

ALABAMA DUI LAW UPDATE 2011

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The 1980 “Rules of the Road” DUI

- **One sentence** constituted the entire DWI law for the state in 1927. The wording of the state’s DWI statute remained unchanged until 1980.
- 1980: Alabama legislature writes new “Rules of the Road” and enacts Chapter 5A of Title 32. The current DUI statute - 32-5A-191- now exceeds four pages, single spaced, in length.
- 32-5A-191 (a): A person ***shall not drive or be in actual physical control*** of any vehicle while:
 - (1) There is **0.08 percent or more by weight of alcohol** in his or her blood;
 - (2) **Under the influence of alcohol**;
 - (3) **Under the influence of a controlled substance** to a degree which renders him or her incapable of safely driving;
 - (4) **Under the combined influence of alcohol and a controlled substance** to a degree which renders him or her incapable of safely driving; or
 - (5) **Under the influence of any substance which impairs** the mental or physical faculties of such person to a degree which renders him or her incapable of safely driving. (A-5 enacted in 1983)

Two Major Changes

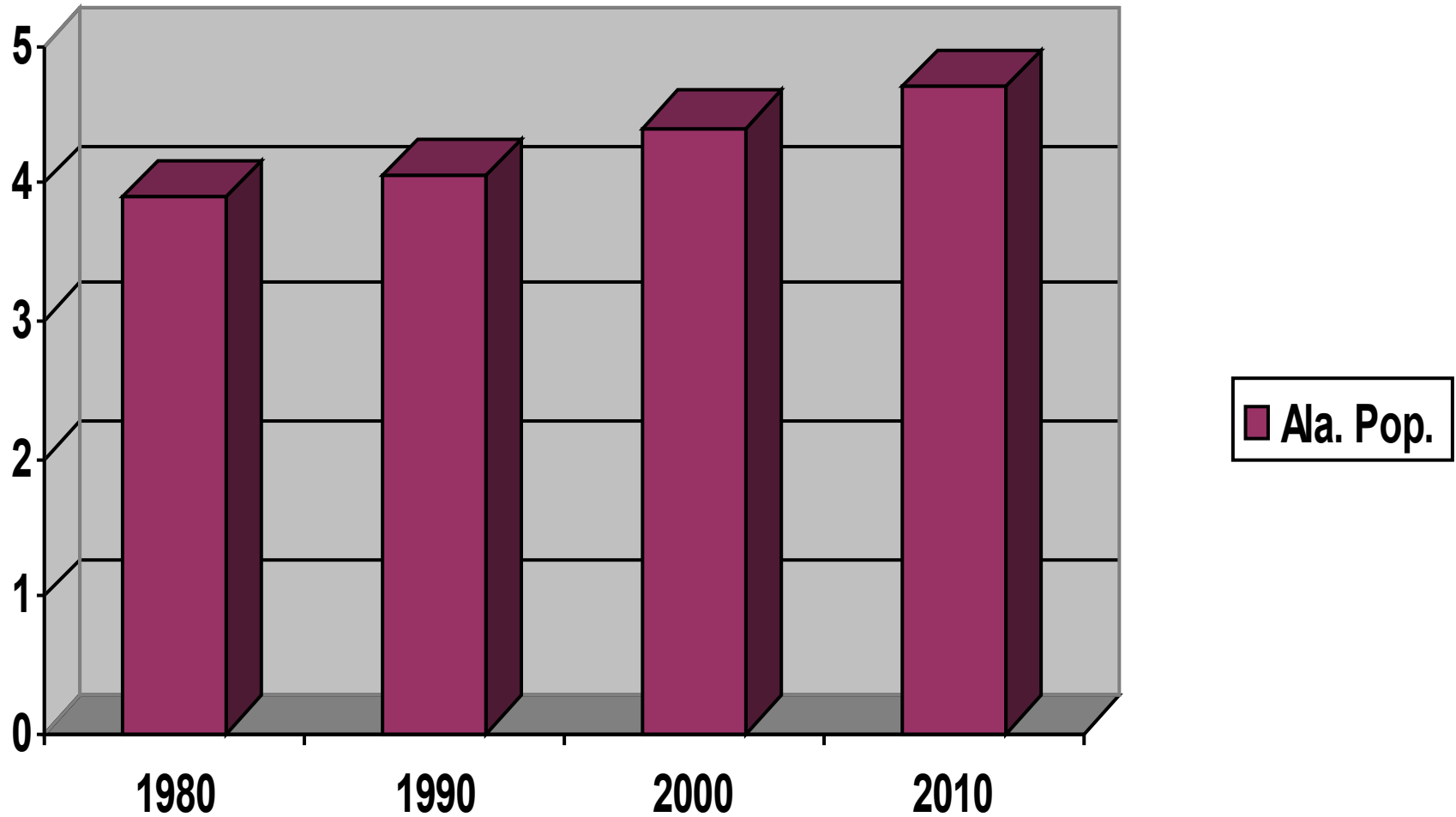
- The first major change contained in the 1980 DUI statute was the removal of the term “intoxication” as part of the of the offense.
- Under the 1980 statute, a new term replaced “driving while intoxicated” with “***driving under the influence.***”
- The second major change that took effect with the enactment of the 1980 statute was, for the first time in this state, ***a per se violation of the DUI statute based strictly on the blood or breath test reading.***
- No evidence of actual physical impairment or proof of intoxication is required to obtain and uphold a conviction

DUI becomes a 'blood-alcohol' offense

- The ***per se*** violation constituted a major shift in the prosecution of the DUI driver.
- Testimony now centered on **test admissibility** rather than the indications of physical impairment of the motorist.
- Additionally, with two later pieces of legislation, the state's case was easier to prove than previously:
 - Act 660 of the 1988 legislature re-wrote the chemical test for intoxication act, and included as part of the legislation the “**2100 to 1 ratio**” as a *fundamental part of state law* governing the administration of breath tests.
 - In 1995, the legislature re-wrote the DUI statute lowering the *per se* violation from **.10% to .08%**, and incorporated the same changes into the chemical test act.

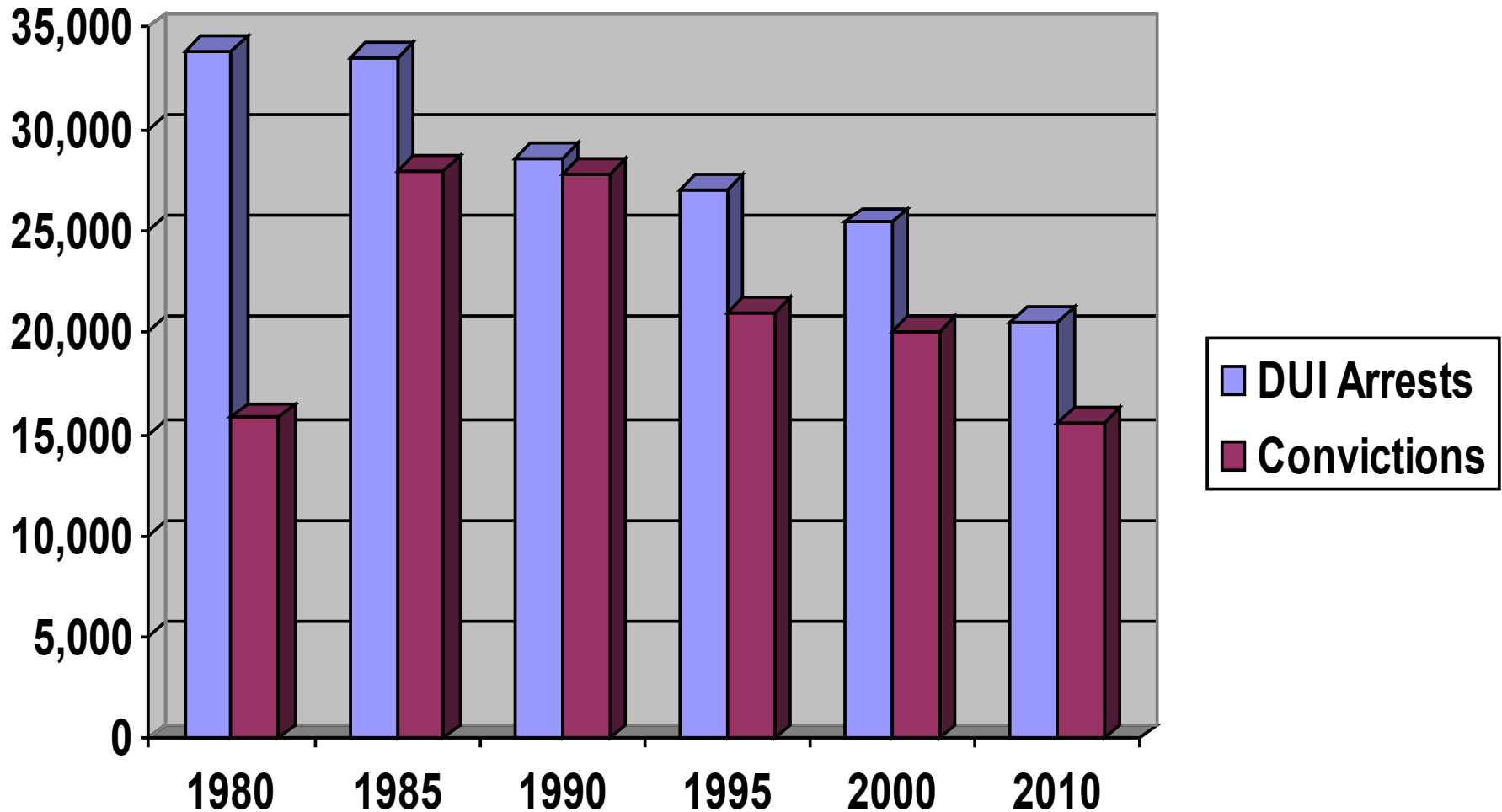
Population Trend: State Population Up 20% in past 30 years

Source: Auburn University at Montgomery

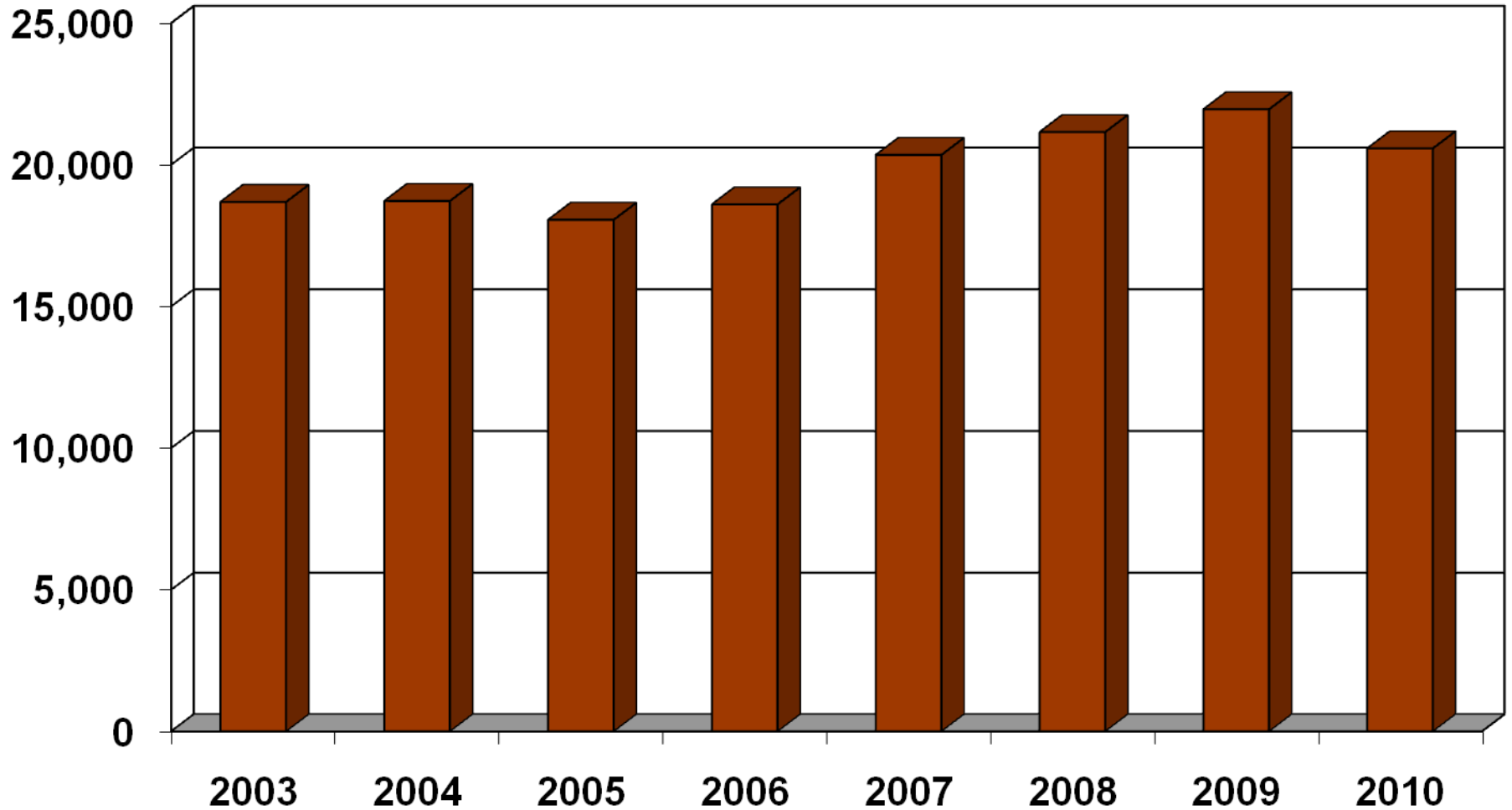


DUI Arrests As Compared to Population Trends

State population increases 20% over the past 30 years, but **DUI arrests decline by 39%**



DUI Arrests Statewide 2003-2010



2009 DUI Arrest Data

Total: **21,951 DUI Arrests state-wide**

Convictions: 16,983 (77%)

Dismissed/Not Prossed: 3,907(18%)

Acquitted/Not Guilty: 976 (4%)

Reduced to Reckless Driving: 54

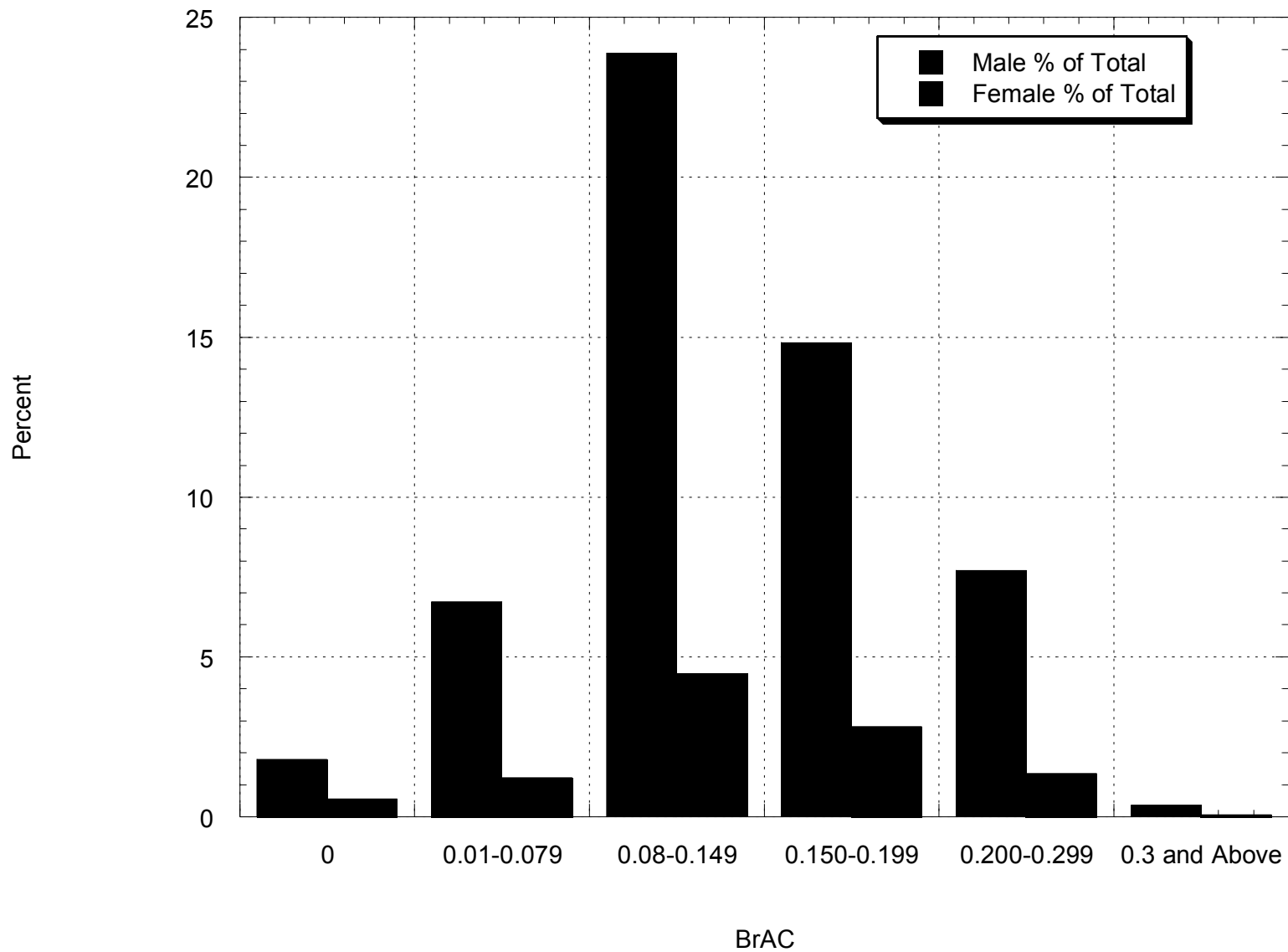
Other: 76

Alabama's DUI Offenders

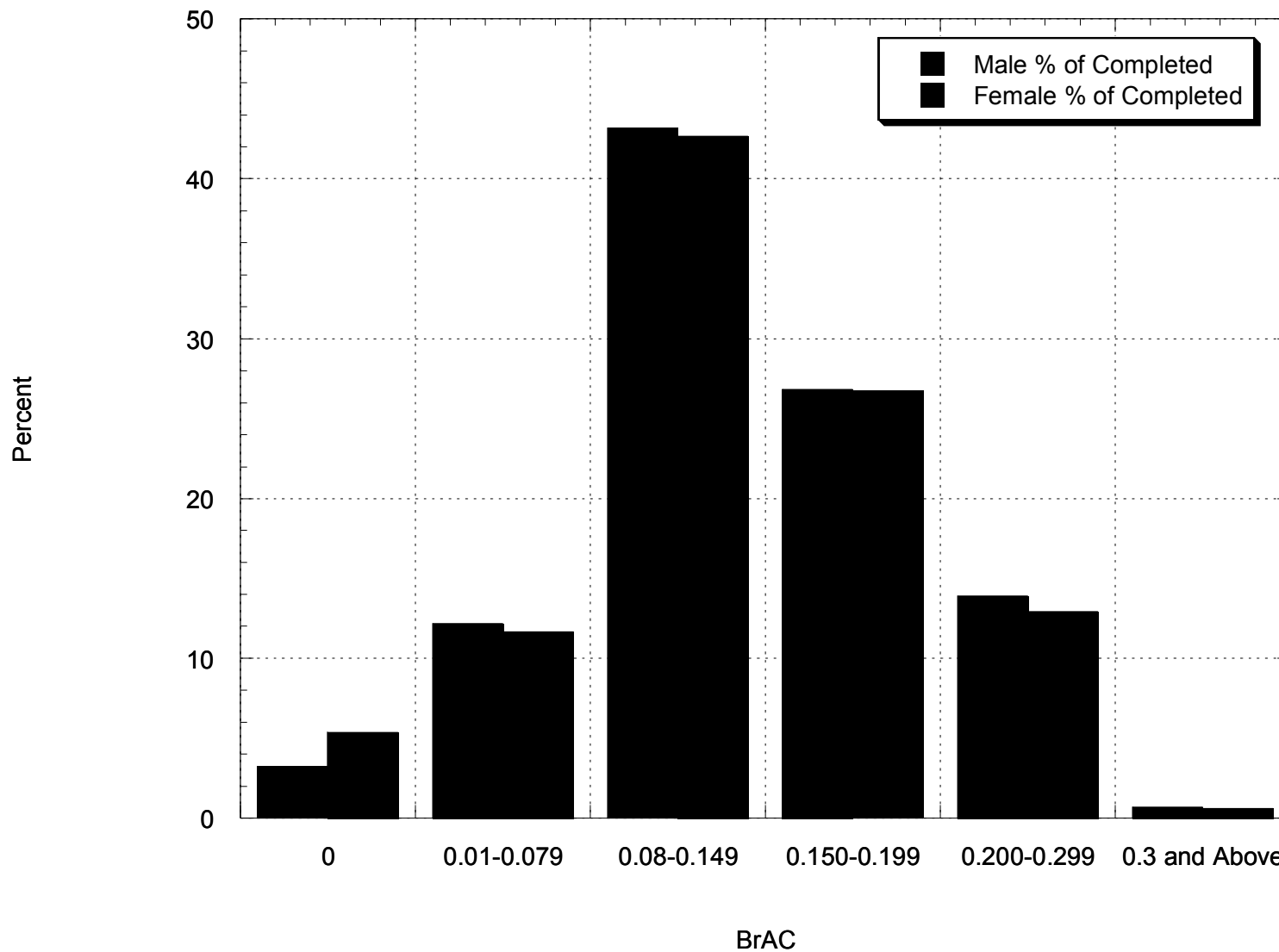
A Statistical Study Based on Draeger
Breath Test Data

7/15/2003 – 10/21/2007

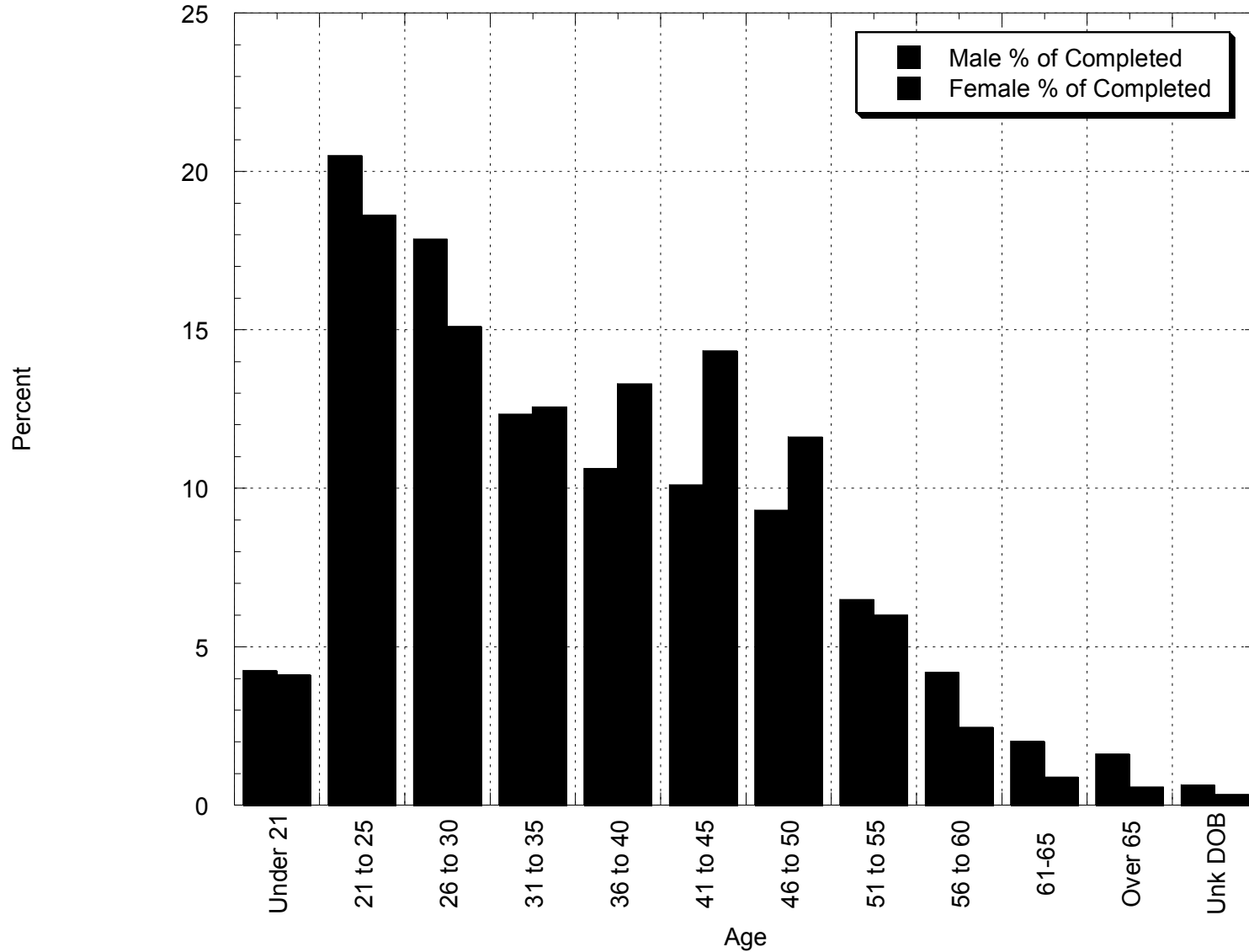
Percent of total Test As a Function of BrAC for Males and Females



Percentage of Test Results as a Function of BrAC For Males and Females For completed Tests



Percentage of DUI Test As a Function of Age



Alabama Breath Test Data

7/15/2003 – 10/21/2007

- 51 month analysis of all Draeger tests in Alabama
- 101,668 tests
 - 66,904 completed tests (65.8%)
 - 56,226 male (**84% male**)
 - 10,676 female (**16% female**)
 - 34,764 refusal/incomplete (29.8%)
 - 4.4% incomplete other reasons
- 32% all test takers aged 21-30
- Average BrAC all tests- **.137%**
- Per cent tests above .15% - **41% all tests**

Based on Statistics, Who is the Most Likely DUI Offender?

- Male, aged 21-35 (approximately **50% of all DUI arrests** are **males, aged 21-35**)
- With a breath test at or near **.15%**

Federal Mandates

Federal statutes requiring state compliance or order the Secretary of Transportation to ***withhold federal highway funds from non-compliant states***:

- 23 U.S.C. 153, PL 102-240 “Use of Safety Belts and Motorcycle Helmets”
- 23 U.S.C. 154, PL 102-240 “Open Container Requirements”
- 23 U.S.C. 157, PL 102-240 “Safety Incentive Grants for Use of Seatbelts”
- 23 U.S.C. 158, PL 105-178 “National Minimum Drinking Age”
- 23 U.S.C. 159, PL 102-388 “Revocation or Suspension of Driver’s Licenses of Individuals Convicted of Drug Offenses”
- 23 U.S.C. 163, PL 105-178 “Safety Incentives to Prevent Operation of Motor Vehicles by Intoxicated Persons”
- 23 U.S.C. 164, PL 105-178 “Minimum Penalties for Repeat Offenders for Driving While Intoxicated or Driving Under the Influence”

The MADD Agenda - In Effect in Alabama

- **.08 Per Se**
Comments: 32-5A-191(a)(1)
- **Administrative License Revocation**
Comments: 32-5A-300, 304, 305
- **Child Endangerment**
Comments: Minimum sentence doubled; Ala. Code 32-5A-191(n)
- **Dram Shop**
Comments: Ala Code 6-5-71
- **Fake ID**
Ala. Code 13A-10-14 and 28-3A-25(22)
- **Felony DUI**
Comments: 4th and subsequent offence (within 5 years)
- **Graduated Drivers Licensing**
Ala. Code 32-6-7.2
- **Keg Registration**
Comments: Passed 2004.
- **Mandatory Alcohol Assessment/Treatment**
Comments: On first offense required
- **Mandatory Alcohol Education**
Comments: On first conviction required
Ala. Code 32-5A-191(i)
- **Mandatory BAC Testing for Drivers involved in fatal or serious injury collisions** Ala. Code 32-5A-200
- **Mandatory Jail 2nd Offense**
Ala. Code 32-5A-191 (f)
- **Open Container Law that is Federally Compliant**
Ala. Code 32-5A-330
- **Happy Hour Laws**
Comments: Regulation 20-X-6-.14

The MADD Agenda - In Effect in Alabama

- **Primary Belt Law**
Ala. Code 32-5B-1
- **Repeat Offender Law that is Federally Compliant**
(Ignition Interlock Req. Eff. 09/2011)
- **Selling/Furnishing Alcohol to Youth**
Ala. Code 28-3A-25 (a)(3)
- **Sobriety Checkpoints**
Comment: By case law decision
- **Social Host**
Comments: Limited to intoxicated underage people.
- **Vehicle Sanctions While Suspended**
Ala. Code 32-6-19(b)
- **Vehicular Homicide**
Comments: Two types: Homicide by vehicle - felony - 32-5A-192; criminally negligent homicide while DWI - class C felony 13A-6-4(a) and (c)
- **Victim Rights Constitutional Amendment**
- **Youth Attempt at Purchase**
Ala. Code 28-3A-25 (a)(19)
- **Youth Consumption of Alcohol**
Ala. Code 28-3A-25(a)(19)
- **Youth Possession of Alcohol**
Ala. Code 28-3A-25(a)(19)
- **Youth Purchase**
Comments: Exceptions: For law enforcement purposes only; 28-1-5 and 28-3A-25(a)(19)
- **Zero Tolerance Under 21**
Comments: .02 BAC; 32-5-191(b)
- **Ignition Interlock**
Ala. Code 32-5A-191 & 191.4
- **High BAC**
.15% BAC “Double Minimum Punishment”

...And Coming Soon To Alabama (MADD Agenda Not Yet in Effect)

- **Anti-Plea Bargaining**
- **Habitual Traffic Offender**
- **Hospital BAC Reporting**
- **Lower BAC for Repeat Offender**
- **Mandatory BAC Testing for Drivers who are Killed**
- **Mandatory Server Training**
- **Penalties for Test Refusal Greater than**
- **Plate Sanctions**
- **Preliminary Breath Tester**
- **Vehicle Confiscation**
- **Vehicle Impoundment**

MADD's Definition of "**High-Risk**" Driver

The MADD Impaired Driving Summit (2002) found that a major focus should be the "higher-risk driver" who is defined as:

- 1) ***convicted of a repeat offense*** for driving while intoxicated (DWI) or driving under the influence (DUI), or
- 2) **convicted of DWI/DUI** with a blood-alcohol concentration of **.15 percent or higher**, or
- 3) ***convicted of a driving-while-suspended offense*** where the suspension was the ***result of a conviction for driving under the influence.***

MADD's Proposal to Deal with the High-Risk Driver:

- **Driver's license suspension for not less than one year**, including a complete ban on driving for not less than 90 days; and for the remainder of the license suspension period and prior to the issuance of a probational hardship or work permit license the **offender must install a certified alcohol ignition interlock device** on his/her vehicle
- **Impoundment or immobilization of the motor vehicle for not less than 90 days**; and for the remainder of the license suspension period the offender must install a certified alcohol ignition interlock device on his/her vehicle
- Alcohol assessment and appropriate treatment; if diagnosed with a substance abuse problem
- **Imprisonment for not less than 10 days**, an electronic monitoring device for not less than 100 days, or be assigned to a DWI/DUI special facility for 30 days
- **Fined a minimum of \$1000**, with the proceeds to be used for state or local jurisdiction for impaired driving prevention and/or enforcement
- If the arrest resulted from a crash, requires restitution to victims of the crash
- Requirement to attend a victim impact panel if panel is available in the area

Alabama's New "Get Tough" on DUI Laws

- Act 11-613 (HB 361) "Ignition Interlock"
- Act 11- 621 (SB 67) "Double Minimum Punishment"
- Both acts were signed into law on June 9, 2011; both acts are complete revisions and reenactments of the previous DUI statute.
- Act 11-613 was signed into law at 1:05 p.m.; Act 11-621 was signed into law at 1:28 p.m.
- Does the later act replace and repeal all previous acts? Can both acts be reconciled and harmonized to give legislative effect?

Act 11-621

“Double Minimum Punishment”

Adds new sub-section (i) to 32-5A-191:

- If blood alcohol concentration is .15% or greater, the defendant ***“...shall be sentenced to at least double the minimum punishment...”***
- The minimum period of incarceration is one year – all of which may be suspended except as provided in (f) and (g) [5 days second offense; 60 days third offense]
- ***“In addition, the Director of Public Safety shall revoke the driving privileges or driver’s license of the person convicted for a period of not less than one year.”***

Practical Effects and *Unresolved Issues* of Act 11-621

- **Fines will double** - first offense will increase from \$600 to \$1200; second offense from \$1100 to \$2200.
- On first offense, **mandatory revocation** of driver license or privilege (includes out of state drivers) **for a period of one year** – not 90 day suspension as previously.
- Does Act 11-621 repeal by implication parts of the Administrative License Suspension Act – specifically sub-section 32-5A-304(c)?
- Does Act 11-621 “double” the existing “double punishment” for transportation of child under 14 while driving under the influence?

Act 11-613

“Ignition Interlock”

Ignition Interlock required on first offense conviction:

- If blood alcohol concentration .15% or greater, or
- Any breath test refusal, or
- If any child under 14 present in vehicle, or
- If any person (other than defendant) is injured as a result of driving

*Ignition Interlock required on **all second offense convictions** within a 5 year period (without regard to circumstances)*

Technical Requirements – Ignition Interlock

Duration of installation:

- Two years for first offense conviction (from date of license reissuance)
- Two years for second offense conviction (from date of license reissuance)
- Three years for third offense conviction (from date of license reissuance)
- Five years for fourth offense conviction (from date of license reissuance)

Note that license revocation period must be served in full prior to installation of ignition interlock

Fees and Technical Issues – Ignition Interlock

- ***Additional court fee: \$75 per month*** for the first four months (\$300 total) to the sentencing court
- ***\$150 additional fee to DPS*** for “ignition interlock required” driver license
- Installation of approved interlock device to a specific VIN numbered vehicle prior to obtaining restricted driver license
- Installation of device by DFS approved vendors (outsourced to private industry)
- If defendant does not own a vehicle, ***mandatory \$75 per month fee*** to the clerk of the court for the same duration as if an ignition interlock was installed.

Penalty for Non-Compliance

Any person who operates a vehicle without ignition interlock as required (or has disabled the interlock device):

- *“shall be immediately removed from the vehicle and taken into custody”* [custodial arrest required]
- the vehicle *“shall be impounded”* [towed and impounded]
- First conviction: sentenced as a Class A misdemeanor and required to use ignition interlock for an additional 6 months
- Second conviction: sentenced as a Class A misdemeanor; mandatory 48 hours in jail and required to use ignition interlock for an additional 6 months
- Third conviction: sentenced as a Class A misdemeanor; jail sentence of not less than 5 days and additional one year interlock

Practical Effect of Ignition Interlock & Penalties

- Convicted DUI offender w/ interlock requirement cannot rent a vehicle or use any other vehicle other than specified by VIN identification
- Class A misdemeanor offense for any violation
- Convicted offender cannot “wait-out” interlock requirement; period for interlock use starts after application for re-licensing
- If convicted offender w/ interlock requirement is re-arrested for DUI and refuses breath test or result is .15% or greater – duration of time interlock required is doubled.

Additional Ignition Interlock Issues

- If an Alabama licensee is convicted in an out-of-state court, where is the sentencing court for collection of the additional fees and monitoring?
- If convicted licensee does not own a vehicle, how will the mandatory two years of ignition interlock be determined for purposes of re-licensing?
- Does the sentencing court possess equitable remedies to set aside or modify the requirements?

Interlock Device Required Estimated Numbers

Using the statistical information for 2009 DUI arrests:

- 21,905 arrests; 16,912 convictions (77%)
- Any given year, 34-36% refuse breath test
- Any given year, 40-41% all breath tests are .15% or higher
- *Without taking into account generic second and third offense DUI convictions: **12,600** persons will be subject to ignition interlock requirement*

Potential Market Share – the new Alabama market

Ignition Interlock contract:

- Initial installation = \$175 to \$250
- Monthly “service fee” = \$75 (\$900 yr.)
- Re-calibration fee = \$50 to \$75 (each re-calibration)
- Estimated annual fee per client: \$1225 to \$1500

Market share: 12,600 new clients per year =
\$18,900,000 per year

\$37,800,000 over 2 year minimum contract

The Sum of it All

Alabama's two new DUI statutes – if both are construed *in pari materia* – impose the following **mandatory sentence** on **FIRST offense DUI** with a .15% BAC or greater:

- Fine of not less than \$1200
- Incarceration for one year (may be suspended)
- Revocation of driver license for one year
- Installation of ignition interlock for two years (after serving the one year revocation period)

Is Act 11- 613 Invalid?

- Under the general rules of statutory construction, a later act which *completely re-writes* a prior act repeals by implication the earlier act.
- Act 11-613 was signed into law prior to Act 11-621.
- The Department of Public Safety has requested a formal Attorney General's Opinion to determine the validity of Act 11-613 as well as parts of Act 11-621.
- In event Act 11-613 is determined invalid, DPS and DFS intend to re-write Act 11-613 and submit an amended ignition interlock bill for 2012 regular session.

Attempting to Elude

- New 'Attempting to Elude' bill was signed by the Governor on May 21, 2009 with an effective date of **September 1, 2009**.
- Act 2009-616 replaces the former 32-5A-193; codified at 32-5A-340
- Title 32-5A-340: **class A misdemeanor** offense to “intentionally flee by any means” to avoid apprehension by law enforcement; a **class C felony** if in the attempt to elude, any bystander or third party is injured.
- Statute includes court ordered driver license suspension of not less than six months nor more than two years*. (* If court order does not include suspension duration in sentence, DPS will impose a six month suspension by operation of law.)
- The new Act is both wider in scope and application, and more severe in penalty, than the former traffic code statute.

Hankins Decision and Related ***Hankins*** Decisions

- ***Hankins v. State***, 989 So. 2d 610 (Ala. Cr. App. 2007): Using the rules of statutory construction, and the rule of lenity, the legislature's adoption in 2006 of sub-section 'o' to 32-5A-191 requires strict application of the five year "look-back" provision for prior DUI convictions for purpose of sentencing.
- ***Hankins*** has no retroactive effect: ***Stewart v. State***, 990 So. 2d 441 (Ala. Cr. App. 2008): The law in effect at the time of the offense is controlling [i.e.- no application of the five year look back provision if the DUI offense occurred prior to April 28, 2006] See, also, ***McCall v. State***, 995 So. 2d. 183 (Ala. Cr. App. 2008): Defendant not entitled to dismissal of indictment when the basis for the charge took place a year ***before*** enactment of the statute.
- Circuit Court retains jurisdiction if remanded, and not the District Court: ***Ex parte Marshall***, 25 So. 3d 1190 (Ala. 2009) : If the felony DUI is nullified by the ***Hankins*** decision, the case remains under the jurisdiction of the circuit court, and not the district court.

Municipal Court Convictions – the *Holbert* Rule

- ***Ex parte Holbert***, 4 So. 3d 410 (Ala. 2008): Construing the rule established in ***Ex parte Bertram***, prior in-state municipal court convictions are not “convictions” for purpose of a felony offense under 32-5A-191 (h). [The ***Holbert*** decision is limited by the adoption of section “o” as of April 28, 2006.]
- ***Ex parte Holbert*** has significant retroactive effect: No municipal court conviction prior to April 28, 2006 has any enhancement effect under 32-5A-191 [Includes Rule 32 petitions – ***Johnson v. State***, 45 So. 3d 376 (Ala. Cr. App. 2009)]

Deciphering *Hankins*, *Holbert*, and Section “o”

- It is critical that you obtain a certified five year copy of defendant’s driving record
- Based on the ***date of conviction*** (not date of the offense), does defendant have any prior offenses entered on or after ***April 28, 2006***? All convictions, from any court, in or out of state, will count as a prior conviction.
- Does defendant have any state court convictions in the last five years? All state court convictions entered in the past five years under 32-5A-191 will count for sentencing purposes.
- Out of state convictions and municipal court convictions, with conviction date ***prior to April 28, 2006***, will not be used for sentence enhancement under 32-5A-191.

Understanding Blood Analysis in DUI and Traffic Homicide Cases

Understanding Blood Analysis

- Basic analytical methods: **gas chromatography** and **enzymatic assay**
- **Gas chromatography** – the standard forensic method
- **Enzymatic assay** (EIA) – the standard hospital lab method
- These techniques are not the same and can (and probably will) produce **different** blood alcohol measurements

Chain of Custody

– Who can draw blood?

- Code of Alabama section 32-5A-194 (a)(2)
 - Licensed physician
 - Registered nurse
 - “Other qualified person” (requires credentials)
 - Para-medic/EMT is **NOT** a “qualified person”

– Custody of the sample:

- ‘Link’ analysis: The chain of custody is composed of links
- Each link must be accounted for
- Accountability may be direct or circumstantial- but each link must be recognized and not presumed

Taking, Storage, and Analysis

- Blood sample must be taken in prescribed manner.
- Blood is a organism that can change (degrade) if not properly collected and preserved.
- Possibility of contamination if strict evidentiary controls are not used.
- Whole blood (not serum) should be analyzed by the GC method – be especially cautious if *blood serum* was tested by the EIA method (normally has 14-16% higher reported BAC)
- Alabama is a “blood” (i.e., whole blood) state by statute
- Refer any blood analysis report to a forensic expert for secondary examination.

Supreme Court Case of Significant Interest

- ***Melendez-Diaz v. Massachusetts***, 557 U.S. ___, (June 25, 2009): Submission of crime lab report to trial court in lieu of live testimony violates 6th Amendment confrontation clause. Defendant in any criminal case must have the right to cross-examine lab technician who prepared report.
- ***Bullcoming v. New Mexico***, ___ U.S. ___ (June 23, 2011): The ‘Particular Witness’ rule is fundamental to the Confrontation Clause of the Sixth Amendment. The lab analyst who conducted the forensic test must testify under oath, and the report or result may not be introduced into evidence through a ‘surrogate witness’ (absent opportunity for the defendant to cross-examine the analyst under oath prior to trial.)
- **Comment:** Code of Ala. Section 12-21-300 “Certificate of Analysis” permits the D.A. to offer a lab certificate in lieu of live testimony, and the defendant may only challenge use of a certificate “for good cause shown.” ***Melendez-Diaz*** has expressly over-ruled that part of 12-21-300; whether wide-spread use of Certificate of Analysis will continue is questionable.

Blood Analysis

For further information, please refer to the special publication:

Understanding Blood Analysis in DUI and Traffic Homicide Investigations

by Mahaney / Kalin / Valentine

February 2011 version

END of PRESENTATION

WHAT ARE YOUR QUESTIONS?

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