South Carolina Bar

2017 South Carolina Bar Convention

Criminal Law Section Seminar (Part 2)

Friday, January 20, 2017

presented by
The South Carolina Bar
Continuing Legal Education Division

SC Supreme Court Commission on CLE Course No. 170437

South Carolina Bar

A View from the Bench

The Honorable Kaye G. Hearn
Conway, SC

A VIEW FROM THE BENCH

Justice Kaye G. Hearn
Supreme Court of South Carolina

Miller v. Alabama

- Mandatory life without parole for a juvenile precludes consideration of the hallmark features of youth including immaturity, impetuosity, and failure to appreciate risks and consequences. Moreover it does not take into account the family and home environments, the circumstances of the events, the defendant's inability to assist his own attorneys, or the possibility of rehabilitation.

Miller v. Alabama

- "[G]iven all we have said in . . . this decision about children's diminished culpability and heightened capacity for change, we think appropriate occasions for sentencing juveniles to this harshest possible penalty will be uncommon.
- "Although we do not foreclose a sentencer's ability to make that judgment in homicide cases, we require it to take into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison."

Aiken v. Byars

(1) Was Miller v. Alabama retroactive?

(2) Does Miller v. Alabama apply when a state's sentencing scheme is not mandatory, but discretionary?

Aiken v. Byars

- "We conclude Miller creates a new, substantive rule and should therefore apply retroactively. . . .
- "Miller does more than ban mandatory life sentencing schemes for juveniles; it establishes an affirmative requirement that courts fully explore the impact of the defendant's juvenility on the sentence rendered."

Montgomery v. Louisiana

- "The Court now holds that Miller announced a substantive rule of constitutional law. . . .
- "Giving Miller retroactive effect, moreover, does not require States to relitigate sentences, let alone convictions, in every case where a juvenile offender received mandatory life without parole. A State may remedy a Miller violation by permitting juvenile homicide offenders to be considered for parole, rather than by resentencing them."

Aiken v. Byars: *Factors a Sentencing Court Should Consider*

(1) Defendant's chronological age and the hallmark features of youth—immaturity, impetuosity, and failure to appreciate risks and consequences;

(2) family and home environments surrounding defendant;

(3) circumstances of the homicide, including the extent of defendant's participation and how familial and peer pressures may have affected him;

(4) incompetencies associated with youth including defendant's inability to deal with police officers or prosecutors or to assist his own attorneys; and

(5) the possibility of rehabilitation.

Fourth Amendment

Standard of Review:

- "In reviewing a challenge under the Fourth Amendment, the Court must affirm if there is any evidence to support the ruling. Accordingly, this Court reviews the trial court for clear error and will affirm if there is *any* evidence to support the ruling."

  - State v. Anderson

State v. Moore

"We nevertheless comment on law enforcement's reliance on the seemingly omnipresent factor of nervousness. *General nervousness will almost invariably be present in a traffic stop.* At the suppression hearing, Deputy Owens gave a lengthy list of factors in support of reasonable suspicion, including many that were merely different manifestations of the element of nervousness. *While nervous behavior is a pertinent factor in determining reasonable suspicion, we, like many appellate courts, have become weary with the many creative ways law enforcement attempts to parlay the single element of nervousness into a myriad of factors supporting reasonable suspicion.* Here, law enforcement's penchant for turning nervousness into a laundry list of factors was not necessary."

Utah v. Strieff

- Whether discovery of a valid arrest warrant is a sufficient intervening event to break the causal chain between an unlawful stop and the discovery of evidence, assuming (because the State conceded the point) that the officer lacked reasonable suspicion for the initial stop

Utah v. Strieff

- "[W]e hold that the evidence discovered on Strieff's person was admissible because the unlawful stop was sufficiently attenuated by the pre-existing arrest warrant. Although the illegal stop was close in time to Strieff's arrest, that consideration is outweighed by two factors supporting the State. The outstanding arrest warrant for Strieff's arrest is a critical intervening circumstance that is wholly independent of the illegal stop."

Utah v. Strieff

Justice Sotomayor's Dissent:

- "Most striking about the Court's opinion is its insistence that the event here was 'isolated,' with 'no indication that this unlawful stop was part of any systemic or recurrent police misconduct.' Respectfully, nothing about this case is isolated."
- "Outstanding warrants are surprisingly common. When a person with a traffic ticket misses a fine payment or court appearance, a court will issue a warrant. The States and Federal Government maintain databases with over **7.8 million outstanding warrants**, the vast majority of which appear to be for minor offenses."

State v. Bennett

In the context of a directed verdict, "although the *jury* must consider alternative hypotheses, the *court* must concern itself solely with the existence or non-existence of evidence from which a jury could reasonably infer guilt. This objective test is founded upon reasonableness. Accordingly, in ruling on a directed verdict motion where the State relies on circumstantial evidence, the court must determine whether the evidence presented is sufficient to allow a reasonable juror to find the defendant guilty beyond a reasonable doubt."

State v. Stukes

- S.C. Code Ann. § 16-3-657 (2015).
  - The testimony of the victim need not be corroborated in prosecutions under Sections 16-3-652 through 16-3-658.
- Jury Charge:
  - "The testimony of a victim in a criminal sexual conduct prosecution need not be corroborated by other testimony or evidence."
- Held this charge is confusing and violative of the constitutional provision prohibiting courts from commenting to the jury on the facts of a case.

State v. Beaty

Judge's Opening Remarks:

- This ... trial ... is a search for the truth in an effort to make sure that justice is done. In searching for the truth and ensuring that justice is done is [sic] often slow, deliberate, and repetitive.
- [The attorneys] are sworn to uphold the integrity and the fairness of our judicial system and to help you as jurors to search for the truth.
- [Y]ou also just took an oath to listen to the evidence in this case and reach a fair and just verdict . . . .
- [A]fter hearing that evidence you will deliberate and render a true and just verdict under the solemn oath that you just took as jurors.
- [I]n determining what the true facts are in this case you must decide whether or not the testimony of a witness is believable.
- [A]fter argument of counsel and the charge on the law by me, you will then be in a position to determine what the true facts are and apply those facts to the law and thus surrender [sic] a true and just verdict.

State v. Beaty

- Remarks to Jury:
  - "We caution trial judges to avoid [any] terms . . . that may divert the jury from its obligation in a criminal case to determine, based solely upon the evidence presented, whether the State has proven the defendant's guilt beyond a reasonable doubt."

State v. Beaty

- Order of Closing Arguments:
  - "[I]n a criminal trial where the party with the 'middle' argument requests, the party with the right to the first and last closing argument must open in full on the law and the facts, and in reply may respond in full to the other party's argument but may not raise new matter."

In the end . . .

It doesn't matter what side of the bench or the "v." you're on, we all want to reach the right result.

2016 CRIMINAL LAW UPDATE

JUVENILE LIFE WITHOUT PAROLE SENTENCES

1) *Miller, Aiken,* and *Montgomery*

In *Miller v. Alabama*, the United States Supreme Court held mandatory life without parole sentences for juvenile offenders violate the Eighth Amendment's prohibition on cruel and unusual punishments. 132 S. Ct. 2455, 2469, 183 L. Ed. 2d 407 (2012). Two years later, the South Carolina Supreme Court addressed the new *Miller* rule in *Aiken v. Byars*, 410 S.C. 534, 765 S.E.2d 572 (2014). The *Aiken* Court first determined that *Miller* established a new substantive rule and thus applied retroactively to juveniles who had already been sentenced to life without parole. *Id.* at 540–41, 765 S.E.2d at 575–76. Furthermore, the Court found the essential point of Miller's holding to be that youth is constitutionally significant. Id. at 542–43, 765 S.E.2d at 576. Thus, any "failure of a sentencing court to consider the hallmark features of youth prior to sentencing . . . offends the Constitution," regardless of whether the sentencing scheme is mandatory or discretionary. *Id.* at 543–44, 765 S.E.2d at 576–77. The Court held juvenile offenders previously sentenced to life without parole are entitled to resentencing hearings "where the mitigating hallmark features of youth are fully explored." *Id.* at 545, 765 S.E.2d at 578. Specifically, the factors a sentencing court must consider include:

> (1) the chronological age of the offender and the hallmark features of youth, including "immaturity, impetuosity, and failure to appreciate the risks and consequence"; (2) the "family and home environment" that surrounded the offender; (3) the circumstances of the homicide offense, including the extent of the offender's participation in the conduct and how familial and peer pressures may have affected him; (4) the "incompetencies associated with youth—for example, [the offender's] inability to deal with police officers or prosecutors (including on a plea agreement) or [the offender's] incapacity to assist his own attorneys"; and (5) the "possibility of rehabilitation."

Id. at 544, 765 S.E.2d at 576 (quoting *Miller*, 132 S. Ct. at 2468). The South Carolina Supreme Court granted the affected inmates one year to file for a resentencing hearing under *Aiken*.

In early 2016, the United State Supreme Court confirmed that Miller's prohibition on mandatory life without parole sentences was a new substantive rule, and held the rule must apply retroactively. *Montgomery v. Louisiana*, 136 S. Ct. 718, 732–36, 193 L. Ed. 2d 599 (2016). Additionally, the Court in *Montgomery* indicated states could remedy *Miller* violations by extending parole eligibility to juvenile offenders. *Id.* at 736. However, since neither *Aiken* nor *Montgomery* provided South Carolina courts with a

template on how these sentencing rehearings should be presented, that issue is likely to be fleshed out in case law to come.

FOURTH AMENDMENT

1) ***State v. Anderson*, 415 S.C. 441, 783 S.E.2d 51 (2016).**
In *State v. Anderson*, the South Carolina Supreme Court reiterated that "[a] person's proximity to criminal activity, without more, cannot establish reasonable suspicion to detain that individual." 415 S.C. at 448, 783 S.E.2d at 55. Specifically, the Court held it was a violation of the defendant's Fourth Amendment rights for police to detain him and search his person based solely upon his location in a high crime area, near where a search warrant was being executed. *Id.*

2) ***Utah v. Strieff*, 136 S. Ct. 2056, 195 L. Ed. 2d 400 (2016).**
After observing Strieff leave a house believed to be the site of drug activity, a police officer unlawfully stopped him to investigate his activities at the house. *Utah v. Strieff*, 136 S. Ct. at 2059–60. During the stop, Strieff produced his identification card and the officer discovered Strieff had an outstanding arrest warrant for a traffic violation. *Id.* at 2060. At that point, the officer arrested Strieff and, upon searching his person, found a bag of methamphetamine as well as drug paraphernalia. *Id.* At trial, Strieff moved to suppress the drug evidence, arguing it was found pursuant to an unlawful stop. *Id.* On appeal, the United States Supreme Court addressed whether the attenuation doctrine applies "where the intervening circumstance that the State relies on is the discovery of a valid, pre-existing, and untainted arrest warrant." *Id.* at 2061. After applying the three factors provided in *Brown v. Illinois*,[1] the Court held the outstanding arrest warrant broke the causal chain between the unlawful stop and the discovery of the evidence, and thus the drug evidence was admissible under the attenuation doctrine. *Id.* at 2063.

3) ***State v. Moore*, 415 S.C. 245, 781 S.E.2d 897 (2016).**
In *State v. Moore*, the South Carolina Supreme Court reinstated Moore's conviction, holding there was evidence to support the trial court's refusal to suppress evidence found during a prolonged traffic stop. 415 S.C. at 256, 781 S.E.2d at 902–03. Moore's unusual itinerary, possession of a large sum of cash—especially considering his unemployment—and excessive nervousness during the traffic stop all supported the trial court's finding of reasonable suspicion to prolong the stop. *Id.* at 253–54, 781 S.E.2d at 901–02. However, the Court emphasized that extreme nervousness must be considered in light of the fact some "[g]eneral nervousness will almost invariably be present in a traffic stop." *Id.* at

[1] 422 U.S. 590, 95 S. Ct. 2254, 45 L. Ed. 2d 416 (1975). The three factors articulated in *Brown* for determining whether the attenuation doctrine applies are: (1) "temporal proximity between the unconstitutional conduct and the discovery of evidence;" (2) "the presence of intervening circumstances;" and (3) "the purpose and flagrancy of the official misconduct." *Strieff*, 136 S. Ct. at 2061–62 (quoting *Brown*, 422 U.S. at 603–04, 95 S. Ct. 2254 (internal quotations omitted)).

254, 781 S.E.2d at 902. Moreover, the Court warned against "parlay[ing] the single element of nervousness into a myriad of factors supporting reasonable suspicion." *Id.* at 254–255, 781 S.E.2d at 902.

4) ***State v. Counts*, 413 S.C. 153, 776 S.E.2d 59 (2015).**
In *State v. Counts*, the South Carolina Supreme Court reiterated that the "knock and talk" technique, an investigative tool used by law enforcement, is not per se unconstitutional. 413 S.C. at 164–66, 776 S.E.2d at 65–67. However, in order to protect individuals' right to privacy under the South Carolina Constitution, the Court held law enforcement must have a reasonable suspicion of illegal activity before approaching an individual's residence to conduct a "knock and talk." *Id.* at 172–74, 776 S.E.2d at 69–71.

DIRECTED VERDICT

1) ***State v. Bennett*, 415 S.C. 232, 781 S.E.2d 352 (2016).**
In *State v. Bennett*, the South Carolina Supreme Court clarified the framework of a court's inquiry when determining whether substantial circumstantial evidence was presented to require the denial of a directed verdict. 415 S.C. at 235–37, 781 S.E.2d at 353–54. Specifically, the Court held:

> [A]lthough the *jury* must consider alternative hypotheses, the *court* must concern itself solely with the existence or non-existence of evidence from which a jury could reasonably infer guilt. This objective test is founded upon reasonableness. Accordingly, in ruling on a directed verdict motion where the State relies on circumstantial evidence, the [appellate] court must determine whether the evidence presented [was] sufficient to allow a reasonable juror to find the defendant guilty beyond a reasonable doubt.

Id. at 237, 781 S.E.2d at 354 (emphasis in original).

2) ***State v. Phillips*, 416 S.C. 184, 785 S.E.2d 448 (2016).**
In this case, the Court clarified the *Hepburn* waiver rule, holding testimony of a co-defendant or *offered by* a co-defendant shall not be considered in reviewing the denial of a directed verdict motion. 416 S.C. at 195–96, 785 S.E.2d at 453–54 (citing *State v. Hepburn*, 406 S.C. 416, 435, 753 S.E.2d 402, 412 (2013)) (emphasis added).

3) ***State v. Pearson*, 415 S.C. 463, 786 S.E.2d 802 (2016).**
In *Pearson*, the Court reiterated the standard for reviewing denial of a directed verdict motion, noting the State is not required "to present evidence sufficient to exclude *every* other hypothesis of [the defendant's] guilt" at the directed verdict state. 415 S.C. at 472–74, 783 S.E.2d at 807–08 (emphasis in original). It is not for an appellate court to weigh the evidence; rather, the court's inquiry is limited to whether there is sufficient evidence

such that a reasonable juror could find the defendant guilty beyond a reasonable doubt. *Id.* at 473–74, 783 S.E.2d at 807–08 (quoting *Bennett*, 415 S.C. at 236–37, 781 S.E.2d at 354).

JURY INSTRUCTIONS

1) ***State v. Stukes*, 416 S.C. 493, 787 S.E.2d 480 (2016).**

The Court held it was reversible error for a trial court to charge the jury that the victim's testimony need not be corroborated by additional evidence or testimony pursuant to Section 16-3-657 of the South Carolina Code (2003). 416 S.C. at 498, 787 S.E.2d at 482. In particular, the Court found charging the jury on that statute to be "confusing and violative of the constitutional provision prohibiting courts from commenting to the jury on the facts of a case." *Id.* at 499, 787 S.E.2d at 483. Accordingly, the Court overruled the precedent condoning the use of this instruction. *Id.* at 500, 787 S.E.2d at 483.

PROTECTION OF PERSONS AND PROPERTY ACT

1) ***State v. Jones*, 416 S.C. 283, 786 S.E.2d 132 (2016).**

Whitlee Jones was arrested and charged with murder after fatally stabbing her live-in boyfriend, Eric Lee. 416 S.C. at 286–87, 786 S.E.2d at 134. The night of the incident, Jones and Lee were arguing over a cell phone. *Id.* at 287, 786 S.E.2d at 134. As Jones was attempting to leave the apartment, Lee beat her and grabbed her by her hair, attempting to drag her back into the apartment. *Id.* Jones eventually got away, but returned to the apartment later that evening when she had calmed down. *Id*. at 288, 786 S.E.2d at 134. Lee had been throwing her belongings around, and immediately yelled at her to get out. *Id.* at 288, 786 S.E.2d at 135. As Jones was collecting her belongings, she found a knife and took it to defend herself if necessary. *Id.* When she returned downstairs, Lee started yelling again, grabbed her and shook her. *Id.* Believing Lee was about to hit her again, Jones grabbed the knife and stabbed Lee once in his chest. *Id.*

On direct appeal, the South Carolina Supreme Court affirmed the circuit court judge's order granting Jones immunity from prosecution under section 16-11-440(C) of the Protection of Persons and Property Act. *Id.* at 302, 786 S.E.2d at 142. In interpreting section 16-11-440(C), the Court held the phrase "another place" encompasses a residence, because to hold otherwise "would create a nonsensical result—that a person can defend themselves from attack by their spouses, lovers, or any other co-resident while outside of their home, but not inside of their home." *Id.* at 295, 786 S.E.2d at 138 (internal quotations omitted). The Court further explained that excluding the presumption of reasonable fear from subsection (C) did not preclude immunity for an individual attacked in his or her home by a co-habitant. *Id.* at 297, 786 S.E.2d at 139. Rather, the Court reasoned the Legislature's purpose in requiring an individual establish reasonable fear of the attacker under subsection (C) was "to differentiate between an intruder, who is

presumably a violent stranger intent on harming the residents, versus a 'household member' or a contenant, who is presumably a welcome member of the home." *Id.* at 297, 786 S.E.2d at 139–40.

2) ***State v. Manning*, -- S.E.2d --, 2016 WL 4658956 (Sept. 7, 2016).**
Under the Protection of Persons and Property Act, a full evidentiary hearing is not necessary to satisfy the requirement that a defendant's entitlement to immunity be determined prior to trial. 2016 WL 4658956 at *2.

DOUBLE JEOPARDY

3) ***State v. Rearick*, -- S.C. --, 790 S.E.2d 192 (2016).**
Following the circuit court judge's declaration of a mistrial, Rearick moved to bar subsequent prosecution on the ground a second trial would violate the Double Jeopardy Clause of the South Carolina and United States Constitutions. 790 S.E.2d at 192–93. The Court reiterated its well-established appealability precedent and declined to adopt the United States Supreme Court's decision in *Abney*. *Id.* at 196–99 (citing *Abney v. United States*, 431 U.S. 651, 97 S. Ct. 2034 (1977)). Accordingly, the Court dismissed the appeal as interlocutory. *Id.* at 200.

South Carolina Bar

A Look Behind The Curtain: Deconstructing Forensic DNA Evidence

Arie D. Bax
Beaufort, SC

South Carolina Bar

DUI and New Technolgy

R. Scott Joye
Murrells Inlet, SC

DUI AND NEW TECHNOLOGY

SC Bar Convention

January 20, 2017

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THREE PRIMARY AREAS AFFECTED BY TECHNOLOGY:

Videotaping

Testing for Alcohol and/or Drugs

Ignition Interlock Devices

VIDEOTAPING REQUIREMENT IN SC: SC CODE §56-5-2953(A):

A person who violates Section 56-5-2930, 56-5-2933, or 56-5-2945 **must** have his conduct at the incident site and the breath test site video recorded.

INCIDENT SITE VIDEO RECORDING MUST: §56-5-2953(A)(1):

(i) Not begin later than the activation of the officer's blue lights;

(ii) Include any field sobriety tests administered; and

(iii) Include the arrest of a person for a violation of Section 56-5-2930 or Section 56-5-2933, or a probable cause determination in that the person violated Section 56-5-2945, and show the person being advised of his Miranda rights.

THE TWO MOST IMPORTANT CASE SINCE THE ENACTMENT OF THE VIDEOTAPING REQUIREMENT UNDER §56-5-2953(A)(1):

City of Rock Hill v. Suchenski, 374 S.C. 12. 646 S.E.2d 879 (2007):

The SC Supreme Court held that dismissal of the DUAC charge was the appropriate remedy where the City's failure to produce a complete incident site videotape due to the fact the officer's videotape ran out prior to the recording of the administration of the third Field Sobriety Test.

The Court stated that "the plain language of the statute provided that the 'failure to produce videotapes would be grounds for dismissal if no exceptions [§56-5-2953(B)] apply.'"

§56-5-2953(A)(1) CASES:

State v. Gordon, 408 S.C. 536, 759 S.E,2d 755 (S.C.App. 2014):

held that, "dismissal of the DUI charge is an appropriate remedy when a violation of the statute requiring a video recording of any field sobriety tests at the incident site is not mitigated by any other statutory exceptions."

"Defendant's head must be visible in the recoding during the administration of the horizontal gaze nystagmus (HGN) test."

Because the Defendant's head was visible at all times during the administration of the HGN test, the conviction was affirmed.

The Court also noted that since all the conduct during the HGN test was recorded even if you could not see the Defendant's eye's, the correct remedy would have been to redact the test from the video and not mention its administration during testimony if the poor quality of the video was more prejudicial than probative and not a §2953(A) dismissal.

§56-5-2953(A)(1) CASES:

State v. Taylor, 411 S.C. 294, 768 S.E.2d 71 (S.C.App. 2014):

The affidavit requirement of §56-5-2953(B) is excused when each and every aspect of the Defendant's conduct at the incident site is not recorded.

The Court noted, Suchenski, Murphy, and Gordon demonstrate the plain language of the statute does not require the video to encompass every action of the defendant, but requires video of each event listed in the statute.

§56-5-2953(A)(1) CASES:

State v Henkel, 413 S.C. 9, 774 S.E.2d 458 (S.C. 2015):

- The Supreme Court reversed the Court of Appeals dismissal under 56-5-2953(A) and found that §56-5-2953(B) exceptions applied.
- Dismissal wasn't warranted where Miranda warnings given in the back of an ambulance and given prior to the officer's body microphone being activated complied with "as soon as practicable" language under section (B).
- The Court noted in footnote 5 that this was prior to the February 10, 2009 amendment which required the video "must…..show the person being advised of his Miranda rights."

§56-5-2953(A)(1) CASES:

State v. Manning, 400 S.C. 257, 734 S.E.2d 314 (S.C.App 2012):

Established the "impossibility exception" to §56-5-2953(A)(1) incident site videotaping requirement due to the fact that the defendant had been transported by ambulance to the hospital prior to the officer's arrival on scene and therefore the officer and the defendant were never at the incident site at the same time.

§56-5-2953(A)(1) CASES:

City of Greer v. Humble, 402 S.C. 609, 742 S.E.2d 15 (S.C.App. 2013):

Affidavit was deficient on its face in violation of 56-5-2953 under the Section (B) exception where the affidavit did not state "which reasonable efforts had been made by the City to maintain the equipment in an operable condition."

The City failed to show that it made "reasonable efforts to maintain the video equipment in an operable condition" where the city maintenance log showed the police officer knew video recording equipment in his car was having problems for at least a year, that ten days before the defendant was pulled over, the video recording equipment in the officer's car was reported as malfunctioning to the manufacturer, and the City elected not to pursue repairs when it was advised it would be charged for an on-site visit by the manufacturer.

BREATH TEST VIDEO RECORDING MUST §56-5-2953(A)(2):

(a) Include the breath test procedure, the person being informed that he is being video recorded, and that he has the right to refuse the test;

(b) Include the person taking or refusing the breath test and the actions of the breath test operator while conducting the test;

(c) Also include the person's conduct during the twenty-minute pre-test waiting, unless the officer submits a sworn affidavit certifying that it was physically impossible to video record this waiting period.

56-5-2953(A)(2) CASES:

State v. Johnson, 396 S.C. 182, 720 S.E.2d 516 (S.C.App. 2011):

Held that the State's failure to produce video of Defendant was fatal to the prosecution when officer was forced to move the Defendant to second machine in the same room as a result of the first machine being inoperable.

Trial court had ruled the appropriate remedy was the suppression of the breath test.

56-5-2953(A)(2) CASES:

State v Sawyer, 409 S.C. 475, 763 S.E.2d 183 (S.C. 2014):

Held that a silent video recording at the site of the breath test cannot meet the statutory requirements of §56-5-2953(A)(2) and that there was no statutory exception to the dismissal.

§56-5-2953(A)(2) states the breath test video "must include the reading of the Miranda rights" and "the person being informed that he is being videotaped, and that he has a right to refuse the test."

56-5-2953(A)(2) CASES:

State v Hercheck, 403 S.C. 597, 743 S.E.2d 798 (2013):

Held that no §2953(A)(2) violation occurs "once the Defendant refused the (breath) test, the officer was no longer required to continue to videotape the 20 minute pre-test waiting period; since no test was administered, then the waiting period was rendered unnecessary, and so was the videotape recording of that waiting period.

State v Elwell, 403 S.C. 606, 743 S.E.2d 802 (2013):

Held that no §2953(A)(2) violation occurs "once the defendant refuses the test, officer was no longer required to continue to videotape the 20 minute pre-test waiting period; to require otherwise, would have resulted in the officer having to undergo a useless and absurd act."

§56-5-2953(G) CASES:

Town of Mt. Pleasant v. Roberts, 393 SC 332. 713 S.E.2d 278 (2011):

The SC Supreme Court again strictly construed the incident site videotaping requirement in reversing the DUI conviction and found the Town's, "interpretation of subsection (G) is nonsensical as the requirements of section 2953 could be circumvented in perpetuity" The SC Supreme Court held again strictly construed the incident site videotaping requirement in reversing the DUI conviction and found the Town's, "interpretation of subsection (G) is nonsensical as the requirements of section 2953 could be circumvented in perpetuity"

§56-5-2953(G) CASES:

State v. Johnson, 408 S.C. 544, 758 S.E.2d 911 (S.C.App. 2014):

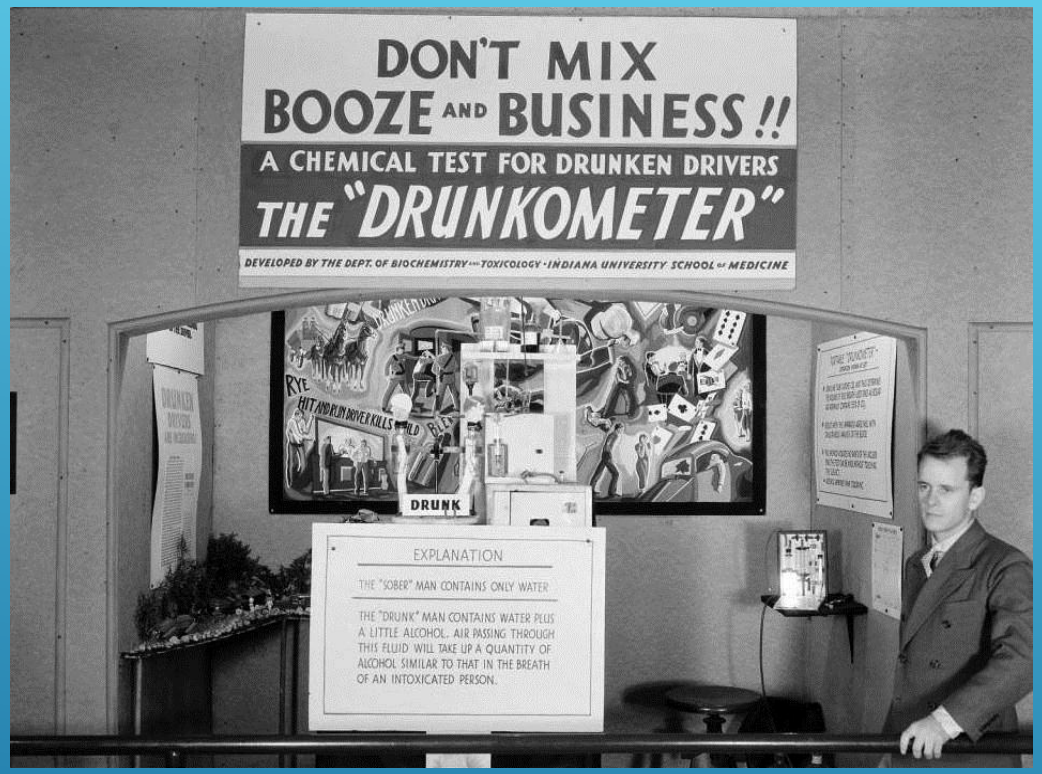
> Unlike the police department in *Roberts,* the Greenville PD did not seek to evade its duties in equipping law enforcement vehicles with video recording systems. Thus, under subsection (G) of 56–5–2953, the video recording requirements of subsection 56–5–2953(A) had not taken effect because a video camera had not been installed in the vehicle.

ALCOHOL AND/OR DRUG TESTING:

Breath Testing

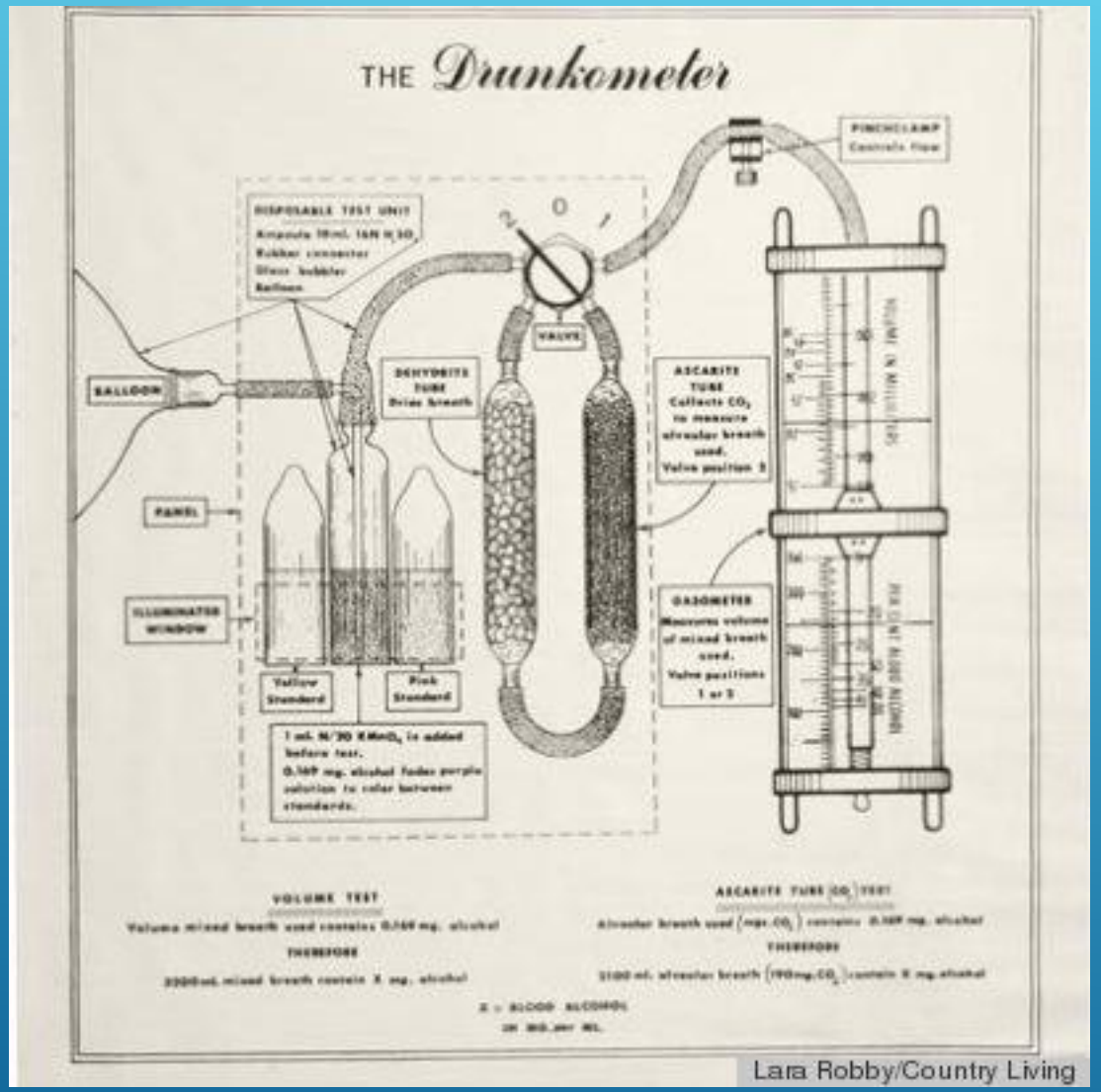
Blood Testing

Urine Testing



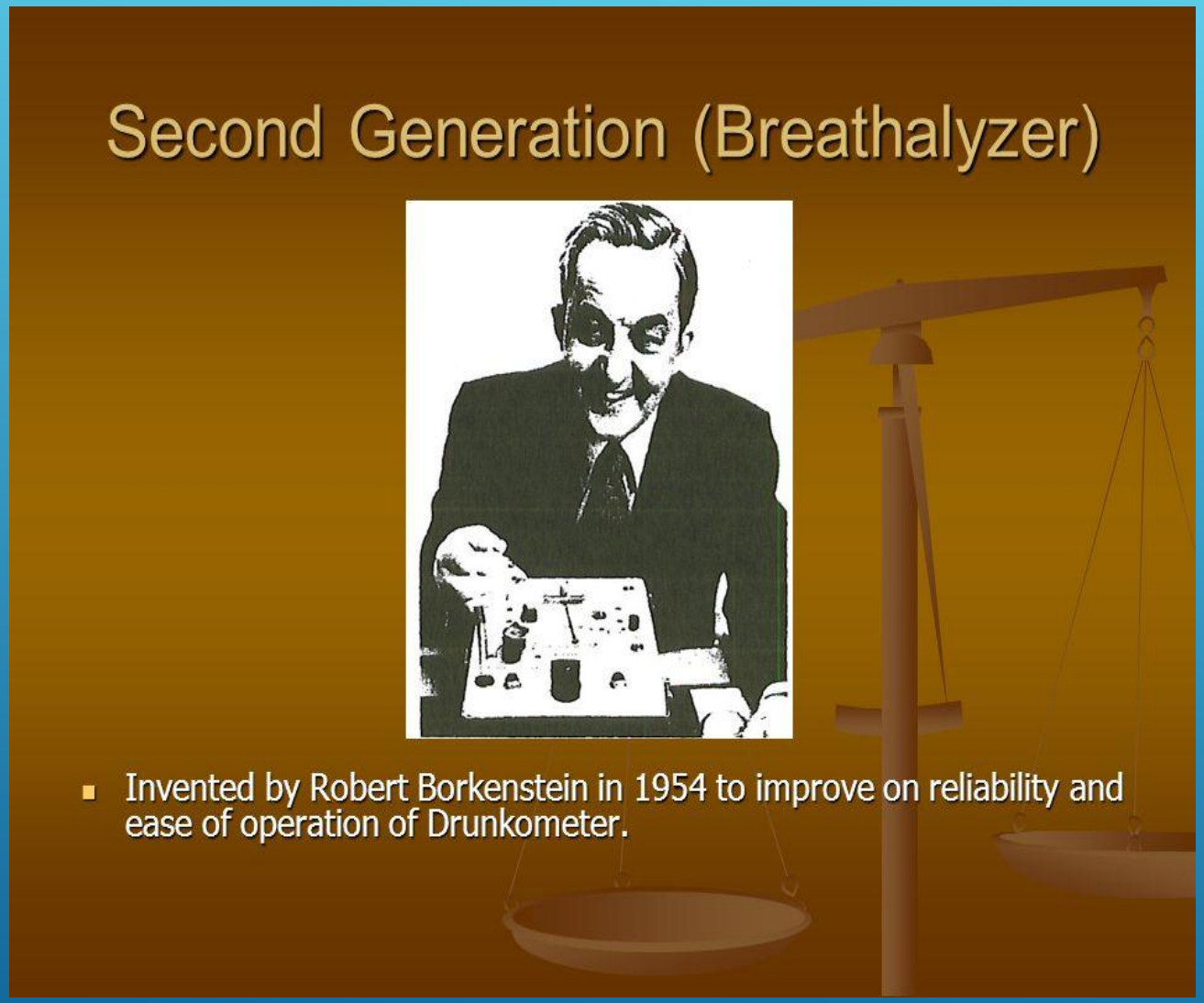
HARGER'S DRUNKOMETER

THE BREATH SAMPLE WAS BLOWN INTO A BALLOON AND THEN RELEASED INTO A CHEMICAL SOLUTION



DRUNKOMETER

Indiana biochemist Dr. Rolla N. Harger invented the Drunkometer in 1931. Indiana state troopers put the device to use on New Year's Eve 1938: Suspects inflated a balloon, and the captured air was released into the machine where it mixed with a chemical solution. If alcohol was present, the solution changed color the greater the color change, the higher the alcohol concentration. The officer was given a measurement by the machine which plugged into a mathematical equation giving a BAC reading.



BREATHALYZER:

In 1954, Dr. Robert Borkenstein invented the Breathalyzer.

He had previously collaborated with Dr. Harger in developing the Drunkometer.

BREATHALYZER:

Dr. Borkenstein created basically an all in one machine. It was a non-invasive and provided an instant reading.

Shown here is the Smith and Wesson Breathalyzer 900.

BREATHALYZER:

SLED was appointed the regulatory agency for the administration of the breath testing program in 1969.

Eventually SLED began to phase out the Breathalyzer 900 and replaced them with the 900A shown here.

BAC DATAMASTER

In 1991, as funding permitted, SC began its transition from the Breathalyzer 900A to the DataMaster.

It took until 1997 to completely transition to the DataMaster.

The DataMaster utilizes infrared spectroscopy.

DATAMASTER DMT:

The DataMaster DMT replaced all of the machines and was fully funded and went online on February 10, 2009.

This coincided with the passage of enhanced DUI laws which took effect at the same time.

SOME OF THE SCIENTIFIC ASSUMPTIONS OF BREATH TESTING:

2100 to 1 breath to alcohol ratio

actual range is 1300/1 to 3200/1

Simulator solution temperature of 34 degrees Celsius

within +/- .05 degrees or 33.9

Breath test subjects temperature of 34 degrees Celsius

not actually measured (2 x Celsius + 30 = Fahrenheit)

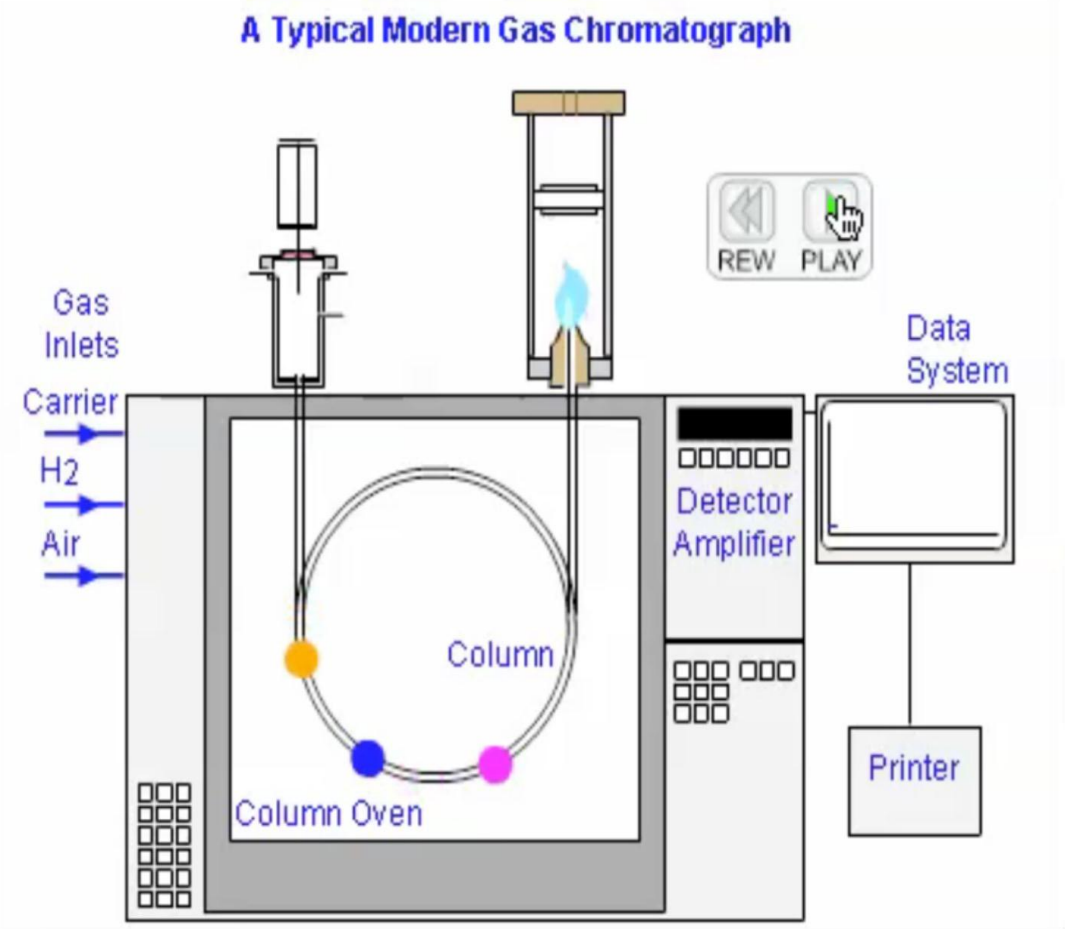
External Standard (i.e.: Simulator Solution) of .08

within +/- .05 or .076 to .084

BLOOD TESTING:

All SLED blood test are performed by Gas Chromatography/Mass Spectrometry

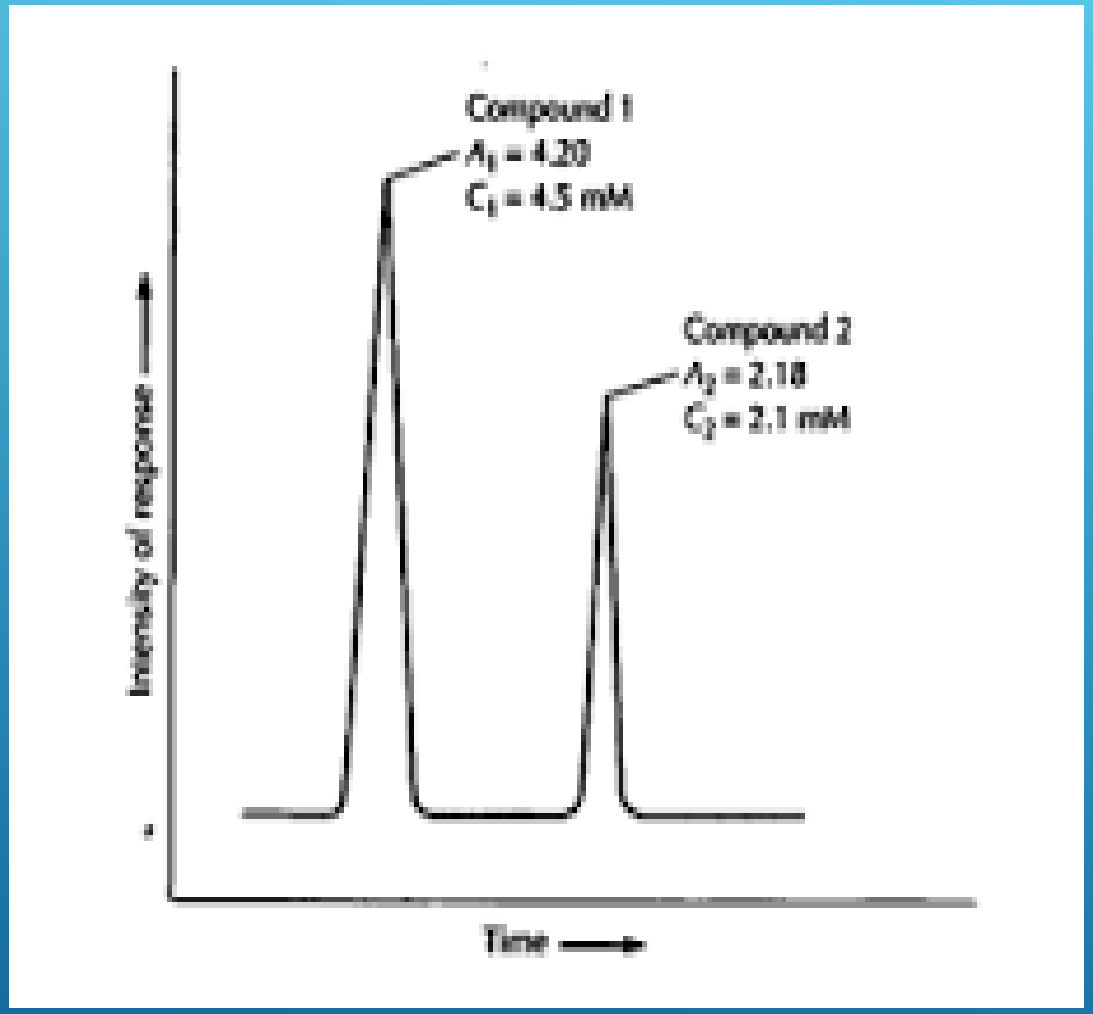
GC Animation:



GAS CHROMOTOGRAPHY

A sample is injected into the GC injector port and then it moves into the column. It is pushed into and through the column by a gas known as the "carrier gas." As it moves through the column, it interacts with the "stationary phase" which causes separation between the different molecules in the mixture. As each molecule hits the flame ionization chamber the gas is vaporized and creates an electrical impulse.

GAS CHROMATOGRAM



We are looking for classic Gaussian peaks.

The area under the peak is measured into a quantifiable Blood alcohol level.

Because Ethanol is a volatile compound, it lends itself to testing with Gas Chromatography.

MASS SPECTROMETER

Because drugs are not typically volatile, they do not lend themselves Gas Chromatography testing.

In extremely simplified terms, the Gas Chromatograph is able to separate and identify drug compounds in the blood. The Mass Spectrometer then weighs these compounds to give a value as to what levels are present in the blood.

URINE TESTING:

SC does not test urine for Ethanol as it does blood.

However, urine is tested for drugs when the officer has probable cause to believe that the driver is under the influence of something other than alcohol and the breath test results do not match the behavior the officer observes.

It is the least accurate of all testing procedures as typically it test for metabolites which are the waste product from the use of drugs.

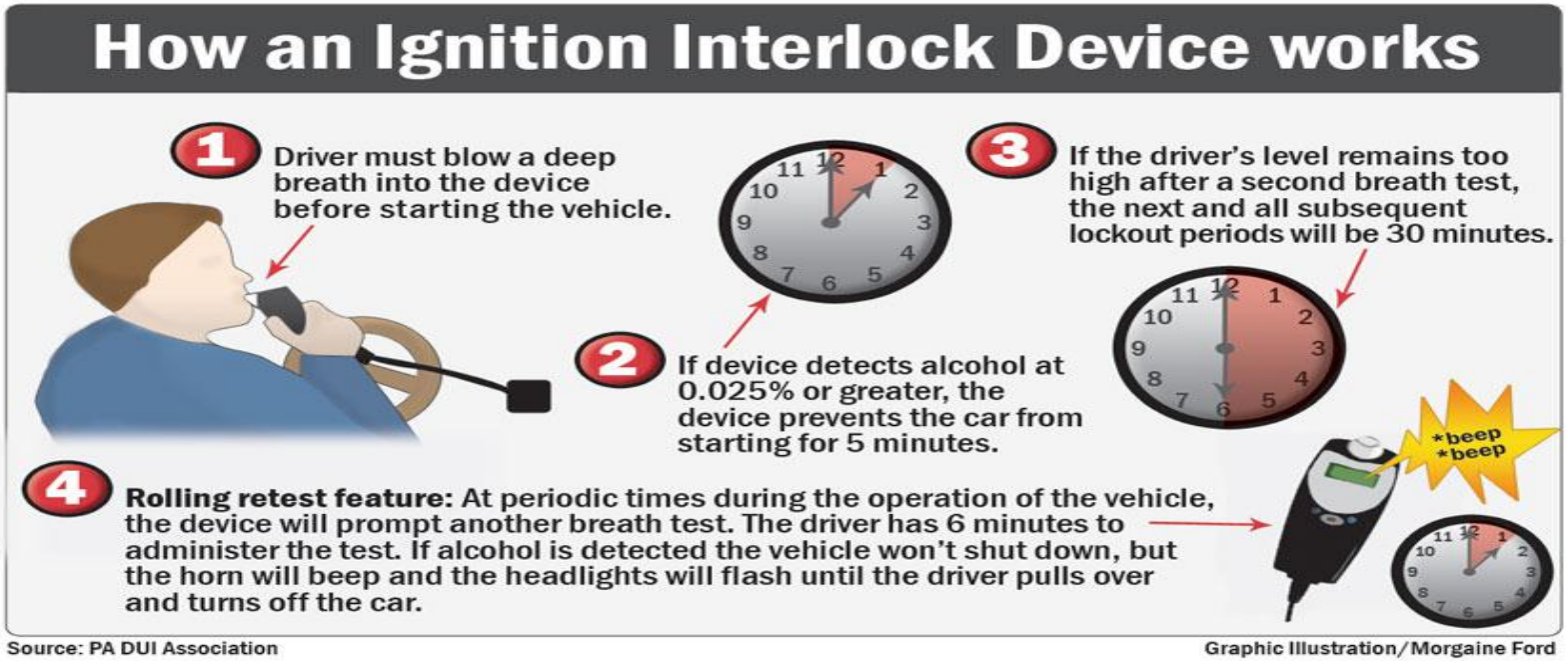
In the case of most drugs of abuse it is not the active drug itself, although there are a few exceptions.

The forensic testing procedures are the same as with blood testing.

In other words Gas Chromatography/Mass Spectrometry.

IGNITION INTERLOCK DEVICES

Now required by drivers who have certain conviction of DUI, DUAC, or Implied Consent violations.



IN SC THE LEVEL IS .02. ADDITIONALLY, SC REQUIRES CAMERA INSTALLATION AND THE DEVICE KEEPS A RECORD OF ALL TESTS AND PHOTOS WHEN THE DEVICE IS USED. IN SC IF THE IID RECORDS A .02 OR GREATER READING WHILE DRIVING, THE HORN WILL BLOW AND CONTINUE TO BLOW UNTIL THE CAR IS STOPPED AND SHUT OFF. IT WILL NOT CRANK AGAIN UNTIL THE BAC IS UNDER .02. A COMPUTER RECORD OF THE MACHINE IS MAINTAINED BY THE DEVICE AND MUST BE DOWNLOADED AT LOCATIONS DESIGNATED BY THE VENDOR AT LEAST EVERY 60 DAYS.

EMMA'S LAW REQUIREMENTS AFTER OCTOBER 1, 2014:

For an Implied Consent violation there are 3 options for a driver:

1. Wait out the suspension period of 6 months for a refusal and 3 months for .15 BAC and enroll in ADSAP.
2. Enroll in ADSAP and apply for a Route Restricted License.
3. Get Camera Equipped Ignition Interlock Device (IID) installed.

If DUI or DUAC conviction at less than .15:

1. Apply for a Provisional Drivers License If eligible after enrolling in ADSAP.
2. Enroll in ADSAP and install IID for 3 months.

For a DUI or DUAC 1st conviction of .15 or greater:

1. Enroll in ADSAP and install IID for 3 months.

For a DUI conviction on a refusal:

1. Enroll in ADSAP and install IID for 6 months.

EMMA'S LAW REQUIREMENTS AFTER OCTOBER 1, 2014:

For DUI or DUAC Conviction (second conviction within 10 years, violation date to violation date):

Enroll in ADSAP and IID for a minimum of 2 years.

For DUI or DUAC Conviction (third conviction within 10 years, violation date to violation date):

Enroll in ADSAP and IID for a minimum of 3 years.

For DUI or DUAC Conviction (third conviction within 5 years, violation date to violation date):

Enroll in ADSAP and IID for a minimum of 4 years.

For DUI or DUAC Conviction (fourth conviction within 10 years violation date to violation date):

Enroll in ADSAP and IID for **LIFE!**

POINTS FOR IID VIOLATIONS:

Failure to report to Vendor for download and calibration = 1 point each occurrence

Attempting to start the vehicle with BAC of .02 or greater = ½ point each occurrence

Violations of Running Re-Test with BAC of .02 or Greater = ½ point each occurrence

Violation of Running Re-Test with BAC of .04 to Less than .15 = 1 point each occurrence

Violation of Running Re-Test with BAC of .15 or Greater = 2 points each occurrence

****** If a Running Re-Test Violation occurs, the vehicle MUST be brought in to the Vendor within 4 days or the IID will cause the to no longer start.*****

CONSEQUENCES OF A VIOLATION:

ALL POINTS ASSESSED ARE CUMULATIVE!

2-2.5 Points result in a two month extension on the program.

3-3.5 Points results in a Substance Abuse Assessment and/or Treatment and a four month extension on the program.

4 Points or greater results in a 1 year Driver's License Suspension and the driver must complete a Substance Abuse Program.

ANOTHER DRIVER IS NOT PROHIBILTED FROM DRIVING THE VEHICLE, HOWEVER, ANY VIOLATIONS ARE THE RESPONSIBILITY OF THE IID RESTRICTED DRIVER!

COST BREAKDOWN OF THE IID PROGRAM:

What the Driver pays:

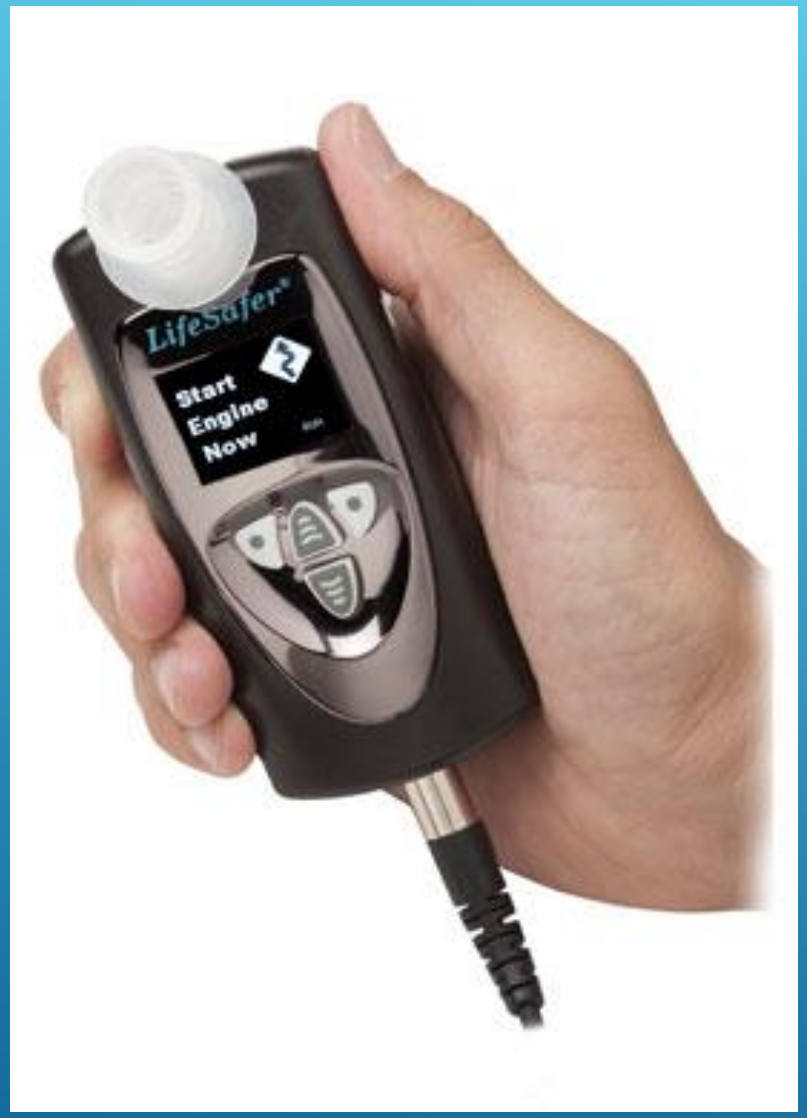
Installs	$30.00
Monthly Monitoring	$69.00
Missed Appointments	$25.00
Violation Reset	$35.00
Change Vehicle	$85.00
Under Hood Charge	$50.00
Complex Installs	Up to an additional $75.00
Inspection	$15.00
Removal	$89.00
Early Removal	$150.00
Cars 2007 and Newer	$50.00

APPROVED SC VENDORS

Smart Start

APPROVED SC VENDORS

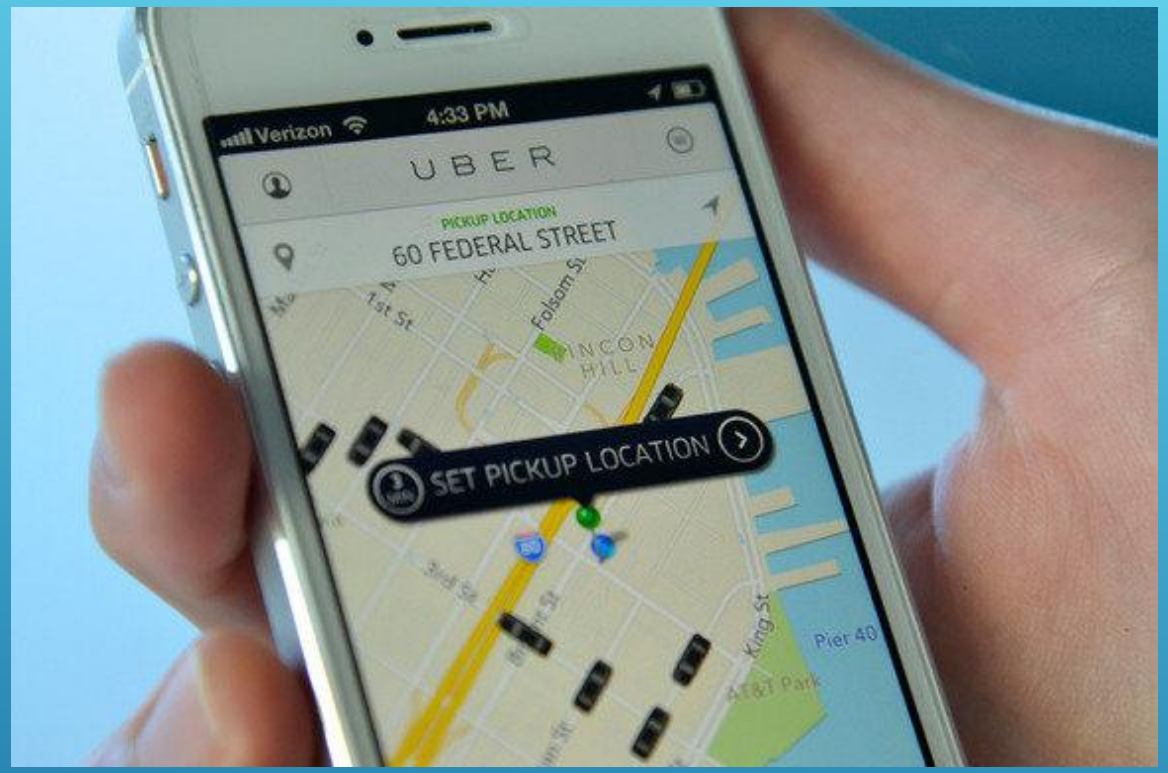
Guardian



APPROVED SC VENDORS

Lifesafer

IT'S A NEW DAY!

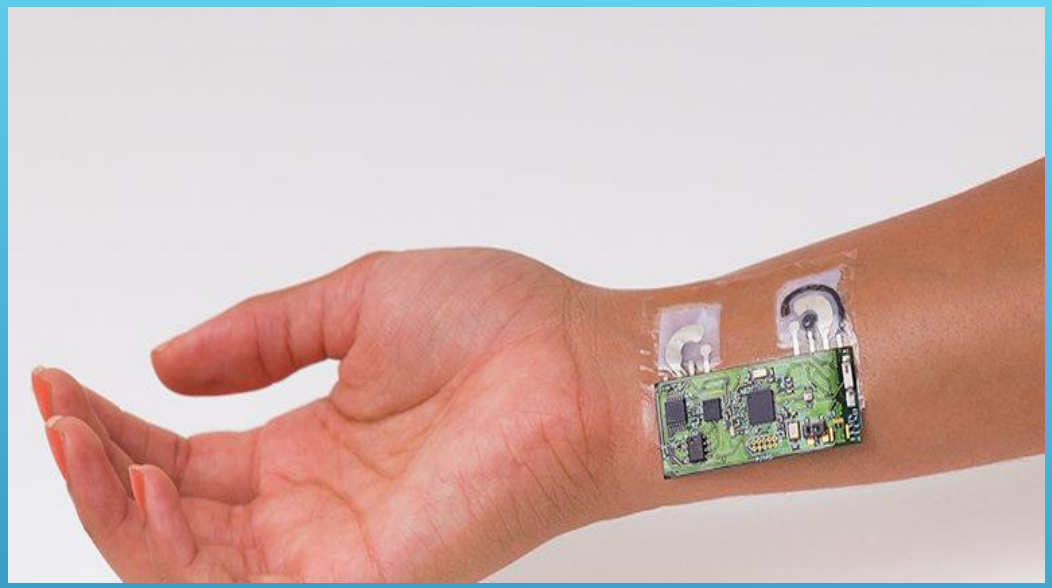

Verizon
4:33 PM
UBER
PICKUP LOCATION
60 FEDERAL STREET
1st St
Folsom St
SET PICKUP LOCATION
King St
Pier 40
AT&T Park

UBER

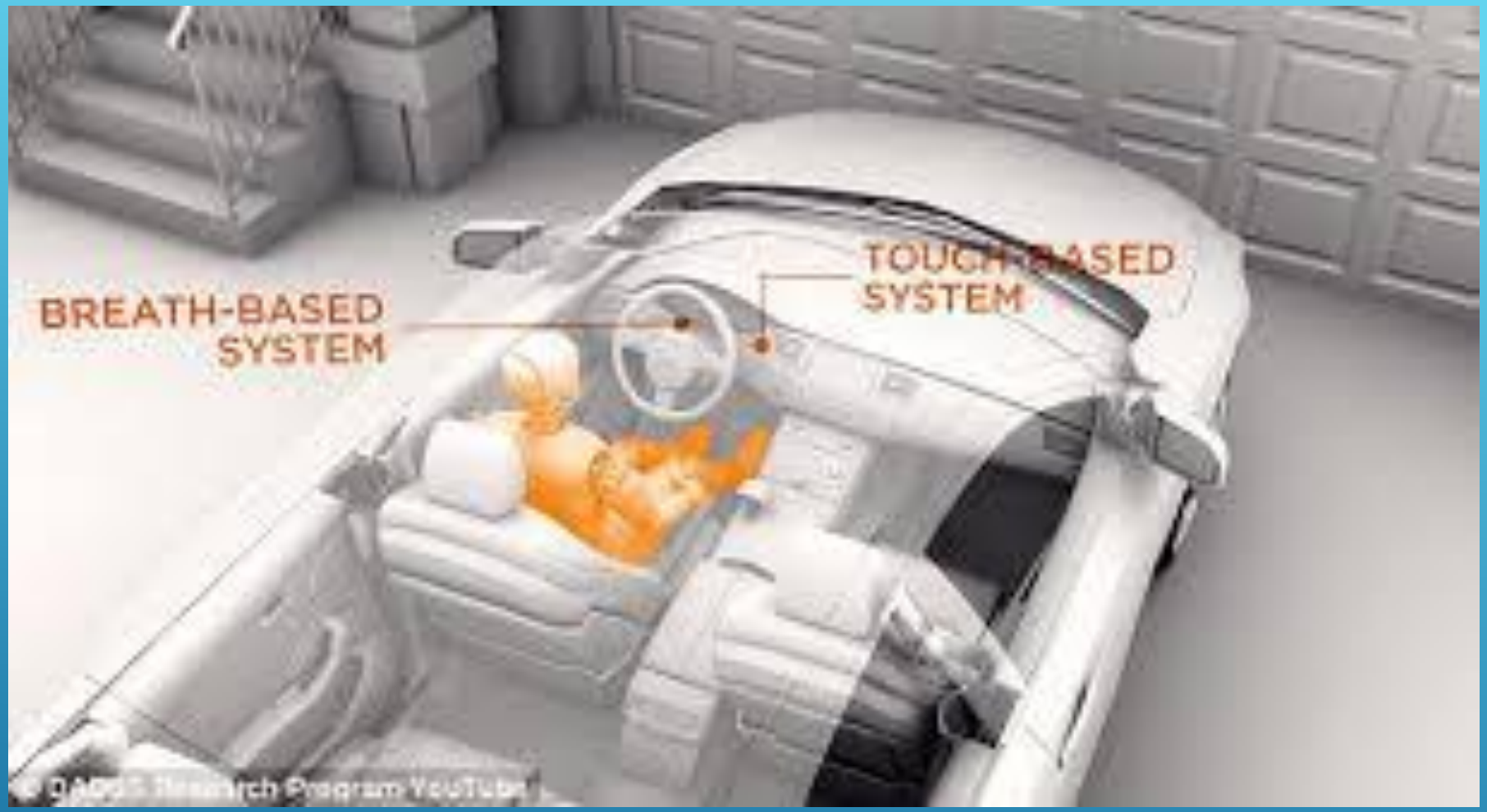
BAC TECHNOLOGY:

Portable Breath Testing devices are cheap and abundant.

Reliable?



KEYRINGS, FITBITS AND EVEN TATTOOS!



SMART CAR TECHNOLOGY

ROADSIDE DRUG TEST

This test has been developed by Draeger which currently manufactures a Breath Alcohol Test approved in some states and tests saliva for THC the active ingredient in Marijuana.

SELF-DRIVING CARS

SMARTPHONE TECHNOLOGY:

For under $100 you can turn your Android or IPhone into a BAC analyzer.

TRANSDERMAL DEVICES:

Secure

Remote

Continuous

Alcohol

Monitoring

South Carolina Bar

Cellular Forensics

Tom Slovenski
Simpsonville, SC

cellularforensics, LLC

Comprehensive Facts That Get Results

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Your Presenter

- **Tom Slovenski**

  30 Year Investigative Professional

  US Department of State Instructor

  SC Bar Approved Instructor

  SLED Approved Instructor/License PDC2073

  Certified Mobile Forensics Examiner

  Certified Cell Site Analyst

  Author of *"Cellular Forensics for First Responders"*

We Will Cover…

- Cell Phones and their Evidence
- Cell Phone Spyware

- Cell Towers and Mapping

Cell Phones and their Evidence

TRUE or FALSE

1. A cell phone is not a computer.
2. All cell phones are the same.
3. A cell phone is easier to examine than a computer.
4. All mobile forensic software does the same.
5. All data remains forever in the cell phone.

Cell Phones (cont.)

7. Wiping and Deleting data is the same thing.
8. All forensic examiners are the same (like attorneys).
9. A cell phone forensic examiner does not have to be licensed in South Carolina?

Cell Phone Spyware (bugs)

TRUE or FALSE

1. All cell phones can be “bugged”.
2. Clicking and lighting up are bug signs.
3. An iPhone doesn’t have to be “jailbroken” to be bugged.
4. An App on a phone could have ‘bugging’ capabilities.

Cell Towers and Mapping

TRUE or FALSE

1. The cell phone always uses the *closest* tower.
2. Cell Tower mapping is inaccurate.
3. Call History records are what you request.
4. All cell service providers use the same format in their records?

Cell Towers and Mapping (cont.)

5. Cell Tower records do not show Patterns.
6. The “Pie” method of cell site analysis is the most accurate methodology.

Questions?

Thank you !

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