

# SOUND JUDGMENT

## Thank You and Happy New Year!

By Judge Rod Ring, (Ret.)

Thank you to the Oklahoma Judiciary, the Supreme Court, and the Administrative Office of the Courts for your support of the Oklahoma Bar Association/Oklahoma Highway Safety Office Judicial Education Program. We could not function without that cooperation and encouragement. I also want to thank the judges who attended our education sessions in the summer and during the OBA Annual Meeting in November and gave us valuable feedback to help improve our training efforts. In 2019 we provided 9 hours of MJCLE, published a quarterly newsletter and consulted with judges dealing with impaired driving cases. In 2020 we will continue to work towards making our program even more relevant to what you do every day.

This is an important time for Oklahoma. We are exploring criminal justice reform while we are working to keep our communities safe. The goal of the State Judicial Education project is to educate members of the judiciary on impaired driving issues aimed to reduce impaired driving, traffic deaths and increase public safety through-



out the state. We hope to help Oklahoma reach that goal by providing the best science-based information for you to consider when facing issues of offender assessment, sentencing options, use of technical evidence such as standard field sobriety testing and drug recognition experts, reliability of expert testimony, and best practices in dealing with addiction.

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We are now planning the programs for the Summer Judicial Conference and the November OBA Annual Meeting. You can help with our planning by sharing your problems and successes along with the subjects you would like to know more about.

I look forward to working with you toward these efforts and wish you a productive new year!

## In Era of Legal Pot, Can Police Still Search Cars Based on Odor?

By Michael Rubinkam, Associated Press

Reprinted from [www.pbs.com/newshour/nation](http://www.pbs.com/newshour/nation)

Sniff and search is no longer the default for police in some of the 33 states that have legalized marijuana.

Traditionally, an officer could use the merest whiff of weed to justify a warrantless vehicle search, and whatever turned up —

pot, other kinds of illegal drugs, something else the motorist wasn't allowed to have — could be used as evidence in court.

That's still true in the minority of states where marijuana remains verboten. But the legal analysis is more complicated in places where pot has been approved for medical or adult use, and courts are beginning to weigh

in. The result is that, in some states, a police officer who sniffs out pot isn't necessarily allowed to go through someone's automobile — because the odor by itself is no longer considered evidence of a crime.

"It's becoming more difficult to say, 'I

See **Search** on Page 2

## Search continued from Page 1

smell marijuana, I can search the car.' It's not always an automatic thing," said Kyle Clark, who oversees drug impairment recognition training programs at the International Association of Chiefs of Police.

For nearly 100 years, the U.S. Supreme Court has recognized an "automobile exception" to the Fourth Amendment's ban on unreasonable searches and seizures, giving law enforcement the right to conduct a warrantless search if there is reason to suspect a vehicle is hiding contraband or evidence of a crime. Police have long used the exception to conduct vehicle searches based on the pungent, distinctive odor of pot.

Increasingly, motorists in states where marijuana is legal in some form are pushing back when police insist on a search — especially if that search yields evidence of a crime.

Last month, a Pennsylvania judge declared that state police didn't have a valid legal reason for searching a car just because it smelled like cannabis, since the front-seat passenger had a medical marijuana card. The search yielded a loaded handgun and a small amount of marijuana in an unmarked plastic baggie — evidence the judge suppressed.

"The 'plain smell' of marijuana alone no longer provides authorities with probable cause to conduct a search of a subject vehicle," Lehigh County Judge Maria Dantos wrote, because it's "no longer indicative of an illegal or criminal act." She said that once the passenger presented his medical marijuana card, it was "illogical, impractical and unreasonable" for troopers to conclude a crime had been committed.

Prosecutors have appealed the ruling, arguing the search was legal under recent state Supreme Court precedent. But they acknowledge that marijuana odor is an evolving issue in the courts.

"We want to get it right," said Heather Gallagher, chief of appeals in the district attorney's office. "We need guidance, so law enforcement knows what to do." Other states' courts have curtailed searches based on odor.

Massachusetts' highest court has said repeatedly that the smell of marijuana alone cannot justify a warrantless vehicle search. In Vermont, the state Supreme Court ruled in January that the "faint odor of burnt marijuana" didn't give state police the right to impound and search a man's car. Colorado's Supreme Court ruled in May that because a drug-detection dog was trained to sniff for marijuana — which is legal



**Sniff and search is no longer the default for police in some of the 33 states that have legalized marijuana.**  
Photo by REUTERS/Elijah Nouvelage

in the state — along with several illegal drugs, police could not use the dog's alert to justify a vehicle search.

"Smell alone is gradually becoming no excuse for getting around the Fourth Amendment," said Keith Stroup, legal director of the National Organization for the Reform of Marijuana Laws. "It's a major development, and it's going to provide a layer of protection that we lost sometime in the past."

But not every court has ruled against sniff and search.

Maryland's high court quoted the title of Bob Dylan's "The Times They Are A-Changin'" in ruling last month that police did an unlawful body search of a motorist whose car smelled of marijuana and contained a joint on the center console. But the court also decided that police were entitled to search the car itself, noting that marijuana is still considered contraband despite the state's medical marijuana program, and people have a "diminished expectation of privacy" in an automobile.

Judges have also ruled that marijuana odor can be used in conjunction with other factors to support a search. If the smell is overpowering, for example, an officer might conclude the motorist has a quantity of cannabis far in excess of what's allowed. Driving under the influence of marijuana is illegal in all 50

states, so police are free to search the car of a driver who shows signs of impairment.

The longstanding federal ban on marijuana, and whether a state's marijuana law is broad or narrow in scope, are additional factors that courts have considered, said Alex Kreit, visiting professor at the Drug Enforcement and Policy Center at Ohio State University's law school.

On patrol, some officers are taking heed of the changing landscape.

In Michigan, medical marijuana patient Craig Canterbury said he produced his ID card after state police told him they smelled marijuana in his van during a traffic stop last year.

"They looked at the card, made sure it was legal, and that was that," Canterbury said. He said he wouldn't have agreed to a vehicle search "because I had shown we were legal."

When David Boyer, former Maine political director of the Marijuana Policy Project, was pulled over for speeding last year, the officer said she smelled marijuana in his car. Boyer, who said he had consumed cannabis at a friend's house several hours earlier, reminded the officer it was legal in Maine and told her he wasn't under the influence.

"She pushed back a little bit on it but ultimately, I just got the speeding ticket," Boyer said.

The officer didn't ask to search the car.



# Examine Issues with Prosecuting Driving Under the Influence of Drugs (DUID) Cases

## Objective of Research Study:

To examine and document challenges faced by the criminal justice system during the prosecution of drug impaired driving offenses, and detail potential solutions.

## Background:

The National Highway Traffic Safety Administration (NHTSA) is conducting a study of the process of prosecuting a Driving Under the Influence of Drugs (DUID) offense.

Unlike the single substance of alcohol, there are hundreds of other drugs with varying effects on the body and thus on driving behavior. The ability to detect drugs within the body also varies as do the tools and procedures for testing. Unlike the alcohol breath test, reliable roadside tests for drug consumption are not yet readily available. These factors create multitudes of complexity for prosecution of DUID cases.

Many drivers consume over-the-counter and prescription medications and may be unaware of potentially impairing effects. This brings a broader range of drivers into the “impaired” realm, and officers need to be adept at recognizing signs and symptoms of impairment from legal and illegal drug use. This can range from a person on a newly prescribed medication and not yet acclimated to sedating effects, to someone who purposely ingested an illegal drug to feel euphoric.

The laws where the offense occurred make a difference in whether and what offense can be charged. State laws vary on whether legislation refers to a driver being “under the influence” or being impaired; how control of a vehicle is defined; implied consent laws, and type of testing allowed. State laws vary on per se limits for selected drugs, meaning that a person who is tested for a substance above the per se level would be arrested; in another State that concentration may be below the specified limit and the driver would be released. States also vary in whether separate alcohol and drug-impaired driving offenses are an option for charging offenders.

## Approach:

NHTSA will review arrest records and court



case files from selected jurisdictions to examine which strategies and expert witnesses assist in securing appropriate adjudication of cases. Issues that occur which present both common and unusual DUID prosecution experiences will be documented in order to see what information is available to prosecutors and what information may be missing or difficult for judges or jurors to understand.

NHTSA will also conduct discussions with prosecutors, traffic safety resource prosecutors, state prosecutor coordinators, and others who assist in cases to learn from law enforcement officers, drug recognition experts, toxicologists, defense attorneys, judges, and jurors.

## Time Frame:

This is a 36-month project. Data collection will be collected in 2020 and 2021.

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## A Case to Watch!

The Supreme Court of the United States has taken on a case from Pennsylvania which may impact evidence in Impaired Driving cases. The issue is whether a motorist's assertion of his Fourth Amendment right to refuse consent to a warrantless blood test may be used as evidence of guilt for the offense of Driving Under the Influence.

The case can be found at *Bell vs. Pennsylvania*, 167 A.3d 744, or follow the link below:

<https://www.scotusblog.com/wp-content/uploads/2019/12/2019-11-map-2018.pdf>

# Car Crashes in Pot-Legal States Have Soared

November 13, 2019

[www.bloomberg.com/news/articles](http://www.bloomberg.com/news/articles)

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Car crashes in the first three states to legalize recreational marijuana have soared as law enforcement and regulators struggle to define driving high, let alone determine how to fight it.

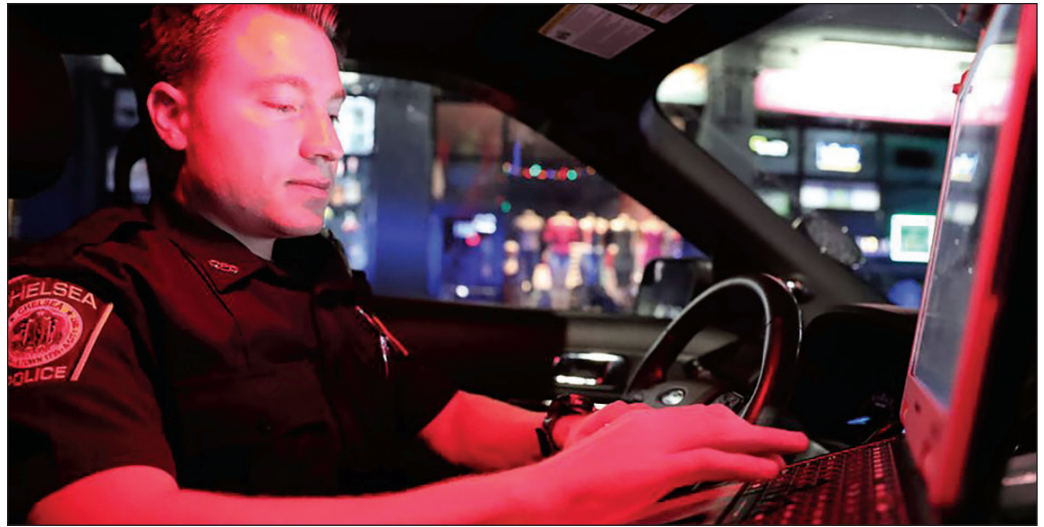
Colorado, Oregon, and Washington saw a combined 5.2% increase in the rate of police-reported crashes after legalizing recreational marijuana, compared with neighboring states where such sales are illegal, according to data compiled and analyzed by the Insurance Institute for Highway Safety. Researchers tallied crash rates between 2012 and 2016.

Auto-insurance collision claims in the three states have also increased a combined 6% since legalization, compared with neighboring western states without legal weed, the Highway Loss Data Institute found. Analysts controlled for variables such as driver population, car model, weather, and driving environment.

The increases have caught Congress and federal regulators off guard as states with legalized marijuana seek answers. Unlike with alcohol, scientifically there's neither a proven definition of marijuana-impaired driving nor a method of detecting it, making it difficult to police and prosecute. Insurance companies say driving under the influence statistics don't separate out marijuana and can't be used to set rates, taking away another potential deterrent to driving high. And Congress has impeded regulator efforts to collect more information on the subject.

"Drunk driving is still the No. 1 killer on our roads," said Helen Witty, president of Mothers Against Drunk Driving. "But drugged driving, as it's legalized across this country, is a huge, emerging issue."

Scientists know that drivers who are high tend to drive at lower speeds, have more difficulty staying in their lanes, and are slower to brake in an emergency than drunk drivers, the National Highway Traffic Safety



A Chelsea police "drug recognition expert," runs the license of a driver who failed to let a pedestrian cross the street in a cross walk in Chelsea, U.S. Photographer: Matthew J. Lee/The Boston Globe via Getty Images

Administration reported.

That may explain why traffic fatalities aren't necessarily rising in the states that have legalized pot even as reports of accidents and collision claims have.

In Colorado, the first state to legalize recreational marijuana, officials have seen a decrease in marijuana-impaired traffic fatalities. About 8% of all traffic fatalities tested positive for five nanograms of THC in 2017, down from 12% in 2016, according to the Colorado Division of Criminal Justice. That's the blood-THC level at which Colorado drivers can be charged with driving under the influence. Tetrahydrocannabinol, or THC, is the substance in marijuana that causes a user's impairment.

Washington, however, noticed a spike in the number of fatally injured drivers who had the chemical in their blood after recreational sales started in 2014. The number of drivers involved in fatal crashes there who tested positive for any THC has more than doubled since 2013, the Washington Traffic Safety Commission said.

## How Weed Impairs

Police officers may use a Breathalyzer to confirm whether a driver's blood alcohol level, known as BAC, is above the federal legal limit

of .08%. Five states have limits for THC, according to the Governors Highway Safety Association, but there's no scientifically accepted method of testing for impairment.

That's because marijuana and alcohol affect the body differently.

The presence in the blood of marijuana, unlike alcohol, doesn't necessarily indicate impairment, said Staci Hoff, research director at the Washington Traffic Safety Commission. Also, THC can all but disappear from the bloodstream in as little as half an hour, making it difficult to capture evidence that a person is too high to drive.

Factors such as potency, how often someone consumes, and whether marijuana is consumed through an edible, oil, or smoke can affect driving, said Erin Sauber-Schatz, a transportation safety team leader at the Centers for Disease Control.

"It's like we're missing the right marker in order to identify impairment," said Kyle Clark of the International Association of Chiefs of Police.

While auto insurers use DUI information to set prices, the available data generally doesn't distinguish by substance. Until it

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## Crashes continued from Page 4

does, marijuana use or the fact someone lives in an area where pot is legal won't affect rates.

"We're kind of on the brink of making those strides to be able to drill down forward," said Janet Ruiz, spokeswoman for the Insurance Information Institute.

### Tough to Prosecute

In Washington state, prosecutors are seeing more cases involving marijuana and driving because weed is now more accessible, said Moses Garcia, a traffic safety resource prosecutor there. Their toxicology labs have been so overwhelmed by requests for blood tests, it now takes them about 14 months instead of 30 days to turn around results.

The biggest challenge is a lack of reliable field tests to establish impairment, Garcia said.

"We're trying to use techniques that we are familiar with," for alcohol, Garcia said. "But those techniques, just from a common-sense perspective, they can't work. They're not useful. So most people under the influence of marijuana aren't even caught."

Scientists are working on roadside screening devices and saliva tests. One company is testing a smartphone app that would require drivers to complete four tasks. Researchers at the University of Pittsburgh are working on a marijuana breathalyzer.

Right now, law enforcement officers called Drug Recognition Experts are the main defense against marijuana-impaired driving. DREs undergo two weeks of training in which they learn to determine which drugs impair a driver. Those officers follow a 12-step process that includes examining the eyes, taking a pulse, and checking muscle tone.

DREs found about 30% of people they screened in 2018 were impaired by cannabis, making it the top identified drug category in the U.S. However, DREs aren't required to submit their evaluations, so that number may be incomplete. In the past few years, the police chiefs association has added information to its officer training about marijuana, said Clark, who manages the association's Drug Recognition Expert program.

However, the scientific validity of DRE evidence has been challenged in court. A Massachusetts judge said earlier this year that a drug recognition expert's evaluation couldn't be used against a man charged with

driving under the influence of drugs.

Even if roadside tests could accurately determine a driver's level of THC, they probably wouldn't indicate driving impairment given how quickly THC levels in the blood drop, Sauber-Schatz of the CDC said.

"I'm sorry that the legalization has happened before the science is there because I think that's a huge danger for our society and the protection of our people," MADD's Witty said.

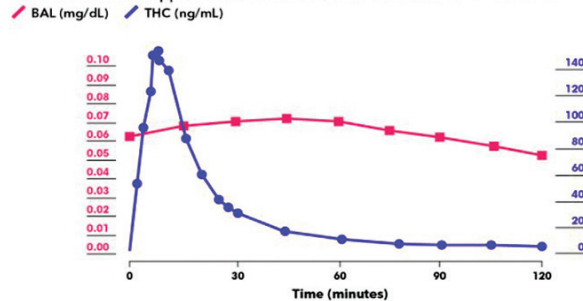
### Lawmakers Respond

States are moving on marijuana and driving faster than lawmakers in Washington, D.C., because marijuana is still federally illegal.

Congress asked NHTSA in the last surface transportation law (Public Law 114-94) to report on marijuana-impaired driving. Lawmakers also requested a Congressional Research Service report on the topic. In spending laws, lawmakers have encouraged the agency to increase awareness of the Drug Recognition Expert program,

#### Alcohol vs. Marijuana in the Blood

THC can all but disappear from the bloodstream in as little as 30 minutes.



Note: The Blood Alcohol Level begins at .06 mg/dL because researchers gave the subjects alcohol before the experiment began. It takes longer for the body to absorb alcohol and for it to have measurable drug effects than it does for THC.

Source: R. Andrew Swell, James Poling, and Mehmet Sofuoglu in the American Journal on Addictions

Bloomberg Government

especially in states with legal recreational and medicinal marijuana.

But Congress has blocked federal funding for the NHTSA National Roadside Survey in four of the last five spending laws, a Bloomberg Government analysis found. The survey randomly samples drivers to provide a snapshot of drugged and drunk driving. NHTSA last conducted the survey in 2013-2014, and before that typically conducted it about every 10 years.

Survey efforts in 2013-2014 received public backlash, including from several members of Congress who said the roadside tests violated driver privacy, said J.T. Griffin, MADD's chief government affairs officer. Money for the survey wasn't barred in the 2019 spending law, nor is it blocked in the 2020 transportation appropriations bill the Senate passed in late October.

House Transportation and Infrastructure Chairman Peter DeFazio (D) said his committee "would look at" incorporating funding for marijuana-impaired driving research in the next sur-

face transportation bill, which would replace the 2015 law after it expires in September 2020. NHTSA is currently studying how to understand better how drugs influence drivers, an agency spokesperson said in an email.

"The first thing federal policy needs to be is investment in research to develop real-time technology to protect people who may be heavily under the influence of marijuana," said DeFazio. "Right now, that doesn't exist." Recreational marijuana is legal in DeFazio's home state of Oregon.

### A New 'Culture War'

At the state level, officials from at least four states in the northeast agreed in October to a uniform set of policies for marijuana-impaired driving. They agreed to coordinate DRE training and enforce a uniform standard for blood and saliva cannabis tests, said Max Reiss, spokesman for Gov. Ned Lamont (D-Conn.).

"We have to figure out: how do we deal with this patchwork of regulations around the region," Reiss said.

In Colorado, transportation officials launched a statewide campaign shortly after legalization to teach drivers that they could get a DUI for driving high, said Sam Cole, the department's communications manager. The agency also works with dispensaries to distribute flyers about marijuana-impaired driving at the checkout counter.

The entire Colorado state patrol is also now certified in Advanced Roadside Impaired Driving Enforcement, a program that helps police officers recognize behavior of a driver under the influence, said Glenn Davis, the Colorado Department of Transportation's highway safety manager. They had about 200 certified DREs last year.

"I feel like we've won the culture war that it is a bad idea to drink alcohol and drive," said Garcia, the safety resource prosecutor in Washington state. "People will agree with you that no, you shouldn't be drinking and driving. But if you ask the same question about marijuana, they're not sure."

Christina Brady in Washington also contributed to this story.

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# TRAFFIC SAFETY FACTS

## Research Note

DOT HS 812 826

October 2019

# 2018 Fatal Motor Vehicle Crashes: Overview

There were 36,560 people killed in motor vehicle traffic crashes on U.S. roadways during 2018, a 2.4-percent decrease from 37,473 in 2017, which came after a 0.9-percent decrease from 2016 to 2017. Prior to 2016 there were two back-to-back yearly increases of 8.4 percent and 6.5 percent, respectively. Fatalities decreased from 2017 to 2018 in almost all segments of the population with the exception of fatalities in crashes involving large trucks and nonoccupant fatalities (pedestrians and pedalcyclists).

- There were 913 fewer fatalities in 2018 than 2017 in the following (but not limited to).
  - ◆ Passenger car occupants (702 fewer fatalities, 5.2% decrease)
  - ◆ Van occupants (98 fewer fatalities, 8.3% decrease)
  - ◆ SUV occupants (76 fewer fatalities, 1.6% decrease)
  - ◆ Pickup truck occupants (82 fewer fatalities, 1.9% decrease)
  - ◆ Motorcyclists (244 fewer fatalities, 4.7% decrease)
  - ◆ Alcohol-impaired-driving fatalities (397 fewer fatalities, 3.6% decrease)
  - ◆ Speeding-related fatalities (569 fewer fatalities, 5.7% decrease)
  - ◆ Fatalities in single-vehicle crashes (654 fewer fatalities, 3.2% decrease)
  - ◆ Fatalities in multiple-vehicle crashes (259 fewer fatalities, 1.5% decrease)
  - ◆ Passenger vehicle occupants killed in rollover crashes (681 fewer fatalities, 9.5% decrease)
- Fatalities increased in 2018 compared to 2017 in these categories.
  - ◆ Large-truck occupants (7 more fatalities, 0.8% increase)

- ◆ Pedestrians (208 more fatalities, 3.4% increase)
- ◆ Pedalcyclists (51 more fatalities, 6.3% increase)
- Vehicle miles traveled (VMT) based on early traffic volume trends (TVT) increased by 0.3 percent from 2017 to 2018.
- The fatality rate per 100 million VMT decreased by 3.4 percent from 1.17 in 2017 to 1.13 in 2018.

Over the past 40 years there has been a general downward trend in traffic fatalities. Safety programs such as those increasing seat belt use and reducing impaired driving have substantially lowered the traffic fatalities. Vehicle improvements such as air bags and electronic stability control have also contributed greatly to the reduction of traffic deaths.<sup>1</sup> The partnerships with States on highway safety issues support a range of activities that have saved lives over the years.

This fact sheet contains information on fatal motor vehicle crashes and fatalities based on data from the [Fatality Analysis Reporting System](#) (FARS). Refer to the end of this publication for more information on FARS.

Information in this note is presented in the following sections.

- [Overall Trends](#)
- [Fatality Rates](#)
- [Change in Fatality Composition](#)
- [Fatality Changes by Person Type](#)
- [Fatalities in Crashes Involving Large Trucks](#)
- [Fatalities by Land Use](#)
- [Inside Versus Outside the Vehicle](#)
- [Alcohol-Impaired-Driving Fatalities and Drivers](#)

<sup>1</sup> Kahane, C. J. (2015, January). *Lives saved by vehicle safety technologies and associated Federal Motor Vehicle Safety Standards, 1960 to 2012 – Passenger cars and LTVs – With reviews of 26 FMVSS and the effectiveness of their associated safety technologies in reducing fatalities, injuries, and crashes.* (Report No. DOT HS 812 069). Washington, DC: National Highway Traffic Safety Administration. Available at <https://crashstats.nhtsa.dot.gov/Api/Public/ViewPublication/812069>

## Fatality Analysis Reporting System

The FARS contains data on every fatal motor vehicle traffic crash within the 50 States, the District of Columbia, and Puerto Rico. To be included in FARS, a crash must involve a motor vehicle traveling on a public trafficway and must result in the death of a vehicle occupant or a nonoccupant within 30 days of the crash. The Annual Report File (ARF) is the FARS data file associated with the most recent available year, which is subject to change when it is finalized about a year later. The final version of the file is aptly known as the “Final” file. The additional time between the ARF and the Final file provides the opportunity for submission of important variable data requiring outside sources, which may lead to changes in the final counts.

The updated final counts for a given previous calendar year will be reflected with the release of the recent year’s ARF. For example, along with the release of the 2018 ARF, the 2017 Final file was also released to replace the previous year’s 2017 ARF. The final fatality count in motor vehicle crashes for 2017 was 37,473, which was updated from 37,133 from the 2017 ARF.

## 2016 FARS Final File Revision

Due to amendments made to the 2016 FARS Final file, the number of alcohol-impaired-driving fatalities for 2016 changed from 10,996 to 10,967. Also the number of fatalities involving large trucks changed from 4,369 to 4,678 because of the light pickup truck classification revision.

## Light Pickup Truck Classification Issue

NCSA reviewed vehicles coded as a light pickup truck body type in the 2016 data collection year in FARS and, as applicable, reclassified them as an appropriate large truck body type. In all, 329 vehicles that were classified as light pickup trucks were reclassified as large trucks.

These changes are reflected in the FARS 2016 Amended Final file. In addition, the coding of light and large pickup trucks on the FARS 2017 Final file and 2018 Annual Report File (ARF) was reviewed and where applicable, revised in accordance with the FARS 2016 Amended Final file guidelines. Any issues existing in 2015 and earlier year files were not addressed due to a lack of source materials needed to revise the original data.

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For questions regarding the information presented in this report, please contact [NCSARequests@dot.gov](mailto:NCSARequests@dot.gov). Access this Crash•Stats and other general information on traffic safety at <https://crashstats.nhtsa.dot.gov/>.



U.S. Department  
of Transportation  
**National Highway  
Traffic Safety  
Administration**



# Please Tell Us What You Want



The purpose of the State Judicial Outreach Liaison program administered through the Oklahoma Highway Safety Office and the Oklahoma Bar Association is to increase judiciary knowledge of challenges in adjudication of Impaired Driving cases. We do this through peer-to-peer judicial education, technical assistance, and links to resources.

We try to review and distribute

current research, data, and information on evidence-based sentencing practices, DUI Courts, Ignition Interlocks, caselaw and offender assessment and treatment.

However, we can't meet our goal without help from you. Please let us know about interesting issues, facts, and arguments you have encountered in your courts. Please share your successes and failures and tell us what you want to learn more about.

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