HB19-1146 Tandem DUI *Per Se*

CONCERNING THE OFFENSE OF TANDEM DUI *PER SE.*

This bill replaces the current 5 ng/ml THC permissible inference level with Tandem DUI *per se* and makes requisite conforming changes to other statutes.

Key points:
- A 5 ng/ml THC law is
    - Scientifically invalid   see below
    - Limited to only part of the DUID problem   Table 1 on page 2
    - Prosecutorially ineffective   Tables 1 & 2 on pages 2 & 3
    - Judicially unsound   Table 3 on page 3
- Colorado's 5 ng/ml permissible inference law should be replaced with a Tandem *per se* law.
- New information[1] tells us now is the time to act.

    "**RESOLVED,** that the National Sheriffs' Association joins with the International Association of Chiefs of Police supporting the National Safety Council's Alcohol, Drugs, and Impairment Division in supporting that organization's *Position on Cannabis and Driving* publication, which sets forth conclusions that operating vehicles under the influence of THC increases risk of injury and death and that **there is no minimum blood THC concentration which a driver can be considered unaffected after recent cannabis product consumption**."[2]

What is Tandem *per se*?
- Alcohol's *per se* law requires <u>one</u> event to prove a violation of the law:
    - Proof of BAC $\geqq$.08.

- Tandem *per se* requires <u>two</u> events to prove a violation of the law:
    - Evidence based on the driver's behavior, that the driver was impaired, and
    - Proof of any level of a drug other than alcohol in the driver's blood or oral fluid.

A 5 ng/ml THC level is scientifically invalid
- Like alcohol impairment, THC impairment is dose dependent. That is, the more a user consumes, the more impaired they become[3].
- But because THC is fat soluble, unlike alcohol the blood level of THC tells us <u>nothing</u> about the brain level of THC and therefore about the level of THC impairment[4].
- Blood THC levels can be very low, or even non-detectable when brain THC levels are high[5].

---

[1] Bui B, Reed J. Driving Under the Influence of Alcohol and Drugs. A Report Pursuant to HB 17-1315. July 2018. Colorado Division of Criminal Justice. We have long known that a 5 ng/ml law was scientifically invalid. The DCJ report shows it is also prosecutorially ineffective and judicially unsound.

[2] Approved by the Board of Directors of the National Sheriffs' Association on June 18, 2018, at the Annual Conference of the National Sheriffs' Association, New Orleans, Louisiana.

[3] Verster JC, Pandi-Perumal SR, Ramaekers JG. Drugs, Driving and Traffic Safety. ISBN 978-3-7643-9922-1 [See reference 135 – Abstract p 477 and conclusion p 495]

[4] Logan BK, Kacinko SL, Beirness DJ. An evaluation of data from drivers arrested for DUI in relation to per se limits for cannabis (May 2016) AAA Foundation for Traffic Safety [See reference 335 – especially pages 2 and 25]

[5] Mura P, Kintz P, Dumestre V et al. THC can be detected in brain while absent in blood. J of Anal Tox V 29 Nov/Dec 2005, 842-843 [See reference 317]

- Alcohol is the <u>only</u> drug for which a strong correlation has been shown between blood levels and impairment levels. Among all drugs, marijuana is not the exception in this regard. Alcohol is the exception[6].
- A driver with a blood THC level <u>below</u> 5 ng/ml is as likely or even more likely to cause a crash as a driver <u>above</u> 5 ng/ml[7].
- A driver impaired due to use of a marijuana edible is highly unlikely to have a blood THC level as high as 5 ng/ml[8].

A 5 ng/ml law is prosecutorially ineffective

- Data collected by Colorado's DCJ from DUI cases in 2016 revealed the following:

Table 1[9]   Convictions by drug class

Drug class	Case count	Conviction rate
Alcohol ≧ .05	14,217	93.3%
≥ BAC .08		95.3%
BAC .05 - .079		73.8%
THC ≧ 1.0	2,227	82.8%
≥ 5 ng/ml		87.5%
1.0-4.9 ng/ml		76.6%
CNS Depressants	881	83.2%
CNS Stimulants	797	89.0%
Narcotic analgesics	368	83.7%
Prescription & OTC	170	74.1%
Other	30	86.7%
Single drug	14,549	90.1%
Polydrug	2,100	88.4%

- Cases in 2016 adjudicated by report date mid-2018
- Convictions include Guilty, Deferred & Deferred/Dismissed

- Convictions of THC cases were no higher, and usually lower than that of other drug classes that have no permissible inference level.

Caution:
Table 1 includes cases of single drug impairment as well as polydrug impairment. It also does not differentiate between DUI and DWAI convictions.

Table 2 presents data on defendants with no evidence of polydrug impairment and also shows DUI and DWAI convictions separately.

---

[6] DuPont R. Testimony before the US House Energy and Commerce Committee July 11, 2018 [See reference HHRG-115-1F17 page 18]

[7] Huestis MA. Effects of cannabis with and without alcohol on driving. ACMT Seminars in Forensic Toxicology. Denver, CO, Dec 9, 2015 [See reference 300 – especially slide 15]

[8] Vandry R, Herrmann ES, Mitchell JM. Pharmacokinetic profile of oral cannabis in humans: blood and oral fluid disposition and relation to pharmacodynamic outcomes. J Anal Tox 2017 41 83-99 [See reference 381 p 94]

[9] Data from Tables 33, 34, 40 and 38 from Bui and Reed 2018

A 5 ng/ml law is prosecutorially ineffective (Continued)

Table 2[10]   **Convictions by single drug impairment**

	Convictions by drug		Case Count
	DUI	**DWAI**	
Alcohol only			13,323
≥ BAC .08	92.5%	99.9%	11,857
BAC .05 - .079	23.6%	85.0%	1,189
THC only			878
≥ 5 ng/ml	59.8%	99.7%	621
1.0-4.9 ng/ml	14.1%	91.4%	241

Colorado DUI/DUID adjudicated cases in 2016
No polydrug cases included
Convictions include Guilty, Deferred, Deferred/Dismissed
DUI: substantially incapable of safe driving
DWAI: impaired to the slightest degree, less safe

- Most THC cases were convicted of DWAI, proving the following:
  - These defendants were impaired.
  - Officers identify THC impairment, even without a drug version of a breathalyzer.
  - Prosecutors convict defendants based upon evidence presented by officers.
- 59.8% of THC cases ≧5 ng/ml were convicted of DUI.
- 14.1% of THC cases < 5 ng/ml were convicted of DUI.
- Officers and prosecutors are doing their job.
- The 5 ng/ml THC law isn't. Let's change it.

A 5 ng/ml THC law is judicially unsound

- In DUI cases with victims, a DWAI conviction alone does not provide justice.
  - In Colorado, DUI Vehicular Homicide is a Class 3 felony. But a DWAI Vehicular Homicide is not unlawful.
  - In cases of DWAI Vehicular Homicide, a prosecutor must rely upon a lesser offense such as Reckless Vehicular Homicide or Careless driving resulting in death.

- **Table 3**[11]   **Vehicular Homicide/Assault-DUI Convictions**

Cases	Number	Rate	Note
VH-alcohol only	10	80%	
VH-THC only	2	**0%**	**All were < 5 ng/ml**
VH-single drug	1	0%	
VH-polydrug	7	71%	
VA-alcohol only	79	75%	
VA-THC only	5	80%	All were ≥5 ng/ml
VA-single drug	3	67%	
VA-polydrug	50	88%	

[10] Data from Bui email Aug 24, 2018 [See Ed Wood Data Request, tab 2]
[11] Data from Tables 42 and 43 of Bui and Reed 2018

5 ng THC permissible inference alternatives

- 5 ng/ml THC *per se*
    - 5 ng/ml is not a scientifically valid limit for THC impairment.
    - Most THC-impaired drivers test below that limit.
    - Drivers impaired by THC edibles test below that limit.
    - This does not deal with non-THC causes of drugged-driving.
    - This does not deal with polydrug impairment.
    - Adoption of oral fluid testing will make blood limits irrelevant.
- The Canadian approach – 2 ng/ml and 5 ng/ml THC *per se*
    - This has most of the above-noted drawbacks.
    - Canadian observers report that this is confusing, contentious, and likely will not survive a constitutional challenge.
- Non-zero *per se* limits for a panel of drugs
    - This cannot be realistically done for all the impairing drugs currently in use, even if the levels were to be scientifically valid.
    - Non-zero limits do not deal well with polydrug impairment.
    - These laws specify blood limits that may become irrelevant with the adoption of oral fluid testing.
- Revert to an impairment-based law without *per se* limits
    - Conviction rates are lower than with *per se* laws.
    - It's more difficult to educate the public to the dangers of impaired driving without limits.
- Zero tolerance for impairing drugs
    - Zero tolerance laws vary widely among the sixteen states that have adopted them.
    - These are difficult to pass because of three common objections:
        - "Zero tolerance" is considered to be intolerant, which it is, by definition. That is considered to be a bad thing by a tolerant society.
        - Many believe that the mere presence of a drug should not be cause for a violation.
        - The public expects that *per se* limits should define impairment, which is not the intention of zero tolerance.
- Tandem *per se*