



2015 YLD  
Bridge the Gap Seminar

## When the Reefer Meets the Road

10:45 a.m.-11:45 a.m.

**Presented by:**

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# WHEN THE REEFER MEETS THE ROAD

**Iowa Bar Association - Nuts and Bolts Seminar, 2015**



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## When the Reefer Meets the Road

### APPLICABLE STATUTES

#### Iowa Code § 321J.2

1. A person commits the offense of operating while intoxicated if the person operates a motor vehicle in this state in any of the following conditions:

a. While under the influence of an alcoholic beverage or other drug or a combination of such substances.

- “Drug” is defined as: “any substance, or component thereof, that is intended by the user to affect the structure or function of the body, as well as those substances recognized as “drugs” by national and official publications.” *State v. Bond*, 493 N.W.2d 826, 828 (Iowa 1992).
- “We do not believe the legislature intended to narrowly define the word “drug” under section 321J.2, but rather intended the definition to extend beyond a technical definition to include *any substance that affects the body so as to impair an individual’s ability to operate a motor vehicle.*”
- For recognized “drugs” check out: <http://www.usp.org/>

b. While having an alcohol concentration of .08 or more.

c. While any amount of a controlled substance is present in the person, as measured in the person's blood or urine.

- “Controlled substance” means any drug, substance, or compound that is listed in section 124.204 or 124.206, **or any metabolite** or derivative of the drug, substance, or compound. Iowa Code § 321J.1.
- “Any amount” means “any detectible amount.” *State v. Comried*, 693 N.W.2d 773 (Iowa 2005).
- There is a “reasonable fit” between complete ban of controlled substance in individual’s system while driving and purpose of statute. *State v. Hodges*, 2011 WL 944378 (Iowa App.)

- It doesn't matter that client has pot in system from smoking 2 weeks ago and there was no way it was affecting his ability to drive.

BUT SEE

- *State ex rel. Montgomery v. Harris*, 322 P.3d 160 (Ariz. 2014) – Statutory prohibition of operating a vehicle with any “drug ... or **its metabolite** in the person’s body” referred only to a proscribed substance’s metabolites that are capable of causing impairment.”

## IMPORTANT DISTINCTION

- Impairment means nothing for basic OWI’s with *per se* violation.
  - Prescription drug defense available?
  - If there is a test result you must get that result suppressed.
- Impairment means EVERYTHING for “Under the Influence.”
- Impairment means EVERYTHING for Serious Injury by Vehicle or Vehicular Homicide.

## HOW CONSUMED

- Smoke – “Joint” or “bong”
- Oral consumption – Food items.
- Vaporizers

## CANNABIS METABOLISM<sup>1</sup>

Cannabis is derived from the *cannabis sativa* plant. The tetrahydrocannabinol (THC) is responsible for the mood-altering effects of cannabis which activate cannabinoid receptors in the central nervous system.

1. Absorption Phase - Inhalation of THC is absorbed by the lungs into the blood stream.

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<sup>1</sup> Cannabis and Driving Simulated Driving and Field Impairment Testing, Dr. Katherine Papafotiou.

2. Re-Distribution Phase – THC is “dumped” from the bloodstream into fatty tissue and crosses membranes into tissue (Brain; cannabinoid receptors activated)
  3. Elimination phase – “Dumped” THC re-enters the bloodstream and is metabolized in the liver.
- The time of peak drug blood level does not correspond with the time of peak behavioral level.

### THREE METABOLIC INDICATORS OF THC INGESTION

1. THC ( $\Delta^9$  Tetrahydrocannabinol) – The active, impairing, ingredient of marijuana.
2. 11-OH-THC (Hydroxy-THC) – Active metabolite - Indicates recent consumption.
3. THC-COOH (Carboxy – THC) – Inactive secondary metabolite. Means jack in terms of impairment.

### LAW ENFORCEMENT INDICATORS OF CANNABIS USE

	Law Enforcement Indicators of Cannabis Use
<b>HGN</b>	No
<b>Vertical Nystagmus</b>	No
<b>Lack of Convergence</b>	Yes
<b>Pupil Size</b>	Normal to Dilated
<b>Pulse Rate</b>	Elevated
<b>Blood Pressure</b>	Elevated
<b>Temperature</b>	Normal
<b>Pupil Reaction</b>	Normal
<b>Normal Duration of “High”</b>	2-3 hours

- And don’t forget the ever popular “Green Tongue.”

- This is informational only! Consult a qualified pharmacist or physician for expert testimony when necessary. Also, it is a wise idea to obtain a copy of the NHTSA DRE Training Manual.

## DRIVING IMPAIRMENT

**Does Marijuana consumption impair driving ..... Probably, maybe, not sure.**

- Hartman, (2013), *Cannabis Effects on Driving Skills*. Clinical Chemistry. “Evidence suggests recent smoking and/or blood THC concentrations 2-5 ng/mL are associated with substantial driving impairment, particularly in occasional smokers.”

- **But, ask our federal agency charged with keeping our highways safe**

NHTSA – “While a number of previous studies have shown some increased risk associated with marijuana use by drivers, many studies have not found increased risk. As was noted previously, studies that measure the presence of THC in the drivers’ blood or oral fluid, rather than relying on self-report tend to have much lower (**or no elevated**) crash risk estimates. Likewise better controlled studies have found lower (**or no**) elevated crash risk estimates.” Drug and Alcohol Crash Risk, Traffic Safety Facts, Research Note, U.S. Department of Transportation, National Highway Traffic Safety Administration, February 2015.

## FIELD SOBRIETY TESTING AND MARIJUANA

- THERE HAS BEEN NO SCIENTIFIC STUDY, PUBLISHED FOR PEER REVIEW, WHICH WOULD CORRELATE TO ANY DEGREE OF SCIENTIFIC CERTAINTY, A PERSON’S PERFORMANCE ON FIELD SOBRIETY TESTS TO IMPAIRMENT BY MARIJAUAN OR ANY OTHER DRUG OTHER THAN ALCOHOL FOR THAT MATTER!!!!!!!!!!!!!!!!!!!!!!!!!!!!

- **Four Known Attempts**

1. Papafotiou (2004) – *An evaluation of the sensitivity of the Standardised [I did not misspell this – that is precisely how the article is titled in the publication] Field Sobriety Tests (SFSTs) to detect impairment due to marijuana intoxication*. Psychopharmacy.

- NOTE – Added “head movement/jerks” during HGN as an additional scoring factor – maybe looking to add that as a new clue for drugs.

**Conclusion:** “In the high THC condition, 46.2% of individuals were classified as impaired at Time 1, 41% were classified as impaired at Time 2, and only 28.2% were classified as impaired at time 3.”

**Results:**

Percentage classified as impaired based upon normal law enforcement scoring of tests.

5 Minutes after smoking full joint

- **Placebo** – 2.5
- **Low THC** – 23.1
- **High THC** – 46.2

55 Minutes after

- **Placebo** – 7.5
- **Low THC** – 23.1
- **High THC** – 41

105 Minutes after

- **Placebo** – 5
- **Low THC** – 15.4
- **High THC** – 28.2

- Still claimed “THC significantly impaired performance on the SFST’s”
- NEVER TESTED SUBJECT’S BASELINE PRIOR TO TESTING!

2. Papafotiou (2005) – *The relationship between performance on the standardised [I did not misspell this – that is precisely how the article is titled in the publication] field sobriety tests, driving performance and the level of Delta9-tetrahydrocannabinol (THC) in blood.* Forensic Science International.

**Procedure:** Smoked – SFST 1 (5 min post smoke); Drive 1 (30 min); SFST 2 (55 min); Drive 2 (80 min); SFST 3 (105 min)

**Results:** NO impairment at Drive 1. Unknown performance on SFST 1.

- LOW THC Level SFST time 2 (55 min post smoke) – 38.5% of people that passed the driving test were correctly identified as not impaired by field sobriety tests. (Read that again)

- That meant performance of field sobriety tests indicated someone was impaired 61.5% of the time when driving showed no impairment.
- LOW THC Level SFST time 3 (105 min post smoke) – “Of the 26 participants, who were impaired on the driving task, 100% were correctly identified as impaired **but of the 14 participants who were not impaired on the driving task, NONE were correctly identified as not impaired.**”
  - That meant performance of field sobriety tests indicated someone was impaired 54% of the time when driving showed no impairment.
- High THC Level SFST time 2 (55 min post smoke) – “Only 15.4% of participants who were not impaired on the driving task were correctly identified as not impaired.”
  - That meant performance of field sobriety tests indicated someone was impaired 84.6% of the time when driving showed no impairment.
- High THC Level SFST time 3 (105 min post smoke) – “61.5% of those who were not impaired were correctly identified as no impaired.”
  - Lowest they got to correctly identifying unimpaired drivers through field sobriety testing was a whopping 48.5% false positive percentage rate.
- Conceded “the level of THC in the blood does not provide an accurate and reliable indicator of whether driving performance is impaired.”

**Problems - NO CONTROL GROUP!** Didn't test sober people.

- NO BASELINES for driving or SFST performance.
- Does not disclose actual performance and scores for participants.
- “Researcher” Bias – in discussion portion in discussing the false positives, the author writes: “Furthermore, it is the authors’ view that in real-life scenarios, a high incidence of false negatives is more detrimental to the safety of motorists than a high incidence of false positives.”



3. Bosker, et. al., (2012) *A placebo-controlled study to assess Standardized Field Sobriety Tests performance during alcohol and cannabis intoxication in heavy cannabis users and accuracy of point of collection testing devices for detecting THC in oral fluid.* Psychopharmacology.

**Conclusion:** “SFST were mildly sensitive to impairment from cannabis in heavy users. Lack of sensitivity might be attributed to tolerance and time of testing.

- **Fun and Interesting Observations.**

- Whopping 20 for sample size.
  - At least did baseline SFST performance!
    - During baseline testing 11 failed W & T and 4 failed OLS!
  - Statistical gymnastics aside the results are actually amusing.
    - 11 out of 20 FAILED W & T completely sober. (55%)
    - Out of the 11 that failed W & T during baseline – 7 PASSED it with pot.
    - 4 out of 23 actually did BETTER on both W & T and OLS with pot than they did without.
    - 3 showed HGN with Pot – Contrary to what law enforcement is taught.
    - If you take out those participants that failed either W & T or OLS at baseline only 3 subjects were left that then failed W & T or OLS with pot compared to the 7 that did better with pot.
4. *Downey et. al. - Detecting impairment associated with cannabis with and without alcohol on the Standardized Field Sobriety Tests.* Psychopharmacology, (June, 2012).

**Conclusion:** “The current results highlight the limited ability of the SFST to identify drug consumption in the absence of any evidence of driving impairment or physiological indicators.”

## **ROADSIDE TESTING FOR PRESENCE OF POT**

- *Drager 5000* – From the trusted name in evidentiary breath testing (not used in Iowa) comes a saliva based screening device for testing for marijuana and other drugs.
  - “The test person moves the top part of the collector briefly back and forth between his cheek and gums until the integrated indicator signals that enough of a sample has been collected. This usually takes less than a

minute and never more than four minutes. The test person returns the cassette to you. .... Afterwards you insert the test cassette and cartridge directly into the Drager DrugTest 5000 Analyzer for evaluation.

- *DrugWipe*- “Drugwipe® can be used to screen invisible residue of drugs and drug metabolites on surfaces, in saliva or in sweat. The test is intended for professional use as an aid for on-site detection of possession, trafficking, use or abuse of drugs.”
- *SensAbuse* – “The product, DrugTrap®, comprises a filter holder, mouthpiece, plastic bag with volume indicators and seals for both ends. It is delivered in a box with easy to follow instructions. After the test has been taken, the filter holder is sealed and labelled. Place the DrugTrap® in an envelope and post it to the laboratory.”

## **PROBLEMS WITH CREATING SENSIBLE, IMPAIRMENT BASED LEGISLATION FOR DRIVING AND MARIJUANA.**

- There is no true agreed upon absorption or elimination curve for marijuana as it relates to THC.
- TH-COOH (Carboxy-THC) can and does stay in a user’s system for up to 30 days depending upon frequency of use, potency of drug ingested and individual metabolic characteristics.
- The only way to detect true impairing levels of THC is through invasive blood testing.

## **DEFENDING DRIVING WHILE DRUGGED CASES**

### **1. Prescription Drug Defense.**

Iowa Code § 321J.2(11)

- a. This section does not apply to a person operating a motor vehicle while under the influence of a drug if the substance was prescribed for the person and was taken under the prescription and in accordance with the directions of a medical practitioner as defined in chapter 155A or if the substance was dispensed by a pharmacist without a prescription pursuant to the rules of the board of pharmacy, if there is no evidence of the consumption of alcohol and the medical practitioner or pharmacist had not directed the person to refrain from operating a motor vehicle.

Elements:

1. Valid Prescription or dispensed by pharmacists without prescription; and
  2. Taken under the prescription and in accordance with the directions; and
  3. NO evidence of alcohol consumption.
    - Prescription medical defense requires there be no evidence of alcohol when it is alleged that the individual is “under the influence” of the prescription drug. *State v. Wolfe*, 369 N.W.2d 458 (Iowa 1985).
- b. When charged with a violation of subsection 1, paragraph “c”, a person may assert, as an affirmative defense, that the controlled substance present in the person's blood or urine was prescribed or dispensed for the person and was taken in accordance with the directions of a practitioner and the labeling directions of the pharmacy, as that person and place of business are defined in [section 155A.3](#).
- Creates the question of its it is merely “*per se*” violation and not overt evidence of impairment, can an individual assert the prescription drug defense with alcohol present so long as no instructed not to drink?
2. Notice and appreciate the subtle differences between “Under the Influence” and “Per Se” violations.

Under the Influence – Only requires being “under the influence” of a “drug.”

Again, “drug” has a much broader definition.

Focus is on impairment - The conduct and demeanor of the individual is the focus of an inquiry pursuant to the “under the influence” alternative as opposed to the numerical “test result.” See *State v. Price*, 692 N.W.2d 1, 4 (Iowa 2005).

Per Se – Must have a “controlled substance” present in their blood or urine.

- There is a difference between “Drug” and “Controlled Substance.”

- Toxicology experts regarding false positives.

### 3. Reasonable Grounds

Iowa Code section 321J.6 requires that prior to invoking Implied Consent, an officer must have both “reasonable grounds” to believe the individual has violated Iowa Code section 321J.2 and one of the following six delineated conditions:

- (a) The person submitted to a preliminary breath screening test (PBT) which indicated an alcohol concentration of eight hundredths (0.08) or more; or
- (b) The person was under age 21 and submitted to the PBT which indicated an alcohol concentration of two hundredths (0.02) but less than 0.08; or
- (c) The person was operating a commercial motor vehicle and submitted to a PBT which indicated an alcohol concentration of four hundredths (0.04) or more; or
- (d) The person refused to submit to a PBT under Iowa Code Section 321J.5; or
- (e) The person was involved in a motor vehicle accident or collision resulting in personal injury or death; or
- (f) The person was placed under arrest for violation of Iowa Code Section 321J.2; or
- (g) The person submitted to a PBT which indicated an alcohol concentration of less than eight hundredths (0.08) and the peace officer had reasonable grounds to believe that the person was under the influence of a drug other than alcohol or a combination of alcohol and another drug.

Iowa Code section 321J.6. Reasonable grounds and one of the delineated conditions are separate and distinct requirements, both of which must be satisfied before Implied Consent can legally be invoked. See *State v. Braun*, 495 N.W.2d 735, 738 (Iowa 1993).

Questions to ask yourself when evaluating “reasonable grounds”:

- Is the officer qualified to form conclusions regarding your client being “under the influence” of a drug?

- Is the officer a certified Drug Recognition Expert (DRE)?
  - If so, a court is likely to conclude that a reliable foundation exists for the officer's conclusion that the defendant was under the influence of a "drug" if the officer can articulate basis for conclusion.
  - 12 step protocol followed?
- If Not a DRE and no DRE is called in – What other basis does the officer have to claim your client is under the influence of a "drug?"

There is no peer reviewed study, "validation study," or any other study for that matter, that correlates performance on field sobriety tests with being "under the influence" of drugs.

Normal "beat officer" won't be qualified to form this conclusion just based upon field sobriety test "failure" alone.

**\*\* Remember the focus for "reasonable grounds" is on impairment by the drug NOT the presence of a controlled substance being present in suspects system!**

Client admitting to smoking pot a day ago gives reasonable grounds to believe pot in his system but does NOT in and of itself give reasonable grounds to believe currently impaired by pot.

- Are the officer's conclusions consistent with the observations he claims to have made?
  - The 12<sup>th</sup> Step of a DRE protocol is to call the "category" of drug they conclude is in the individual's system. Do the symptoms match the category called? See cheat sheet.

#### 4. *Miranda* issues.

- a. Custody: Questioning initiated by law enforcement officers after a person has been taken into custody *or otherwise deprived of his freedom in any way.* (emphasis added) *State v. Kyseth*, 240 N.W.2d 671, 673 (1976). This is an objective test. "The only relevant inquiry is how a

reasonable man in the suspect's position would have understood his situation.” *State v. Turner*, 630 N.W.2d 601, 607 (Iowa 2001).

- See *State v. O'Dell*, 772 N.W.2d 16 (Table), 2009 WL 1677057 (Iowa App). Recognizing it to be a “fairly close” whether or not a defendant asked to sit in the front of squad car during winter weather amounted to a “custodial” situation.
- b. Interrogation: Questions reasonably calculated to elicit incriminating response. *Rhode Island v. Innis*, 446 U.S. 291, 300-01 (1980).

## States with Legal Marijuana Consumption (2015)

State:	Recr. use:	Med. use:	Amount Permitted
Alaska	X	X	1 oz usable; 6 plants
Arizona		X	2.5 oz usable; 0-12 plants
California		X	8 oz usable; (6 mature plants or 12 immature plants)
Colorado	X	X	2 oz usable; 6 plants
Connecticut		X	One-month supply
Wash. D.C.		X	2 oz dried
Delaware		X	6 oz usable
Hawaii		X	3 oz usable; 7 plants (3 mature, 4 immature)
Illinois		X	2.5 oz usable
Maine		X	2.5 oz usable; 6 plants
Maryland		X	30 day supply
Massachusetts		X	60 day supply
Michigan		X	2.5 oz usable; 12 plants
Minnesota		X	30 day supply
Montana		X	1 oz usable; 4 mature plants; 12 seedlings
Nevada		X	1 oz usable; 7 plants (3 mature, 4 immature)
New Hamp.		X	2 oz usable
New Jersey		X	2 oz usable
New Mexico		X	6 oz usable; 16 plants (4 mature, 12 immature)
New York		X	30 days supply
Oregon	X	X	24 oz usable; 24 plants (6 mature, 18 immature)
Rhode Island		X	2.5 oz usable; 12 plants
Vermont		X	2 oz usable; 9 plants (2 mature, 7 immature)
Washington	X	X	24 oz usable; 15 plants

