

DUI NEWS

INSIDE THIS ISSUE:

<i>Recent Cases</i>	2-4
<i>Training Opportunities</i>	5
<i>Impeachment</i>	6
<i>Drug Recognition</i>	7
<i>Experts</i>	8
<i>V.H. Cases</i>	9
<i>Tennessee Stats</i>	10-11
<i>Repeat Offenders</i>	12



December 11, 2002
 The "Booze It and Lose It" campaign is taking on Tennessee. On Wednesday, the governor's highway safety office announced the next phase. All 95 counties in the state will now have an increased number of sobriety checkpoints during the enforcement period.

GOVERNOR'S HIGHWAY SAFETY OFFICE FUNDS DUI COORDINATOR GRANT

Through the generosity of the Governor's Highway Safety Office, the Tennessee Department of Transportation and the National Highway Traffic Safety Administration, the District Attorneys General Conference now have an office of DUI Training. The coordinator is Tom Kimball, an Assistant District Attorney formerly with the DUI division in Chattanooga. The administrative assistant is Sherri McCloud, formerly a training specialist with T.B.I.

The purpose of the office is to provide training for prosecutors in DUI cases for successful prosecution. Other purposes are to keep prosecutors informed of changes in the law and recent appellate decisions. In addition the office will provide training for law enforcement officers to assist in building cases that result in convictions. The ultimate goal is to reduce the number of drug and alcohol related traffic collisions, injuries and fatalities on Tennessee roads.

Contact Tom or Sherri at (615) 253-6733.



MADD' Eight-Point Plan

The *Getting MADD All Over Again* plan includes recommendations to:

- Resuscitate the nation's efforts to prevent impaired driving
- Increase driving while intoxicated (DWI)/driving under the influence (DUI) enforcement, especially the use of frequent, highly publicized sobriety checkpoints
- Enact primary enforcement seat belt laws in all states
- Create tougher, more comprehensive sanctions geared toward higher-risk drivers
- Develop a dedicated National Traffic Safety Fund
- Reduce underage drinking
- Increase beer excise taxes
- Reinvalidate court monitoring programs

From *Driven* magazine used with permission from M.A.D.D.

RECENT CASES

The following decisions concerning traffic issues have been reported since October, 2002:

WestLaw Search:
Driving/2 influence&
2002

State v. Shinavar
Slip Copy
Tenn. Crim. App.,
2002.
Nov. 15, 2002.



DRUNKENNESS

Edict against drunkenness: *"Any man convicted of being drunk will be condemned: on the first offense, to detention in prison on bread and water; on the second offense, to be whipped in the inner court of the*



RECENT CASES CONTINUED

State v. Jensen

No. E2002-00712-

CCA-R3-CD

Nov. 15, 2002

Remember the defense that goes *the officer has no probable cause because he did not see the defendant drive?* This decision has some wonderful analysis thwarting that defense. The defense of *it*

*How the world views
impaired driving:*

State v. Patterson

Slip Copy
 Tenn. Crim. App., 2002.
 Oct. 4, 2002. (Approx. 3 pages)

The Victim:

“Norman suffered broken feet, a broken elbow, and crushed hips, which required reconstruction. His spleen and liver were lacerated, causing a loss of 75% of his blood. Norman's face was crushed from his chin to his eye sockets. By the time of the sentencing hearing, he had undergone six different surgeries and faced three more operations for reconstruction and bone grafting of his face. His college education was interrupted and medical bills, only some of which were paid by insurance, had accumulated to approximately \$200,000.00. Norman's father is disabled and his mother, who provided care for the victim, missed a considerable amount of time from her work. The amount of the medical bills, which were in Ms. Norman's name, resulted in her filing bankruptcy.”

The Criminal:

“On the night of November 19, 2000, the defendant, who had been drinking at the Governor's Lounge in Chattanooga, drove his vehicle onto Bonny Oaks Drive at speeds in excess of 70 miles per hour and passed a vehicle driven by Sherry Wilson. While in the wrong lane of traffic, the defendant sideswiped a car driven by Meredith Stalyon and occupied by Ashley Hobbs. His automobile then struck head-on a vehicle driven by Dustin Norman, age 22.



Dustin's car

Activate yourself to duty by remembering your position, who you are, and what you have obliged yourself to be.
 ~ Thomas [à Kempis](#)

The result:

“The trial court specifically determined that the defendant had demonstrated a flagrant disregard for the safety of others by operating his vehicle at a high rate of speed while having an unusually high blood alcohol content. The consequences were devastating, especially for Norman. In our view, the proof established that the defendant drove his vehicle at a high rate of speed on the wrong side of the road. He passed one vehicle and sideswiped another before striking Norman's vehicle head-on. The record establishes that the injuries suffered by the victim were extensive, of a permanent nature, and required a substantial amount of medical care and treatment. In our view, the trial court properly denied the alternative sentence. Accordingly, the sentence for the vehicular assault of Dustin Norman is modified from four to three years; otherwise, the judgments are affirmed.”

TRAINING OPPORTUNITIES

VEHICULAR HOMICIDE CONFERENCE

The first conference of the DUI division is scheduled for February 3-7 in Nashville. Many prosecutors have pending vehicular homicide cases. These cases tend to be complex and confusing. In addition to the challenges of a DUI trial they include issues of crash reconstruction. In order to analyze and prepare such cases prosecutors need time to devote to the subject. The vehicular homicide conference is a trial preparation workshop that includes all aspects of trial and a block of time to create visual aids and power point presentations. There is also a three hour segment on reconstruction and the direct exam of a crash reconstructionist. Don't delay. Sign up now.

Faculty at Vehicular Homicide Conference:

- Kim Fogarty, A.D.A. Massachusetts
- Parke Masterson A.D.A. Chattanooga,
- Steven Strain, A.D.A. Jasper,
- William Ferland Director Criminal Division
Attorney General Rhode Island
- Ira Karmelin A.S.A. Florida;
- Jim Camp D.A Wisconsin;
- Deputy Mark Kimsey, Hamilton County, Tn

PROTECTING LIVES SAVING FUTURES

This Course will be conducted March 25-27 at Fall Creek Falls State Park. It will be repeated in June in East Tennessee and in July in West Tennessee.

This course was designed by the American Prosecutors Research Institute to create a team building approach between prosecutors and police officers to aid in the detection, apprehension and prosecution of impaired drivers. Prosecutors and police officers will participate in interactive training classes taught by a multi-disciplinary faculty.

Sessions include:

- VEHICLE IN MOTION
- REPORT WRITING
- PERSONAL CONTACT
- UNDERSTANDING SFSTS
- HGN
- PRE-ARREST SCREENING
- CHEMICAL TESTING
- DRUG RECOGNITION
- PRETRIAL PREPARATION
- MEETING DEFENSES
- MOCK TRIAL

Space is available for 10 prosecutors who may bring two officers from their jurisdiction. The March Session is intended for middle Tennessee offices.

TRAIN THE TRAINERS

Our friends in Georgia Are offering 5 out of state scholarships to District Attorneys and A.D.A.'s who want to attend their **PROSECUTOR FACULTY DEVELOPMENT COURSE** on September 8-11, 2003 at the Renaissance Pineisle Resort at Lake Lanier Islands.

This Course is designed by the U.S. Department of Transportation , NHTSA and the Transportation Safety Institute.

It is intended to help prosecutors become better instructors for fellow prosecutors, officers police academy students and whomever you teach.

This course is required for instructing at the N.A.C.

NDAA OFFERS "PROSECUTING THE IMPAIRED DRIVER"

THIS COURSE IS SCHEDULED AT THE NATIONAL ADVOCACY CENTER IN COLUMBIA, SOUTH CAROLINA MARCH

" I find the harder I work, the more luck I seem to have"
Thomas Jefferson (1743-1826"



Fall Creek Falls scene

APRI's National Traffic Law Center's

Impeachment Checklist

1. The oath

2. Perception & Memory

This is a great area of impeachment if they have been drinking, using drugs or any combination of alcohol and drugs: "Does alcohol affect your memory? Eyesight? Balance? Judgment?"

3. Communication

Who contacted the witness about testifying? When was the witness contacted? Was it the day after the arrest, the night before the trial, etc. You can argue to the jury that the witness and the defendant have had a long time to plan what the witness is going to say. If it was the night before trial, you can say that this is a witness who will say anything for a friend.

Who has the witness talked with about his testimony? Almost certainly he will have talked to the defendant at some point. Otherwise, how would the defendant know the testimony would be favorable?

Did the defense witnesses call the police or prosecutors office to provide them with their "stunning information" to help exonerate an "innocent" defendant? Reasonable people do not sit on that type of information for a year or more until trial.

4. Bias, prejudice, interest, corruption

What is the witness' relationship to the defendant? Is the witness the spouse, sibling, parent, in-law, friend, co-worker, boss, neighbor, or social friend of the defendant? Is the witness being paid or compensated to testify?

5. Criminal Convictions

Be sure to take this up with the judge outside the presence of the jury if there is any question about admissibility. It is a guaranteed mistrial if you are wrong.

"You have previously been convicted of a felony, correct? On [DATE], you were convicted of [INSERT CRIME]? This was a felony involving dishonesty or a false statement?"

6. Prior bad acts

Consult your local rules of evidence, and if there is any question about admissibility, take it up outside the presence of the jury.

7. Prior Inconsistent statements

Set a hook and fully commit the defendant to statements about to be impeached.

Only effective if the jury understands the significance of the prior statement. So, build the importance of the prior inconsistent statement and the events around it before going into its substance.

Either sworn or unsworn, including tape recordings, videotapes and written statements. If the witness testified at the license revocation hearing, get a copy of the transcript or tape.

8. New witness –character –reputation

Direct: "I have known him for 20 years, and he would never drink and drive."

Cross: "But, hasn't your life experience shown you that while using alcohol people sometimes do things they normally would not do?"

The answer doesn't matter. If he agrees, you have made your point. If he disagrees, his reality does not jibe with jurors' life experiences. This question is a credibility breaker, especially if they hedge. Also, the defense just put the defendant's character at issue opening the door to any prior bad acts regarding drinking and driving.

9. Any matters related to honesty.

Practice Tip: Always have the defendant identify their booking photo. Most defendants' photos are a striking contrast to their in-court appearance. Also, many impaired driving mug shots document blood-shot eyes and the disheveled appearance of the truly drunk.

Old Standards or Common Responses of Defendants in Impaired Driving Cases

Be ready for the old standards of defendants:

Fatigue/Sleepiness

Direct: "I worked 17 hours that day pouring concrete. I was real, real tired, and after work, I only had two beers. I was driving poorly because I was so tired and sleepy."

Cross: "Would you agree with me that a reasonable person does not drink beer to stay awake?"

Refusal

Direct: "I didn't take the test because [I'm scared of needles/ a friend of mine who is a lawyer said to never take the test/ I don't believe those breath machines work.]"

Cross:

"The officer offered you the test?"

"He read you this implied consent form?"

"On this form, it states that the purpose of this test is to determine your blood/alcohol content?"

"You could either say *yes, I'll take the test* or *no, I won't take the test*, correct?"

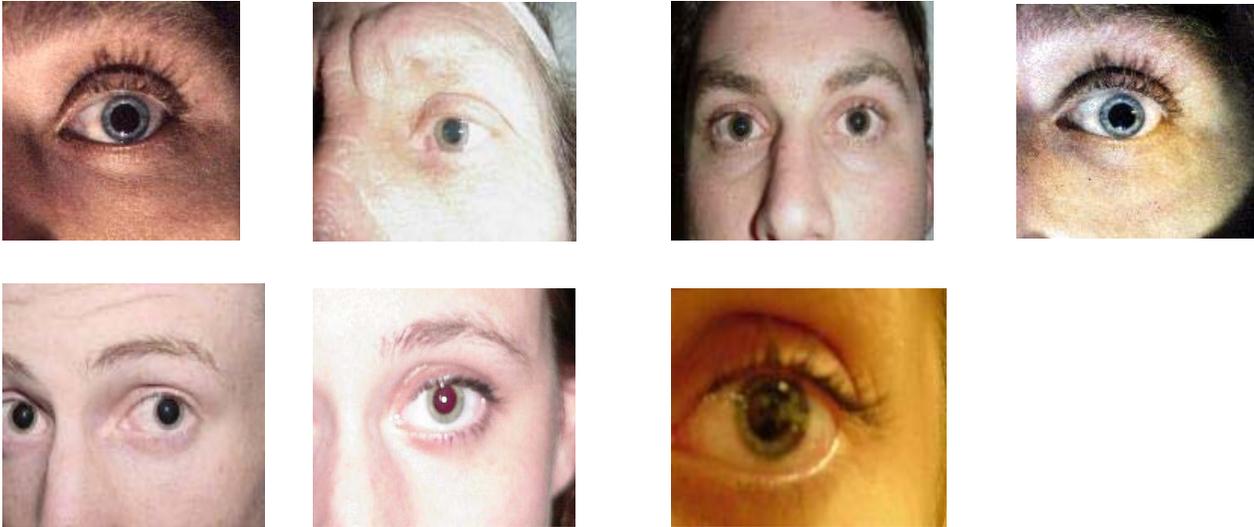
"You chose to say *no*?"

"And this is your signature at the bottom of the form showing that you refused the test?"

"Bottom line: you had a choice to take the test, and you refused. The one test that would have shown the jury exactly how much you had to drink, and you refused."

Direct: "That machine is just not accurate." (*Click!* The door just opened. Approach the bench.)

Cross: Ask the defendant about the other times he took blood alcohol tests and entered a plea of guilty. He must have believed the machine was accurate on those occasions.



The above three subjects were known MDMA (ecstasy) users. Note the extreme dilation. Field evaluations of subjects under the influence of MDMA have shown that in addition to the extreme dilation of the pupils that the pupils also show very little to no reaction to light. (Thanks to Bernie Bogenreif of the Hennepin County, Minnesota Sheriff's Office for the picture on the left) (Thanks to officer R.F. Conley of the Nashville Metro Police for the other 5 pictures) Officer Conley is one of the few DRE trained officers in Tennessee. Read more at www.tndre.homestead.com

Good news in Nashville December 19, 2002

The Metropolitan Police Department this evening announced that officers are literally working overtime in their best effort to see that traffic fatalities in Nashville are at an eleven year low at the end of 2002.

Through today, 67 persons have been killed in 64 fatal crashes, a net reduction of 29 fatalities when compared to the same period last year. Through December 19, 2001, 96 persons had been killed in 92 fatal crashes.

Much of the credit for this year's reduction goes to the officers participating in an unprecedented program of traffic enforcement begun during the Memorial Day weekend and which has continued on every weekend since. The program puts an additional 19 officers, three sergeants and one lieutenant on the streets for the sole purpose of enforcing traffic laws on Thursday, Friday and Saturday nights, the evenings that statistics show are the most likely times for fatal and critical accidents as well as DUI arrests.

The Governor's Highway Safety Office is funding the program through a \$1.2 million grant. The money is used to pay overtime to officers who volunteer to take part in the enhanced enforcement effort.

"Since May 24, the officers participating in the program alone have made more than 350 DUI arrests and issued more than 11,000 traffic citations," Traffic Section Lt. Bob Lyons said. "Strict enforcement of traffic laws by a team of additional officers, with an emphasis on identifying impaired drivers, is proving to be a great success in reducing fatal crashes."

The success of the enforcement program is complimented by the work of the police department's DUI Squad, a team of 8 officers and one sergeant which typically works from 6:30 p.m.-2:30 a.m. looking for signs of impairment among the motoring public. The DUI squad averages approximately 100 impaired driving arrests per month.

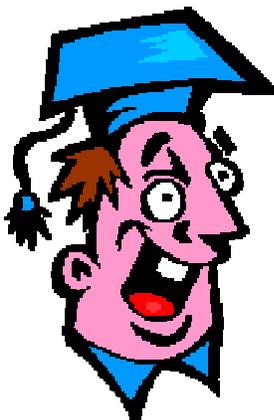
EXPERT DATABASE

Help us help all. Send information, c.v.'s, transcripts, research and recommendations concerning expert witnesses. We will keep a database on the Conference website. Any toxicologists, reconstructionists, etc. you recommend will include your recommendation. Any material you provide on a defense witness will be kept at the office to be distributed as needed.

See two examples:

The good expert is John Kwasnoski.
The defense person is Dr. Warren Woodford.

“Appellant Battle also complains about the exclusion of expert evidence of Dr. Warren Woodford that the substance Battle possessed with intent to distribute was not crack, Dr. Woodford’s idiosyncratic theories have been uniformly rejected and in addition it turns out that the curriculum vitae which he submitted to the court contained the false representation that he is licensed by the DEA to conduct tests on controlled substances. We are surprised that the federal public defender would rely on Woodford.” U.S. v. Ingram 175 F.3d 1021, 1999 WL 170319 (7th Cir.(Ill.)



PROFESSOR KWASNOSKI

Professor Emeritus
Western New England College
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kwasnoski@aol.com

John B. Kwasnoski is Professor Emeritus of Forensic Physics at Western New England College, Springfield, MA after thirty-one years on the faculty. He is a certified police trainer in more than twenty states. He is the crash reconstructionist on the "Lethal Weapon - DWI Homicide" team formed by the National Traffic Law Center to teach prosecutors how to utilize expert witness testimony and cross examine adverse expert witnesses. Prof. Kwasnoski has reconstructed over 650 crashes, including multiple and single vehicle, pedestrian, motorcycle, and train crashes. He has served as an expert in several cases of national significance including S. Carolina v. Susan Smith (a mother's drowning murder of her two children) in which he participated in the re-enactment of the drowning in a submerged automobile and the creation of a video used in the sentencing phase of the trial. He also reconstructed the multiple vehicle crash in Washington, DC in which a Russian embassy aide was charged with vehicular homicide (U.S.A. v. Makharadze) and subsequently pled guilty after being released from diplomatic immunity. He was the reconstructionist for the plaintiff in the case of Ulm v. Ford Motor Co. in which a jury awarded the plaintiff over one million dollars. He has worked for more than fifty major insurers as a consultant and/or expert witness, and has conducted training for the claims representatives and special investigators of a number of insurance companies.

Kwasnoski has co-authored three best-selling books: Investigation and Prosecution of DWI and Vehicular Homicide, Courtroom Survival, and The Officer's DUI Manual, published by LEXIS LAW PUBLISHING. In 1989 he authored a widely used trial manual, Establishing Liability in Vehicular Accidents, which presents predicate questions to introduce the technical topics of crash reconstruction in a jury-friendly and convincing manner.

Useful Information

The National Traffic Law Center (NTLC) is directed by former Tennessee Assistant District Attorney, John Bobo.

The mission of the NTLC, a program of the American Prosecutors Research Institute, is to improve the quality of justice in traffic safety adjudications by increasing the awareness of highway safety issues through the compilation, creation and dissemination of legal and technical information. The website for NTLC is:

www.ndaa.org/apri/NTLC/index.htm

NTLC was created by the National Highway Traffic

Safety Administration and works closely with the National Association of Prosecuting Coordinators to offer courses at the National Advocacy Center including Prosecution of Driving While Under the Influence, Prosecuting the Drugged Driver and Lethal Weapon, DUI Homicide.

NTLC has a clearinghouse of resources including case law research, legislation research studies, training materials, trial documents, and a directory of professionals who work in the fields of crash reconstruction, toxicology, drug recognition and other areas. When dealing with horizontal gaze nystagmus, breath testing

instruments or blood tests the NTLC can assist with technical and case law research. Contact the NTLC at:

APRI, 99 Canal Center Plaza, Suite 510, Alexandria, Virginia, 22314 (&03)549-4253

“If a man does his best, what else is there?”

-General George S. Patton (1885-1945)

VEHICULAR HOMICIDE CASELAW

State v. Noles

Slip Copy
Tenn.Crim.App.,2002.
Dec. 12, 2002.

The defendant was properly sentenced to three years to serve for reckless vehicular homicide. Factors permitting the State to overcome the presumption in favor of alternative sentencing included: "The fatal accident which the defendant caused was not just

the result of some fleeting moment of inattention; rather, it resulted from a high-speed "cat-and-mouse" game which covered approximately 100 miles of Interstate 40. Furthermore, the defendant did not come before the sentencing court with the cleanest of hands. She had previously been convicted of two speeding offenses,

and one of those additionally involved her driving without a license. Not only did the defendant's recklessness result in the victim's death, but it imperiled both passengers in her car, including her four-year-old son." Opinion by Judge Curwood Witt. Prosecution at trial: Garry G. Brown. On appeal: John Bledsoe



Web site coming:

In the next month we plan to have a link to the D.A.'s Conference Website for DUI information. We plan to password protect this area. Motions, briefs and transcripts as well as an expert database will be available. Suggestions for content will be gratefully received.

State v. Thorpe

Slip Copy
Tenn.Crim.App.,2002.
Nov. 7, 2002.

This defendant hit a pedestrian, Jennifer Turner, and left the scene. After conviction he received a sentence of 22 years for aggravated vehicular homicide and two consecutive years for leaving the scene. Janice was discovered the morning after her death by kids on the way to school. After pieces of the grill and headlight of a Ford pickup were discovered the Chattanooga police department went hunting. Found was the defendant's vehicle with matching damage. With cooperation of traffic officers, a detective and the D.A.'s office, an investigation was launched to determine who was driving and what the driver had consumed.

Recipe for conviction:

- (1) Thorough investigation of vehicle;
- (2) Mirandized statement;
- (3) Interviews with those who sold Thorpe beer;
- (4) Search warrant for Thorpe cell phone;
- (5) audio taped interview of recipient of calls, ex-wife;
- (6) photos including garbage can Thorpe hit when backing in;
- (7) Finding and proving prior convictions.



**DUI Prosecutors and
Administrative Assistants**

The G.H.S.O. has awarded grants for several DUI Prosecutors and assistants in Tennessee. They are:

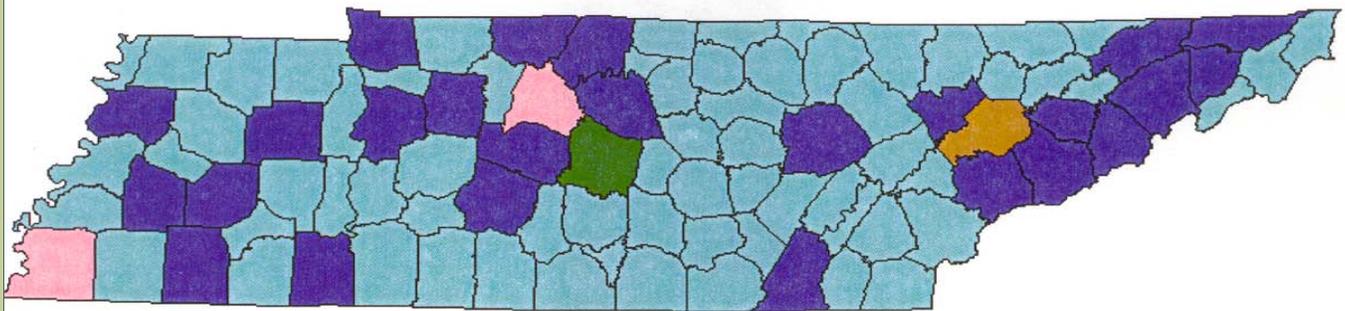
District Attorney's:

Stan Widener, 1st District
Howard Ellis, 8th District
Thomas Tansel, 13th District
Georgia Feldner, 21st District

Administrative Assistants:

Faye Perry, 1st District
Wesley Bray, 13th District
Justine Barton, 21st District

Alcohol Related Fatalities by County [2001]



Source: National Center for Statistics and Analysis, 2001 FARS Annual Report File

Tennessee ranks 12th in the nation for most alcohol related highway fatalities. Since 1982 Tennessee fatalities have decreased 59% compared to a national average decrease of 62%. Last year the decrease in Tennessee was 4%. Nationwide alcohol related fatalities increased from 17,380 people in 2000 to 17,448 in 2001. The map shows fatalities by county in 2001. TK

Year	Fatalities			Fatality Rate	
	Tot	Alc-Rel	%	Tot	Alc-Rel
1982	1,055	668	63	3.03	1.92
1983	1,037	643	62	2.86	1.77
1984	1,095	640	58	3.00	1.75
1985	1,101	603	55	3.03	1.66
1986	1,230	686	56	3.11	1.74
1987	1,247	621	50	2.96	1.47
1988	1,266	673	53	2.86	1.52
1989	1,088	559	51	2.38	1.22
1990	1,177	601	51	2.52	1.29
1991	1,113	601	54	2.35	1.27
1992	1,153	562	49	2.31	1.12
1993	1,170	538	46	2.25	1.03
1994	1,214	503	41	2.23	0.92
1995	1,259	533	42	2.24	0.95
1996	1,239	523	42	2.12	0.90
1997	1,225	510	42	2.02	0.84
1998	1,216	513	42	1.94	0.82
1999	1,302	515	40	2.01	0.80
2000	1,307	542	41	1.99	0.82
2001	1,251	537	43	1.85	0.79

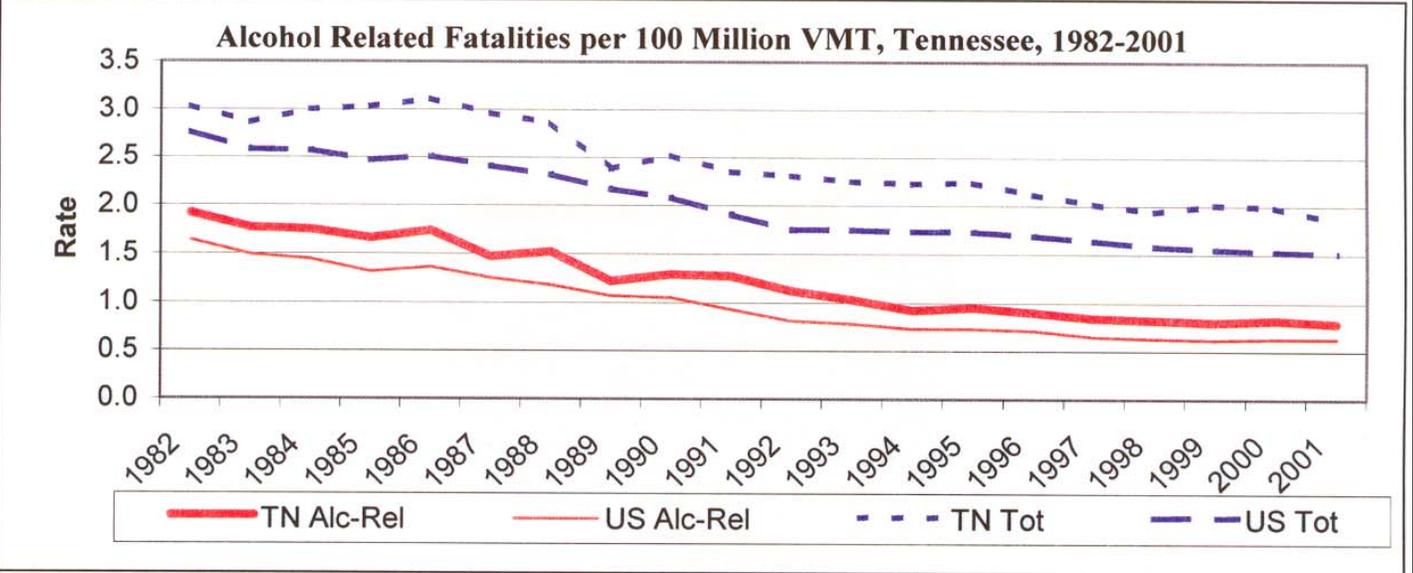
Source: 1982-2000 (Final) FARS Files and 2001 FARS Annual Report File, FHWA's Highway Statistics Annual Series

TENNESSEE

Change in AR-Rates over time, Tennessee vs. US		
Time Period	Tennessee	US
1982 to 2001	-59%	-62%
Last 10 years	-38%	-32%
Last 5 years	-12%	-11%
Last 3 Years	-4%	0%
Last 1 Year	-4%	0%

Impaired Driving Legislations*	
Law	BAC Level
Administrative Per Se BAC Level	None
Illegal Per Se BAC Level (Effective Date)	0.08* (07/01/03)
Youthful (under 21) Offenders BAC Level	0.02

*Enacted as of 09/03/2002 but effective as of a later date.





**Tennessee District Attorneys
General Conference**

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(615) 253-6735 Fax

Impeaching the Friend,
who appears out of the blue at
trial to lie for his buddy:

- You know the defendant?
yes
- You've known him a long
time? *5 years*
- You talk with him now
and then? *About every day*
- Work with him? *Nope*
- Cook out with him? *Once
in a while.*
- Have a beer with him now
and then? *Yep*
- Twice a week or more?
Yep
- Go to church with him?
nope
- Know what he drives? *Yep*
- Know his favorite bar?
Yep
- Been with him at his
favorite bar? *Yep*
- More than once? *Yep*
- Twice? *Yep*
- Twice a week? *No*
- Once a week? *Yes*
- You drive? *Yes*
- You drive your car to the
bar? *Yep*
- He drives his to the bar?
Yep
- Neither of you are in
charge of the other?
- You go home after drink-
ing?
- He goes some where else
after drinking?

At closing argument

Why a switcharoo?

**New report shows thousands of repeat drunk drivers avoid
conviction**

December 2, 2002

Nearly 40 percent of re-
peat drunk drivers
ignore court orders and
take advantage of other
loopholes to avoid
sentences handed down
by judges, who
themselves are
frustrated by a
system they say is overly
complicated and chroni-
cally under
resourced.
These are the main con-
clusions of a new U.S.
traffic safety study being

released today, the start
of the 20th anniversary of
National Drunk and
Drugged Driving (3D)
Prevention Month. Drunk
driving prevention
experts say this is one of
the most critical times of
the year due to the
approaching holiday
party season.
According to the survey
of 900 judges from 44
states, the top problems
they face when dealing
with repeat drunk drivers
are inadequate systems to

ensure sentences are be-
ing carried out;
insufficient and incom-
plete evidence at trial
which
often results in cases be-
ing
dismissed and
overwhelming caseloads
that require judges to
review up to 200 cases
per day.
For full report and many
more check out the web-
site at www.trafficinjuryresearch.com.



**For more information
contact:**

- Barbara Koppe, Traf-
fic Injury
- Research Foundation,
- 877-238-5235

The top 3 problems:

1. Inadequate sentence
monitoring: Judges say
that 40 percent of repeat
offenders fail to report to
their probation officer,
thereby avoiding court-
ordered penalties.
2. Problems with evidence:
Insufficient or inadequate
evidence may force
judges to accept pleas to
lesser charges, dismiss
cases or impose reduced
sentences. In addition,
judges say they lack ade-
quate knowledge about
scientific issues that often
arise in drunk driving
cases.
3. Excessive caseloads:
Some judges report they
review up to 200 cases per
day, resulting in limited
contact with offenders
and familiarity with the
details of cases.

**Submit ideas and
Articles.**

Got an item you want to pub-
licize. Got an
article you want to share. Got
a column you want to write.
Contact Tom or Sherri

Coming next issue:

Seizure in Tennessee.
Redefining Seizure
after
*Daniel, Binnette and
Randolph.*

How does Tennessee
compare to the nation.

Faculty requests:

Recommend someone!
Do you know of
someone you want other
prosecutors and/or police
officers to learn from?
Send in your
recommendations.

Alcohol Influence Forms

Do your police departments use
Alcohol Influence Forms? If so,
would you send us a copy? The
form has a score sheet for Field
Tests and plenty of areas for
defendant observations.