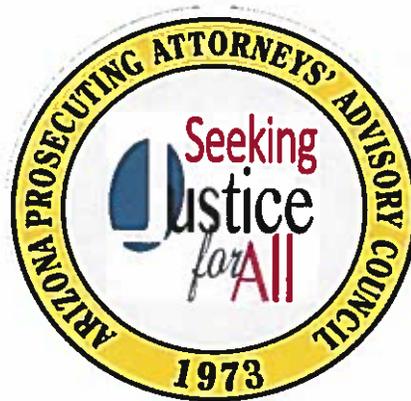


2017 APAAC Annual Prosecutor Conference
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Arizona Grand Resort & Spa
Phoenix, Arizona



**DUI LEGAL UPDATES &
REMINDERS**

Presented By:

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Distributed by:

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ELIZABETH ORTIZ
EXECUTIVE DIRECTOR

	<p style="text-align: center;">DUI LEGAL UPDATES & REMINDERS</p> <p style="text-align: center;">2017 APAAC ANNUAL PROSECUTOR CONFERENCE</p> <p><small>This presentation may contain materials created by others. Such material is used under a claim of fair use pursuant to the Fair Use Guidelines for the purpose of engaging in face-to-face instructional education activities. Additional use or distribution of that material is prohibited.</small></p> 
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	<p style="text-align: center;">CASE LAW UPDATES</p>
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	<p style="text-align: center;">FOURTH AMENDMENT OPINIONS</p>
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OVERHEARD STATEMENTS

• Defendant Did Not Have a Reasonable Expectation of Privacy in Statements

- Door to hospital room was open, he did not ask for it to be closed
- He spoke "a littler louder than normal conversation"
- Officer merely standing at nurse's station waiting for the blood samples, not lurking trying to overhear statements

State v. Peltz, 241 Ariz. 792 (App. 2017).

MEDICAL MARIJUANA - SEARCH

Scent of marijuana alone is sufficient to supply probable cause for search warrant of commercial warehouse if there is no evidence that use/possession of marijuana is allowed by AMMA.

State v. Sisco, 239 Ariz. 532 (2016).

MEDICAL MARIJUANA - SEARCH

Odor of burnt marijuana provided grounds for warrantless search of a car.

[Must not have evidence that use/possession of marijuana is allowed by AMMA.]

State v. Cheatham, 240 Ariz. 1 (2016).

MEDICAL MARIJUANA SEARCHES

- If suspect provides a MM card, need more than just odor of marijuana to search vehicle. [Consent, inventory search of an impounded vehicle, or additional facts indicating the use/possession is illegal].

MEDICAL MARIJUANA SEARCHES

- AMMA contains provisions indicating MM card holders are not authorized by AMMA to smoke marijuana in any public place or on any means of public transportation. Evidence of smoking in car, may provide the additional facts needed for the search of the vehicle of a medical marijuana card holder.
- Appears to allow warrantless searches of vehicles based on the odor of fresh marijuana as well as burnt marijuana.

SUSPECTED DUI - STOP OF VEHICLE

- Totality of the circumstances provided reasonable suspicion for the stop - for suspected DUI.
- Defendant:
 - slowed below the speed limit as he passed the officer
 - twice applied the brakes for no apparent reason
 - swerved across the white fog line twice

State v. Gutierrez, 240 Ariz. 460 (App. 2016).

STOP OF VEHICLE REMINDERS

- Include Safety Concerns in Motion Responses & Testimony (*Organ, Becerra, Mendoza-Ruiz*)
 - Most equipment violations pose safety concerns
- Always Include Suspected Impaired Driving if Applicable (*Blake, Gutierrez*)
 - Most moving violations could be signs & symptoms of impairment
- Objective basis (*Blake*)
 - *Whren v. United States*, 517 U.S., at 810.

4TH AMENDMENT REMINDERS

- Good Faith
- Exclusionary Rule (suppression) is NOT automatic
 - *Herring v. US*, 555 U.S. 35 (2009).
 - If relying on overturned precedent - *Davis v. US*, 564 U.S. ____ (2011)
- Inevitable discovery. *State v. Rojers*, 216 Ariz. 555 (App. 2007)
 - Look for no stop - *Robles*
 - AZ no tougher than feds except for home searches

MEDICAL BLOOD DRAWS

- To use the medical blood draw statute[A.R.S. § 28-1388(E)] State must prove:
 - (1) probable cause for DUI,
 - (2) exigent circumstances made it impractical to get a warrant,
 - (3) the blood was drawn by medical personnel for a medical reason, and
 - (4) "the defendant freely and voluntarily consented to the medical treatment" [or was unconscious/ incapable of refusal.]
- State v. Nissley*, 241 Ariz. 327 (2017).

UNCONSCIOUS BLOOD DRAWS

- Blood draws under 28-1321(C) violate the Fourth Amendment unless case-specific exigent circumstances prevent law enforcement officers from obtaining a warrant
- Blanket departmental policies to draw blood under the statute (rather than under case-specific exigent circumstances) violate the Fourth Amendment (no good faith)

State v. Havatone, 241 Ariz. 506 (2017)

EXIGENT CIRCUMSTANCES (BLOOD DRAWS)

- Trooper testimony provided exigency:
 - Defendant taken by ambulance for treatment
 - At time of blood draw trooper did not know scope or extent of treatment
 - Based on training as military combat lifesaver, he was aware "intravenous application of fluids" could alter BAC and "destroy whatever evidence was available"

State v. Peltz, 2 CA-CR 2016-0055 (App. 2017).

EXPLORE POTENTIAL EXIGENT CIRCUMSTANCES

- Contamination of Sample
- Suspect Will be Unavailable (taken to surgery, etc.)
- [Waiting will cause a second blood draw]
- Fast Metabolizing Drugs

COCAINE (BENZOYLECGONINE)

- *State v. McFadden*, No. 1 CA-Cr 14-0614 (App. 2016) recognizes how fast Cocaine metabolizes.
- [Also held non-impairing metabolite sufficient for (A)(3) charge.]

INHALANTS

THC LEVELS THROUGHOUT TIME

SHIELD FROM BARELYN HUESTIS ET AL

**IF TOX RESULTS ARE SUPPRESSED
DO NOT AUTOMATICALLY DISMISS**

- Evaluate Your Case
- Remember: Cannot Use The Constitution as a Shield & a Sword

Harris v. New York, 401 U.S. 222, 91 S.Ct. 643 (1971);
United States v. Havens, 446 U.S. 620, 100 S.Ct. 1912 (1980);
State v. Menard, 135 Ariz. 385 (App. 1983);
State v. Fortier, 149 Vt. 599, 547 A.2d 1327 (1988).

Suppressed evidence can be used
to impeach.

SEARCH INCIDENT TO ARREST

- States may enact statutes criminalizing the refusal of breath tests - but not blood tests.
- Fourth Amendment allows warrantless breath tests as a search incident to arrest - but not blood tests.
 - **REMEMBER:** A.R.S. § 28-1321 (Implied consent statute) says if the suspect refuses the test none shall be given "except by warrant."

Birchfield v. North Dakota, 136 S. Ct. 2160 (2016).

BREATH TEST CASES

- Admonitions - provide no basis for suppression of breath test results under 4th Amendment.
- Warrantless breath tests may be administered as search incident to arrest under 4th Amendment. Relies on *Birchfield*.
 - Even if obtained through coercive admonitions
 - Under AZ constitution also.
- Contact me if get Fr. 3 argument

State v. Navarro, 241 Ariz. 19 (App. 2016).

INFLUENCE & IMPAIRMENT

- "Under the influence" in A.R.S. § 12-711 is not unconstitutionally vague.
- Since 1929 [*Hasten v. State*, 35 Ariz. 427, 430-31 (1929)] AZ courts have interpreted "under the influence" to mean "intoxicated to the slightest degree."
- One is intoxicated in the slightest degree when one "is to some degree at least less able, either mentally or physically or both, to exercise the clear judgment and steady hand necessary" to drive an automobile.

Franklin v. Clemett, et al., 240 Ariz. 587, 382 P.3d 802 (App. 2016).

28. 1381(A)(1) DRIVING OR ACTUAL PHYSICAL CONTROL WHILE UNDER THE INFLUENCE (Not A Great Jury Instruction)

- The crime of driving or actual physical control while under the influence requires proof that:
- 1. The defendant drove [was in actual physical control of] a vehicle in this state; and
- 2. The defendant was under the influence of [intoxicating liquor] [any drug] [a vapor releasing substance containing a toxic substance] [any combination of liquor, drugs or vapor releasing substances] at the time of [driving] [being in actual physical control]; and
- 3. The defendant was impaired to the slightest degree by reason of being under the influence of [intoxicating liquor] [any drug] [a vapor releasing substance containing a toxic substance] [any combination of liquor, drugs or vapor releasing substances].

MARIJUANA DUIs

ISHAK V. MCCLENNEN

- Reversible error not to admit evidence of med. marijuana card.
- "the focus of the affirmative defense must be on the effect of the THC concentration on the defendant cardholder."
- To present affirmative defense may use:
 - Expert testimony
 - Lay witness testimony
 - Testimony of the defendant
 - Cross examination of State's witnesses

ISHAK V. MCCLENNEN

• *Ishak* only applies to (A)(3) charge.

• **NOTE:** Petition for review filed in AZ Supreme Court

MISCELLANEOUS

ELECTRONIC BLOOD WARRANTS

• Supreme Ct. Administrative Order 2016-121

- Issued 11/23/16
- Authorizes Maricopa County Superior Ct to issue warrants to draw blood DPS on Vehicular Homicide and DUI cases state wide.
- Pursuant to Maricopa Local Rule 4.10

RULES OF CRIMINAL PROCEDURE

- AZ Rules of Criminal Procedure - comprehensive revision
 - Initial comments: March 14, 2017.
 - Supplement to Petition if any: April 26, 2017.
 - Second round of comments: May 31, 2017.
 - Reply due: July 7, 2017.

DUI HOT TOPICS

- Marijuana!
- Prescriptions
- Spice has made a return
- Heroin has also returned
- Warrantless Blood Draws
 - Medical
 - Unconscious
- Admonitions



Legislative Update



Controlled Substances

HB 2033

Adds 36 drugs to A.R.S. § 13-3401.

***Effective on the general effective date
Amends A.R.S. §§ 13-3401*

DUI DRUG REMINDERS TO ASSIST WITH PRESCRIPTION DRUG CASES

- Instruct officers to get blood as soon as possible
- Research the drug(s)
- Use the matrix
- Look for evidence defendant is abusing his/her prescription
- Voir Dire is KEY
- Motions in limine
- Propose jury instructions
- DO NOT get hung up on therapeutic levels

DON'T FORGET 13-3401(28)

28. Prescription-only drug" . . . means:
- (a) Any drug which because of its toxicity or other potentiality for harmful effect, or the method of its use, or the collateral measures necessary to its use, is not generally recognized among experts, qualified by scientific training and experience to evaluate its safety and efficacy, as safe for use except by or under the supervision of a medical practitioner.
 - (b) Any drug that is limited by an approved new drug application under the federal act or section 32-1962 to use under the supervision of a medical practitioner.
 - (c) Every potentially harmful drug, the labeling of which does not bear or contain full and adequate directions for use by the consumer.
 - (d) Any drug required by the federal act to bear on its label the legend "Caution: Federal law prohibits dispensing without prescription" or "Rx only".

2017 Ignition Interlock: regulations

SB 1158

- Requires ignition interlock devices to take and record a digital image with the date and time that identifies the person providing the breath sample.
- Establishes additional requirements for providers including daily reports to ADOT.

****Effective date 7/1/2018**
Amends A.R.S. § 28-3154; 28-3101

2017 Teenage Drivers/Instruction Permits
Cell Phones/Texting

SB 1080

- Prohibits drivers with
 - instruction permits
 - class G licenses for first 6 months or until 18th birthday
 From using wireless communication devices while driving.
- Can use in emergency. Can use GPS if not manually adjusting.
- Is a secondary offense.

****Effective date 7/1/2018**
Amends A.R.S. § 28-3154; 28-3101


 STATE OF ARIZONA
 OFFICE OF THE ATTORNEY GENERAL
 Department of Justice

Michael A. Brien
 Attorney General

April 20, 2017

To: Honorable David R. Williams
 Governor
 1700 North Central Avenue
 Phoenix, Arizona 85004

Re: SB 1080 (House Bill) - Cell Phone Use While Driving

Your office has requested my opinion on the constitutionality of the proposed legislation. I have reviewed the bill and find it to be constitutional.

The bill is a secondary offense. It is a secondary offense because it is not a crime in itself. It is a crime because it is a violation of the law.

I am sure that you will find this opinion helpful. If you have any questions, please contact me.

Michael A. Brien
 Attorney General

cc: Honorable David R. Williams
 Honorable David R. Williams
 Honorable David R. Williams

 **License Plate Covers**

SB 1073

Prohibits any covering, substance, electronic device or electrochromatic substance applied to a license plate that obscures from any angle, the numbers, characters, year validating tabs or name of the jurisdiction issuing the plate.

***Effective general effective date*
Amends A.R.S. §§ 28-2354

 **Amateur Radio Operator Special Plates**

SB 1132

- Establishes Amateur Radio Operator Special Plates & fund

***Effective general effective date*
Amends A.R.S. §§ 28-2407, 28-4501, 28-4991 & 28-4993.

 **Vehicle Registration: nonresidents penalty**

HB 2249

- Reduces penalty for ARS § 28-2322 [nonresidents or persons operating foreign vehicle owned by nonresident on highway without proper license plates and vehicle registration] from class 2 misdemeanor to a civil traffic violation.

***Effective general effective date*
Amends A.R.S. § 28-884

 **Search Warrants - tracking; simulator devices**

SB 1342

- Establishes requirements for tracking device & cell site simulator device search warrants.
- "Cell site simulator device"- portable device transmits/receives radio waves to identify, locate, track movements of communications device.
- "Tracking device" electronic or mechanical device including a communications device that tracks movements of a person or object.

**Effective general effective date
Amends A.R.S. § 13-38(18); adds article 34

RELATED CASE TO WATCH
Carpenter v. United States

- Issue: Whether the warrantless seizure & search of historical cell-phone records revealing the location and movements of a cell-phone user over the course of 127 days is permitted by the Fourth Amendment

 **Victims' Rights - pleading endorsements**

HB 2241

- Requires that an attorney who files notice of appearance on behalf of a victim be endorsed on all pleadings after the notice has been filed
- Victim's attorney must receive timely notice on all pleadings.

**Effective general effective date
Amends A.R.S. § 13-



Victims' Rights - monetary judgments/liens

HB 2269

- Allows prosecutors & victims to file requests for a pre-conviction restitution liens
- Allows victims to file restitution liens after restitution is ordered by the court after sentencing.
- Prevents monetary judgments to be paid to current or past prisoners before restitution and incarceration costs are paid.

***Effective general effective date
Amends A.R.S. § 13-*



Blue Lives Matter Law

SB 1366

- Evidence that defendant assaulted officer out of malice because the person is an officer as an aggravating factor in sentencing for aggravated assault.
- Assault will be aggravated assault if victim is an officer, even if not on duty at time of assault.

***Effective general effective date
Amends A.R.S. § § 13-1204; 13-701; 13-702*

Thank You!

Beth Barnes
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DRUG CATEGORY SYMPTOMOLOGY MATRIX

MAJOR INDICATORS	CNS DEPRESSANTS	CNS STIMULANTS	HALLUCINOGENS	DISSOCIATIVE ANESTHETICS	NARCOTIC ANALGESICS	INHALANTS	CANNABIS
HGN	PRESENT	NONE	NONE	PRESENT	NONE	PRESENT	NONE
VERTICAL GAZE NYSTAGMUS	PRESENT * HIGH DOSES	NONE	NONE	PRESENT	NONE	PRESENT * HIGH DOSES	NONE
LACK OF CONVERGENCE	PRESENT	NONE	NONE	PRESENT	NONE	PRESENT	PRESENT
PUPIL SIZE	NORMAL (1)	DILATED	DILATED	NORMAL	CONSTRICTED	NORMAL (4)	DILATED (6)
REACTION TO LIGHT	SLOW	SLOW	NORMAL (3)	NORMAL	LITTLE OR NONE VISIBLE	SLOW	NORMAL
PULSE RATE	DOWN (2)	UP	UP	UP	DOWN	UP	UP
BLOOD PRESSURE	DOWN	UP	UP	UP	DOWN	UP/DOWN (5)	UP
BODY TEMPERATURE	NORMAL	UP	UP	UP	DOWN	UP/DOWN/ NORMAL	NORMAL
MUSCLE TONE	FLACCID	RIGID	RIGID	RIGID	FLACCID	FLACCID OR NORMAL	NORMAL
GENERAL INDICATORS	UNCOORDINATED DISORIENTED SLUGGISH THICK, SLURRED SPEECH DRUNK-LIKE BEHAVIOR DROWSINESS DROOPY EYES FUMBLING GAIT ATAXIA BLOODSHOT WATERY EYES	RESTLESSNESS BODY TREMORS EXCITED EUPHORIC TALKATIVE EXAGGERATED REFLEXES ANXIETY BRUXISM - (GRINDING OF THE TEETH) REDNESS TO NASAL AREA RUNNY NOSE LOSS OF APPETITE INSOMNIA INCREASED ALERTNESS DRY MOUTH IRRITABILITY	DAZED APPEARANCE BODY TREMORS SYNESTHESIA HALLUCINATIONS PARANOIA UNCOORDINATED NAUSEA DISORIENTED SPEECH DIFFICULTIES PERSPIRING POOR PERCEPTION OF TIME & DISTANCE MEMORY LOSS FLASHBACKS PILORECTION *NOTE WITH LSD, PILORECTION MAY BE OBSERVED (GOOSE BUMPS, HAIR STANDING ON END)	PERSPIRING WARM TO THE TOUCH BLANK STARE VERY EARLY ANGLE OF HGN ONSET SPEECH DIFFICULTIES INCOMPLETE VERBAL RESPONSES REPETITIVE SPEECH INCREASED PAIN THRESHOLD CYCLIC BEHAVIOR CONFUSED AGITATED HALLUCINATIONS POSSIBLY VIOLENT & COMBATIVE CHEMICAL ODOR *MOON WALKING*	PTOSIS - (DROOPY EYELIDS) *ON THE NOD* DROWSINESS DEPRESSED REFLEXES LOW, RASPY, SLOW SPEECH DRY MOUTH FACIAL ITCHING EUPHORIA FRESH INJECTION SITES TRACK MARKS NAUSEA *NOTE: TOLERANT USERS EXHIBIT RELATIVELY LITTLE PSYCHOMOTOR IMPAIRMENT	RESIDUE OF SUBSTANCE AROUND NOSE & MOUTH ODOR OF SUBSTANCE POSSIBLE NAUSEA SLURRED SPEECH DISORIENTED CONFUSION BLOODSHOT, WATERY EYES LACK OF MUSCLE CONTROL FLUSHED FACE NON COMMUNICATIVE INTENSE HEADACHES	MARKED REDDENING OF CONJUNCTIVA ODOR OF MARIJUANA DEBRIS IN MOUTH BODY TREMORS EYELID TREMORS RELAXED INHIBITIONS INCREASED APPETITE IMPAIRED PERCEPTION OF TIME & DISTANCE DISORIENTED POSSIBLE PARANOIA
DURATION OF EFFECTS	BARBITURATES: 1-16 HOURS TRANQUILIZERS: 4-8 HOURS METHAQUALONE: 4-8 HOURS	COCAINE: 5-90 MINUTES AMPHETAMINES: 4-8 HOURS METHAMPHETAMINES: 12 HOURS	DURATION VARIES WIDELY FROM ONE HALLUCINOGEN TO ANOTHER	ONSET: 1-5 MINUTES PEAK EFFECTS: 15-30 MINUTES EXHIBITS EFFECTS UP TO 4-6 HOURS	HEROIN: 4-6 HOURS METHADONE: UP TO 24 HOURS OTHERS VARY	VOLATILE SOLVENTS: 6 - 8 HOURS ANESTHETIC GASES AND AEROSOLS VERY SHORT DURATION	EUPHORIA: 2 - 3 HOURS IMPAIRMENT MAY LAST UP TO 24 HOURS WITHOUT AWARENESS OF EFFECT.
USUAL METHODS OF INGESTION	ORAL INJECTED OCCASIONALLY	INSUFFLATION (SNORTING) SMOKED INJECTED ORAL	ORAL INSUFFLATION SMOKED INJECTED TRANSDERMAL	SMOKED ORAL INSUFFLATION INJECTED EYE DROPS	INJECTED ORAL SMOKED INSUFFLATION	INHALED	SMOKED ORAL
OVERDOSE SIGNS	SHALLOW BREATHING COLD CLAMMY SKIN PUPILS DILATED RAPID WEAK PULSE, COMA	AGITATION INCREASED BODY TEMPERATURE HALLUCINATIONS CONVULSIONS	LONG INTENSE TRIP	LONG INTENSE TRIP	SLOW SHALLOW BREATHING CLAMMY SKIN COMA CONVULSIONS	COMA	FATIGUE PARANOIA

FOOTNOTE: THESE INDICATORS ARE THE MOST CONSISTENT WITH THE CATEGORY. KEEP IN MIND THAT THERE MAY BE VARIATIONS DUE TO INDIVIDUAL REACTION, DOSE TAKEN AND DRUG INTERACTIONS.

NORMAL RANGES

PULSE: 60 - 90 BEATS PER MINUTE

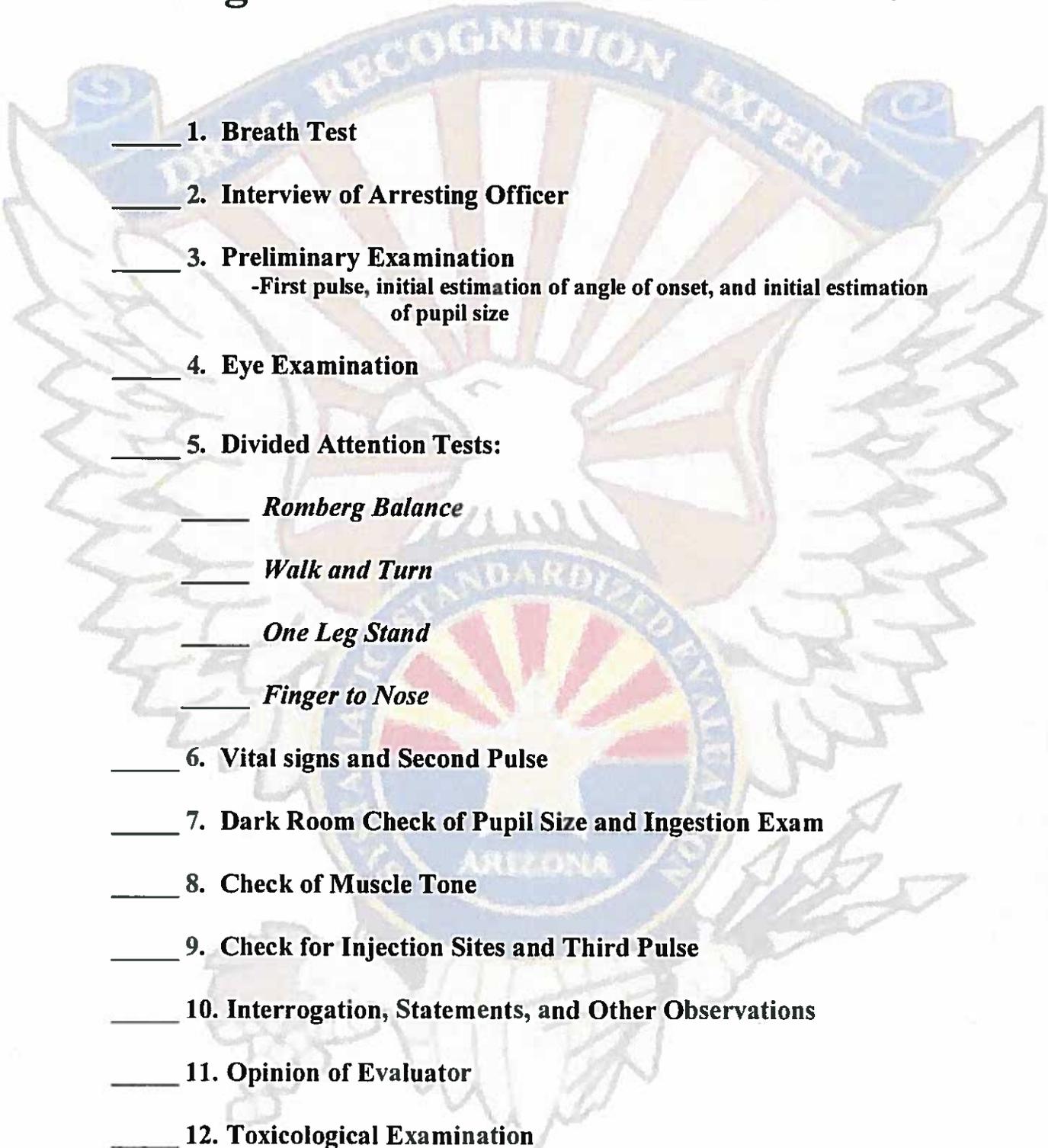
PUPIL SIZE: ROOM LIGHT: 2.5 - 5.0 (AVERAGE 4.0)
NEAR TOTAL DARKNESS: 5.0 - 8.5 (AVERAGE 6.5)
DIRECT LIGHT: 2.0 - 4.5 (AVERAGE 3.0)

BLOOD PRESSURE: 120 - 140 SYSTOLIC
70 - 90 DIASTOLIC.

BODY TEMPERATURE: 98.6 +/- 1.0 DEGREE

1. SOMA, QUAAALUDES AND SOME ANTI-DEPRESSANTS USUALLY DILATE PUPILS
2. QUAAALUDES, ETOH AND POSSIBLY SOME ANTI-DEPRESSANTS MAY ELEVATE
3. CERTAIN PSYCHEDELIC AMPHETAMINES CAUSE SLOWING
4. NORMAL BUT MAY BE DILATED
5. DOWN WITH ANESTHETIC GASES, BUT UP WITH VOLATILE SOLVENTS AND AEROSOLS
6. PUPIL SIZE POSSIBLY NORMAL

Drug Influence Evaluation Checklist

- 
- 1. **Breath Test**
 - 2. **Interview of Arresting Officer**
 - 3. **Preliminary Examination**
-First pulse, initial estimation of angle of onset, and initial estimation of pupil size
 - 4. **Eye Examination**
 - 5. **Divided Attention Tests:**
 - Romberg Balance*
 - Walk and Turn*
 - One Leg Stand*
 - Finger to Nose*
 - 6. **Vital signs and Second Pulse**
 - 7. **Dark Room Check of Pupil Size and Ingestion Exam**
 - 8. **Check of Muscle Tone**
 - 9. **Check for Injection Sites and Third Pulse**
 - 10. **Interrogation, Statements, and Other Observations**
 - 11. **Opinion of Evaluator**
 - 12. **Toxicological Examination**

