

Ohio's OVI law problems

- **Immediate –**
 - Carboxy THC urine tests don't prove impairment
 - Inconsistent with legalized and commercialized marijuana
- **Longer term –**
 - None of Ohio's other drug *per se* levels prove impairment either
 - Urine testing is useless to prove drug impairment
 - Whole blood drug concentrations are not the same as serum or plasma
 - Current OVI statute only prohibits drugs of abuse, not all impairing drugs
 - Benzodiazepines
 - Z-drugs
 - Novel Psychoactive Substances
 - Emerging hemp derivatives

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Proposed SB55 solutions

- OVI *per se* for 5 ng/mL Δ^9 -THC in whole blood
- OVI inference for 2-5 ng/mL Δ^9 -THC in whole blood
- OVI Inference for 25 ng/mL Δ^9 -THC in urine
- OVI Inference for 5 ng/mL Δ^9 -THC in oral fluid

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National Safety Council Research Report

It is further concluded that due to rapid changes in blood THC concentrations over time, there is no minimum safe threshold blood concentration below which a driver can be considered to have been unaffected while driving following recent cannabis use. Consequently, there is no scientific basis for the adoption of THC *per se* laws for driving.

<https://www.nsc.org/getmedia/8840b317-9960-48b9-a3ae-3fec77a9448b/position-on-cannabis-and-driving.pdf>

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NSC is not alone

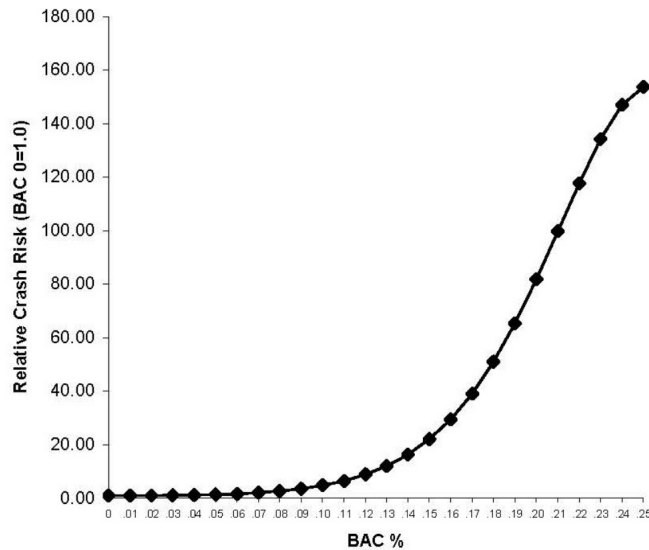
- American Automobile Association
- International Association of Chiefs of Police
- National Sheriff's Association
- Arkell et al. *Traffic Injury Prevention*
- Reisfield et al. *Journal of Analytical Toxicology*

2017 NHTSA Report to Congress

<https://www.nhtsa.gov/sites/nhtsa.dot.gov/files/documents/812440-marijuana-impaired-driving-report-to-congress.pdf>

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BAC vs adjusted relative crash risk



No drug other than alcohol has a proven correlation between blood levels and crash risk.

For marijuana we have proof that there can never be a correlation between blood levels and crash risk. The laws of chemistry and human physiology prevent any possible correlation.

Source: NHTSA DOT HS 813 233 (2022)

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Alcohol, THC and Driving Impairment

- Neither alcohol nor THC impair a driver's blood.
- These and other drugs impair a driver's brain.

Alcohol is **water soluble**

- Uniform distribution throughout the body
- What's in the blood is in the brain
- Is only consumed orally
- **BAC is a useful tool to assess DUI**

THC is **fat soluble**

- Rapidly redistributed from blood to brain
- Brain level is much higher than in the blood
- Is consumed orally and directly to lungs
- **Blood THC content cannot assess DUI**

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Valid reasons to rely on toxicology tests

- Alcohol impairment
 - Identify alcohol as the cause of the observed impairment.
 - Prove a violation of the OVI *per se* law 4511.19(A)(1)(b).
 - [Not the OVI law 4511.19(A)(1)(a)]
- Drug impairment
 - ID which drug (s) responsible for the observed impairment.

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Proposed solutions in SB55

- OVI *per se* for 5 ng/mL Δ^9 -THC in whole blood
 - Scientifically invalid
 - It does not work
 - It is not needed
 - Most stoned drivers test below 5 ng
- OVI inference for 2-5 ng/mL Δ^9 -THC in whole blood
 - Drivers <2ng/mL Δ^9 -THC can still be dangerously impaired
- OVI Inference for 25 ng/mL Δ^9 -THC in urine
 - THC glucuronide, not THC is found in urine. THC glucuronide is not psycho-active and remains in urine long (days) after impairment subsides
 - In a urine-testing jurisdiction no stoned driver would be convicted
- OVI Inference for 5 ng/mL Δ^9 -THC in oral fluid
 - Scientifically invalid
 - Near half of stoned drivers test below 5 ng

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Colorado conviction rates by cause

Alcohol only	94%	
Polydrug	90%	
Other single drug	79%	
THC only	74%	(45% for DUI, 98% for DWAI)

Note: Colorado 4-year average figures for 2018-2021

Note: This combines convictions for DUI and DWAI

Note: Includes findings of Guilty, Deferred and Deferred/Dismissed

Sources: CDPS annual DUI reports 2018-2021

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Colorado's "DUI" Offenses

	DUI - DUI <i>per se</i>	DWAI
Name	Driving Under the Influence	Driving While Ability Impaired
Statutory definition	Incapable of safe driving	Impaired to the slightest degree – less safe to drive
Alcohol legal limits	.08 <i>per se</i>	.05 permissible inference
THC legal limits	5 ng/mL permissible inference	N/A

Note: THC's 5 ng/mL law applies only to DUI, not to DWAI

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Similar legal structures

	Most serious	Least serious
Colorado	DUI	DWAI
Michigan	OWI	OWVI
New York	DWI	DWAI

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Other single drug	79%
THC <i>only</i>	74% (45% for DUI, 98% for DWAI)

↑
Is the 45%/98% conviction rate difference due to tighter DUI definition or to the 5 ng/mL THC permissible inference level?

Note: Colorado 3-year average figures for 2018-2021

Note: This combines convictions for DUI and DWAI

Note: Includes findings of Guilty, Deferred and Deferred/Dismissed

Sources: CDPS annual DUI reports 2018-2021

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Convictions by charge & THC level

	<u>DUI</u>	<u>DWAI</u>
5 ng+	64%	99%
<5ng	8%	94%

A 5 ng THC limit does not discriminate between impaired and non-impaired drivers.

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Convictions by charge & THC level

	<u>DUI</u>	<u>DWAI</u>
5 ng+	64%	99%
<5ng	8%	94%

Permissible inference prevents convictions based on only toxicology results.

It's easier to prove impairment than "incapable of safe driving."

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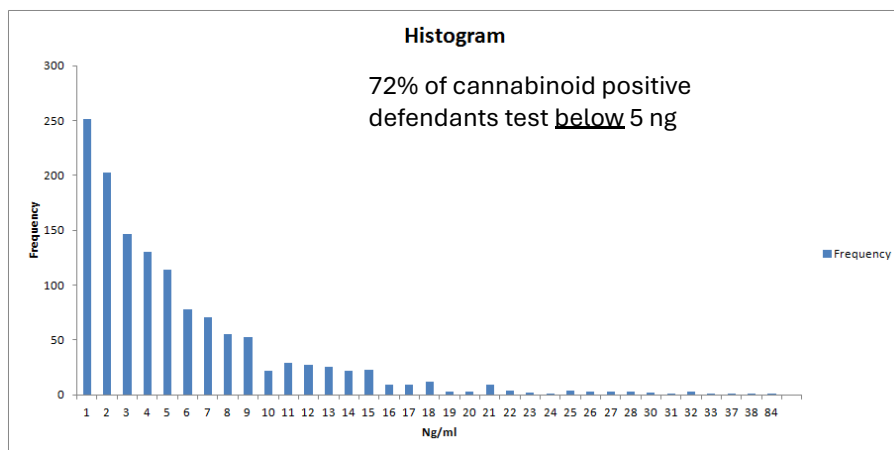
Convictions by charge & THC level

	<u>DUI</u>	<u>DWAI</u>
5 ng+	64%	99%
<5ng	8%	94%

A 5 ng THC level prevents most convictions of impaired drivers below the legal limit.

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CDPHE - 2012

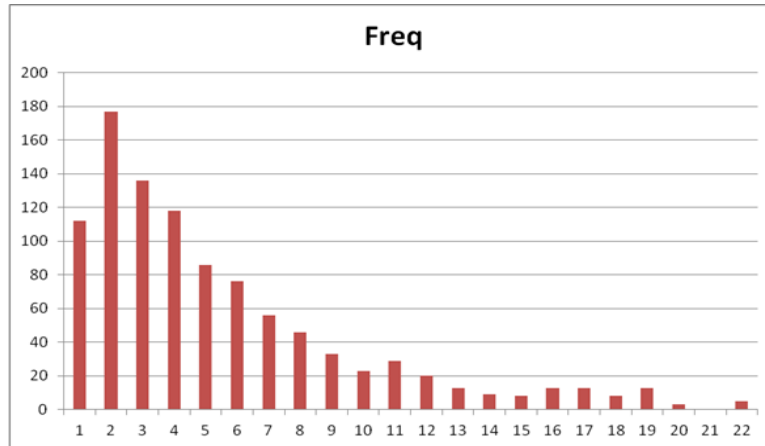


2,099 cannabinoid confirmation tests
 1,326 were ≥ 1 ng THC (above limit of quantitation)
 595 were ≥ 5 ng THC. That's only 28% of cannabinoid positive defendants

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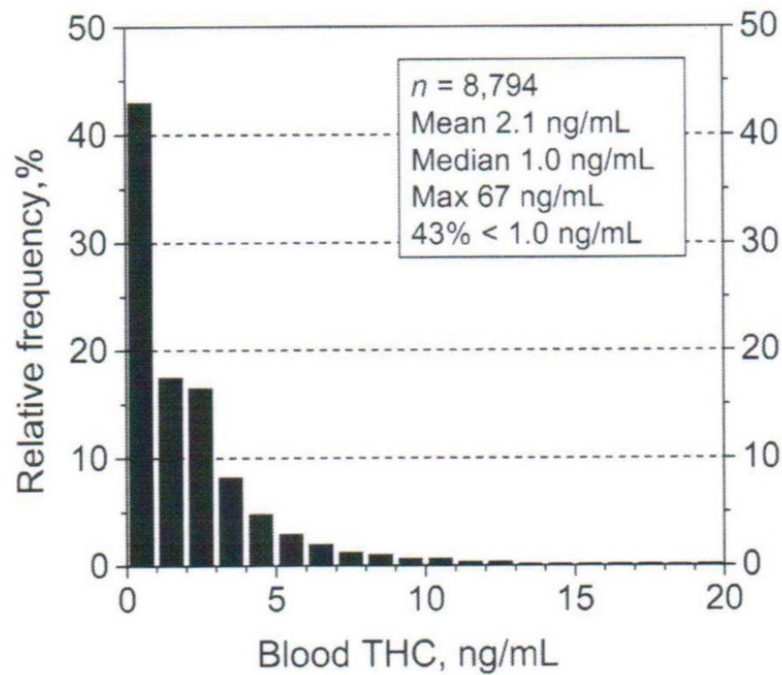
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Washington



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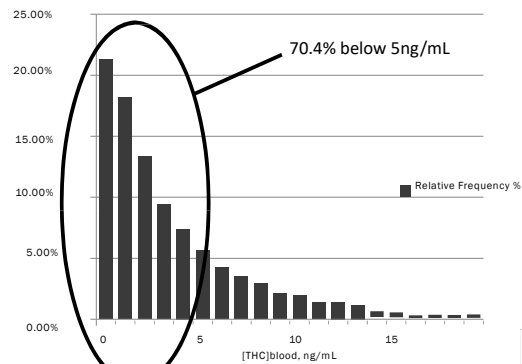
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Impact of 5ng/mL THC *per se* Law

10,144 Marijuana DUID /DRE cases testing positive for THC and/or metab.



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Distribution of THC in DUI Oral Fluid Cases

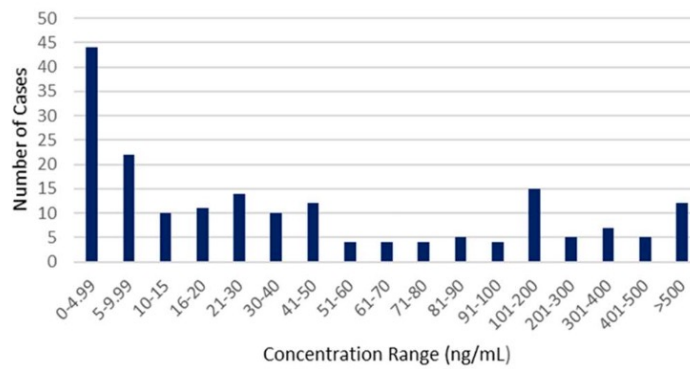


Figure 17: Δ^9 -THC Distribution in DUI/D OF Cases Submitted to ADFS

Maxwell, Jasmine, "Evaluating Cannabinoid Interference and Drug Stability in Oral Fluid for DUI/D Testing". (2022). All ETDs from UAB. 574.

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“Incapable” impairment level definitions

Statutory definitions for drug impairment (13)

Alabama	Illinois
Kansas	Maryland
Nevada	New Mexico
North Dakota	Oklahoma
Rhode Island	South Dakota
Utah	Wisconsin
Wyoming	

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Lower DUID impairment level definitions

Statutory definitions for drug impairment (19)

AR	Skills & judgment altered	AZ	Impairs to the slightest degree
DC	In a way that can be perceived	DE	Less able to have clear judgment
FL	Normal facilities impaired	GA	Less safe to drive
HI	Impair normal mental faculties	KY	Impairs driving ability
MS	Impairs ability to operate	MT	Ability is diminished
NH	Impairs ability	NY	Ability is impaired
PA	Impairs ability to drive safely	SC	Faculties are materially impaired
TN	Impairs ability to operate safely	TX	Not normal use of faculties
VA	Impairs to the slightest degree	VT	Impaired to the slightest degree
WA	Affected by		

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Ohio's OVI jury instruction #6

“..so affected the nervous system, brain, or muscles of the defendant so as to impair, to a noticeable degree, his/her ability to operate the vehicle..”

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Recommendations

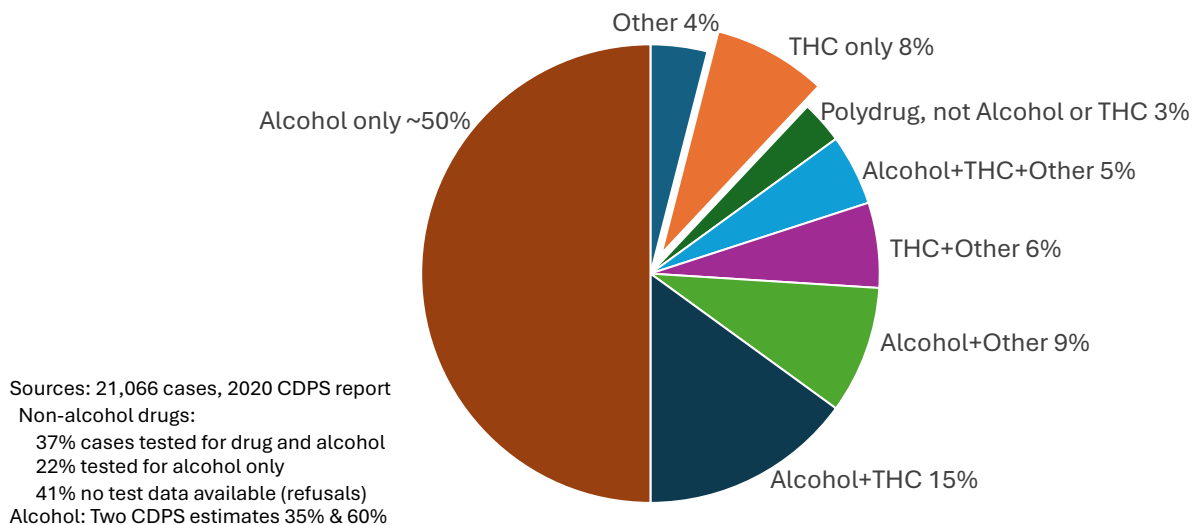
1. Repeal marijuana metabolite *per se* law.
2. Put OVI jury instruction in statute.
3. Get your own data- what are your drugged driving problems?
4. Convene a competent body to propose further amendments
 1. Eliminate urine testing for OVI-drugs. Use only blood or oral fluid.
 2. Eliminate all non-zero *per se* limits for drugs other than alcohol.
 3. Expand OVI definition to include all impairing drugs.

If drugged driving conviction rates are too low, try:

A permissible inference of OVI for a driver with any measurable amount of one or more psychoactive drugs other than alcohol in blood or oral fluid.

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Causes of 2020 Colorado DUI Cases



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Recommendations

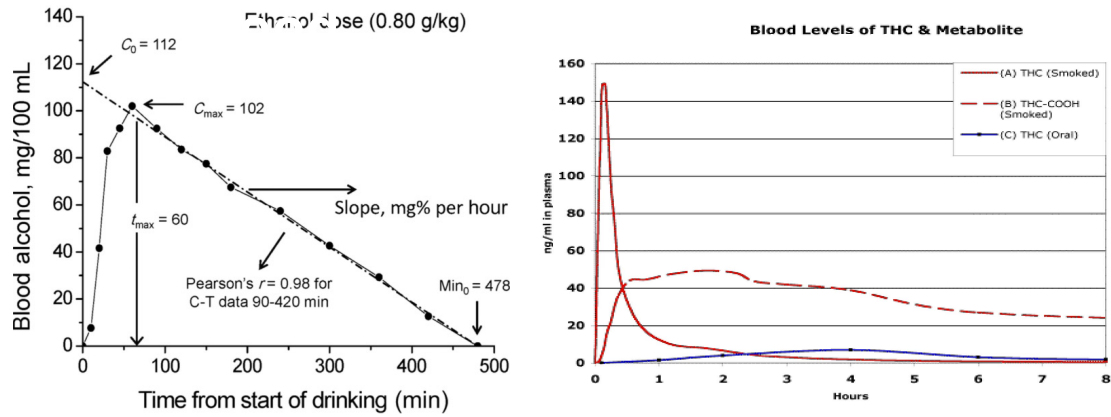
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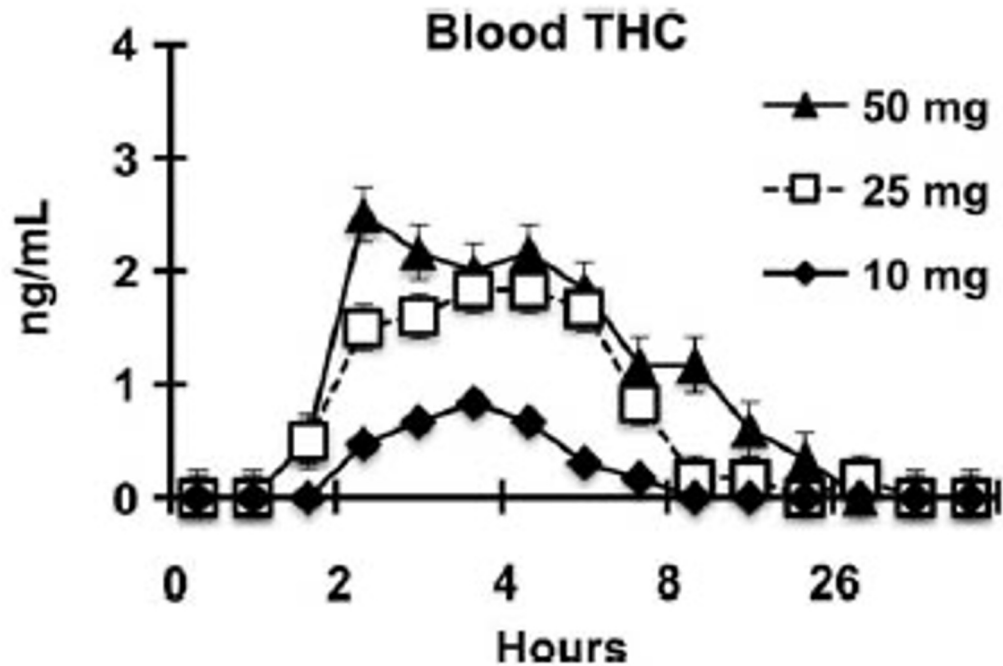
Alcohol and THC Pharmacokinetic Profiles



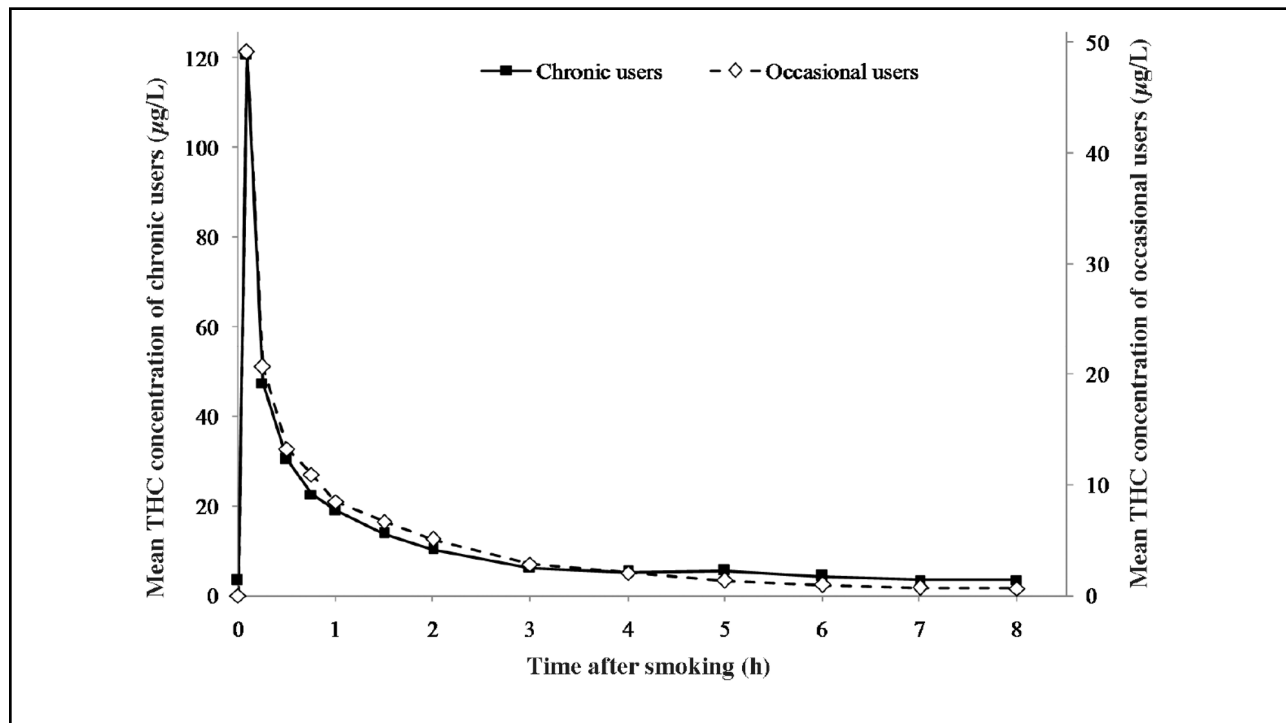
Blood THC levels don't behave like BAC

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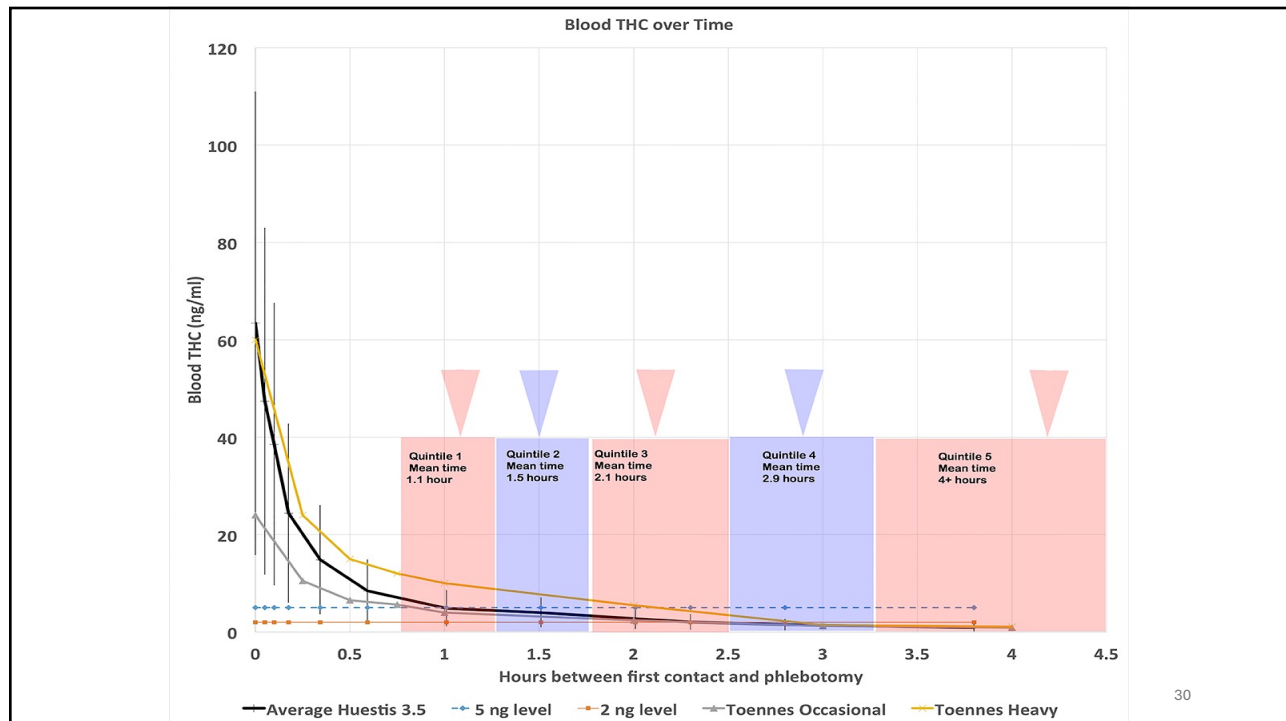
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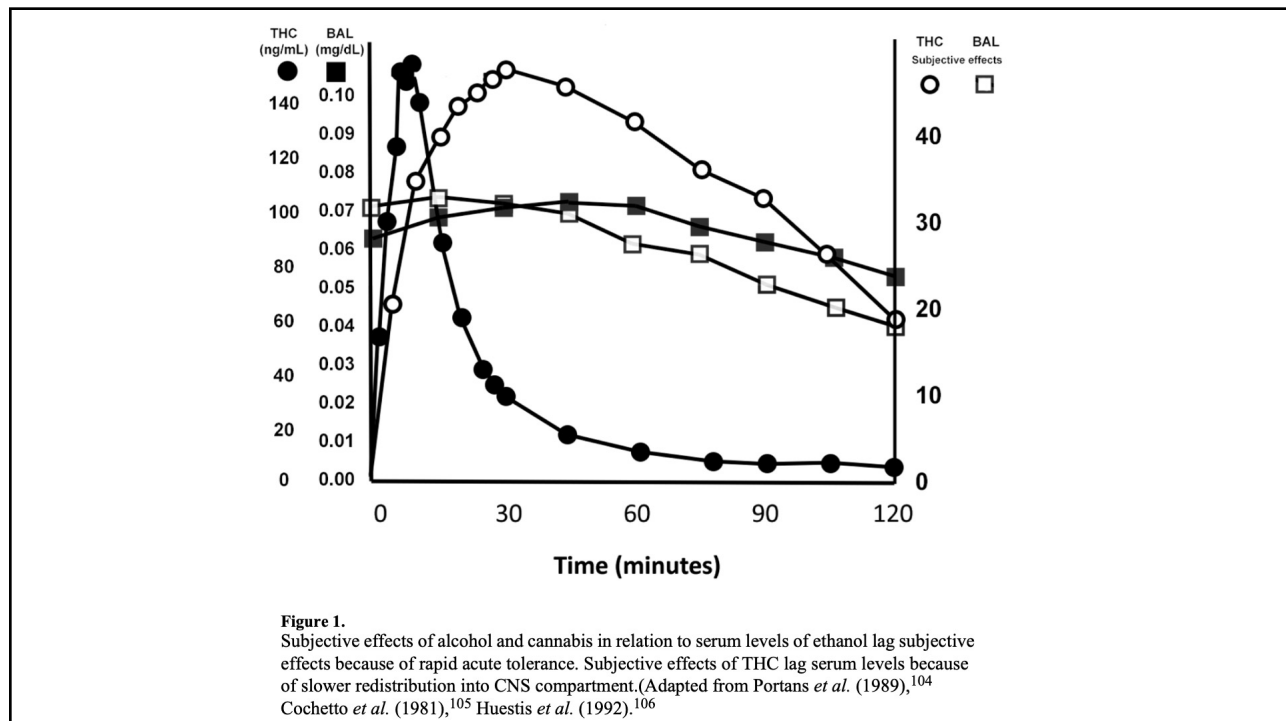


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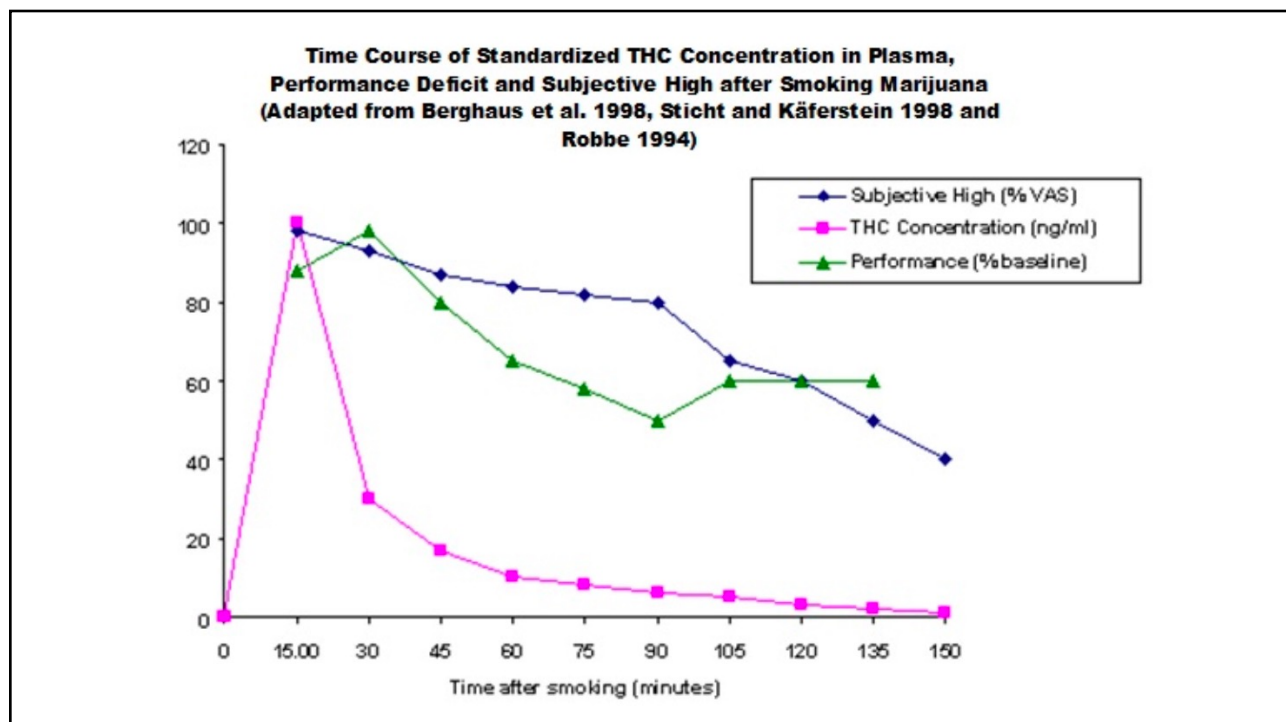


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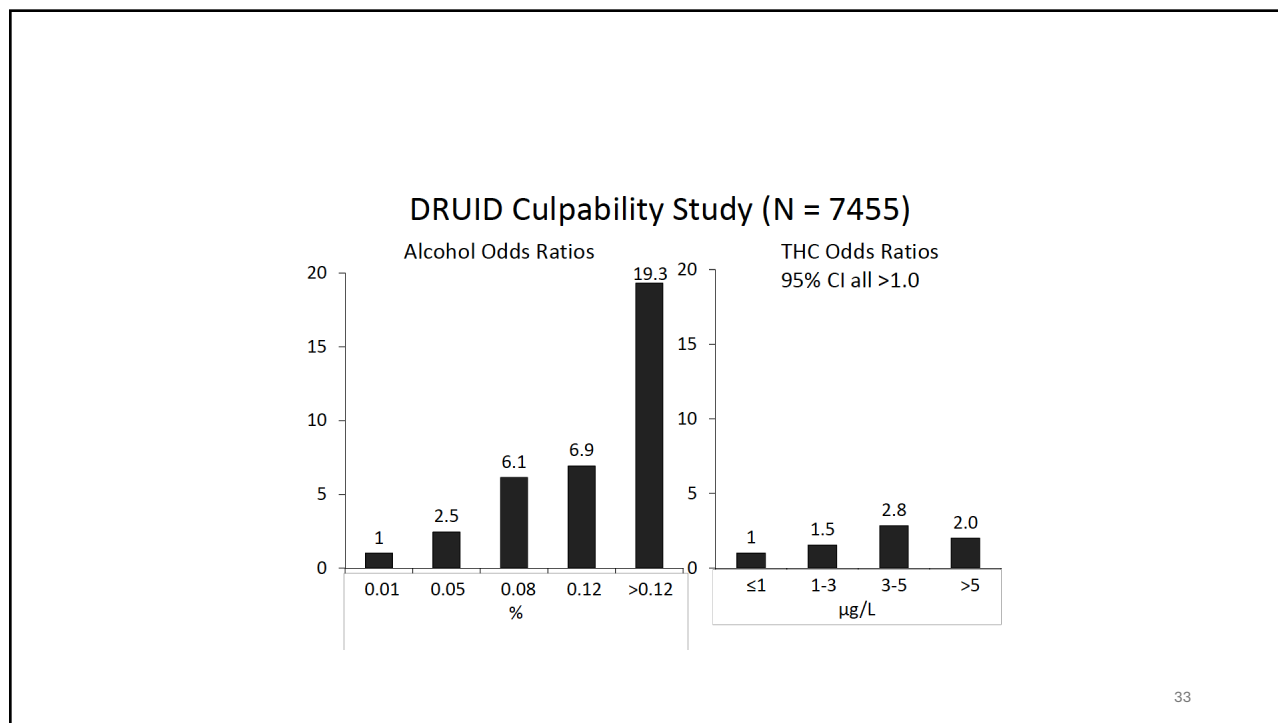
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The role of toxicology in DUI assessment

- Determine the drug responsible for observed impairment
- Determine the degree of impairment – ONLY FOR ALCOHOL
- Blood tests – the gold standard
- Oral fluid tests – good
 - More variable than blood tests (edible vs smoked/vaped, drug difference)
 - Best assessment of recency of use
 - Can reduce delay in capturing a test sample
- Urine tests – useless
 - Tests for metabolites – not the impairing drug
 - Useful for confirming historical use only

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Recommendations

1. Repeal marijuana metabolite *per se* law.
2. Put OVI jury instruction in statute.
3. Get your own data
4. Convene an expert panel to redraft Ohio OVI laws
 - Eliminate urine testing for OVI-drugs. Use only blood or oral fluid.
 - Eliminate all non-zero *per se* limits for drugs other than alcohol.
 - Expand OVI definition to include all impairing drugs.

If drugged driving conviction rates are too low, try:

A permissible inference of OVI for a driver with any measurable amount of one or more psychoactive drugs other than alcohol in blood or oral fluid.

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Ohio Senate Bill 55

Opposition Testimony

SB 55 would make it either more difficult or impossible to convict stoned drivers of OVI, depending on the toxicology methods used to support the OVI charge.

There are many flaws in Ohio's current OVI law. The bill sponsor has identified one of them. Recommendations to correct all flaws are included in the following testimony.

SB 55 shows a profound lack of understanding of toxicology.

SB 55 ignores the lessons learned by experts about protecting the public from the dangers of drugged driving.

Ohio's public and especially the victims of drugged driving deserve better than SB 55.

Ed Wood



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