

STATEMENT OF THE OHIO STATE BAR ASSOCIATION IN SUPPORT OF SENATE BILL 55

Before the Senate Judiciary Committee
Senator Nathan Manning, Chair

Chairman Manning, Vice Chair Reynolds, Ranking Member Hicks-Hudson and members of the Senate Judiciary Committee, on behalf of the Ohio State Bar Association, I am honored to have the opportunity to testify in support Senate Bill 55.

My name is Blaise Katter and in addition to serving as chair of the Ohio Bar's Traffic Law Committee, I am the current president and policy chair for the Ohio Association of Criminal Defense Lawyers and a board member of the national DUI Defense Lawyers Association. I am also the proud author of the primary scholarly book on OVI law in Ohio, "Ohio Driving Under the Influence Law." I practice privately alongside Attorney Tim Huey who also publishes an authoritative guide to DUI defense in Ohio. We regularly train our fellow lawyers across the country and in Ohio on how to navigate the many intricacies and challenges with this area of law. In addition, I was pleased to work with many of you when I served as staff attorney with the Criminal Justice Recodification Committee.

I hope it goes without saying that nobody wants a person who is impaired by drugs to be operating a motor vehicle. But it is equally important that our laws are designed only to punish those who are actually impaired and not, in our zeal to ensure safe roads and increased public safety, sweeping up a vast amount of wholly innocent conduct.

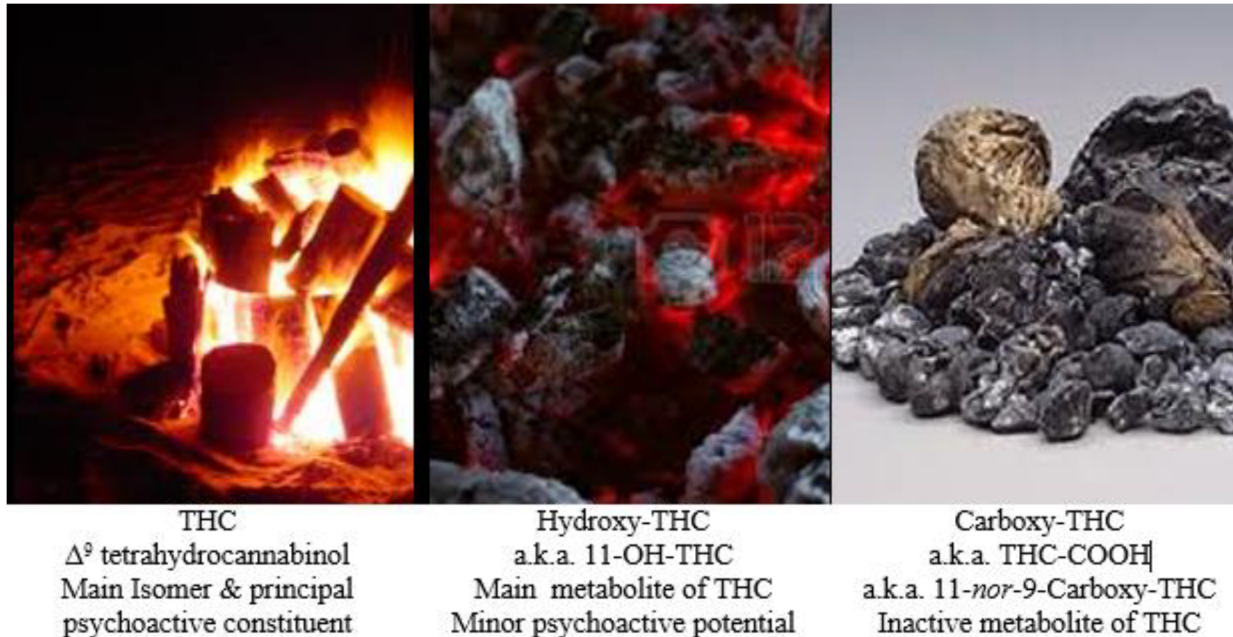
The reforms in SB55 are long overdue and have become even more critical following the legalization of medical and recreational marijuana in Ohio. As it stands today, an individual who legally consumed marijuana days, weeks and even months prior to getting behind the wheel of a car could be found guilty of OVI in Ohio even if there is zero evidence of driving impairment. This is because of the way Ohio tests for and assumes impairment based on the presence of an inactive residual substance that can be detected in marijuana user's system well after any danger of impairment has passed. That's why we need the well-reasoned approach to Ohio OVI law, as proposed via SB55. It is rooted in science and fairness where our current laws are not.

The Science of Impairment

Ohio's current per se law, which says it is illegal to operate a vehicle with a prohibited concentration of alcohol and/or drugs in the driver's breath, blood or urine, simply does not work when it comes to marijuana and has no basis in science.

When marijuana is consumed, the psychoactive ingredient that produces an impairing effect is called Delta-9 THC. The Delta-9 THC then quickly metabolizes, or breaks down, into what is called Hydroxy-THC. Hydroxy-THC has only minor psychoactive ability and only has a slight effect with the human body. Hydroxy-THC then further breaks down into Carboxy-THC. It is unanimously understood by every scientific expert on the subject that Carboxy-THC is

completely inactive with no psychoactive properties whatsoever. The following visual aid is something Tim and I have found useful to emphasize this point.



The burning fire represents the psychoactive Delta-9 THC, the active ingredient in marijuana. Hot embers in the center image illustrate the Hydroxy THC. Finally, Carboxy-THC is like the cold ash that is left in the fireplace long after any psychoactive component is extinguished.

Rationally, you would think it makes the most sense to test for the active Delta-9 THC to determine the level of marijuana in a person's system. However, in Ohio we currently primarily test for that inactive Carboxy-THC, which we know can lay dormant in a person's body for weeks or even months after use.

Further, it is an incontrovertible fact that drugs simply interact with a person differently than alcohol. And it is extremely difficult, if not impossible, to come up with a standard, scientifically valid concentration of drugs that could automatically define impairment as we have done with alcohol. In other words, there is no comparable number for THC in marijuana that equates to the .08 limit for alcohol in current law. Scientists, experts and even the National Highway Traffic Safety Administration in a report to Congress, agree on this point.

So, when you combine the fact that Ohio tests for the inactive residual substance vs. the active substance, and that we continue to have a per se standard based on concentrations of that inactive substance, you can see that current law is unworkable and must be changed.

Why the Approach in SB55 Is Superior

SB55 is carefully crafted to make sure that, first, it does not disturb the roadside investigations and determinations law enforcement must make when deciding whether to arrest someone.

Arrest is governed by the probable cause standard and nothing in SB55 changes that. Officers would still have the full battery of roadside tests and all their current training and tools to make a determination of probable cause that a person is impaired, to arrest and charge the person with OVI and to request a chemical sample. This bill only addresses what comes next — how can a person defend themselves in court that they were not impaired or unsafe to drive.

Though we maintain that there is no scientifically accepted THC concentration level that can accurately define impairment for all persons, we have worked with Senator Manning and other interested parties in good faith on a compromise that would still be a vast improvement over current law.

The bill would establish a per se limit for blood tests that would now be based upon concentrations of Delta-9 THC — the active metabolite vs. the inactive metabolite — of five nanograms per milliliter of a person's whole blood. There would be no per se limit for urine tests.

Instead, the bill establishes a new evidentiary standard which would say that if a blood or urine test shows a concentration of marijuana or metabolite in the person's system, the trier of fact could infer that the individual is under the influence of marijuana without need for expert testimony. There are a wide variety of factors to consider in refining these threshold limits to make the bill as strong as possible, and we stand ready to work with the chair and members of the committee to establish reasonable and workable standards to strengthen this bill and ensure the dual aims of this bill — to give law enforcement and prosecutors the tools they need to combat and convict persons who are under the influence of marijuana, while safeguarding truly innocent people who are not impaired or unsafe to drive. We are also open to considerations of thresholds of oral fluid testing that could trigger the evidentiary inference if the thresholds are set based upon scientific considerations of the effect of THC in a person's saliva.

While not perfect, we prefer the inference approach because the focus in a trial would go back to the critical issue of whether or not the person was impaired. Then, the jury could consider the chemical tests alongside other evidence of impairment (or lack thereof). It would allow the defense to present a case arguing that the person was not impaired. And it would leave the ultimate decision of that question in the capable hands of a jury.

Conclusion

We recognize that this is a complicated area of law that meets at the intersection of science, due process and public safety. However, when you look beyond the surface and really dive deep into this area of law, you can reach but one conclusion — current law is in desperate need of change. SB55 is a thoughtful, balanced approach to help ensure that Ohio is targeting those people who drive impaired, while not convicting innocent people who currently have no opportunity to meaningfully defend themselves.