition interlock device for the purpose of providing an operable motor vehicle or motorcycle to a person subject to the prohibition established in KRS 189A.420.</p> <p>(b) First offense → Class B misdemeanor                  Second or subsequent offense → Class A misdemeanor</p> <p><b>Installing Defective Ignition Interlock Device/ Tampering:</b></p> <p>(3)(a) No person shall: 1. Knowingly install a defective ignition interlock device on a motor vehicle or motorcycle; or 2. Tamper with an installed ignition interlock device with the intent of rendering it defective.</p> <p>(b) First offense → Class B misdemeanor                  Second or subsequent offense → Class A misdemeanor and be prohibited from installing ignition interlock devices or directing others in the installation of ignition interlock devices.</p>	<p>Second or subsequent offense → Class A misdemeanor.</p> <p><b>Starting the Vehicle Equipped with IID for someone else:</b></p> <p>(3)(a) No person shall start a motor vehicle or motorcycle equipped with an ignition interlock device for the purpose of providing an operable motor vehicle or motorcycle to a person subject to the prohibition established in KRS 189A.340.</p> <p>(b) First offense, be guilty of a Class B misdemeanor                  Second or subsequent offense → Class A misdemeanor.</p> <p><b>Installing Defective Ignition Interlock Device/ Tampering:</b></p> <p>(4) (a) No person shall: 1. Knowingly install a defective ignition interlock device on a motor vehicle or motorcycle; 2. Tamper with an installed ignition interlock device with the intent of rendering it defective; or 3. Alter, conceal, hide, or attempt to alter, conceal, or hide, the person's identity from the ignition interlock device's camera while providing a breath sample.</p> <p>(b) First offense → Class B misdemeanor                  Second or subsequent offense → Class A misdemeanor and be prohibited from installing ignition interlock devices or directing others in the installation of ignition interlock devices.</p>
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	<p><b>Directing Others:</b></p> <p>(4) (a) No person shall direct another person to install a defective ignition interlock device on a motor vehicle or motorcycle when the person giving the direction knows that the ignition interlock device is defective.</p> <p>(b) First Offense → Class B misdemeanor</p> <p>Second or subsequent offense → Class A misdemeanor and be prohibited from directing others in the installation of ignition interlock devices or installing ignition interlock devices.</p>	<p><b>Directing Others:</b></p> <p>(5) (a) No person shall direct another person to install a defective ignition interlock device on a motor vehicle or motorcycle when the person giving the direction knows that the ignition interlock device is defective.</p> <p>(b) First Offense → Class B misdemeanor</p> <p>Second or subsequent offense → Class A misdemeanor and be prohibited from directing others in the installation of ignition interlock devices or installing ignition interlock devices.</p> <p><b>Assisting Others in Making False Statements:</b></p> <p>(6)(a) No person shall knowingly assist a person who is issued an ignition interlock license in making a false statement in order to qualify for the employer exemption under KRS 189A.340(6).</p> <p>(b) Guilty of a Class A misdemeanor and shall have his or her motor vehicle or motorcycle operator's license suspended by the Transportation Cabinet for six (6) months.</p>
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**Process of Applying for and Completion of an Ignition Interlock License and Device****Step 1: The Application**

- Can apply online, at the Division of Driver Licensing Regional Field Office or the One Stop Shop (various locations listed at drive.ky.gov)
- What to bring:
  - Proof of Kentucky insurance
  - Proof of Kentucky registration (along with a notarized letter from the owner if the vehicle drive is not registered in the applicant's name)
  - \$105.00 non-refundable fee
- What you receive:
  - A receipt
  - Letter of eligibility to be used for installation

**Step 2: Installation**

- Schedule an appointment with a certified Ignition Interlock Installer
- Drive.ky.gov provides the websites and contact info for the following:
  - Guardian (800) 499-0994
  - Lifesafer (800) 634-3077
  - Smart Start (844) 206-2867
  - Intoxalock (844) 837-3850
  - LowCost Interlock (800) 352-4872
- What to bring:
  - Eligibility Letter
  - Court Order (if required by the installer)
  - Breath Alcohol Ignition Interlock Physician's Statement if you have a medical condition that diminishes your breath output. (form found at drive.ky.gov)

**Step 3: Ignition Interlock License Issued**

- What to bring to the Circuit Court Clerk's Office:
  - certification of installation from the provider/installer
  - \$40.00 reinstatement fee
  - Either \$12.00 for the duplicate license fee OR \$20.00 for the renewal license fee

**Steps of Completion:****Step 1: Letter of Completion**

- Two weeks before the end of the IID period, the KY Transportation Cabinet (KYTC) will send a letter to the driver state that the device can be removed. This letter will include the completion status of the required drug & alcohol classes.

**Step 2: Remove Ignition Interlock Device**

- Contact the Installer to have the device removed
- What to bring:
  - The Removal Letter

**Step 3: Completion**

- What to bring to the Circuit Court Clerk's Office
  - The Certificate of removal provided by the installer
  - A new license will be issued at the end of this process. → bring \$12 for a duplicate license fee OR \$20 for a renewal license fee

*Points on a Driver's License*

No points are assessed on Kentucky Driver's Licenses because of a DUI conviction. This is because the driving privileges are already revoked. However, moving violations associated with DUIs such as reckless driving or speeding will result in points on the license. It is important to make your client aware of these consequences.

Kentucky drivers may accumulate points on their driver's license for various moving violations. For drivers 18 years old or older, twelve (12) points within a two-year period may result in suspended driving privileges. For those younger than 18, it is seven (7) points.

<b>Violation</b>	<b>Point total</b>
10 mph or less over speed limit on limited access highway	0
11-15 mph over the speed limit on limited access highway	3
15 mph or less over speed limit on any non-limited access highway	3
16-25 mph over speed limit on any road or highway	6
26 mph over speed limit on any road or highway	Hearing/ possible suspension
Attempting to elude police officer	Hearing/ possible suspension
Racing	Hearing/ possible suspension
Failure to stop for church or school bus	6
Committing a moving hazardous violation involving an incident	6
Committing two or more moving hazardous violations in any continuous occurrence	6
Improper passing	5
Reckless driving	4
Following too close	4
Driving on wrong side of roadway	4
Changing drivers in a motor vehicle	4
Vehicle not under control	4
Failure to yield to emergency vehicle	4
Failure to yield	3
Failure to yield right-of-way to funeral procession	3
Stop-violation (traffic signal, railroad crossing, stop sign)	3
Wrong way on a one-way street	3
Too fast or too slow for road conditions	3
Improper driving, improper start or improper turn	3
Careless driving	3
Improper lane usage	3
Improper use of left lane/limited access highway	3
Failure to illuminate headlights or failure to dim headlights	3
Failure to comply with instructional permit requirements	3
Texting while driving	3
Any other moving hazardous violation	3

Because a person convicted of two or more offenses arising from the same set of operative facts may only be assessed a maximum of six points on their driver's license, all offense should go to DOT on one citation to assure that more points are not assessed.

In order to prevent points from accumulating on a driver’s license, the defendant may attend State Traffic School. Once this program is completed successfully, no points will be assessed and the charge will not appear on their driving record. Instead STS (State Traffic School) will appear.

***Commercial Driver’s License Penalties***

***First Offense on a Commercial Driver’s License***

Disqualification: A driver with a commercial driver’s license shall be disqualified from driving a commercial vehicle for one (1) year if convicted of any of the six offenses listed in KRS 281A.190(1), including DUI. This disqualification is extended to three (3) years if the driver was hauling hazardous materials during the commission of any of the six offenses. These disqualification periods CANNOT be reduced. KRS 281A.190(4).

Refusal

If a person refuses to submit to a test to determine their BAC, the cabinet can deny their CDL license or suspend, revoke, or cancel commercial driving privileges. KRS 281A.190(8).

Blood Alcohol Concentration for Commercial Drivers

A CDL driver is not permitted to drive a commercial vehicle within the state with any detectable/measurable amount of alcohol or other controlled substance in his/her system. KRS 281A.210(1). If (s)he has a detectable amount of alcohol or controlled substance in their system or refuse to submit to a test, (s)he shall be placed out of service for twenty-four (24) hours.

KRS 281A.190(3) states that a BAC of .04 or more is deemed to be operating a vehicle under the influence. A BAC reading of .04 or more will disqualify them under KRS 281A.190.

Commercial Driver’s License Fines Quick Look: KRS 281A.2102

	<b>Fine</b>	<b>License</b>
BAC .04 - .08	\$20 - \$50	Out of service for 24 hours
BAC > .08	As defined under KRS 189A.010(5)(a)-(d)	Disqualified for 1 year

***Second Offense on a CDL***

Lifetime Disqualification: A driver with a commercial driver’s license shall be disqualified from driving a commercial vehicle for life if convicted of two (2) or more of the six offenses listed in KRS 281A.190(1), including DUI. This can mean two of the same offense or any combination of the offenses. KRS 281A.190(2).

***Reinstatement***

To have a CDL reinstated, a driver must wait for their disqualification period to end and (s)he will then have to pay a \$50.00 reinstatement fee and pass a written and vision test before being given a CDL permit. The permit must be held for fourteen (14) days and a driver is required to pass all applicable skills tests before being issued a full CDL. If the disqualification is for one (1) year or more a driver must retake all CDL application tests.

## STOPS

### Four Wheeled Vehicle Stops

A March 2010 research study from the NHTSA determined that officers use approximately 24 driving cues that they believe indicate BAC levels of 0.08 or greater.

### Officer's DUI Detection Guide:

<b>Observed Actions</b>	<b>Accuracy</b>
Problems Maintaining Proper Lane Position <ul style="list-style-type: none"> <li>• Waving</li> <li>• Weaving across lane lines</li> <li>• Straddling a lane line</li> <li>• Swerving</li> <li>• Turning with a wide radius</li> <li>• Drifting</li> <li>• Almost striking a vehicle or other object</li> </ul>	P = .50 - .75
Speed and Braking Problems <ul style="list-style-type: none"> <li>• Stopping problems (too far, too short, or too jerky)</li> <li>• Accelerating or decelerating for no apparent reason</li> <li>• Varying speed</li> <li>• Slow speed (10+ mph under limit)</li> </ul>	P = .45 - .70
Vigilance Problems <ul style="list-style-type: none"> <li>• Driving in opposite lanes or wrong way on one-way</li> <li>• Slow response to traffic signals</li> <li>• Slow or failure to respond to officer's signals</li> <li>• Stopping in lane for no apparent reason</li> <li>• Driving without headlights at night</li> <li>• Failure to signal or signal inconsistent with action</li> </ul>	P = .55 - .65
Judgment Problems <ul style="list-style-type: none"> <li>• Following too closely</li> <li>• Improper or unsafe lane change</li> <li>• Illegal or improper turn (too fast, jerky, sharp, etc.)</li> <li>• Driving on other than the designated roadway</li> <li>• Stopping inappropriately in response to the officer</li> <li>• Inappropriate or unusual behavior (throwing, arguing, etc.)</li> <li>• Appearing to be impaired</li> </ul>	P = .35 - .90
Post Stop Cures <ul style="list-style-type: none"> <li>• Difficulty with motor vehicle controls</li> <li>• Difficulty exiting the vehicle</li> <li>• Fumbling with driver's license or registration</li> <li>• Repeating questions or comments</li> <li>• Swaying, unsteady, or balance problems</li> <li>• Leaning on the vehicle or other object</li> <li>• Slurred speech</li> </ul>	P > .85

<ul style="list-style-type: none"> <li>• Slow to respond to officer or officer must repeat</li> <li>• Providing incorrect information, changes answers</li> <li>• Odor of alcoholic beverage from the driver</li> </ul>	
<p>P &gt; .50 when combined with any other cue:                  Driving without headlights at night                  Failure to signal or signal inconsistent with action</p> <p>The probability of detecting DWQI by random traffic enforcement stops at night have been found to be 3%. See also <b>Checkpoints</b></p>	

For the complete list, reference:

<https://www.nhtsa.gov/sites/nhtsa.dot.gov/files/documents/808677.pdf>

Although there are no cases in Kentucky on this point, United States v. Freeman, a case out of the 6<sup>th</sup> Circuit held that a motor home's weaving into emergency lane did not establish probable cause that traffic violation occurred, and weaving did not establish probable cause that driver was intoxicated. 209 F.3d 464 (6th Cir. 2000).

**Motorcycle Stops**

In 2014, NHTSA estimated that 30% of all motorcyclists killed had a BAC of .08 or greater. The Detection of DWI Motorcyclists, DOT HS 812 292, June, 2016 and Fatal Accident Reporting System (FARS).

Officers who take the DWI Field Sobriety Detection Course are taught that motorcycles are defined as s two- or three-wheeled motorcycles, off-road motorcycles, mopeds, scooters, mini bikes, and pocket bikes. The motorcycle rider is the person operating the motorcycle; the passenger is a person seated on, but not operating, the motorcycle; the motorcyclist is a general term referring to either the rider or passenger.

Category of Clue	Action
Excellent cues (50% or greater probability of impairment)	<ul style="list-style-type: none"> <li>• Drifting during turn or curve</li> <li>• Trouble with dismount</li> <li>• Trouble with balance at a stop</li> <li>• Turning problems (e.g., unsteady, sudden corrections, late braking, improper lean angle)</li> <li>• Inattentive to surroundings</li> <li>• Inappropriate or unusual behavior (e.g., carrying or dropping object, urinating at roadside, disorderly conduct, etc.)</li> <li>• Weaving</li> </ul>
Good Cues (30-50% probability of impairment)	<ul style="list-style-type: none"> <li>• Erratic movements while going straight</li> <li>• Operating without lights at night</li> <li>• Recklessness</li> <li>• Following too closely</li> <li>• Running stop light or sign</li> <li>• Evasion</li> <li>• Traveling wrong way</li> </ul>

## Stopping the Driver

In order for an officer to conduct a constitutionally valid traffic stop, there must be reasonable and articulable suspicion that a crime has occurred. The officer may observe a traffic violation, become informed about a DUI that is occurring, or receive an anonymous tip.

Like a *Terry* stop, an investigatory traffic stop requires an officer to have reasonable and articulable suspicion that a crime has occurred. Reasonable suspicion, while requiring less of a showing than probable cause, requires at least a minimal level of objective justification for making the stop. United States v. Sokolow, 490 U.S. 1 (1989). See also, Bauder v. Commonwealth, 299 S.W.3d 588, 590–91 (Ky. 2009) (citing *Terry v. Ohio*, 392 U.S. 1, 30(1968) (“A police officer may constitutionally conduct a brief, investigatory stop when the officer has a reasonable, articulable suspicion that criminal activity is afoot.”))

Although an officer may detain a vehicle and its occupants in order to conduct an ordinary traffic stop, any subsequent detention must not be excessively intrusive. The officer’s actions must be reasonably related in scope to circumstances justifying the initial stop and cannot detain occupants beyond the completion of the initial traffic stop. Davis v. Commonwealth, 484 S.W.3d 288 (Ky. 2016). If a traffic stop is prolonged beyond the time required for the purpose of the stop, any subsequent discovery of contraband is the product of an unconstitutional seizure. *Id.* There is no “de minimis exception” to the rule that a traffic stop cannot be prolonged for reasons unrelated to the purpose of the stop. *Id.* (overruling Epps v. Commonwealth, 295 S.W.3d 807, Johnson v. Commonwealth, 179 S.W.3d 882.)

Law enforcement officer had reasonable suspicion that defendant might have been driving while intoxicated and, thus, was authorized to detain defendant for the routine purpose of determining his state of sobriety and his ability to drive; officer lawfully stopped defendant’s vehicle after witnessing it cross the center line of the roadway, and officer observed an open beer can in the vehicle after the stop. Davis v. Commonwealth, 484 S.W.3d 288 (Ky. 2016).

In Prouse, 440 U.S. at 663, the United States Supreme Court held that “except in those situations in which there is at least articulable and reasonable suspicion that a motorist is unlicensed or that an automobile is not registered, or that either the vehicle or an occupant is otherwise subject to seizure for violation of law, stopping an automobile and detaining the driver in order to check his driver’s license and the registration of the automobile are unreasonable under the Fourth Amendment.”

### Other Fourth Amendment Issues

There is no reasonable expectation of privacy in the license plate—either subjectively or objectively. Because a license plate is displayed on the exterior of the vehicle, it is well settled that “[w]hat a person knowingly exposes to the public ... is not a subject of Fourth Amendment protection.” Katz v. United States, 389 U.S. 347, 351 (1967). Furthermore, “objects falling in the plain view of an officer who has a right to be in the position to have that view are subject to seizure.” Harris v. United States, 390 U.S. 234 (1968).

### Emergency Aid Exception

The purpose of the emergency aid exception is to allow officers to assist persons who are seriously injured or threatened with such injury. Because society desires that police officers assist citizens in life-threatening situations, the emergency aid exception permits them to do so. Consequently, despite the differences between homes and automobiles, the emergency aid exception is available under appropriate circumstances when police officers conduct a warrantless search of a motor vehicle. Mundy v. Commonwealth, 342 S.W.3d 878, 882–883 (Ky.App.2011).

The test for whether this exception applies has two prongs: 1) whether the officer, based on the information available at the time, had an objectively reasonable belief 2) that an occupant of the vehicle was in need of immediate aid. *Id.* at 884.

#### Anonymous Tip

An anonymous tipster must provide some predictive information for the tip to have sufficient reliability. The tipster cannot simply provide the license plate number. (S)he must provide intimate knowledge of the state of the motorist's drunkenness. Without more, the tip does not give the officer clear and articulable suspicion to pull over a motorist. *Collins v. Commonwealth* 142 S.W.3d 113 (Ky. 2004). Contrast this with *Commonwealth v. Kelly*, 180 S.W.3d 474 (Ky. 2005) which holds that a citizen informant has a strong presumption of reliability and is enough to provide an officer with the reasonable suspicion necessary to pull over a motorists.

### Checkpoints

Checkpoints must be established in such a way to avoid unconstrained discretion of the police officers. Therefore, there is a two-prong analysis to determine the constitutionality of a checkpoint. (1) The primary purpose of the stop must be constitutional and (2) balancing test.

#### Primary Purpose

Brief, suspicionless seizures of motorists at highway sobriety checkpoints for purposes of combating drunk driving and removing drunk drivers from the road **is constitutional**. *Michigan Dept. of State Police v. Sitz*, 496 U.S. 444 (1990); *Commonwealth v. Cox*, 491 S.W.3d 167 (Ky. 2015). Even roadblocks set up for the purpose of verifying drivers' licenses and registrations is permissible. *Delaware v. Prouse*, 440 U.S. 648 (1979). Other factors to be considered are whether the checkpoint was conducted pursuant to a systematic plan, *Steinbeck v. Commonwealth*, Ky.App., 862 S.W.2d 912 (Ky. Ct. App. 1993), and whether only some vehicles were stopped or all vehicles were stopped. *Kinslow v. Commonwealth*, Ky.App., 660 S.W.2d 677 (1983). *See also*, *Commonwealth v. Bothman*, 941 S.W.2d 479 (Ky. Ct. App. 1996). However, if the primary purpose of the stop was to detect narcotics or any other violation of law, then the checkpoint/ stop is unreasonable and unconstitutional.

In *Commonwealth v. Buchanon*, 122 S.W.3d 565 at 570 (2003), the Kentucky Supreme Court set out four "non-exclusive factors courts may consider in determining the reasonableness of a particular roadblock."

1. Decisions regarding location, time, and procedures must be determined by supervisory officers, not low ranking officers.
2. Officers working the checkpoints must comply with all procedures established by superior officers.
3. Nature of the checkpoint should be readily apparent to approaching motorists. Officers should be in uniform and signs clearly visible.
4. Motorists should not be detained any longer than is necessary to perform the cursory examination of the vehicle and look for signs of intoxication. *Id.* at 571.

These factors should be considered on a case-to-case basis to determine the reasonableness of the checkpoint. *See Commonwealth v. Cox*, 491 S.W.3d 167 at 169 (Ky. 2015).

Officers are permitted to inform the public of an upcoming checkpoint via a press release. In *Redfern v. Commonwealth*, No. 2016-CA-001792-DG, 2017 WL 5632308, at \*2 (Ky. Ct. App. Nov. 22, 2017), the court reiterated *Buchanon* and *Cox* in saying that warning signs of the checkpoints were advisable, the press release was sufficient, and the officers wearing visible safety vests was sufficient to give motorists warning.

Balancing Test

If the primary purpose is to detect DUIs, then courts use the balancing test explained in Brown v. Texas, 443 U.S. 47 (1979). Constitutionality of a stop requires weighing

1. the gravity of public concerns served by the seizure,
2. the degree to which the seizure advances the public interest, and
3. the severity of the interference with individual liberty

Avoiding a Checkpoint

The leading case on this issue is Bauder v. Commonwealth, 299 S.W.3d 588 (Ky. 2009). In Bauder, the defendant made an abrupt stop approximately 100 yards from the checkpoint and used a side road to circumvent the stop. Although the court did not determine whether or not these turnarounds in and of themselves are specific and articulable fact sufficient to give rise to reasonable suspicion, the court held that reasonable suspicion is based on the “totality of the circumstances” including the experience of the officer in determining reasons defendants circumvent checkpoints.

ISSUE	CASE	BLACK-LETTER LAW	POINTS OF INTEREST
Primary Purpose	<u>Commonwealth v. Buchanan</u> , 122 S.W.3d 565 (Ky. 2003)	Required analysis: primary purpose of the roadblock; if impermissible, then unconstitutional. If permissible purpose, apply the balancing test factors in <i>Brown</i>  Determining reasonableness of checkpoint: (1) location, time & procedures determined by supervisory law enforcement officers, permission should be sought from supervisors, and location should be safe and bear reasonable relation to conduct law enforcement is trying to curtail; (2) officers should not have unfettered discretion, must follow procedures to ensure each driver is dealt with exactly the same as to whether they are stopped or how they are handled; (3) the nature of roadblock should be readily apparent – uniformed officers, marked patrol cars, warning signs; (4) length of stop must be no longer than necessary for cursory examination	Impermissible purpose of general crime detection in this case – officers weren’t trained in DUI detection, drug dog on site, officers said they were there to stop all crime  Despite the court finding that the purpose of the checkpoint in this case was impermissible, it continued (unnecessarily) to examine the <i>Brown</i> reasonableness factors - later cases make clear these are used to determine reasonableness under <i>Brown</i>
	<u>Commonwealth v. Cox</u> , 491 S.W.3d 167 (Ky. 2015)	The third <i>Buchanon</i> factor implicitly mandates prior notice of the roadblock to motorists	“From a birds-eye view of <i>Buchanon</i> , it is clear we strongly disfavor hastily arranged highway checkpoints”  In ambiguous cases, court must err on side of

			caution and invalidate stop  Concurrence by Justice Noble <i>Bauder</i> should be overturned, as checkpoints are only valid because of consent motorists give to be stopped by proceeding to checkpoint. Drivers need notice and the freedom to go around the checkpoint for valid consent.
	<u>Commonwealth v. Wheeler</u> , 558 S.W.3d 475 (Ky. Ct. App. 2018)	Solely activating emergency lights and being in uniform will not satisfy the third <i>Buchanon</i> factor on notice, as it is identical to what was present in <i>Cox</i>	
	<u>Singleton v. Commonwealth</u> , 364 S.W.3d 97 (Ky. 2012)	Impermissible primary purpose to check for compliance with city ordinance requiring parking permits (not highway safety)  Factor in assessing validity of checkpoint is whether an alternate, less intrusive means available to achieve the same objective	
	<u>City of Indianapolis v. Edmond</u> , 531 U.S. 32 (2000)	Impermissible if checkpoint’s primary purpose is to detect ordinary criminal wrongdoing (in this case, narcotics possession)	Court reaffirms permissible checkpoints: immigration, sobriety, check for license and registration, and emergencies (terror attack, fleeing felon)  Additional factor weighing against checkpoint was presence of a drug dog
	<u>Carrender v. Commonwealth</u> , --- S.W.3d ---, 2020 WL 855689 (Ky. Ct. App. Feb. 21, 2020)	Even though officer testified that purpose of checkpoint was “general law enforcement,” purpose was permissible when considered with facts that KSP notice stated purpose for checkpoint was to enforce traffic safety laws with an emphasis on “occupant protection (seatbelt adherence), sobriety, insurance, and registration violations”	

<p><b>Reasonableness Balancing Test</b></p>	<p><u>Brown v. Texas</u>, 443 U.S. 47 (1979)</p>	<p>Whether a stop is reasonable depends on a balance between the public interest and the individual’s right to be free from arbitrary interference by law officers</p> <p>Constitutionality of a stop requires weighing (1) the gravity of public concerns served by the seizure, (2) the degree to which the seizure advances the public interest, AND (3) the severity of the interference with individual liberty</p> <p>Fourth Amendment requires that seizure be based on facts specific to that individual or be carried out pursuant to a plan embodying explicit, neutral limitations on the conduct of the individual officers</p>	
	<p><u>Michigan Dept. of State Police v. Sitz</u>, 496 U.S. 444 (1990)</p>	<p><i>Brown</i> is the correct test for constitutionality of checkpoints</p> <p>Degree of intrusion looks to the duration of the seizure and intensity of the investigation</p>	<p>Court upholds checkpoint as constitutional – drunk driving is grave concern, the interference is minimal, and it is effective enough (not going to second-guess policy decisions on effectiveness)</p>
	<p><u>Commonwealth v. Bothman</u>, 941 S.W.2d 479 (Ky. Ct. App. 1996)</p>	<p>Dispositive question is not whether checkpoint complied with KSP requirements, but only whether it passes constitutional muster</p>	
<p><b>Reasonableness</b></p>	<p><u>Bauder v. Commonwealth</u>, 299 S.W.3d 588 (Ky. 2009)</p>	<p>Courts must apply a “totality of the circumstances test” when determining whether there is reasonable, articulable suspicion to stop a driver that avoids a checkpoint</p> <p>Of primary importance is the officer’s experience - has he done checkpoints before, what has he found to be true of people avoiding checkpoints</p>	<p>Analysis is completely independent of the case law on checkpoints – it is a standard reasonable suspicion analysis, with one factor being the avoidance of the checkpoint</p>
	<p><u>Smith v. Commonwealth</u>, 219 S.W.3d 210 (Ky. Ct. App. 2007)</p>	<p>For a checkpoint to be constitutional, it must be executed pursuant to a systematic plan, and the officers should not be permitted to exercise their discretion regarding which specific vehicles to stop (citing Steinbeck)</p>	<p>Officers did not exercise unconstitutional discretion when they stopped checkpoint to relieve traffic congestion</p>

			and then restarted it – procedures allowed for this, and did not target specific cars
	<u>Monin v. Commonwealth</u> , 209 S.W.3d 471 (Ky. Ct. App. 2006)		Commonwealth failed to offer proof that checkpoint had been preapproved by supervisors or that it had a constitutional primary purpose
	<u>Steinbeck v. Commonwealth</u> , 862 S.W.2d 912 (Ky. Ct. App. 1993)	Totality of the circumstances test applied for whether there is reasonable, articulable suspicion to stop a vehicle that avoids checkpoint	Includes officer’s experience with those who avoid, where they turn into, the time of day
	<u>Kinslow v. Commonwealth</u> , 660 S.W.2d 677 (Ky. Ct. App. 1983)		Because every vehicle was stopped, police discretion was sufficiently limited to allow checkpoint

## FIELD SOBRIETY TESTS

Field sobriety tests are used by police officers to assess an individual’s mental or physical impairment. They are used to show probable cause for the stop and the arrest of your client.

Field Sobriety Tests are not the sole way for an officer to establish probable cause. Often times the officer will use the individual’s performance of FST in conjunction with other factors to establish probable cause.

The Commonwealth is NOT required to make a showing that the field sobriety testing was *scientifically reliable*. Kentucky courts has previously held that evidence of field sobriety testing is admissible and that officers observing a defendant’s driving and physical condition may offer both lay and expert opinion testimony that a defendant is intoxicated. Bridgers v. Commonwealth, No. 2005-CA-001690-DG, 2007 WL 121846, at \*1 (Ky. Ct. App. Jan. 19, 2007)(unpublished). The opinion testimony of an officer on the issue of a defendant’s intoxication is admissible. Commonwealth v. Rhodes, 949 S.W.2d 621 (Ky. App. 1996).

**PRACTICE TIP:** If the prosecutor is attempting to tender the police officer as an expert, challenge his/her qualifications under KRE 702.

Furthermore, the Court of Appeals affirmed that the client was entitled to introduce “any evidence which tended to impugn the results of the breath- and blood-alcohol concentration test, including evidence of his performance on field sobriety tests.” Mattingly v. Commonwealth, 98 S.W.3d 865, 866 (Ky. Ct. App. 2002).

### History of Field Sobriety Tests and Studies to Use When Challenging Them

Law enforcement settled on the use of the walk and turn, one leg stand, and horizontal gaze nystagmus as the three standardized field sobriety tests beginning in the 1970s. The following studies have been used to justify law

enforcement's reliance on these FSTs, despite clear shortcomings in their scientific rigor and results that raise serious concerns regarding their reliability:

- [Psychophysical Tests for DWI Arrest](#) (1977)
  - NHTSA researchers examined six different exercise to determine if they were reliable indicators of intoxication. It was completed in a controlled study lab environment, rather than in the field.
  - It was determined that three tests (one leg stand, walk and turn, and horizontal gaze nystagmus) were the most reliable among others that were being used by law enforcement at the time.
  - Based on these tests, officers successfully “arrested” 84% of those with BAC at or above .10 (legal limit at time of study)
  - However, among total arrests, 47% were “false arrests” of a legal driver
    - Total arrests – 101
    - Drivers at or above .10 BAC – 54
    - Drivers below .10 BAC – 47
- [Development and Field Test of Psychophysical Test For DWI Arrest](#) (1981)
  - Researchers attempted to standardize FSTs to demonstrate consistent results across multiple studies. However, there continued to be a high rate of error among those arrested (32% false arrest rate). This was despite the rate of successful detection of illegal drivers dropping to only sixty-four percent (64%)
- [Validation of the Standardized Field Sobriety Test Battery at BACs Below .10 \(San Diego Study\)](#) (1998)
  - This study was used to justify the continued use of FSTs to determine whether a subject's BAC was at or above the legal limit, despite the legal limit in most states having been lowered to .08 and prior studies having used .10 as the standard
  - However, the study offered a breakdown of how subject drivers performed on individual FSTs based on how many clues were exhibited, and the results indicate that these tests continue to classify legal drivers as intoxicated at an alarming rate:
    - HGN → of 81 drivers with BAC below .08, 30 exhibited 4 or more clues and “failed” the test
    - One Leg Stand → of 75 drivers with BAC below .08, 31 exhibited 2 or more clues and “failed” the test
    - Walk and Turn → of 76 drivers with BAC below .08, 40 exhibited 2 or more clues and “failed” the test
- Other studies that have been cited by law enforcement to support their continued reliance on FSTs to determine BAC:
  - [Field Evaluation of a Behavioral Test Battery for DWI](#) (1981)
  - [A Colorado Validation Study of the Standardized Field Sobriety Test \(SFST\) Battery](#) (1995)
  - [A Florida Validation Study of the Standardized Field Sobriety Test \(SFST\) Battery](#) (1997)

\*\*\*Aaron Riggs gave a presentation at Annual Conference 2020 going in more detail about these studies; this presentation and additional resources are available on the Trumpet.

### Training of the Officer

Before a police officer can administer field sobriety tests on suspected drunk drivers, (s)he must be qualified. The International Association of Chiefs of Police (IACP) and the National Highway Traffic Safety Administration (NHTSA) have prepared a Standardized Field Sobriety Testing (SFST) training for officers.

Each officer is given a participant manual, which they are instructed to read before class and use to study for the exam. This manual and attendance at this training is simply that: a training. It is **NOT a certification**. An officer CANNOT be “certified” in administering Standardized Field Sobriety Tests, only Drug Recognition Experts are certified.

**PRACTICE TIP:** If an officer is persistent that they are certified in field sobriety tests, ask them for their certification number. They will not be able to give you a non-existent certification number.

Officers are taught: “When making a DWI arrest, always assume that the chemical test evidence will not be available. It is critical that you organize and present your observations and testimony in a clear and convincing manner. This will allow more impaired drivers to be convicted regardless of whether they take the chemical test(s) or the test(s) results.” DWI Detection and Standardized Field Sobriety Testing Participant Guide, February 2018 Edition.

- Officers are responsible ONLY for the information given to them during their session of field sobriety tests training. NHTSA does not require an officer to undergo additional training if the manual is updated or when new information is available.
- Undergoing the SFST training does NOT qualify the officer as a Drug Recognition Expert (DRE). Intense training, including classroom and on-site training, are necessary to have the DRE distinction. See ***Drug Recognition Experts***.

**PRACTICE TIP:** Obtain a current copy of the NHTSA SFST training manual by requesting it from your local police department or downloading the on-line version. Keep a copy in your office for all attorneys to use. By challenging the officer’s inability or unwillingness to follow proper procedure and protocol you may effectively suppress the field sobriety tests before going to trial. Furthermore, since the officer is not responsible for knowing any updates to the manual or receiving continuing education on FST, you must be aware under which manual they gleaned their knowledge. Keep older versions of the participant manuals (there are 13 manuals in total beginning in 1987) in your office so you have them on hand and ready to use for cross-examination and case preparation.

### Advanced Roadside Impaired Driving Enforcement (ARIDE) Training

According to the Kentucky League of Cities website ([www.klc.org](http://www.klc.org)):

“The SFST program trains officers to identify and assess drivers suspected of being under the influence of alcohol, while the DEC/DRE program provides more advanced training to evaluate suspected drug impairment. The SFST assessment is typically employed at roadside, while an officer trained as a Drug Recognition Expert (DRE) through the DEC program conducts a 12-step evaluation in a more controlled environment such as a jail or a detention facility. ARIDE is intended to bridge the gap between the SFST and DEC/DRE programs by providing officers with general knowledge related to drug impairment and by promoting the use of DREs in states that have the DEC Program.

One of the more significant aspects of ARIDE is the required student demonstration of the SFST proficiency requirement. The ARIDE program stresses the importance of the signs and symptoms of the seven drug categories. This course will train law enforcement officers to observe, identify and articulate the signs of impairment related to drugs, alcohol, or a combination of both,

in order to reduce the number of impaired driving incidents as well as crashes which result in serious injuries and fatalities. This course will educate other criminal justice professionals (prosecutors, toxicologists, judges, etc.) to understand the signs of impairment related to drugs, alcohol, or a combination of both, to enable them to effectively work with law enforcement in order to reduce the number of impaired driving incidents as well as crashes which result in serious injuries and fatalities. ARIDE is a **16-hour training course** and is taught by DRE instructors.”

Sessions contained within the course include:

1. Introduction and Overview of Drugs and Highway Safety
2. SFST Update, Review and Proficiency Examination
3. Observations of Eyes and other Sobriety Tests to Detect Alcohol and Drug Impairment
4. Seven Drug Categories
5. Effects of Drug Combinations
6. Pre- and Post-Arrest Procedures

The training will be conducted under the administration and approval of the DEC/DRE program state coordinator. This course is designed to build on the Standardized Field Sobriety Test practitioner course. In order for the participant to effectively utilize the information presented in this course, NHTSA has set a prerequisite of SFST proficiency. The participant will receive a short review and update. All participants are required to pass an SFST proficiency evaluation. Failure to successfully complete the SFST proficiency evaluation will result in dismissal from class.

**REQUIREMENTS:**

- All participants **MUST** be SFST proficient.
- Must pass an SFST Proficiency and Course Assessment

*Testimony of the Officer*

As previously stated, Kentucky courts have held that evidence of field sobriety testing is admissible and that officers observing a defendant’s driving and physical condition may offer both lay and expert opinion testimony that a defendant is intoxicated. Bridgers v. Commonwealth, No. 2005-CA-001690-DG, 2007 WL 121846, at \*1 (Ky. Ct. App. Jan. 19, 2007)(unpublished). The opinion testimony of an officer on the issue of a defendant’s intoxication is admissible. Commonwealth v. Rhodes, 949 S.W.2d 621 (Ky. App. 1996).

In a NEW opinion out of Fayette Circuit Court, the Court addresses officer testimony as it related to Field Sobriety Tests. In Iraola-Lovaco v. Commonwealth, 586 S.W.3d 241 (Ky. 2019), the police officer testified that the defendant had “failed” the “tests,” and the defendant argued on appeal that use of the terms “test,” “pass” and “fail” lent the police officer’s lay witness testimony an “aura of scientific validity” implying reliability and transforming the testimony into expert witness testimony. Unfortunately, the defendant did not object to this at trial, nor challenge the ability of the officer to properly administer the test. The Supreme Court adopted the language of a Kansas opinion that held:

“[W]here officer testimony does not link test performance with a specific level of intoxication, the mere use of the term ‘test’ or an indication by the officer that the defendant failed to perform the tests adequately and, therefore, ‘failed’ the test does not lend scientific credibility to the test results. There is only a semantic difference between ‘field sobriety test’ and ‘field sobriety exercise...’ [citing State v. Shadden, 290 Kan. 803, 235 P.3d 436, 453-54 (2010) (citation omitted)].

Here, [the officer] did not equate a level of certainty or probability to his opinion that Iraola-Lovaco was intoxicated, or correlate Iraola-Lovaco’s performance on the FSTs with a specific BAC

level. Rather, [the officer] testified that based on his training, experience, and personal observations, Iraola-Lovaco’s performance on the FSTs led [him] to opine that [Irola-Lovaco] was intoxicated.”

The upshot of the case is that if the officer testifies that the failure of the FSTs are linked to a particular blood alcohol concentration, and if the attorney objects, the result would be that the testimony should be excluded at trial (absent qualifying the police officer as an expert).

**PRACTICE TIP:** If the prosecutor is attempting to tender the police officer as an expert, challenge his/her qualifications under KRE 702.

Preliminary “Tests”

The officer is trained to use techniques to assess impairment even before administering the field sobriety tests. These “preliminary tests” may be the officer’s way of building a case against your client. These tests do **NOT** replace the FST and cannot be used as their substitute.

Questioning Techniques	Examples	Behaviors the Officer is Looking For
Ask for two things simultaneously	Asking for license AND registration	<ul style="list-style-type: none"> <li>- Forgets to produce both documents</li> <li>-Produces documents other than those requested</li> <li>-Fails to see the license, registration, or both while searching</li> <li>-Fumbles or drops wallet, purse, license or registration</li> <li>-Unable to retrieve documents using fingertips</li> </ul>
Ask interrupting or distracting questions	Asking an unrelated question to the driver as they are searching for documentation	<ul style="list-style-type: none"> <li>-Ignores the question and concentrates only on the license or registration search</li> <li>-Forgets to resume the search after answering the question</li> <li>-Supplies a grossly incorrect answer to the question</li> </ul>
Asking unusual questions	After obtaining license/registration, ask unrelated questions (i.e. what is your middle name)	<p>(This is supposed to trip up an impaired driver)</p> <ul style="list-style-type: none"> <li>-Answers incorrectly</li> <li>-Ignores the question and responds to a usual but unasked question</li> </ul>

### Additional Tests

None of the following are designated components of the Field Sobriety Tests. These additional tests can only be used by the officer to build a case as to evidence of impairment and CANNOT be a replacement for one or all of the Field Sobriety Tests.

- Alphabet → Requesting the driver to recite the alphabet backwards or recite sections of the alphabet (i.e. G-P)
- Counting → Requesting the driver to recite 15 or more numbers in reverse sequence
- Finger taps → Requesting the driver to touch their thumb to one finger at a time and then reverse.

**PRACTICE TIP:** Highlight all the tests your client did well or the behaviors (s)he exhibited that do **NOT** show impairment. It is also important to highlight that a SOBER individual may not be able to comply with the request (i.e. reciting the alphabet backwards).

### Exiting "Clues"

The officer is also trained to observe how an individual exits the vehicle as proof of impairment.

## Eye Tests

Police officers believe that the eyes give the clearest signs of alcohol and drug impairment.

**\*\*** Before the police officer begins the Field Sobriety Tests, (s)he must determine if the client has a medical impairment. (S)he will observe (1) the size of the pupils, (2) resting nystagmus, and (3) equal tracking.

### Pupil Size

If the pupils are different sizes, it is possible that the client is suffering from a head injury or a neurological disorder. It is also possible that the client has a prosthetic eye. If the pupils are dilated, the client may be impaired by CNS stimulants, hallucinogens, or cannabis. If the pupils are constricted, the client may be impaired by a narcotic analgesic.

#### **Pupil Size Quick Look:**

Pupils are different sizes → may be suffering from a head injury or a neurological disorder

Dilated → may be under the influence of CNS stimulants, hallucinogens, or cannabis

Constricted → may be under the influence of CNS depressants, dissociative anesthetics, or inhalants

**\*\*** CNS depressants, dissociative anesthetics, and inhalants usually do **NOT** affect pupil size.

### Tracking of the Eyes

Tracking ability is affected by certain medical conditions or brain injuries. An officer is instructed to pass a stimulus across both eyes to observe their tracking. If one eye tracks the stimulus, but the other fails to move, or lags behind the stimulus, this is an indication that the client may have a neurological disorder. If the client has sight in both eyes, but the eyes fail to track together, there is a possibility that the client is suffering from an injury or illness. This observation is a medical assessment.

If your client is legally blind in one eye, tracking will be affected. The eye with full vision ability may not be able to see the stimulus clearly or the legally blind eye may not be able to track/ keep up with the other eye.

What is Nystagmus? (“jerking” of the eyes)

There are more than forty different types of nystagmus that can be present in the human body. For our purposes, police officers focus on three specific types: Resting, Vertical Gaze, and Horizontal Gaze. Each of these types shows the same basic concept → an involuntary jerking of the eyes as they move from a center position.

*Resting Nystagmus* is the jerking of the eyes as the individual looks straight ahead. Resting nystagmus indicates a pathological disorder or high doses of dissociative anesthetic drugs like PCP in the individual’s system.

*Vertical Gaze Nystagmus (VGN)* is the involuntary jerking of the eyes (up and down) which occurs as the eyes are held at maximum elevation. The jerking is distinct and sustained.

“Fatigue nystagmus” is different than physical fatigue from lack of sleep. As recently as February 2019, prosecutors and police officers are attempting to discredit a 2001 study that stated that sleep may exaggerate endpoint nystagmus. Book JL. *End-position Nystagmus as an Indicator of Ethanol Intoxication*. Science Justice 2001; 41:113-116. They suggest that “fatigue nystagmus” is created if the eye is held at maximum deviation for thirty (30) or more seconds and therefore, physical fatigue does not affect eye movement or nystagmus.

**PRACTICE TIP:** Fatigue because of lack of sleep can demonstrate sobriety or give reasons for his/her bad driving other than intoxication. Do NOT let the officer off the hook by conceding that “fatigue” and “fatigue nystagmus” are two different concepts. Highlight the effects of fatigue on a driver by hiring an expert and educate your jury during voir dire.

*Horizontal Gaze Nystagmus (HGN)*

HGN is the first test administered as part of the three-part field sobriety tests. HGN is the involuntary jerking of the eyes occurring as the eyes gaze to the side. There are only four known causes of horizontal gaze nystagmus: (1) depressants, (2) inhalants, (3) dissociative anesthetics, and (4) brain stem injury.

\*\* Caffeine, nicotine, smoke, cannabis, hallucinogens, or narcotic analgesics do **NOT** cause HGN. See **Drug DUIs**

HGN: the officer is looking for **three** clues: 3 clues in each eye; total of 6 clues for the client

HGN		
Clue 1	Lack of Smooth Pursuit	As the eye moves from side to side, does it move smoothly or does it jerk noticeably?
Clue 2	Distinct and sustained nystagmus at maximum deviation	When the eye moves as far to one side as possible and is kept at that position for several seconds (minimum 4 seconds, cannot exceed 30 seconds), does it jerk distinctively?
Clue 3	Onset of nystagmus prior to 45-degrees	As the eye moves toward the side, does it start to jerk prior to a 45-degree angle?

If **4 or more clues** are evident, likely individual’s BAC is above .08. These clues are progressive. In order to see onset of nystagmus prior to 45-degree angle, the officer must first have observed lack of smooth pursuit and distinct and sustained nystagmus at maximum deviation.

How to Administer the Horizontal Gaze Nystagmus Test:

1. Ask the individual to remove their glasses.
  - a. Glasses can restrict peripheral vision or obstruct the officer's observation of the eyes.
2. Medical Assessment of the Eyes
  - a. The first two (2) passes over the eyes are to observe tracking, pupil size, and resting nystagmus.
3. Medical Assessment of the Individual
  - a. Ask the individual if they have any medical conditions that would prevent them from performing the field sobriety tests.
4. Instruction Phase
  - a. "Stand with feet together, hands at side, hold the head still, and follow the motion of the stimulus with the eyes only."
5. Prepare for the HGN Test
  - a. Stimulus may be the tip of a pen or pencil, whichever contrasts with the background.
  - b. Stimulus must be 12-15 inches from the individual's nose.
  - c. Individual may be seated if their height prevents them from viewing the stimulus effectively.
  - d. Officer **must** begin the test with the left eye
  - e. Must test each eye independently
6. Smooth Pursuit
  - a. Must pass each eye two or more times
  - b. Two (2) seconds to bring eye back to center and four (4) seconds across the body
  - c. Repeat for both eyes
7. Distinct and Sustained Nystagmus at Maximum Deviation
  - a. Move the stimulus so the eye is as far to one side as possible, showing no white in the corner of that eye
  - b. Hold for between 4-10 seconds
  - c. Repeat for both eyes
8. Onset Prior to Forty-Five Degrees
  - a. The angle of onset is the point at which the eye is first seen jerking
  - b. Move the stimulus slowly over the period of four (4) seconds before reaching 45-degrees
  - c. When the officer sees the eye jerking, stop moving the stimulus, hold steady the stimulus, and observe if there is jerking in the eye
  - d. Repeat for each eye

To properly admit HGN test results into evidence, the Commonwealth must show:

- Some foundation testimony that the officer was trained/certified in HGN testing;
- That the test was properly administered; AND
- That the proper procedures were employed.

However, even if the client fails the HGN test, this failure combined with other evidence may still establish probable cause for arrest. Leatherman v. Commonwealth, 357 S.W.3d 518 (Ky. App. 2011).

Issues with the Administration of the HGN Test

- Eyewear is not removed (glasses, sunglasses)
- Incorrect positioning of the stimulus
- Facing the client towards the roadway or the lights of the police vehicle or emergency vehicles (optokinetic nystagmus)
- Commencing the test too quickly/ didn't "properly conduct the medical assess" of the client
  - Must check that there is no resting nystagmus
  - Must verify that the driver has no head injury
- Conducting the test too quickly
  - Should be two (2) seconds to move the stimulus from center to right, another two (2) seconds to move back to center, two (2) seconds from center to left, two (2) seconds back to center
- Checking for equal tracking and lack of smooth pursuit at the same time
  - "There should be a clear, distinguishable break between the check for equal tracking and lack of smooth pursuit." NHSTA SFST Instructor Manual
- Lack of Smooth Pursuit conducted too quickly
  - The eye is moved 30 degrees per seconds - should be 16 seconds long! If it is shorter than 16 seconds, the eyes will show "catch-up saccades" which can be mistaken for nystagmus
- Not holding at maximum deviation for at least four (4) seconds
- Not holding the stimulus at the same location at maximum deviation
  - If driver moves their head, the officer cannot conduct this test
- Stopping the stimulus at a location that is at or past the 45 degree (maximum deviation location)
  - Some white of the eye must still be showing in the corner of the eye
- Not stopping during onset prior to 45 degrees to confirm nystagmus is present and to confirm prior to 45 degrees

### The Two Divided Attention Tests

There are two divided attention field sobriety tests: the walk-and-turn and the one-leg-stand. These tests assess the following functions:

- Information processing
- Short-term memory
- Judgment and decision making
- Balance
- Steady and sure reactions
- Clear vision
- Small muscle control
- Coordination of limbs

Divided attention tests are important because officers believe that intoxicated individuals may still be able to concentrate on one task but will have much more difficulty if trying to concentrate of multiple tasks. Police officers justify these tests because it takes divided attention to drive → looking in the mirrors, looking forward, watching the speedometer, braking, staying within the lane, etc.

*Walk and Turn*

There are two stages to the walk and turn: the instruction phase and the walking stage.

In the NHTSA Instructor Manual, the officer is required to ask the driver, prior to the walk and turn, if they have any impairments or disabilities which would prevent them from completing the walk and turn. This requirement is stated in the Instructor's Manual. In the Participant's Manual, however, it states WHY the officer must ask (i.e. in case of head injury), not that they are required to ask. Therefore, some officers may rely on visual clues of injury instead of asking.

The Participant Manual states that individuals who are 65 years or older, are 50 lbs or more overweight, or have back, knee, or inner ear problems have shown difficult in performing this test.

**Beware of the following language by the officer:**

- "I'll take [the impairment or disability] into consideration" → The officer cannot dismiss the presence of a physical impairment or disability. A physical impairment or disability nullifies this test because the officer cannot efficiently parse between which clue is a result of intoxication and which is a result of the disability.
- "Do you think you can do this test?" → the officer must determine if the client is medically qualified to perform the test and not leave it up to the client

**How to Administer the Walk and Turn**

- **Instruction Phase:**
  - Subject must stand heel-to-toe position (left foot on line and right foot behind it)
  - Keep arms at side; and
  - Listen to instructions
  - (Demonstration by officer)
  - "Do not start until I tell you to."
  - "Do you understand the instructions?" (there are 17 verbal instructions; the client must acknowledge they understand)
- **Walking Phase:**
  - Nine (9) heel-to-toe steps
  - Turns in a prescribed manner
  - Takes nine (9) heel-to-toe steps back
  - Counts the steps out loud and watching their feet
  - (Demonstration of heel-to toe by officer)
- **Turning Phase:**
  - Front foot on line
  - Turn in the prescribed manner
    - On the ninth step, keep front foot on line
    - Turn by taking several small steps with the other foot to complete turn
  - (Demonstration of prescribed turn by officer)
  - "Do you understanding the instructions?"

There are eight (8) possible clues:

- Can't balance during instructions
- Starts too soon
- Stops while walking
- Doesn't touch heel-to-toe
- Steps off line
- Uses arms to balance
- Loses balance on turn or turns incorrectly
- Takes the wrong number of steps

Inability to complete test when:

- Steps off line 3 or more times
- Is in danger of falling
- Cannot do the test

If **2 or more clues** are evident or fails to complete the test, likely individual's BAC is above .08.

Issues with the Administration of the Walk and Turn:

- The driver does not understand the 17 verbal instructions and demonstrations
  - The officer is required to ask the client that (s)he understands the instructions. If the officer does NOT, the test should be void.
- Conditions of the road
  - Dry, level, hard, non-slippery surface
- Footwear
  - Client should have the opportunity to remove his/her shoes if the heels are over 2 inches high or have unusual footwear such as flip flops or platform shoes
- The officer fails to give all relevant instructions
- The officer distracts the client while the client is performing the test
- The officer finding incorrect "clues" that have specific requirements
  - i.e. says steps off line when no line is designated

**PRACTICE TIP:** Officers are also instructed to list other observations that are not designated clues. (i.e. The client incorrectly counting to 10 but takes the required 9 heel-to-toe steps). The officer may incorrectly categorize these as "clues" when in fact they are not. Always check the officer's notes against the proper procedures and protocol.

### *One Leg Stand*

The One Leg Stand is said to be an effective indication of intoxication because a study showed that an individual who has a BAC of .10 or above can hold their balance for up to 25 seconds, but cannot hold it 30 or more seconds.

Just like with the Walk and Turn, the Participant Manual states that individuals who are 65 years or older, are 50 lbs or more overweight, or have back, knee, or inner ear problems have shown difficulty in performing the One Leg Stand.

**Beware of the following language by the officer:**

- “I’ll take [the impairment or disability] into consideration” → The officer cannot dismiss the presence of a physical impairment or disability. A physical impairment or disability nullifies this test because the officer cannot efficiently parse between which clue is a result of intoxication and which is a result of the disability.
- “Do you think you can do this test?” → The officer must determine if the driver is medically qualified to perform the test and not leave it up to the individual

**How to Administer the one leg stand**

- **Instruction Phase:**
  - Subject must stand with heels together
  - Keep arms at side; and
  - Listen to instructions
  - (Demonstration by officer)
  - “Do not start until I tell you to.”
  - “Do you understand?” (there are 13 verbal instructions; the client must acknowledge they understand)
- **Balancing**
  - Raise one leg (can be either leg)
  - Keep the leg 6 inches off the ground
  - Toe pointed out
  - Keep both arms straight
  - Keep eyes on elevated leg
- **Counting**
  - While holding that position count out loud “one thousand and one; one thousand and two...”
  - “Do not stop until told to stop”
  - (Demonstration by officer)
  - “Do you understanding?”

**There are four (4) possible clues:**

- Sways while balancing
- Uses arms to balance
- Hops
- Puts foot down

Inability to complete: puts foot down three or more times

If **2 or more clues** are evident or fails to complete the test, likely individual's BAC is above .08.

#### Issues with the Administration of the One Leg Stand

- The client does not understand the 13 different verbal instructions and demonstrations
  - The officer is required to ask the client that (s)he understands the instructions. If the officer does NOT, the test should be void.
- Conditions of the road
  - Dry, level, hard, non-slippery surface
- Footwear
  - Client should have the opportunity to remove his/her shoes if the heels are over 2 inches high or have unusual footwear such as flip flops or platform shoes
- The officer fails to give all relevant instructions
- The officer does not instruct the client to look down on their elevated foot
- The officer distracts the client while the client is performing the test
- Finding incorrect "clues" that have specific requirements
  - i.e. says to lift leg six inches and the individual lifts their leg to what the officer thinks is 7 inches

#### Challenges to the Field Sobriety Tests

- **ANY** client would be unable to complete the field sobriety tests
  - Environment → time of day, lighting conditions, weather conditions, conditions of the ground, other objects in the way
- **THIS** client would be unable to complete the field sobriety tests
  - Clothing/shoes
  - Language Barrier → English is not their first language
  - Prosthetic/knee brace/glass eye
  - Medical condition
  - Cognitive impairment
  - Victim of an accident
  - Human factor → can't do these tests when sober

## IMPLIED CONSENT

KRS 189A.103 provides that a person who operates or is in physical control of a motor vehicle in the Commonwealth,

"has given consent to one or more tests of blood, breath, or urine, or a combination thereof, for the purpose of determining alcohol concentration or presence of a substance which would impair driving ability if an officer has a reasonable belief that a violation of KRS 189A.010(1) or KRS 189.520."

In other words, in exchange for the privilege of operating a motor vehicle in Kentucky, one consents in advance to any form of testing of their breath, blood, or urine if stopped and suspected of a DUI.

The implied consent warning is integral to the DUI offense because it informs the client not only of his/her rights, but also, the consequences for his/her actions (i.e refusal). It has been deemed to be constitutionally valid by the Kentucky Supreme Court in Commonwealth v. Hernandez-Gonzalez, 72 S.W.3d 914 (Ky. 2002).

The implied consent warning is as follows:

“I will be requesting that you submit to a test of your breath, blood or urine, or any combination of these tests. If you refuse to submit to any test, which I request, your refusal may be used against you in court as evidence of your violation of KRS 189A.010 and your driver’s license will be suspended by the court at the time of arraignment, and you will be unable to obtain an ignition interlock license during the suspension period.

If you are convicted of KRS 189A.010, your refusal will subject you to a mandatory minimum jail sentence which is twice as long as the mandatory minimum jail sentence that would be imposed if you submit to all requested tests. The results of any test taken may be used against you in court as evidence of your violation of KRS 189A.010(1).

If a test is taken, although your license will be suspended, you will be eligible immediately for an ignition interlock license allowing you to drive during the period of suspension and, if you are convicted, you will receive credit toward any other ignition interlock requirement arising from this arrest. If you submit to all tests which I request, you have the right to obtain a test or tests of your blood performed at your expense by a qualified person of your choosing within a reasonable time of your arrest.”

Implied consent also applies to stationary vehicles. There must be sufficient evidence that the individual was operating or in physical control of a motor vehicle. See ***Operation/In Physical Control***. See also, *Pence. v. Commonwealth*, 825 S.W.2d 282 (Ky. Ct. App 1991).

Implied consent does NOT require an arrest to be triggered.

#### *When and Where the Implied Consent Warning Should be Read*

This implied consent warning is to be read **at the time** that a breath, blood, or urine test is requested by a police officer and **at the testing site**. KRS 189A.105. Although the reading of the implied consent warning is mandatory, “there is no statutory requirement that a defendant understand or acknowledge the reading of the implied consent warning. The statute merely requires that the officer read it.” *Commonwealth v. Rhodes*, 308 S.W.3d 720, 722 (Ky. Ct. App. 2010). Once the warning has been read, **only then** can the client impliedly or explicitly refuse consent to be tested.

The Commonwealth has the burden of proving by a preponderance of the evidence that the client gave his voluntary consent to blood draw (i.e. the search). *Smith v. Com.*, 181 S.W.3d 53, 58 (Ky. Ct. App. 2005).

**PRACTICE TIP:** Use pretrial motion practice and discovery tools to determine if the implied consent warning was actually given pursuant to the statute. If the implied consent warning was not read in its entirety exactly as written or if the officer paraphrased the warning, it is deficient and should be challenged.

#### *Individuals who speak English as a second language*

For clients whose second language is English, one of the reasons for “refusal” may be that (s)he did not understand what he would be consenting or refusing. Furthermore, if (s)he does not understand the warning, (s)he may not understand other instructions such as the field sobriety test instructions, right to speak with an attorney, or right to obtain an independent blood test. *Commonwealth ex rel. Logan County Attorney v. Williams*, addressed the issue of whether the district court properly suppressed a blood alcohol concentration (BAC) results collected from a Spanish-speaking driver, who was read the implied consent law in English before submitting to a blood draw. 2019 WL 4559354 (Ky. Ct. App. Sept. 20, 2019) **NOT FINAL**. The Court held that the defendant was statutorily “informed” of Kentucky’s implied consent law by the officer reading the warning to

him in English. There is **NO** statutory requirement that the individual understand the warning or be read the warning in their native language.

**PRACTICE TIP:** Ask the officer during any relevant hearings if (s)he provided a written form of the implied consent form in the client's native language. This can contribute to your argument of lack of probable cause for arrest.

#### Inability to Consent to Testing

Bodily substances, most commonly blood, may be obtained for drug or alcohol testing from any person who is dead, unconscious, or otherwise in a condition rendering him/her incapable of consent. KRS 189A.103(2). Implied consent exists until it is withdrawn by a statement or by conduct of the client. If the client is incapable of withdrawing consent due to an accident, (s)he is still deemed to have consented. This implied consent is valid and constitutional so long as the officer has probable cause to believe the client has committed a DUI. Helton v. Commonwealth, 299 S.W.3d 555 (Ky. 2009).

#### Implied Consent to Testing When Suspected of Drug DUI

If an officer has reasonable grounds to believe there is impairment by a substance other than alcohol, that cannot be detected through a preliminary breath test or breath test, then blood, urine, or both may be required in lieu of a breath test. KRS 189A.103(5). The Kentucky Supreme Court held in Beach v. Commonwealth, that "KRS 189A.103(1) and (5) do not require that a police officer must first offer a DUI suspect a breath test before asking him or her to submit to a blood test." 927 S.W.2d 826, 828 (Ky. 1996).

#### Independent Blood or Urine Tests

Immediately following the administration of any test, the client being tested must again be notified that (s)he has the right to have a physician of their own choosing conduct another test in a reasonable time. KRS 189A.105(4). As long as the client has submitted to the initial test, (s)he is allowed an independent test "to obtain another result to compare with or controvert the police officer's test." Commonwealth v. Minix, 3 S.W.3d 721, 724 (1999).

Furthermore, if the client requests independent testing, the officer must make "reasonable efforts" to provide transportation to a testing site, such as a hospital or medical center, for the test to be administered. "As long as the test can be administered within a reasonable time of the individual's arrest, that individual is entitled to police cooperation to obtain the test." Commonwealth v. Long, 118 S.W.3d 178, 184 (Ky. Ct. App 2003); *See also*, KRS 189A.103(7). Since the term "reasonable efforts" has never been defined, a "totality of the circumstances" approach is used to determine reasonableness. Lee v. Commonwealth, 313 S.W.3d 555, 556 (Ky. 2010) set out the factors that will determine "reasonable efforts":

1. Availability of or access to funds or resources to pay for the requested test;
2. Protracted delay in the giving of the test if the officer complies with the accused's request;
3. Availability of police time and other resources;
4. Location of requested facilities; AND
5. Opportunity and ability of the accused to make arrangements personally for testing.

The Court conducted this "totality of the circumstances" analysis in Commonwealth v. Long, 118 S.W.3d 178, 184 (Ky. Ct. App 2003) when it ruled that the officer's actions of arresting a defendant without any personal belongings except a coat and denying her request to call someone and arrange for money to be brought to her, is **not** reasonable and therefore, warrants the suppression of the initial breathalyzer test results. The proper remedy is suppression of the test results. Dismissal of the DUI charge because "reasonable effort" was not used,

is not a proper remedy. Commonwealth v. Filben, No. 2004-CA-002207-DG (Ky. Ct. App. Jul. 21, 2006)(*unpublished*).

There is a case that is not yet final that suggests that inability to pay for an independent blood test is not grounds for suppression of the blood test results. Commonwealth v. Riker, No. 2017-SC-000483-DG, 2018 WL 6567681 (Ky. Dec. 13, 2018) **NOT YET FINAL**.

Commonwealth v. Morgan, 583 S.W.3d 432 (Ky. App. 2019)

The officer violated the requirements of KRS 189A.105(4) when, after the defendant submitted to the initial requested alcohol test, the officer did not give a second warning concerning the defendant's right to have an independent blood test performed. Because no constitutional right had been violated, the Court noted that Commonwealth v. Bedway, 466 S.W.3d 468 (Ky. 2015) holds that suppression may be warranted upon the violation of a statutory right if there is prejudice to the defendant or if there is evidence of deliberate disregard of the statute. Here, the Court of Appeals determined that the officer deliberately disregarded the statutory mandate of KRS 189A.105(4) and that suppression of the breath test evidence was proper.

#### Contacting an Attorney

The client being subjected to a breath, blood or urine test may be afforded an opportunity of at least ten (10) minutes, but no more than fifteen (15) minutes, to attempt to contact and communicate with an attorney *before* the administration of any test. KRS 189A.105(3). However, inability to reach an attorney does not relieve the person of his obligation to submit to any tests.

There is no *right* to have an attorney present but an attorney *may* be present provided that they can get to the testing site within the time period established (twenty minute observation period). KRS 189A.105(3). If the police deliberately prevents the client from attempting to contact an attorney, evidence obtained may be suppressed. Commonwealth v. Bedway, 466 S.W.3d 468 (Ky. 2015). This is based on constitutional notions of right to counsel and the public policy implications of allowing a suspect the right to receive advice and perhaps receiving a lesser sentence (i.e. if given the opportunity to contact counsel, they would have complied with a breathalyzer rather than refusing, thereby receiving a lesser mandatory minimum jail sentence). A "totality of the circumstances" analysis is necessary to determine if a violation took place. The Court Appeals in Ferguson v. Commonwealth, 362 S.W.3d 341 (Ky. Ct. App. 2011) held that the defendant's right to contact an attorney prior to submitting to an alcohol breath test was violated when the officer refused to allow the defendant access to her cellphone to retrieve her attorney's phone number. However, a client's right to contact an attorney was not violated when the officer dialed the number instead of allowing the client to dial himself. Bhattacharya v. Commonwealth, 292 S.W.3d 901 (Ky. App. 2009).

If an attorney is present, there is no privacy between the attorney and client before the breath test. Litteral v. Commonwealth, 282 S.W.3d 331 (Ky. Ct. App. 2008). Allowing the attorney and client to be left alone would interfere with the required 20-minute observation period. However, this may not be true for blood or urine tests, as the 20-minute observation is not required.

#### Implied Consent for Boaters

KRS 235.240(3) Probable cause must exist to believe the operator violated the statute of boating under the influence. Failure to submit to test is a separate offense and imposes a fine and jail time depending on number of prior refusals. No license suspension is involved. KRS 235.240(4), KRS 235.990(2).

## REFUSAL

### What is Refusal?

**PRIOR TO JULY 1, 2020:** Refusal is defined in KRS 189A.005(8) as:

“Declining to submit to any test or tests pursuant to KRS 189A.103. Declining may be either by word or by the act of refusal. If the breath testing instrument for any reason shows an insufficient breath sample and the alcohol concentration cannot be measured by the breath testing instrument, the law enforcement officer shall then request the defendant to take a blood or urine test in lieu of the breath test. If the defendant then declines either by word or by the act of refusal, he shall then be deemed to have refused if the refusal occurs at the site at which any alcohol concentration or substance test is to be administered.”

*See also, KRS 189A.104*

**EFFECTIVE JULY 1, 2020:** Refusal is defined in KRS 189A.005(9) as:

"Refusal" means declining to submit to any test or tests pursuant to KRS 189A.103. Declining may be either by word or by the act of refusal. If the breath testing instrument for any reason shows an insufficient breath sample and the alcohol concentration cannot be measured by the breath testing instrument, the law enforcement officer shall then request the defendant to take a blood or urine test in lieu of the breath test. If the defendant then declines either by word or by the act of refusal, he shall then be deemed to have refused if the refusal occurs at the site at which any alcohol concentration or substance test is to be administered.

Any act that obstructs the results of the breath test, such as eating, drinking, smoking, or swallowing medication prior to performing the test is considered a refusal. Moseley v. Commonwealth, 492 S.W.2d 204 (Ky. 1973). However, whether an act amounts to refusal is a question of fact determined at a pretrial license suspension hearing pursuant to 189A.220 or DUI acquittal pursuant to 189A.107(2).

KRS 189A.220 contains no requirement that the individual knowingly refuse.

### What is not a Refusal?

An insufficient breath sample, however, is **not** a refusal in itself. There must first be an insufficient sample and the officer must have requested a blood or urine test. Only then is it considered a refusal.

Refusal to sign a release at a hospital is **not** a refusal.

### What Tests can a Person Refuse?

KRS 189A.104 specifically states:

1. The only alcohol or substance testing that is subject to refusal or enhancement of penalties provided for in this chapter is:
  - a. **Breath analysis testing** by a machine installed, tested, and maintained by the Commonwealth for that specific purpose at a police station or detention facility;
  - b. **Blood** or **urine** testing at the request of the officer at a police station, detention facility, or medical facility; or
  - c. **Combination of tests** required in paragraphs (a) or (b) of this subsection.

Requirements for a Refusal to be Valid

To be a valid refusal, there must be a specific request that the individual take the test, “not just an inquiry whether the person would like to take it.” Cook v. Commonwealth, 129 S.W.3d 351, 360 (Ky. 2004). The refusal can be express or implied by conduct. Commonwealth v. Hayden, 484 S.W.2d 97, 99 (1972).

What if the client changes his/her mind? If a client refuses to comply with the initial test but then changes his/her mind and requests the test, the officer is **NOT** required administer the test. Cummins v. Lentz, 813 S.W.2d 822 (Ky. Ct. App. 1991); Sigretto v. Commonwealth, No. 2009-CA-000691-DG, 2010 WL 1508166 (Ky. Ct. App. Apr. 16, 2010)(unpublished).

Consequences of Refusal

A driver has the freedom to refuse to submit to any form of testing. However, refusal to submit can result in a myriad of consequences including the immediate suspension of their driver’s license and a double minimum jail sentence. KRS 189A.105(2); Commonwealth v. Duncan, 483 S.W.3d 353 (Ky. 2015). See **Aggravating Circumstances**. Additional consequences include evidence of refusal being used as evidence of guilt (KRS 189A.105(2)(a)(1)). A driver who refuses to submit to all of the tests requested by an officer, including a breath test, is not entitled to request an independent test because such a right arises only after (s)he has submitted to all of the officer’s requested tests. Gooch v. Commonwealth, 496 S.W.3d 492 (Ky. Ct. App. 2016).

The newly written KRS 189A.105(2)(a)(3) also states:

“That although his or her license will be suspended, he or she may be eligible immediately for an ignition interlock license allowing him or her to drive during the period of suspension and, if he or she is convicted, he or she will receive a credit toward any other ignition interlock requirement arising from this arrest.”

If a client refuses any alcohol concentration test, the “prosecuting attorney shall **NOT** agree to the amendment of the charge to a lesser offense and shall oppose the amendment of the charge at trial, unless all prosecution witnesses are, and it is expected they will continue to be, unavailable at trial.” KRS 189A.120(1). Jones v. Commonwealth, 279 S.W.3d 522 (Ky. 2009).

The client’s driver’s license will be suspended during the pendency of the action under KRS 189A.200 (judicial review of pretrial license suspension). See **Pretrial License Suspension**.

Consequences of Refusal Quick Look:

	<b>Refusal</b>	<b>Compliance</b>
<b>Jail Time</b>	Double the minimum for that offense	Minimum sentence (no aggravators)
<b>License KRS 189A.107</b>	By motion of CW, court to hold hearing to determine by clear and convincing evidence that the persona actually refused the test  If found, then license suspension and Court may authorize person to apply for IIL	License is suspended for the pendency of the action
<b>Trial</b>	Evidence can be used as evidence of guilt	Evidence can be used as evidence of guilt
<b>Ignition Interlock Device</b>	Statute is silent on this point	Immediately eligible for ignition interlock license
<b>Independent Testing</b>	Ineligible	Eligible

Refusal Checklist:

- Definitions in the statute:
  - Was the client operating or in physical control of a motor vehicle anywhere in the state?
- Was the client under arrest?
- Were there “reasonable grounds” to believe that the client violated KRS 189A.010?
- Did the officer advise the client of the consequences of refusal pursuant to KRS 189A.105?
- Did the officer advise the client of his/her right to contact an attorney and have the attorney present at testing?
- Did the client actually refuse?
- Would the test be admissible?

**NON-MOTOR VEHICLES:** Although non-motor vehicles are covered by the implied consent warning, there is no pretrial suspension for a refusal on a non-motor vehicle.

The Commonwealth cannot comment on the defendant’s refusal to take a warrantless blood test. McCarthy v. Commonwealth, 2019 WL 2479324 (Ky. App. June 14, 2019) **UNPUBLISHED**. The Commonwealth contended that it was commenting on his refusal merely to explain to the jury why there was no blood test result. The Court, however, agreed with appellant, holding that the commentary had violated appellant’s exercise of his constitutional right to resist a warrantless search and that reversal was merited despite the circuit court’s admonition that the comments could not be used to imply any motivation on the part of appellant in refusing the test. Like the Fifth Amendment right to remain silent cannot be subject to commentary, so, too, is the Fourth Amendment right to resist a warrantless search immune from comment.

## BREATH, BLOOD, AND URINE TESTS

The admissibility of any breath, blood, or urine tests must be challenged pretrial. Commonwealth v. Green, 194 S.W.3d 277 (Ky. 2006). See also, *Pretrial Motions*.

Any person who is arrested for suspected DUI and who, upon blood alcohol testing, shows a blood alcohol reading above .15 SHALL be detained in custody at least four (4) hours following arrest. KRS 189A.110.

When can an Alcohol/Drug Test be Given?

An officer must have reasonable grounds to believe that there has been a violation of KRS 189A.010(1) or 189.520(1) before compelling the administration of a breath, blood and/or urine test. KRS189A.103(1). The test must be performed **after** a mandatory twenty (20) minute period in which the officer is able to personally observe the person to be tested and the officer issuing the breathalyzer test must be certified to do so. KRS 189A.103(3)(a); KRS 189A.103(3)(b).

Unlike breath tests, blood or urine tests must be conducted by a physician, registered nurse, phlebotomist, medical technician, or medical technologist not otherwise prohibited by law. KRS 189A.103(6). A breathalyzer does not have to be performed before either a blood or urine test. See Beach v. Commonwealth, 927 S.W.2d 826 (Ky. 1996). It is within the discretion of the police officer as to which tests will be administered.

KRS 189A.103(3) checklist of requirements for breath, blood, or urine test(s)

- Officer must have **reasonable grounds** to believe KRS 189A.010(1) or KRS 189A.520(1) have been committed
- Breath, blood, or urine tests must be administered by the Justice and Public Safety **administrative regulations**

- If breath test, the police officer must have personal observation of the individual for **twenty (20) minutes**
- If breath test, the police officer must be **certified** to administer the breath test
- If breath test, the machine must be **used in the correct fashion**
- If **blood test, can only be taken by** a physician, registered nurse, phlebotomist, medical technician, or medical technologist not otherwise prohibited by law can withdraw any blood

## Breathalyzer

### *Breath Test Certification, Instrument, and Proper Usage*

500 KAR 8 outlines (1) the requirements for breathalyzer certification, (2) requirements for the breath alcohol analysis instrument, and (3) how to properly administer the breath test to an individual.

### Breath Test Certification

Before operating a breathalyzer, the officer must be certified to do so. KRS 189A.103(3)(b). 500 KAR 8:010(1) lists three requirements to obtain this certification:

1. To become certified the person must successfully complete the Breath Test Operator Certification training program of the Department of Criminal Justice Training or the Department of Kentucky State Police.
2. Successful completion shall mean receiving a passing score on a standardized written examination as provided by the Department of Criminal Justice Training, or the Department of Kentucky State Police, and the satisfactory completion of a standardized practical proficiency examination administered by a certified instructor.
3. The examinations shall be included in a minimum of twenty-four (24) hours of instruction, which shall include operation of approved instruments that measure alcohol concentration.

### Recertification

To obtain recertification, the officer must review standards and procedures for a minimum of four (4) hours of recertification instruction by the Department of Criminal Justice Training or the Department of Kentucky State Police. If they fail to obtain certification within the two (2) year period, the officer must repeat the twenty-hour (24) hour breath Test Operator Certification training program.

### Revocation of Certification

500 KAR 8:01: An officer's breath test certification may be revoked for the following reasons:

1. Misuse of the instrument by the breath test operator in violation of law;
2. Refusal or failure to perform procedures in an acceptable manner; AND
3. Failure to testify at any judicial proceeding under KRS Chapter 189A without just cause.

All revocations of certification are conducted by the Commissioner of the Department of Criminal Justice Training or the Commissioner of the Department of Kentucky State Police. A written notice is first sent to the officer and an administrative hearing is conducted pursuant to KRS 13B.

### Breath Test Certification Quick Look:

- Certification is valid for two (2) years from date of issuance
- Certification expires if recertification is not obtained within that two (2) year time period

- Recertification is permissible within six (6) months following expiration
- If the expiration occurred while the officer was on active duty for the Kentucky National Guard or United States Armed Forces, the eligibility for recertification is within six (6) months following his/her return to employment

### The Breath Test Analysis Instrument

500 KAR 8:02 provides that the Department of State Police is responsible for purchasing all breath alcohol analysis instruments which are assigned to the Department of State Police. To be a **certified** instrument, the instrument must be accurate within + or - 0.005 or + or - five (5) percent, whichever is greater. Further, all instruments must be examined by a technician trained or employed by the Department of State Police prior to being used **AND** after repairs are made.

### Proper Administration of Breath Tests

#### 500 KAR 8:03(1) Breath Alcohol Tests

- (1) A certified breath test operator shall have the person under personal observation at the location of the test for a minimum of twenty (20) minutes prior to the breath alcohol analysis. During that period, the subject shall not have oral or nasal intake of substances, which will affect the test.
- (2) A breath alcohol concentration test shall consist of the following steps **in this sequence**:
  - (a) Ambient air analysis;
  - (b) Alcohol simulator analysis;
  - (c) Ambient air analysis;
  - (d) Subject breath sample analysis; and
  - (e) Ambient air analysis.
- (3) Each ambient air analysis performed as part of the breath alcohol testing sequence shall be less than 0.02 alcohol concentration units.

### Admissibility

The Supreme Court of Kentucky has determined that breath tests have sufficient reliability to be admissible into evidence and to sustain a conviction. Commonwealth v. Wirth, 936 S.W.2d 78 (Ky. 1996). The proper foundation requirements for admission of a breath alcohol test restated in Commonwealth v. Roberts, 122 S.W.3d 524 (Ky. 2003) are:

1. The machine was properly checked and in proper working order at the time of the test.
2. The test consisted of the steps and sequences set forth in 500 KAR 8:030(2).
3. A certified operator had continuous control of the person by present sense impression for at least twenty (20) minutes prior to the test and that during the twenty (20) minute period the subject did not have oral or nasal intake of substances which will affect the test.
4. The test was given by an operator who was properly trained and certified to operate the machine.
5. The test was performed in accordance with standard operating procedures.

This opinion also clarified the holding in Commonwealth v. Wirth and overruled Marcum v. Commonwealth, 483 S.W.2d 122 (Ky. 1972) and Owens v. Commonwealth, 487 S.W.2d 897 (Ky. 1972). The Commonwealth can satisfy the foundation requirements by relying solely on the testimony of the machine operator (i.e. the police officer), provided the documentary evidence (such as the maintenance records and test ticket) are properly admitted,

making it unnecessary to produce the testimony of the technician who serviced and calibrated the breathalyzer machine.

Following both *Roberts* and *Wirth*, Commonwealth v. Walther, 189 S.W.3d 570 (Ky. 2006) confirmed that a certified copy of the intoxilyzer maintenance records can be admitted into evidence to show the instrument was in proper working order. Notations by the breathalyzer technician on maintenance and performance records of breath analysis instruments are not testimonial and their admissibility is not governed by *Crawford v. Washington*. See also Rowe v. Commonwealth, No. 2007-CA-001540-DG, 2008 WL 4754923, (Ky. Ct. App. Oct. 31, 2008)(*unpublished*). Even testimony that the breathalyzer went through a “calibration check” is enough to lay the proper foundation for introduction of breathalyzer evidence. Lewis v. Commonwealth, 217 S.W.3d 875 (Ky. Ct. App. 2007).

#### *Preliminary Breath Test*

Typically there will be two breathalyzer tests that will be given to your client, one known as the preliminary breath test which is given at the scene of the crime before the individual is arrested, and the second breathalyzer, which is installed at the police station and given when the client is in booking.

The preliminary breath test is used only for purposes of establishing probable cause. Greene v. Commonwealth, 244 S.W.3d 128 (Ky. Ct. App. 2008). For this reason it is **NOT** admissible at trial. KRS 189A.104(2); Hoppenjans v. Commonwealth, 299 S.W.3d 290 (Ky. Ct. App. 2009). In an unpublished case, however, Williams v. Commonwealth, No. 2002-CA-000541-MR, 2003 WL 1403336 (Ky. Ct. App. Mar. 21, 2003), the court determined that an officer’s testimony as to the presence of alcohol was admissible, even though he was not permitted to testify to the reading of the preliminary breath test. Furthermore, an individual refusal of the preliminary breath test cannot be used against him in anyway. KRS 189A.100(1). The exception to this rule is when the preliminary breath test reading will be beneficial for the defendant in non-DUI cases. In Stump v. Commonwealth, 289 S.W.3d 213 (Ky. Ct. App. 2009)(overruled on other grounds by Crouch v. Commonwealth, 323 S.W.3d 668 (Ky. 2010) the Court determined that KRS 189A.104 applied only to DUI cases and therefore, introduction of the PBT reading to argue intoxication at time of confession was admissible.

#### *Challenges to the Breathalyzer*

##### 20-minute Observation Period

The breathalyzer test must be performed after a mandatory 20-minute observation period. KRS 189A.103(3)(a). In Commonwealth v. Crosby, the Appellate Court affirmed the suppression of the BAC test results when the officer began his mandatory 20-minute observation while the defendant was in the back of the police cruiser, on the way to the jail where the breathalyzer was located. No. 2017-CA-000572-MR, 2018 WL 3193074, (Ky. Ct. App. June 29, 2018), review denied (Oct. 25, 2018), opinion not to be published. The court reasoned that even though the officer instructed the defendant not to eat, drink, smoke, or place anything in this mouth or nasal cavity, there were too many factors that impeded the officer’s ability to perform the observation. These reasons included (1) it was dark; (2) they were traveling on a rural road; and (3) no testimony that the officer drove with interior lights inside the vehicle to view the defendant’s face. The observation period should have begun, unimpeded at the jail where the breathalyzer was located. *Id.* The BAC was deemed to be unreliable and suppression was appropriate.

If an attorney is present, there is no privacy between the attorney and client before the breath test. Litteral v. Commonwealth, 282 S.W.3d 331 (Ky. Ct. App. 2008). Allowing the attorney and client to be left alone would interfere with the required 20-minute observation period.

The start time, the calibration check, and the ambient air analysis are all irrelevant as they relate to KAR's 20-minute observation requirement prior to administering a breathalyzer test. The controlling factor is whether the officer had the subject under present sense perception for a period of at least twenty (20) minutes prior to analysis of the subject's breath. Culver v. Commonwealth, No. 2003-CA-000632-DG, 2004 WL 1301318 (Ky. Ct. App. June 11, 2004)(*unpublished*).

### Calibration

Challenges to the calibration can go to admissibility of the BAC **OR** the weight of the evidence. Results of a breathalyzer test are admissible when calibration unit and subject testing unit were shown to be in proper working order on the testing date. Any problems with the intoxilyzer machine on dates other than the testing date go to the weight of the evidence, not to its admissibility. Culver v. Commonwealth, No. 2003-CA-000632-DG, 2004 WL 1301318 (Ky. Ct. App. June 11, 2004)(*unpublished*).

The 4th Amendment permits warrantless breath tests incident to arrests for drunk driving. Birchfield v. North Dakota, 136 S. Ct. 2160 (2016). The impact of breath tests on privacy is slight, and the need for BAC testing is great. *Id.* at 2184.

### **Challenges to the Breathalyzer Quick look:**

- 20-minute observation period was insufficient
- Breathalyzer was improperly calibrated / not working properly
- The BAC results are inconsistent with the behavior of the client (i.e. few or no sign or impairment, completed Field Sobriety Tests correctly)
- Relation Back → The BAC does not reflect the BAC at the time the client was operating the motor vehicle
- The characteristics of the client as well as evidence of **when** alcohol was consumed does not support the BAC results (i.e. A 135-lb female who drank two beers over the course of 2 hours would not have a BAC result of .17)

## Blood Tests

### Proper Administration of a Blood Test

#### 500 KAR 8:03(2) Blood Tests

1. The blood sample shall be collected in the presence of a peace officer, or, at the direction of the officer, another person who can authenticate the sample.
2. The blood sample shall be collected by a person authorized to do so by KRS 189A.103(6).
3. The blood sample shall be collected by the following method:
  - a. Ethyl alcohol (ethanol) shall not be used to clean the skin where a blood sample is to be collected; and
  - b. Blood collecting containers shall not contain an anticoagulant or preservative, which will interfere with the intended analytical method.
4. Individual blood collecting containers shall be labeled to provide the following information:
  - a. The name of the person from which the blood sample is collected;
  - b. The date and time the blood sample is collected;
  - c. The name of the person and agency collecting the blood sample;
  - d. The name of the officer and agency requesting the collection of the blood sample; and
  - e. The complete uniform citation number if available.

5. The blood sample shall be delivered to a forensic laboratory branch of the Department of Kentucky State Police or other clinical laboratory as designated by the Department of Kentucky State Police.

Blood tests do not require a 20-minute observation period but are still required to be taken within two hours after cessation of operation or physical control of a motor vehicle. KRS 189A.010(2)(b) states:

- (2) With the exception of the results of the tests administered pursuant to KRS 189A.103(7),
  - (b) If the sample of the person's blood that is used to determine the presence of a controlled substance was obtained more than two (2) hours after cessation of operation or physical control of a motor vehicle, the results of the test or tests shall be inadmissible as evidence in a prosecution under subsection (1)(d) of this section. The results of the test or tests, however, may be admissible in a prosecution under subsection (1)(c) or (e) of this section.

### *Challenges to the Blood Draw*

#### Fourth Amendment

The Fourth Amendment treats blood draws differently than breath tests. "Blood tests are significantly more intrusive, and their reasonableness must be judged in light of the availability of the less invasive alternative of a breath test. Respondents have offered no satisfactory justification for demanding the more intrusive alternative without a warrant. Birchfield v. North Dakota, 136 S. Ct. 2160, 2184 (2016).

However, be aware of Whitlow v. Commonwealth, 575 S.W.3d 663 (Ky. 2019), Fayette Circuit Court: A Court Order was the equivalent of a search warrant for purposes of seizing a sample of the defendant's blood, under KRS 189A.105(2)(b), in a DUI related crash involving the death of two pedestrians. The statute expressly states that "[n]othing in this subsection shall be construed to prohibit a judge of a court of competent jurisdiction from issuing a search warrant or other court order requiring a blood or urine test...of a defendant charged [with a DUI]... when a person is killed or suffers physical injury." However, the statute later provides that in the event of a fatality, the officer shall seek a search warrant for blood or urine testing unless already given by consent. The Court found that while a court order and a search warrant were not synonymous, in this case there was an affidavit in support of the court order which included numerous facts and observations establishing probable cause to justify the blood test, that none of it was false or misleading, and that probable cause was not contested by the parties. The Supreme Court stated: "The officer obtained a valid search warrant, even though it was labeled as a court order, before the blood test was administered."

#### Relation Back

The Kentucky Supreme Court held in Lopez v. Commonwealth, 173 S.W.3d 905 (Ky. 2005) that to convict a defendant of operating a motor vehicle with an alcohol concentration of or above 0.08, the Commonwealth must prove that the defendant's blood alcohol concentration was 0.08 **at the time he was operating a motor vehicle.**

Pence v. Commonwealth recognized the importance of this issue. 825 S.W.2d 282, 284 (Ky. Ct. App. 1991)(overruled on other grounds by Blades v. Commonwealth, 957 S.W.2d 246 (Ky. 1997)). An officer found Pence behind the wheel while in a stationary vehicle at a truck stop. He admitted to having operated the vehicle earlier in the night and his BAC was 0.29 at the time of the test. There was no evidence presented as to how long Pence had been at the truck stop before the officer arrived. The court found, using a *Wells* analysis, that there was no evidence that Pence was operating the vehicle while intoxicated and further stated, "Viewing the evidence in the light most favorable to the prosecution, there is still an absence of proof that the appellant operated his vehicle while intoxicated. At best the evidence makes the existence of these elements of the offense slightly more

probable than they would be without such evidence, but that is not enough." *Id.* at 284. See also Jackson v. Virginia, 443 U.S. 307 (1979).

### Voluntary Consent

Consent to draw blood need not be knowing or intelligent, just voluntary. Cook v. Commonwealth, 826 S.W.2d 329 (Ky. 1992).

The question of the voluntariness of an expressly given consent is determined after "careful scrutiny all of the surrounding circumstances in a specific case." Cook v. Commonwealth, 826 S.W.2d 329 (Ky. 1992). The Commonwealth must prove voluntariness by a preponderance of the evidence standard. *Id.* at 331 (citing U.S. v. Matlock, 415 U.S. 164, (1974)), but the trial court must conduct "an objective evaluation of police conduct and not ... the defendant's subjective perception of reality." *Cook* at 331, (citing Colorado v. Connelly, 479 U.S. 157 (1986)). See also Commonwealth v. Brown, 560 S.W.3d 873, 876 (Ky. Ct. App. 2018), reh'g denied (Oct. 8, 2018).

## Urine Tests

### Proper Administration of a Urine Test

#### 500 KAR 8:03(3) Urine Tests

- (1) A urine sample shall be collected in the presence of a peace officer, or, at the direction of the officer, another person who can authenticate the sample. The witnessing person shall be of the same sex as the Legislative Research Commission person providing the urine sample.
- (2) The urine sample shall be collected from the subject person's voiding of his or her bladder. This urine sample may be tested for substances of abuse or impairment including alcohol.
- (3) The urine sample shall be collected in a clean, dry container. Preservatives shall not be used.
- (4) The urine sample container shall be labeled to provide the following information:
  - (a) The name of the person from whom the urine sample is collected;
  - (b) The date and time the urine sample is collected;
  - (c) The name of the person and agency collecting the urine sample;
  - (d) The name of the officer and agency requesting the collection of the urine sample; and
  - (e) The complete uniform citation number if available.
- (5) The urine sample shall be delivered to a forensic laboratory branch of the Department of Kentucky State Police or other clinical laboratory as designated by the Department of Kentucky State Police.

### Challenges to the Urine Test

Absent testimony or evidence of that a driver was impaired at the time of operation (or at the time of a car wreck), the admission of urinalysis results showing cocaine and marijuana in the driver's system would only encourage speculation and unduly prejudice the driver by labeling him a drug user. Burton v. Commonwealth, 300 S.W.3d 126 (Ky. 2009).

## ARREST

Typically a police officer will arrest an individual for a DUI offense, however, the police officer may issue a citation in lieu of an arrest. KRS 431.015. In order to arrest an individual for violation of KRS 189A.010, the officer must observe the offense or have probable cause to believe that a DUI offense has been committed. KRS 431.005(e). For example, if an individual was in a motor vehicle accident but left the scene before a police officer arrived, that officer may arrest that individual when located **but only if** the officer has probable cause to believe that a DUI had been committed.

## The Uniform Citation

Uniform citations are the most common charging document for DUI offenses. RCr. 6.02. The uniform citation, if complete and accurate, should contain a plethora of information that can be the first line of defense. By spotting issues within the uniform citation, such as failure to conduct the 20-minute observation period, you will be better prepared for pretrial motions, determining if an expert is needed, and ultimately developing a solid defense for your client.

The officer must note in the citation that a video recording has been made of the transaction (the stop, arrest, pursuit, refusal, administration of the field sobriety tests. KRS 189A.100(3).

### *Sufficiency*

The charging document must be sufficient to inform the defendant of the charge against him/her. KRS 189A.010(1)(a) through (f) provides six possible avenues for a defendant to be prosecuted for a DUI. *See **The Different DUI Offenses***

Sometime before trial, the prosecution has a duty to notify the defendant under which section or sections the defendant is being charged. *See Commonwealth v. Wirth*, 936 S.W.2d 78, 81 (Ky. 1996) (“It would appear that fundamental fairness and appropriate trial preparation requires notice as to which statutory subsections will be proven by the Commonwealth. Such notice should be given in good faith within a reasonable time prior to trial to permit the defendant to assemble evidence in opposition to the charges against him. A blanket notice covering all possible violations without regard to the available evidence would defeat the purpose and be tantamount to no notice at all.”) Moreover, the Court in *Wirth* determined that the Commonwealth may prosecute a defendant under multiple subsections of the KRS 189A.010 statute and is not required to select one and one only subsection as long as notice is given. Remember though that even if the Commonwealth does not give notice, the error may be deemed harmless if that same information is provided through discovery and does not substantially prejudice the defendant. *Smith v. Commonwealth*, 164 S.W.3d 508, (Ky. Ct. App. 2004). *See also, Commonwealth v. Reynolds*, 136 S.W.3d 442 (Ky. 2004).

The police officer may or may not include within the body of the uniform citation the section under which the defendant is charged. However, if the citation has a defect or error, prosecution may continue if the defendant’s substantial rights are not prejudiced. RCr. 6.16. Therefore, if the officer simply indicates a violation of KRS 189A.010 without citing a specific section, use discovery or a bill of particulars to require the Commonwealth to specify which sections it intends to prosecute. Not filing a bill of particulars may limit the defendant’s opportunity to object to a change of theory. RCr. 6.16. *See also, Hall v. Commonwealth*, 402 S.W.2d 701, 702-703 (Ky. 1966) (“Unless the motion for a bill of particulars has been denied or the bill of particulars is inadequate, a defendant will not be heard to complain that he does not know with what he is charged.”)

### *Amending the Charging Document*

An indictment, information, complaint, or other charging document may be amended. RCr. 2.08; RCr. 6.16. Corrections such as time and dates may be amended anytime before a verdict is rendered, however, if justice requires, a continuance may be granted. If the defendant’s substantial rights are prejudiced, amendments may not be permitted.

**Challenging Probable Cause for Arrest Quick Look:** (this is a not a complete list)

- Did the client complete the Field Sobriety Test properly and as instructed?
- Did the officer conduct the Field Sobriety Tests correctly? Was (s)he properly trained?
- How was the client's driving prior to stop and arrest? (highlight GOOD driving)
- Did the officer uses other senses to establish probable cause i.e. smell of alcohol, smell of marijuana coming from the vehicle? What are the explanations for these smells (i.e. spilled alcohol on shirt earlier in the evening; borrowing a friend's car)

## ARRAIGNMENT

An individual charged with a crime must be brought before a judge without unnecessary delay. RCr. 3.02(2). An arraignment will take place in person or over video conference from the jail. The judge must inform the individual of the charges against him/her. The citation may be read at the request of the defendant or his/her counsel but is not necessary. In some counties, a copy of the citation is given to the defendant prior to arraignment so (s)he may have already read the allegations. The judge will then inform the defendant that he has a right to a trial, right to counsel, right not to testify against himself but any statements made may be used against him at a later proceeding. The judge will ask whether the defendant would like to plead guilty or not guilty to the charges.

If a not guilty plea is entered, the judge will then set the appropriate bail or release the defendant on their own recognizance. A return court date will be given. This date should allow a reasonable time for the defendant to confer with counsel.

If a guilty plea is entered, the defendant may be sentenced at that time or be held for sentencing on a different date.

**PRACTICE TIP:** If possible, ask for appointments to be made at the beginning of the arraignment. If you are appointed, you can advocate for the client during the entire arraignments, including making motions for bond reduction, bail credit, or amendment of charges.

## DISCOVERY

Obtain all relevant discovery for each DUI case. RCr 7.24 outlines items of discovery that can be requested. Additional information can also be requested through a bill of particulars. RCr 6.22. It is always best practice to make discovery requests in writing, so that if disputes are raised, documentation will be available. While preparing a DUI case, additional information may be requested or provided through supplemental discovery. For example, blood test results may take months to obtain and therefore are most often handed over separately and much later than initial discovery.

A four-part test is used by the court to determine whether or not a defendant is entitled to production of subpoenaed materials prior to trial. The moving party must show:

1. The documents are evidentiary and relevant;
2. That they are not otherwise producible reasonably in advance of trial by exercising due diligence;
3. That the party cannot properly prepare for trial without such production and inspection in advance of trial and that the failure to obtain such inspection may tend unreasonable to delay trial; and
4. That the application is made in good faith and is not intended as a general "fishing expedition."  
United States v. Nixon, 418 U.S. 683, 699-700 (1974).

**PRACTICE TIP:** Do NOT wait for all material before analyzing and preparing your client's case. Plenty of preparation, challenges and motions can be made while waiting on more discovery such as blood results.

Documentation that should be readily available for formal discovery is requested:

- Citation
- Police Report
- BA Ticket
- Jail Documents (remember if you are looking at medical records from the jail, a HIPPA release must be signed by the defendant)
- 911/CAD logs (both audio and printed)
- Officer training manuals

Checklist for Additional Discovery:

- Records related to your client:
  - Hospital records (from the date of offense)
  - Medical records
  - Prior DUI record (especially out of state offenses)
- Records related to the officer:
  - Certification of officer's training (breathalyzer, administering FSTs, DUI/traffic stops)
    - Remember that it is a requirement that officers must be certified to operate the breathalyzer and must follow guidelines while administering FSTs --- if he/she is not certified, challenge the tests
  - Accident reports
  - Dash Camera/ body camera/ audio recordings
  - Police chatter over the radio
- Records related to field sobriety tests:
  - Instructions that were given to the client during the field sobriety tests
  - Implied consent warning language (if implied consent was offered in another language, what was it? Is it a fair and accurate translation?)
- Records related to the breathalyzer
  - Calibration records
  - Equipment maintenance and repair records
  - Testing on the equipment
  - Logbook records (often kept with the machine)

**PRACTICE TIP:** Be sure to compare and analyze WHEN things occurred. There may be issues that are ripe for challenges. (i.e. if an accident occurred but the client was not on scene when officers arrived, was the blood test taken within two hours?)

Questions to ask yourself at first glance:

1. Is this really a DUI?
2. What type of DUI is this?
3. What is the date and time of the alleged violation?
4. Where did the alleged violation take place?
5. What kind of motor vehicle was involved?
6. Was there an accident?

- a. If yes, when was the accident reported? By whom? when did police arrive? When was the scene cleared?
  - b. Was the defendant at the scene of the accident?
  - c. Was the defendant injured?
7. Are there any aggravating circumstances?
  8. Is there a difference in time between the “violation time” and the “time of arrest”?
  9. Under what section of KRS 189A.010(1) is the officer alleging?
  10. When did the 20-minute observation period begin?
  11. When was implied consent warning read? What language was used?
  12. When and where were field sobriety tests administered?
  13. Did the defendant make any statements? Were Miranda warnings read? Did other passengers or witnesses make statements?

#### Limits on Use of Subpoena Duces Tecums

The court may quash *subpoena duces tecums* if they are unreasonable or oppressive. For example, in Commonwealth v. House, the court held that *subpoena duces tecum* to the manufacturer of the breathalyzer machine that sought the computer code source for an expert to examine for errors was nothing more than a fishing expedition. It is unreasonable if the party demanding production can point to nothing more than hope or conjecture that the subpoenaed material will provide admissible evidence. 295 S.W.3d 825 (Ky. 2009).

#### *Body Cam or Dash Cam Video*

Law enforcement is not required to record either by audio or video the pursuit, stop, or administration of the field sobriety tests, however, if video/audio is available, officers must follow the requirements set forth in KRS 189A.100(2).

(2) (a) Law enforcement agencies may record on film or videotape or by other visual and audible means:

1. The pursuit of a violator or suspected violator;
2. The traffic stop; or
3.
  - a. Field sobriety tests administered at the scene or such tests at a police station, jail, or other suitable facility; or
  - b. The refusal of a violator or suspected violator to submit to tests under KRS 189A.103; for a suspected violation of KRS 189A.010.

(b) Recordings made under paragraph (a) of this subsection shall be subject to the following conditions:

1. The testing is recorded in its entirety (except for blood alcohol analysis testing);
2. The entire recording of the field sobriety tests or refusal and the entire recording of the pursuit and traffic stop is shown in court unless the defendant waives the showing of any portions not offered by the prosecution;
3. The entire recording is available to be shown by the defense at trial if the defendant so desires regardless of whether it was introduced by the Commonwealth;
4. The defendant or his counsel is afforded an opportunity to view the entire recording a reasonable time before the trial in order to prepare an adequate defense;
5. Recordings shall be used for official purposes only, which shall include:
  - a. Viewing in court;
  - b. Viewing by the prosecution and defense in preparation for a trial; and

- c. Viewing for purposes of administrative reviews and official administrative proceedings. Recordings shall otherwise be considered as confidential records;
6. The videotape or film taken in accordance with this section shall, upon order of the sentencing court, be destroyed after the later of the following:
- a. Fourteen (14) months, if there is no appeal of any criminal or traffic case filed as a result of the videotape or film, or if the videotape or film does not record the actual happening of an accident involving a motor vehicle;
  - b. Fourteen (14) months after a decision has been made not to prosecute any case upon which an arrest has been made or a citation issued as a result of the videotape or film, if the videotape does not record the actual happening of an accident involving a motor vehicle;
  - c. Twenty-six (26) months, if there is no appeal of any criminal or traffic case filed as a result of the videotape or film, if the videotape or film records the actual happening of an accident involving a motor vehicle;
  - d. After all appeals have been exhausted arising from any criminal or traffic case filed as a result of the videotape;
  - e. At the conclusion of any civil case arising from events depicted on the videotape or film; or
  - f. At the conclusion of the exhaustion of all appeals arising from any law enforcement agency administrative proceedings arising from events depicted on the videotape or film; and
7. Public officials or employees utilizing or showing recordings other than as permitted in this chapter or permitting others to do so shall be guilty of official misconduct in the first degree.
- (3) When a peace officer makes a videotape or film recording of any transaction covered by subsection (2) of this section and a citation is issued or an arrest is made, the peace officer shall note on the uniform citation that a videotape has been made of the transaction.

## PRETRIAL MOTIONS

The admissibility of any test result should be challenged pretrial, otherwise the suppression issue may be deemed waived, absent the showing of good cause. Commonwealth v. Green, 194 S.W.3d 277 (Ky. 2006).

**PRACTICE TIP:** Renew all motions that were previously denied to make the record for appeal.

Motions Practice allows you to:

- Preview the state's evidence and trial strategy
- Edit, change, revise, or sure up your defense strategy or theory
- Reevaluate your case (is it going to hold up at trial?)
- Be better prepared for plea negotiations
- Learn more about a particular officer, police department, training (or lack there of) for future cases

Motion Practice Quick Look: (this is a not a complete list)

- Discovery
- Bill of Particulars
- Illegal Stop
- Illegal Seizure
- Illegal Search
- Checkpoints/Roadblocks
- Lack of Probable Cause
- Operation (i.e. *Wells* motion)
- Fifth Amendment
- Chain of custody
- Suppression of blood, breath, or urine tests
- Suppression of field sobriety tests
- Expert Testimony/Consultation/ Hearing or Trial Preparation
- Implied Consent
- Due Process
- Speedy Trial

## TRIAL

Plea in absentia

An attorney may enter a plea in absentia for their client, however, in addition to all paperwork being signed by the defendant, the attorney must also obtain a written waiver of appearance from the client. This is specifically required by RCr 8.28(4). If a plea in absentia is entered absent a waiver of appearance, the resulting conviction MUST be challenged before the prior offense is successfully used to enhance a conviction. For example, a challenge to the validity of a DUI 1<sup>st</sup> conviction must be made before a DUI 2<sup>nd</sup> offense, which is enhanced by the first. Commonwealth v. Lamberson, 304 S.W.3d 72 (Ky. Ct. App. 2010).

## Jury Instructions

Defining “Under the Influence”

The Commonwealth cannot instruct jurors on the definition of “under the influence.” In Bridges v. Commonwealth, the Supreme Court of Kentucky determined that a jury instruction which defined “under the influence” equated it with mere consumption, which in turn “re-writes the statute so as to incriminate any person who drives after having consumed any amount of alcohol at any time.” 845 S.W.2d 541, 542 (Ky. 1993). Furthermore, the Court states that “proof that a driver was ‘under the influence’ is proof of impaired driving ability. *Id.* (emphasis added by the Court).

Alternative Theories within the Jury Instructions

When there is evidence to support a DUI conviction under alternative theories of liability, the Commonwealth is not required to elect only one theory under which to proceed. A single jury instruction allowing a DUI conviction under alternative theories of criminal liability is proper despite no separate findings as to each means of the commission of the offenses. Evans v. Commonwealth, 45 S.W.3d 445, 447 (Ky. 2001). Note that in Evans the court likened this to the statute for intentional and wanton murder being presented in a single instruction.

**PRACTICE TIP: JURY INSTRUCTIONS**

- Draft your jury instructions early in the preparation. It will remind you of the elements of the offenses and shape your defense theory.
- Always draft your own instructions and do not rely on the Commonwealth's instructions. By submitting your own jury instructions and objecting to any other form of instructions given, you are preserving the issue for appeal.

**Voir Dire**

Voir dire is the only opportunity you will have to hold a conversation with the jury panel. The best voir dices are those in which the jurors are not only talking to you but also with each other.

Reasons to Prepare and Properly Conduct a Voir Dire:

- Allows you to introduce your theory of innocence to the jury panel
- Humanizes your client
- Educates the jurors (and often times the judge) on issues that the expert will discuss (i.e. relation back, metabolites, medical condition)
- Learn about "gray" areas associated with drinking
  - "consumption" is different than "intoxication"
- Jurors who are vocal will help you educate the entire panel

Possible Voir Dire Topics: (this is not a complete list)

- Case neutral topics (should be in every case)
  - Presumption Innocence
  - Burden of Proof
  - Right not to testify/ defendant's silence
  - Penalty ranges (permitted in misdemeanor cases by *Lawson v. Commonwealth*, 53 S.W.3d 534 (Ky. 2001))
- Interactions with police officers
- Attitudes about alcohol/ drug use
- Attitudes about DUIs
- Drinkers v. non-drinkers
- Driving habits
- Does bad driving = DUI?
- Under the influence is different from mere consumptions
- Why one would refusal to take a BAC test (i.e. afraid of needles)
- Field Sobriety Tests (reasons that one would do badly)

**PRACTICE TIP: VOIR DIRE**

- Ask questions in different formats. Take a poll. Fill in the blank statements. Agree or disagree with a blanket statement. Focus on one juror and ask questions then ask another juror is (s)he agrees or disagrees. Do NOT ask questions such as “Can we all agree to .....?” This type of question will rarely give you any information and jurors are not likely to raise their hand and disagree.
- In your trial notebook, write out all your voir dire questions. Keep one topic per page so it will be easier to discard or skip over sections that may have been covered.
- It is often helpful to have another individual seated at counsel table to take notes as you conduct the voir dire. This will allow you to focus on the conversation rather than taking notes. That individual can also answer questions from the client during voir dire. If all co-workers are out of the office on your trial date, contact the author of this manual for additional resources- perhaps an investigator from another office may be able to help during voir dire.

*Bifurcated Trials*

DUI trials should be bifurcated: with a separate sentencing phase. Previous DUI convictions are not admissible during the guilt phase of a trial when offered to enhance the penalty. The Supreme Court of Kentucky in Dedic v. Commonwealth, 920 S.W.2d 878, 879 (Ky. 1996) held

“In misdemeanor DUI trials, evidence of previous DUI convictions shall not be introduced until a guilty verdict is rendered on the underlying charge. In order to fulfill the legislative mandate of enhanced penalties for repeat DUI offenders and in accordance with our rule-making authority, this Court orders the District Courts to bifurcate misdemeanor DUI trials. As has been shown in felony proceedings, the bifurcation will not impose a heavy administrative burden on the courts or the prosecution. This holding reaffirms the fundamental principle that ‘[a]n accused is entitled to be tried for one offense at a time, and evidence must be confined to that offense.’ O’Bryan v. Commonwealth, 634 S.W.2d 153, 156 (1982).” See also, Commonwealth v. Ramsey, 920 S.W.2d 526, 529 (Ky. 1996)

Furthermore, prior convictions are not an essential element of the Commonwealth’s case-in-chief and must be introduced during the penalty phase.

**Experts***Types of Defense Experts to Consider for DUI Offenses*

Remember that expert testimony, to be admissible, must comply with KRE 702, which states:

“If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if:

- (1) The testimony is based upon sufficient facts or data;
- (2) The testimony is the product of reliable principles and methods; and
- (3) The witness has applied the principles and methods reliably to the facts of the case.”

**PRACTICE TIP:** Always challenge the Commonwealth when they try to tender the officer as an expert witness. Officers, despite their training, education, or years on the force, are NOT experts for the purposes of DUIs. Drug Recognition Experts, however, can be labeled as such.

Possible Experts for DUI trials:

- Toxicologists
- Internal Medicine Physicians
- Independent Lab Technicians
- Accident Reconstructionist
- Psychologist
- Psychiatrist/Mental health expert
- Neurologist
- Pharmacologist

\*\* Remember that one expert may be right for one case but not the other, even if there are similarities between the two cases. Experts should be chosen on an individualized basis and should be the right fit for this case, this client, this theory of innocence.

**PRACTICE TIP:** Use an independent expert for trial and do NOT rely on the officer as your expert. The officer is NOT on your team and can easily derail your defense if you expect them to help your client.

*Testimony of the Police Officer*

Iraola-Lovaco v. Commonwealth, 586 S.W.3d 241 (Ky. 2019), Fayette Circuit Court:

In DUI cases, it is well established that testimony of Field Sobriety Tests (FSTs) are admissible. However, in this case, where the police testified that the defendant had “failed” the “tests,” the defendant argued on appeal that use of the terms “test,” “pass” and “fail” lent the police officer’s lay witness testimony an “aura of scientific validity” implying reliability and transforming the testimony into expert witness testimony. Unfortunately, the defendant did not object to this at trial, nor challenge the ability of the officer to properly administer the test. The Supreme Court adopted the language of a Kansas opinion held that:

“[W]here officer testimony does not link test performance with a specific level of intoxication, the mere use of the term ‘test’ or an indication by the officer that the defendant failed to perform the tests adequately and, therefore, ‘failed’ the test does not lend scientific credibility to the test results. There is only a semantic difference between 13 ‘field sobriety test’ and ‘field sobriety exercise...’ [citing *State v. Shadden*, 290 Kan. 803, 235 P.3d 436, 453-54 (2010) (citation omitted)].

Here, Off. Bellamy did not equate a level of certainty or probability to his opinion that Iraola-Lovaco was intoxicated, or correlate Iraola-Lovaco’s performance on the FSTs with a specific BAC level. Rather, Off. Bellamy testified that based on his training, experience, and personal observations, Iraola-Lovaco’s performance on the FSTs led Off. Bellamy to opine that he was intoxicated.

The upshot of the case is that if the officer testifies that the failure of the FSTs are linked to a particular blood alcohol concentration, and if the attorney objects, the result would be that the testimony should be excluded at trial (absent qualifying the police officer as an expert).

*Drug Recognition Experts (DREs)*

DREs can be called by many titles: Drug Recognition Expert, Drug Recognition Examiner, Drug Recognition Evaluator, Drug Recognition Technician, or Drug Recognition Specialist. Regardless of title, the National Highway Traffic Safety Administration (NHTSA) defined DRE as “to designate an individual who is specially trained and has continued training to conduct examinations of drug-impaired drivers.”

**PRACTICE TIP:** This is an area ripe for challenges! Always challenge a DRE

Certification to Become a Drug Recognition Expert

DRE certification is approximately 160 hours and has a three-phase training curriculum.

	Hours	Requirements	Testing
<b>Phase I: Pre-school</b>	16	Overview of 7 drugs categories and 12-step DRE evaluation	Proficiency test in SFSTs Final Test
<b>Phase II: DRE School</b>	56	30 different chapters covered  Mandatory mid-course review	5 quizzes final exam (100 questions) must get 80% but allows one retake
<b>Phase III: Field Certification</b>		Minimum of 12 evaluations  Must be the evaluator of 6 of 12  Must have minimum of 3 different drug categories	Must complete narrative report and give opinion on all 12 evaluations Final Knowledge Test: 5 part test; must score 80%, complete the Drug Symptomology Chart

Maintaining the DEC (Drug Evaluation and Classification) Certification:

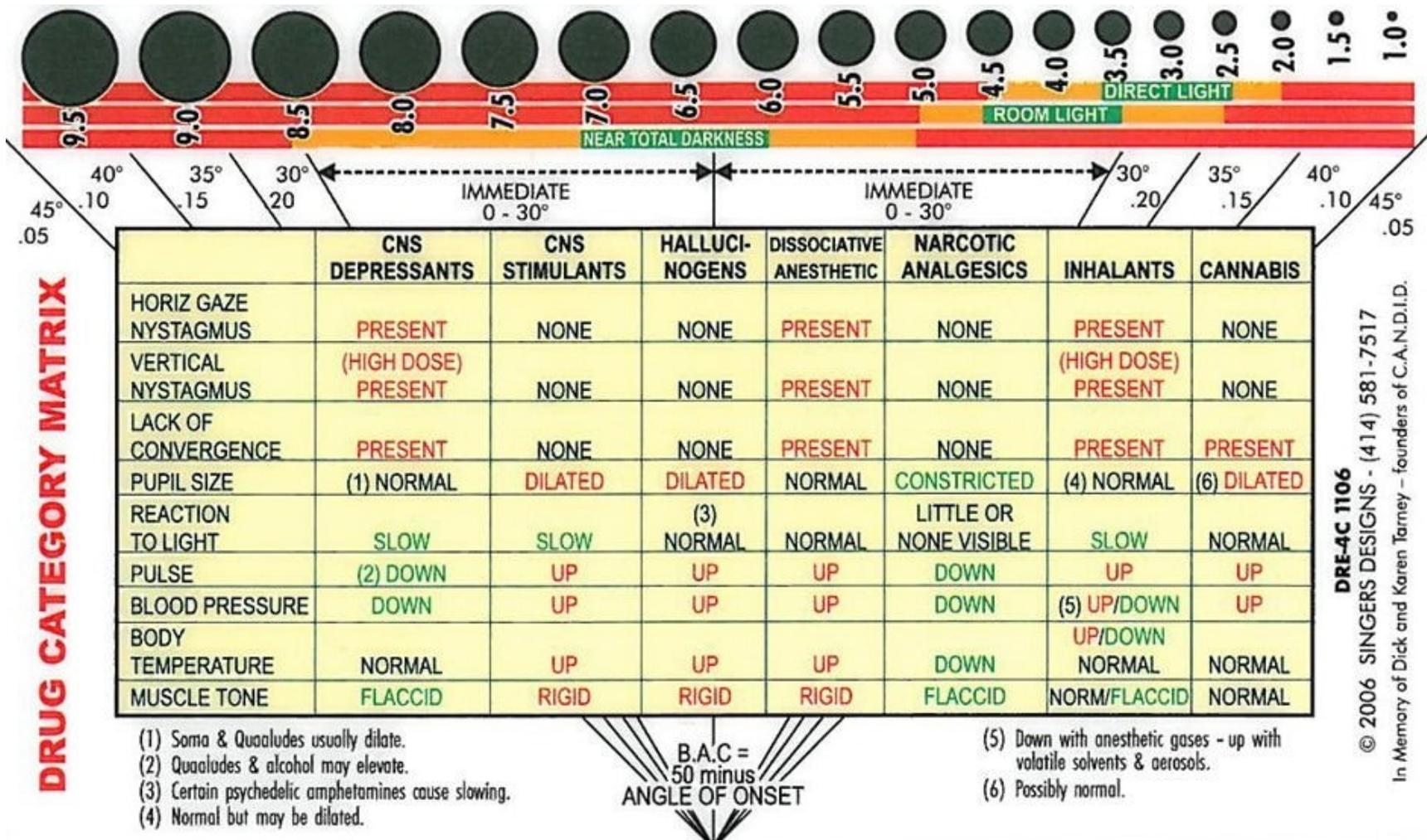
- Must remain in law enforcement
- Attend IACP approved 8-hour recertification training
- Conduct 4 evaluations (all 4 evaluations must be reviewed and approved by a DRE instructor; 1 evaluation must be witnessed by a DRE instructor)
- Updated CV

The DRE process is used to “establish the subject is impaired and verifies his or her alcohol level is not consistent with the degree of impairment that is evident.” NHTSA DRE Participant Manual. When the BAC is not consistent with observed behavior, this is an indication that the use of drugs, or the presence of an illness or injury may have caused the observed behavior.

DRE must use STANDARDIZED procedures. No steps should ever be eliminated! When preparing your examination, challenge the DRE on the procedure that (s)he followed.

Any of the tests in the 12-step procedure are voluntary and the client may choose to stop testing at any time. More often than not, the client will not know that the tests are voluntary.

DREs are looking for these signs to support their assessment that an individual is under the influence of a drug.



**12-Step Drug Influence Evaluation:**

Step	Test/Action	Purpose	Additional Notes	Challenge
1	Breath Alcohol Test	Establishes whether alcohol may be the sole cause of observed behavior or whether it is likely that some drugs or combination of drugs, or other factors are contributing to impairment.		Did the suspect refuse a breath test?  Was the breathalyzer properly used (mandatory observation period)?
2	Interview of the Arresting Officer	Since DRE do not examine the subjects they arrested, they must rely on the observations of the arresting officer. Any observations such as statements, evidence found on the subject (ie. drug paraphernalia), or visual clues may be used		Was this a general interview (i.e. tell me what's going on?) or did the DRE ask specific, pointed, systematic questions?
3	Preliminary Examination	<p>First opportunity to observe the subject closely and assess if there is a medical condition or injury which requires immediate attention</p> <p>Observe subject's appearance, behavior, and automatic bodily responses for signs of drug-induced impairment</p> <p>Attempt to deduce:</p> <ul style="list-style-type: none"> <li>• Possible injuries or medical problems</li> <li>• Observations of subject's face, speech, and breath</li> <li>• Pupil Size and tracking ability</li> </ul>	Officer should take the individual's pulse for the FIRST time, determine the initial angle of onset, and the initial estimate of pupil size (under light only)	Did the DRE conduct an intensive testing to determine if the subject is medically qualified to continue?

		<ul style="list-style-type: none"> <li>• Initial checks of the subject’s eyes</li> <li>• Initial examination of the subject’s pulse</li> </ul>		
4	Examination of the Eyes	<p>Observation of Horizontal Gaze Nystagmus</p>	<p>Remember the 3 clues per eye:</p> <ul style="list-style-type: none"> <li>• Lack of Smooth Pursuit</li> <li>• Distinct and sustained nystagmus at maximum deviation</li> <li>• Onset of nystagmus prior to 45 degrees</li> </ul> <p>Also looks for:</p> <ul style="list-style-type: none"> <li>• Vertical nystagmus</li> <li>• Lack of convergence</li> </ul>	<p>Was the HGN administered properly?</p> <p>Does the client have a congenital condition that the DRE did not know about?</p>
5	Divided Attention Tests	<p>Drugs and alcohol can impair one’s ability to perform divided attention tests</p> <ul style="list-style-type: none"> <li>• Modified Romberg Balance (MRB)</li> <li>• Walk and Turn</li> <li>• One Leg Stand</li> <li>• Finger to Nose</li> </ul>		<p>FST can help assess if ALCOHOL is in the system and there is no correlation between FST and impairment from drugs.</p> <p>The Romberg Balance Test and the Finger to Nose test were deemed to be unreliable and therefore not adopted into standard FSTs</p>
6	Examination of Vital Signs	<p>Reliable indicators of drug influence include blood pressure, pulse, and temperature</p>	<ul style="list-style-type: none"> <li>• Pulse for the SECOND time → 60 – 90 beats per minute (normal)</li> <li>• Blood Pressure             <ul style="list-style-type: none"> <li>○ 120-140 (systolic)(normal)</li> <li>○ 70-90 (diastolic)(normal)</li> </ul> </li> <li>• Body Temperature             <ul style="list-style-type: none"> <li>○ 98.6F +/- 1.0 degree F</li> </ul> </li> </ul>	<p>The medical community does not use vital signs to show drug impairment</p> <p>Was the equipment functioning properly and used properly?</p> <p>Did the officer follow proper procedure to take blood pressure? Was the result accurate?</p>

7	Dark room examinations	<p>Changing the light conditions to observe the pupils response to light</p> <p>Using a penlight to control the amount of illumination entering the subject's eyes and a pupillometer to estimate the size of the subject's pupils</p> <p>May look into the nasal area and mouth for other signs of drug use</p>	<p>Must examine:</p> <p>Pupil Size:</p> <ul style="list-style-type: none"> <li>• Room Light (2.5 mm to 5.0 mm)</li> <li>• Darkness 95.0 mm to 8.5 mm)</li> <li>• Direct Light (2.0 mm to 4.5 mm)</li> </ul> <p>Nasal Cavity</p> <p>Oral Cavity</p>	<p>Was there accurate comparison of the pupils and the pupillometer?</p> <p>What was the lighting conditions? How was the light controlled?</p> <p>Did the DRE determine client's normal or slow reaction to light, estimate pupil size, and observe the eyes for rebound dilation in 15 seconds, as required?</p>
8	Examinations of muscle tone	<p>Certain drugs may cause muscles to become tense and rigid while other drugs may cause flaccidity</p>		<p>This is a completely subjective test</p>
9	Examination for injection sites	<p>Injection sites may be an indication of drug use</p>	<p>Take pulse for the THIRD time!</p>	<p>Were the injection sites properly examined? Fresh or old?</p>
10	Subject's statements and other observations	<p>At this point a DRE should have reasonable grounds to believe a subject is under the influence of drugs and has an articulable suspicion of what category of drugs is causing the impairment</p> <p>Continuing to ask questions of the subject will solidify these conclusions</p>		<p>Is there a Miranda violation here?</p>
11	Opinion of Evaluator	<p>DRE makes a narrative summary of the facts forming the basis of their opinion</p>		<p>Does this DRE have a history of making accurate conclusions?</p>

				<p>“In the next to last step of the evaluation process, you will document your conclusions. Remember: your job is to render an expert opinion about the condition of the suspect right now; it is not your function to speculate about their condition at the time of arrest, unless of course, you witnessed the arrest. If you conclude that the suspect is not now impaired, say so.” NHTSA 2010 Drug Recognition Pre-School manual session II-9</p>
12	Toxicological Examination	These tests can be used to support the DRE’s opinion		<p>Proper chain of custody? Accurate result/conclusion?</p>

**Additional Issues with DREs and How to Challenge Them:**

ISSUE	CHALLENGE
DEC trained officers may attempt to substitute this training for proper scientific or medical training	Compare the 2-week training of these officers with years of education, training and certifications associated with medical and scientific professionals
DEC trained officers are trained to observe signs and symptoms	Highlight that he/she may not understand how or why a sign or symptom actually manifests
DEC trained officers will offer expert testimony	Object to their lack of qualifications under Rule of Evidence 702

<p>DEC trained officers do not use this knowledge every day on the job, their opinions are never evaluated by an independent source (a second opinion)</p>	<p>Contrast this with continued education, training, and judgment for nurses, physicians, and pharmacologists in the field every day</p>
<p>DEC recertification is every two years where they are required to conduct four hands-on evaluations and 8 hours of in-service training</p>	<p>Contrast this with continued education, training, and judgment for nurses, physicians, and pharmacologists in the field every day</p>
<p>The NHTSA Manual states that the DEC program “will furnish reliable evidence of the link between a particular subject and a particular category of drugs in more than a majority of cases.”</p>	<p>There are few studies that have identified the correlation of impaired driving by specific drugs.</p>
<p>Use of the Drug Category Matrix</p>	<p>Not accepted in the scientific and medical communities</p> <p>Categories of drugs are incorrectly lumped together</p>
<p>Medical conditions (problems with the inner ear causes HGN), injuries, and normal conditions (frequent exercise, anxiety etc) may cause false positives</p>	<p>Highlight that DEC trained officers are not trained to diagnose any medical conditions</p>
<p>DEC trained officer identifying observable symptoms and “normal vital signs”</p>	<p>Highlight the symptoms that the officer failed to identify</p> <p>Expose the impossibility of the officer to know a suspect’s “normal” vital signs (an individual may have unusually low blood pressure)</p>
<p>DEC trained officers using the 12 step protocol</p>	<p>Verify that the officer strictly followed all steps</p>

**Drug Recognition Research Studies\***

This chart was taken from the presentation given by Nate Miller at Annual Conference 2020

Study Title and Authors	Process	Conclusions/ Limits of the Study
<p>Identifying types of drug intoxication: A laboratory evaluation of subject examination procedures</p> <p>(Johns Hopkins: Bigelow, Bickel, Roache, Liebson &amp; Nowowieski)</p>	<ul style="list-style-type: none"> <li>• Double blind study was conducted</li> <li>• Four DRE’s for LAPD (assessors)</li> <li>• Eighty test subjects used in the analysis (all seasoned drug users)</li> <li>• Dosed at low and high dose levels using one of three drugs (Amphetamine 15&amp;30 mg; Diazepam 15&amp;30 mg; Cannabis 1.3%&amp;2.8% THC concentration)</li> <li>• DRE’s evaluated only three drug categories (Amphetamines, Depressants and Cannabis)</li> <li>• DRE’s were told what types of drugs subjects were dosed with</li> <li>• DRE’s assessed subjects a high dose, low dose and placebo levels</li> </ul>	<ul style="list-style-type: none"> <li>• Cannot use this study to validate all seven drug categories since it did not assess: Hallucinogens, PCP, Inhalants, or Narcotic Analgesics</li> <li>• Scoring criterion for correct assessment (flawed)</li> </ul>
<p>Drug Recognition Expert Validation Study</p> <p>(Arizona 1994)</p>	<ul style="list-style-type: none"> <li>• Researchers evaluated <b>500 DRE assessments</b> (Phoenix PD).</li> <li>• Evaluated drug influence evaluations (DIE’s) over a 53 month period (Post arrest w/ toxicological samples)</li> <li>• Objective was to determine the validity of DECP methodology, the reliability of observed drug use signs to toxicological presence, and to study arrestee characteristics and their drug use choices.</li> </ul>	<p><u>Issues with the research:</u></p> <ul style="list-style-type: none"> <li>• No direct observation of DIE to determine if the officer conducted assessment correctly/completely</li> <li>• All self-reported data</li> <li>• Assessments with no toxicology results were stratified from sample use to render results</li> <li>• If preliminary drug screen was used (med-tox) the DRE may have drug confirmation prior to making the drug category call</li> </ul>

		<ul style="list-style-type: none"> <li>• Drug screening was conducted using different methods (RIA v. GC/MS)</li> <li>• Urine was the primary sample given in a majority of the cases assessed</li> <li>• Metabolite vs. Confirmed drug</li> </ul>
<p>Laboratory Validation Study of DECP: Ethanol, Cocaine &amp; Marijuana</p> <p>(Johns Hopkins: Heishman, Singleton &amp; Crouch)</p>	<ul style="list-style-type: none"> <li>• Double blind study was conducted</li> <li>• DRE assessors were from multiple states</li> <li>• Subjects dosed at low and high dose levels using one or more of three drugs (Alcohol, Cocaine &amp; Marijuana)</li> <li>• Hallucinogens, Inhalants, PCP, Narcotic Analgesics were not assessed</li> <li>• DRE assessors were not allowed to interview or verbally interact with the test subjects except for administrative directions for testing</li> </ul>	<p><u>Issues w/ research</u></p> <ul style="list-style-type: none"> <li>• Limited sample size</li> <li>• DRE’s knew the category of drugs being assessed but were also told two other categories that were not administered</li> <li>• When DRE concluded impairment by drugs their opinions were consistent with toxicology results only 44% of the time</li> </ul>

What Materials to Use to Challenge a DRE:

- Officer’s training manual
- Officer’s certification (note the expiration date)
- Officer’s process log (did the officer pass every training phase?)
- The rolling logs (compare recent opinions of this officer with the lab test results)
- Updated CV of the officer

Information for this section was gleaned from Steve Oberman’s DRE for Lawyers session at the 2018 Annual Conference and his paper “Driving Impairment by Drugs: The Drug Recognition Evaluation & Issues of Proof” → this can be found on the Trumpet under the 2018 Annual Conference link.

**DRUG INFLUENCE EVALUATION**

Evaluator		DRE #	Rolling Log #	Evaluator's Agency		Case #	
Recorder/Witness		Crash: <input type="checkbox"/> None <input type="checkbox"/> Fatal <input type="checkbox"/> Injury <input type="checkbox"/> Property		Arresting Officer's Agency			
Arrestee's Name (Last, First, Middle)		Date of Birth	Sex	Race	Arresting Officer (Name, ID#)		
Date Examined / Time / Location		Breath Test: Results:	Test Refused <input type="checkbox"/> Instrument #:	Chemical Test: Oral Fluid <input type="checkbox"/>	Urine <input type="checkbox"/>	Blood <input type="checkbox"/> Test or tests refused <input type="checkbox"/>	
Miranda Warning Given Given by:	<input type="checkbox"/> Yes <input type="checkbox"/> No	What have you eaten today? When?		What have you been drinking? How much?		Time of last drink?	
Time now/ Actual	When did you last sleep?	How long?	Are you sick or injured? <input type="checkbox"/> Yes <input type="checkbox"/> No		Are you diabetic or epileptic? <input type="checkbox"/> Yes <input type="checkbox"/> No		
Do you take insulin? <input type="checkbox"/> Yes <input type="checkbox"/> No		Do you have any physical defects? <input type="checkbox"/> Yes <input type="checkbox"/> No		Are you under the care of a doctor or dentist? <input type="checkbox"/> Yes <input type="checkbox"/> No			
Are you taking any medication or drugs? <input type="checkbox"/> Yes <input type="checkbox"/> No			Attitude:		Coordination:		
Speech:		Breath odor:		Face:			
Corrective Lenses: <input type="checkbox"/> None <input type="checkbox"/> Glasses <input type="checkbox"/> Contacts, if so <input type="checkbox"/> Hard <input type="checkbox"/> Soft		Eyes: <input type="checkbox"/> Normal <input type="checkbox"/> Bloodshot <input type="checkbox"/> Watery		Blindness: <input type="checkbox"/> None <input type="checkbox"/> Left <input type="checkbox"/> Right		Tracking: <input type="checkbox"/> Equal <input type="checkbox"/> Unequal	
Pupil Size: <input type="checkbox"/> Equal <input type="checkbox"/> Unequal (explain)		Resting Nystagmus <input type="checkbox"/> Yes <input type="checkbox"/> No		Vertical Nystagmus <input type="checkbox"/> Yes <input type="checkbox"/> No		Able to follow stimulus <input type="checkbox"/> Yes <input type="checkbox"/> No	
Eyelids: <input type="checkbox"/> Normal <input type="checkbox"/> Droopy		Pulse and Time		HGN		Convergence	
1. _____ / _____ 2. _____ / _____ 3. _____ / _____		Lack of Smooth Pursuit Maximum Deviation Angle of Onset		Left Eye Right Eye		/30 <b>One Leg Stand</b> /30	
Modified Romberg Balance Approx. _____ Approx. _____ 		Walk and Turn Test 		Cannot keep balance _____ Starts too soon _____ Stops walking _____ Misses heel-toe _____ Steps off line _____ Raises arms _____ Actual steps taken _____		 L. R. Sways while balancing Uses arms to balance Hopping Puts foot down	
Time Estimation estimated as 30 seconds		Describe turn		Cannot do test (explain)		Type of footwear:	
<b>Finger to Nose</b> (Draw lines to spots touched) 		PUPIL SIZE		Room light (2.5 - 5.0)	Darkness (5.0 - 8.5)	Direct (2.0 - 4.5)	Nasal area:
		Left Eye					Oral cavity:
		Right Eye					Reaction to Light:
		Rebound Dilation: <input type="checkbox"/> Yes <input type="checkbox"/> No		<b>RIGHT ARM</b>			
				<b>LEFT ARM</b>			
Blood Pressure /		Temperature °F		Muscle Tone: <input type="checkbox"/> Normal <input type="checkbox"/> Flaccid <input type="checkbox"/> Rigid			
What drugs or medications have you been using?		How much?		Time of use?		Where were the drugs used? (Location)	
Date / Time of arrest:		Time DRE was notified:		Evaluation start time:		Evaluation completion time:	
Officer's Signature:		Reviewed/approved by / date:				DRE #	
Opinion of Evaluator:		<input type="checkbox"/> Not Impaired <input type="checkbox"/> Medical		<input type="checkbox"/> Alcohol <input type="checkbox"/> CNS Depressant		<input type="checkbox"/> CNS Stimulant <input type="checkbox"/> Hallucinogen	
				<input type="checkbox"/> Dissociative Anesthetic <input type="checkbox"/> Narcotic Analgesic		<input type="checkbox"/> Inhalant <input type="checkbox"/> Cannabis	



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NOTES

## The Advocate

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