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White Paper

Driving Under the Influence of Drugs (DUID)

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“Essentially what we surmised is that in the state of Missouri you can smoke marijuana, drive a motor vehicle, fail to yield and kill someone, just don’t have the marijuana on you at the time of the crash.”

Trish Bottfield, whose nephew was killed in a crash involving a driver with marijuana in his system and was not charged.

Overview

Drugged driving affects each of us at any given time of the day. At a [NIDA conference](#) (Drugged Driving: Future Research Directions)¹, Dr. Mike Walsh noted that “Several studies in the United States and a collaborative US-EU project found that at least 35% of people stopped for erratic driving, drivers involved in a crash, and fatally injured drivers had at least one drug in their system, and many were under the influence of both drugs and alcohol.” NHTSA’s [2014 Roadside Survey](#)² concluded that the number of drivers with alcohol in their system has declined by nearly one-third since 2007, and by more than three-quarters since the first Roadside Survey in 1973. *But that same survey found a large increase in the number of drivers using marijuana or other illegal drugs.*

Current laws, tools and training cannot cope with this growing problem:

- Drugged drivers frequently escape prosecution which means -
- No conviction which means -
- No punishment or accountability which means -
- No rehabilitation which means -
- No justice for the victim/survivor and
- No protection for society

This problem is not unique to America. Other countries, including New Zealand, Australia, Germany, France have implemented national drugged driving legislation, technologies and training. The latest country to act aggressively against drugged driving is [Britain](#), which implemented drugged driving limits for sixteen drugs on March 2, 2015, after realizing that prosecution of DUID was only 2% of the rate of DUI alcohol, whereas its prevalence was 33% that of DUI alcohol³. *The British distinction is that they have the data to show the need for legislation. The United States doesn’t.*

The United States has studied the problem for decades but has yet to take action. GAO’s February 2015 report “[Drug-impaired driving](#)”⁴ identified DUID as a serious and growing problem. We rapidly accept legalization and commercialization of psychoactive drugs with no legal means to effectively provide for public safety or common sense. [Colorado Governor Hickenlooper](#) commented on Colorado’s legalization of marijuana, “If I could’ve waved a wand the day after the election, I would’ve reversed the election. This was a bad idea.”⁵ The results of these bad and costly decisions from our policy makers fall upon us, the innocent public, who suffer the devastating consequences on our roadways. Those of us who become victims and survivors of drugged driving experience an ongoing victimization, first by the drugged driver, then it continues with an ill-equipped and ineffective legal system unresponsive to our pleas.

DUID is not simply a problem of marijuana-impaired drivers. The [2007 National Roadside Survey](#)⁶ shows marijuana was the most common single drug found in drivers, followed by stimulants like cocaine and methamphetamine, then poly-use (more than one class of drug)

¹ <http://druggeddriving.org/pdfs/NIDAMarch192010DruggedDrivingMeetingSummary.pdf>

² “Results of the 2013-2014 National Roadside Survey of Alcohol and Drug Use by Drivers,” NHTSA Traffic Safety Facts Research Note, DOT 812 118, February 2015

³ <https://www.youtube.com/watch?v=0zjsV8onl6c>

⁴ “Drug-impaired driving,” GAO-15-293, February 2015

⁵ <http://www.breitbart.com/big-government/2015/01/23/colorado-gov-legalizing-pot-was-a-bad-idea/>

⁶ *op.cit.* “Drug-impaired driving”, Table 1

and narcotic-analgesics like heroin and synthetic opioids. Dr. Christine Moore writes, “we have seen a large increase in heroin use recently probably because it is much cheaper than oxycodone.”⁷

Perhaps more convincing than large scale studies of drug *presence* is a small scale study of drug *impairment* in drivers *charged* with DUI⁸ and either vehicular homicide or vehicular assault. DUID Victim Voices found that although marijuana was the most commonly cited drug in the 50 drugged drivers identified, marijuana was found *alone* in only 4% of that cohort of drugged drivers. Three-quarters of drugged drivers were on multiple drugs or drugs plus alcohol. After marijuana, the most common classes of drugs cited were stimulants, heroin and other opiate/opioids, and benzodiazepines.

Requested Action

As noted above, NHTSA⁹ and GAO¹⁰ report that the prevalence of driving under the influence of alcohol is gradually declining at the same time that the prevalence of drugged driving is increasing. 23 U.S Code 405¹¹ National priority safety programs addresses impaired driving, *but all listed programs are specific to alcohol impairment*. Multiple highway safety organizations including AAA (American Automobile Association), MADD (Mothers Against Drunk Driving) and GHSA (Governors Highway Safety Association) have all added drugged driving to their agenda. **We Save Lives** and **DUID Victim Voices** request revisions to 23 U.S Code §405 to provide incentives to States to implement technologies, practices and laws specifically directed at the measurement and deterrence of drugged driving.

Identified Need

The White House’s Office of National Drug Control Policy (ONDCP)¹² identified drugged driving as a policy priority, and established a goal in the agency’s 2011 National Drug Control Strategy to reduce drugged driving 10 percent by 2015. This goal was not met¹³. *Concrete actions* are needed to stop the cultural acceptance of Driving Under the Influence of Drugs (DUID). Concrete actions like national alcohol *per se* laws, administrative license revocation and incentives for ignition interlock devices address the DUI-alcohol epidemic. No similar actions or incentives have been put in place to deal with DUID.

Congress should support nine initiatives to stop DUID, some of which have already been adopted by various states, as listed in *Appendix 1 - Reference Statutes*. With one exception, initiatives are listed in order of proposed urgency. The exception is initiative #8, calling for zero tolerance laws for DUID. We expect that zero tolerance laws would have the largest impact in reducing drugged driving of all proposed initiatives. Unfortunately, we recognize that is also the most the difficult initiative to adopt.

1. Collect, analyze and publish DUID (Driving Under the Influence of Drugs) data:

⁷ Personal communication, Christine Moore, PhD, Immunalysis Corp, Pomona, CA, March 31, 2015

⁸ DUID Victim Voices 2013 study, unpublished

⁹ *op.cit.* Traffic Safety Facts, DOT 812 118

¹⁰ *op.cit.* Drug-impaired driving, GAO

¹¹ www.law.cornell.edu/uscode/text/23/405

¹² www.whitehouse.gov/ondcp/2011-national-drug-control-strategy

¹³ *op.cit.* Traffic Safety Facts, DOT 812 118

Collect, analyze and publish data to understand the prevalence, causes and consequences of drugged driving. Report the number of DUID citations and causes, and DUID convictions compared to DUI-alcohol. (Recommended by NHTSA and GHSA.)

2. Implement oral fluid testing (both roadside preliminary devices and evidentiary assays):

- Roadside non-quantitative oral fluid testing devices can be used by officers prior to arrest if the officer has *reasonable grounds* to believe that the driver may be impaired by drugs.
 - Results of non-quantitative oral fluid testing shall guide officers in evidence collection.
 - The roadside non-quantitative oral fluid tests results may not be considered evidentiary.
 - Available devices test for drugs including opiates, cocaine, amphetamines, and cannabis.
- Evidentiary laboratory oral fluid testing may be used in lieu of blood evidentiary testing to prove presence of an impairing substance.

3. Provide more DREs, ARIDE-trained officers:

Provide additional training for and use of Drug Recognition Experts (DREs) and officers trained in Advanced Roadside Impaired Driving Enforcement (ARIDE).

4. Implement mandatory drug testing in the following cases:

- Preliminary breath alcohol tests and preliminary drug oral fluid tests for all DUI arrests.
- Evidentiary alcohol and drug tests of all (surviving and deceased) drivers involved in crashes that result in death or serious injuries. Lack of testing ensures DUID remains under-reported.

In 2016 there were 51,914 drivers involved in fatal crashes that killed 37,461 people. Yet only 15,734 (30.3%) were tested for drugs.

5. Implement eWarrants for blood draws:

Reduce delays in collecting blood samples through the use of electronic warrants. Traditional warrants can add 1½ hour to the normal two hours required to collect a blood sample in cases of death or serious bodily injury. An average of 73% of marijuana's THC is cleared from the blood within 25 minutes after smoking, making blood test levels irrelevant after such a delay.

6. Enhance penalties for polydrug impairment:

Enhance penalties for driving under the influence of combinations of drugs or drugs plus alcohol. Combinations of drugs can be more impairing than individual drugs. Enhanced penalties can incentivize and financially support additional drug testing.

7. Adopt responsible DUID legislative options:

1. Zero tolerance for impairing drugs for drivers under the age of 21.
2. Tandem *per se* where a driver is guilty of DUID *per se* if the following sequence of events occurs:

- The driver was arrested by an officer who had probable cause, based on the driver's demeanor, behavior and observable impairment to believe that the driver was impaired; and
- Proof that the driver had any amount of an impairing substance in blood, oral fluid or breath.

Sixteen states have zero drug tolerance for drivers, following the Department of Transportation zero drug tolerance policy for commercial drivers and other select employees. These zero tolerance laws vary widely from state-to-state but all are suitable substitutes for Tandem *per se*. *Per se* limits for drugs are not advised. The impossibility of determining scientifically valid *per se* levels of all scheduled drugs becomes readily apparent when one considers the multiple thousand combinations of drugs that must also be considered.

A 5 ng/ml THC per se law or permissible inference level is NOT a responsible DUID option; most marijuana-impaired drivers test below 5 ng/ml THC in whole blood.

8. Implement 24/7 sobriety programs for chronic alcohol and drug offenders:

24/7 sobriety programs have proven beneficial for chronic alcohol offenders but are far less common for chronic drug offenders.

9. Impose Administrative License Revocation for drugged driving:

Drivers' licenses should be revoked administratively for all drivers who either fail preliminary alcohol or drug tests or who refuse to provide biological samples for alcohol or drug testing.

We request revisions to 23 U.S. Code §405 to provide incentives to States to implement the above initiatives to reduce drugged driving. *Appendix 1 – Reference Statutes* shows that the proposed initiatives, far from being unrealistic, are already adopted in many locales.

The combination of all nine methods will act as a deterrent to drugged driving, and demonstrate that DUID will not be tolerated. Most importantly, they will provide the means to collect reliable and critical data that will enable States to measure the impact of their initiatives and develop effective long-term strategies to deal with this growing threat on our highways.

Specific Requested Action

Revise 23 US Code § 405 (d) that specifies grants to States that implement impaired driving countermeasures. There are specific grants to States to reduce alcohol impairment (such as grants to adopt and enforce mandatory alcohol-ignition interlocks) but *none* for drugged driving impairment.

Conclusion

DUID is a growing problem made more acute by the alarming acceptance of recreational drugs and self-medication. This was brought home by a recent AAA [survey](#)¹⁴ that found “while two-thirds of those surveyed feel that those who drive after drinking alcohol pose a “very serious” threat to their personal safety, *just over half* feel the same way about drug

¹⁴ <http://newsroom.aaa.com/2014/12/american-drivers-unfazed-confused-drugged-driving/>

use. Unfortunately, at any given moment, we share the road with an untold number of drugged drivers. Our experience with drunk driving shows we can address this problem. Why aren't we doing the same with drugged driving?

The Institute for Behavior and Health¹⁵ estimates that 20% of traffic fatalities are attributable to drugged driving. Estimates are needed because no one measures DUID fatalities. It's time to change that. It can be done at a modest expense obtained by either an additional appropriation, or reallocating current funds allocated to addressing impaired driving. It's already identified as a National priority. It's certainly a priority for DUID victims. It's time to act.

¹⁵ Institute for Behavior and Health, Public Policy Statement, www.druggeddriving.org

Definitions

- DUI: Driving under the influence, also known as DWI, OWI, DUII, OUI, etc. Although commonly assumed to refer only to driving under the influence of alcohol, it is an all-inclusive term referring to driving under the influence of any substance: alcohol, drugs, or a combination of both.
- DUID: Driving under the influence of drugs. In most jurisdictions this violation is included within the definition of DUI.
- DUI *per se*: Driving while having a concentration of an intoxicant in blood or oral fluid in excess of statutory thresholds. The common threshold for alcohol is 0.08 gm/dl but there is no scientifically accepted threshold greater than zero for drugs.
- DRE – Drug Recognition Expert
- ARIDE – Advanced Roadside Impaired Driving Enforcement
- *per se* levels – It is a misdemeanor to drive with a specified level of alcohol or controlled drug in a driver’s body; the level intended to identify impairment. Establishing a *per se* level for alcohol is well accepted worldwide. Establishing *per se* levels for the thousands of impairing drug and drug combinations is not.
- Zero Tolerance – It is a misdemeanor to drive with *any* level of a *prohibited* psychoactive drug in a driver’s body if that driver shows evidence of impairment; any level beyond zero does not necessarily imply impairment, but rather a violation that can only be prosecuted if either there is behavioral evidence of impairment or probable cause for DUI has been established. Zero tolerance has been accepted to deal with drugged driving, since establishing *per se* levels is not generally accepted.
- SFST – standardized field sobriety test
- NHTSA – National Highway Traffic Safety Administration
- GAO – General Accountability Office
- THC: $\Delta 9$ -tetrahydrocannabinol, the primary psychoactive ingredient in marijuana, not to be confused with its secondary inactive metabolite, 11-nor-9 carboxy tetrahydrocannabinol, also known as carboxy THC or THC COOH.
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Appendix 1 – Reference Statutes

The nine recommendations have been adopted in one form or another by the following states. Although the states may have adopted the recommendations in statute, implementation and enforcement varies widely.

- 1 Collect, analyze and publish DUID data.
Half of the states (AL, AZ, CA, DE, GA, HI, IN, KS, KY, LA, MD, MN, MS, MT, NV, NM, NY, ND, OK, PA, SC, VT, VA, WV, WY) have separate statute citation numbers for DUI alcohol and DUID which could theoretically enable the states to track, analyze and report DUID separately from alcohol, but few states take advantage of this. Nearly all states lump DUID data in with DUI-alcohol data making it impossible to understand the true nature of their DUID problem. Those that do provide separate reports do not analyze the data by drug or drug category and/or do not analyze the judicial outcomes of DUID separately from DUI.

Colorado is beginning to address this by linking data from state judicial, forensic laboratories and pres-sentence evaluation reports to at least begin to understand DUID from the small sample of DUI cases that are drug tested. In the

future, this effort should be augmented by including data collected at the roadside during the arrest process.

- 2 Implement oral fluid testing (both roadside preliminary testing devices and evidential assays.
At least sixteen states (AL, AR, AZ, CO, GA, IN, KS, LA, MO, NV, NY, NC, OH, OK, SD, UT) permit the use of oral fluid testing, but none have passed implementing legislation. Pilot studies have been or are being conducted with roadside preliminary testing devices in CA, VT, FL, MI, CO and many others. Some of these are also evaluating oral fluid evidentiary assays.
- 3 Provide more DREs, ARIDE-trained officers.
All states have DRE programs but DREs are not universally available.
- 4 Implement mandatory drug testing.
Mandatory drug tests in cases of fatalities or serious bodily injury are in place in AZ, FL, HI, ME, MN, MO, NV, NY and SC.

Orange County, CA performs drug tests for all DUI cases.
- 5 Implement eWarrants for blood draws.
AZ, CA, GA, some local jurisdictions in CO, ID, TX, UT
- 6 Enhance penalties for polydrug impairment.
To the best of our knowledge, this does not exist in any state.
- 7 Adopt responsible DUID legislation.
- 8 Implement 24/7 sobriety programs for chronic alcohol and drug offenders.
SD, NE,, MT
- 9 Impose Administrative License Revocation for drugged driving.
41 states and the District of Columbia have implemented Administrative License Revocations for individuals arrested for DUI who refuse to provide a sample for toxicological testing or who provide a sample above the 0.08 g/dL limit for alcohol. However, to the best of our knowledge, no states extend this to refusal to provide a sample for drug testing or who test positive for impairing drugs.

Appendix 2 – Proposed changes to 23 US Code § 405 (d)

The following proposed revisions implement the eight methods identified above to reduce drugged driving (**revisions in bold**):

- (d) (3) (B) (i) a statewide impaired driving task force in the State developed a statewide plan during the most recent 3 calendar years to address the problems of impaired driving **due to alcohol, due to drugs, and due to the combination of alcohol and drugs**; or
- (d) (3) (C) (i) (I) conducted an assessment of the State’s impaired driving program during the most recent 3 calendar years **that includes an impairment by alcohol, impairment by drugs, and impairment by a drug/alcohol combination**; or

- (d) (4) (B) (iii) court support of high visibility enforcement efforts, training and education of criminal justice professionals (**including law enforcement and law enforcement liaisons, prosecutors and Traffic Safety Resource Prosecutors, judges and judicial outreach liaisons, drug recognition experts, ARIDE training and probation officers**) to assist such professionals in handling impaired driving cases, hiring traffic safety resource prosecutors, hiring judicial outreach liaisons, and establishing driving while intoxicated courts;
- (d) (4) (B) (v.5) **implementing roadside drug testing technology;**
- (d) (4) (B) (v.6) **implementing electronic warrant systems to reduce delays in collecting biological samples needed for drug tests;**
- **(6.1) Grants to states that adopt enhanced drugged driving deterrence laws.-**
- **In general. - The Secretary shall make a separate grant under this subsection to each State that adopts and enforces one or more of the following enhanced drugged driving deterrence laws:**
 - **Mandatory drug testing of all drivers (deceased and surviving) involved in crashes that result in death or serious bodily injury.**
 - **Enhanced penalties for driving under the influence of combinations of drugs or drugs plus alcohol.**
 - **24/7 sobriety monitoring program for repeat offenders**
 - ***Per se* violation for driving with any level of scheduled drugs in the body of a driver shown to be impaired by behavioral measures.**
- **Use of funds.- Grants authorized under subparagraph (A) may be used by recipient States for any eligible activities under this subsection or section 402.**
- **Allocation.- Amounts made available under this paragraph shall be allocated among States described in subparagraph (A) on the basis of the apportionment formula set forth in section 402 (c) multiplied by the number of enhanced drugged driving deterrence laws enforced.**