

Montana DUIs 101

A Montana TSRP Training

Program Ed Hirsch

Montana TSRP

(406) 414-7029

Edward.Hirsch@mt.gov

Disclaimer

- These opinions are my own and do not necessarily reflect the opinions of the State, the AGO, DOJ, DOT, law enforcement, or anyone else.

Montana DUI Offenses:

- **Primary focus today:**
- Driving Under the Influence (1)(a)
 - 4 Other “Flavors” of DUI
- **Won’t be discussed today (Time):**
- Vehicular Homicide While Under the Influence (DUI + negligently causes death) (Felony - Up to 30 years in prison)
- Vehicular Assault While Under the Influence (DUI + negligently causes injury)
- Criminal Child Endangerment (DUI + Negligently causes substantial risk to child under 14) (Felony – Up to 10 years in prison)
- Other DUI related offenses



Cheeseburgers

Driving Under the Influence MCA § 61-8-1002

- *The Flagship DUI offense*
- DUI (1)(a) Elements:
- A person drives or is in actual physical control of a vehicle
- Upon the ways of the state open to the public
- While under the influence of alcohol and/or drugs.

Driving Under the Influence MCA § 61-8-1002

- DUI (1)(a) Elements:
- A person drives or is in actual physical control of a vehicle
- **Upon the ways of the state open to the public**
- While under the influence of alcohol and/or drugs.

Upon the Ways of the State Open to the Public

- **Upon the ways of the state open to the public**
 - Any public or private road, highway, alley, lane, parking area, or public or private place adapted and fitted for public travel.
 - Parking lots yes. Driveways usually yes.
 - Circumstantial evidence is sufficient – see e.g. State v Mooney, 2006 MT 121 (overruled on other grounds)

Driving Under the Influence MCA § 61-8-1002

- DUI (1)(a) Elements:
- A person drives or is in actual physical control of a vehicle
- Upon the ways of the state open to the public
- While under the influence of alcohol/drugs.

Under the influence

- **While under the influence of alcohol and/or drugs.**
 - “Under the influence” means that as a result of taking into the body alcohol/drugs a person’s ability to safely operate a motor vehicle has been diminished.
 - No actual injury or damage is required – the question is diminished safety
 - If there was a breath/blood alcohol concentration of 0.08 or more, rebuttable inference of diminished safety
 - If there was a refusal of a breath/blood test, rebuttable inference of diminished safety

Driving Under the Influence MCA § 61-8-1002

- DUI (1)(a) Elements:
- A person drives or is in actual physical control of a **vehicle**
- Upon the ways of the state open to the public
- While under the influence of alcohol and/or drugs.

“Vehicle” as contemplated in DUI

- “Vehicle” means a device in, on, or by which any person or property may be transported or drawn on a public highway, except devices moved by animal power or used exclusively on stationary rails or tracks.
 - Not wheelchairs/mobility devices.
 - For purposes of DUI, not bicycles.
 - See MCA §§ 61-8-1001(15) & 61-1-101(91)

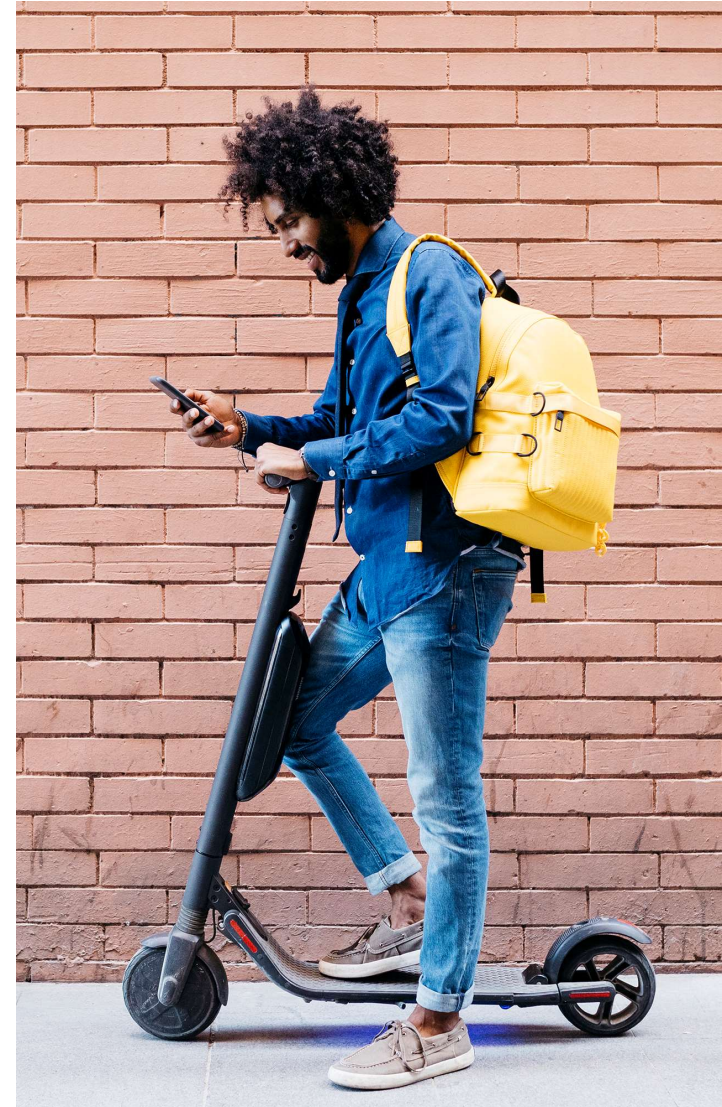
Bicycles § 61-8-102(2):

- (b) "Bicycle" means a vehicle propelled solely by human power on which any person may ride, irrespective of the number of wheels, except scooters, wheelchairs, and similar devices. The term includes an electrically assisted bicycle.



Bicycles § 61-8-102(2):

- (g) "Electrically assisted bicycle" means a vehicle on which a person may ride that has two tandem wheels and an electric motor capable of propelling the vehicle and a rider who weighs 170 pounds no faster than 20 miles an hour on a paved, level surface.
- Unsettled Law



Driving Under the Influence MCA § 61-8-1002

- DUI (1)(a) Elements:
- A person drives **or is in actual physical control** of a vehicle
- Upon the ways of the state open to the public
- While under the influence of alcohol and/or drugs.

Driving or “Actual Physical Control”

- “[a] person is in actual physical control of a motor vehicle if the person is not a passenger, and is in a position to, and has the ability to, operate the vehicle in question.” State v. Hudson, 2005 MT 142, ¶ 8.
- Considering:
 - Where in vehicle
 - Whether key in ignition
 - Whether Engine running
 - Where vehicle parked & how it got there
 - Whether vehicle is disabled and ease of curing disability

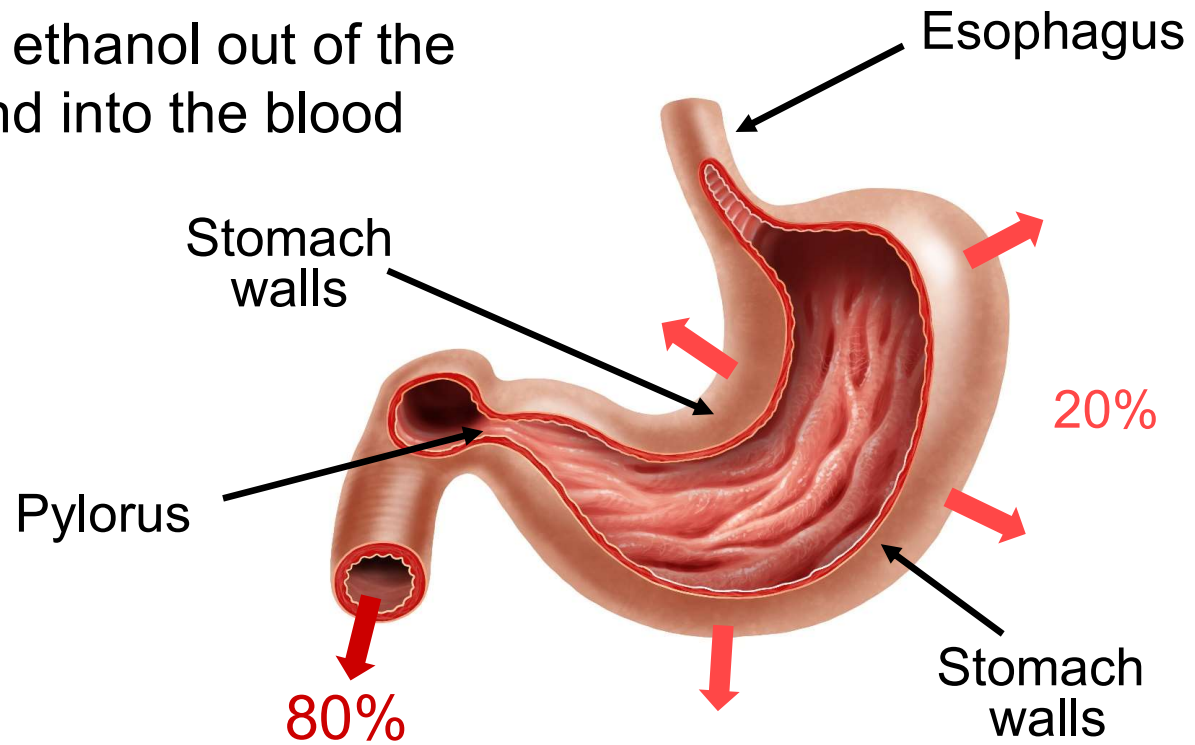
A photograph showing a man in a green t-shirt leaning into the driver's side of a car at night. The car's interior is visible, including the steering wheel and a water bottle in a cup holder. A bright light source, possibly a street lamp or a spotlight, is visible through the car window, creating a strong glare. The text "Actual Physical Control" is overlaid in white on the image.

Actual Physical Control



Absorption of Alcohol (Numbers Go Up)

Getting the ethanol out of the stomach and into the blood





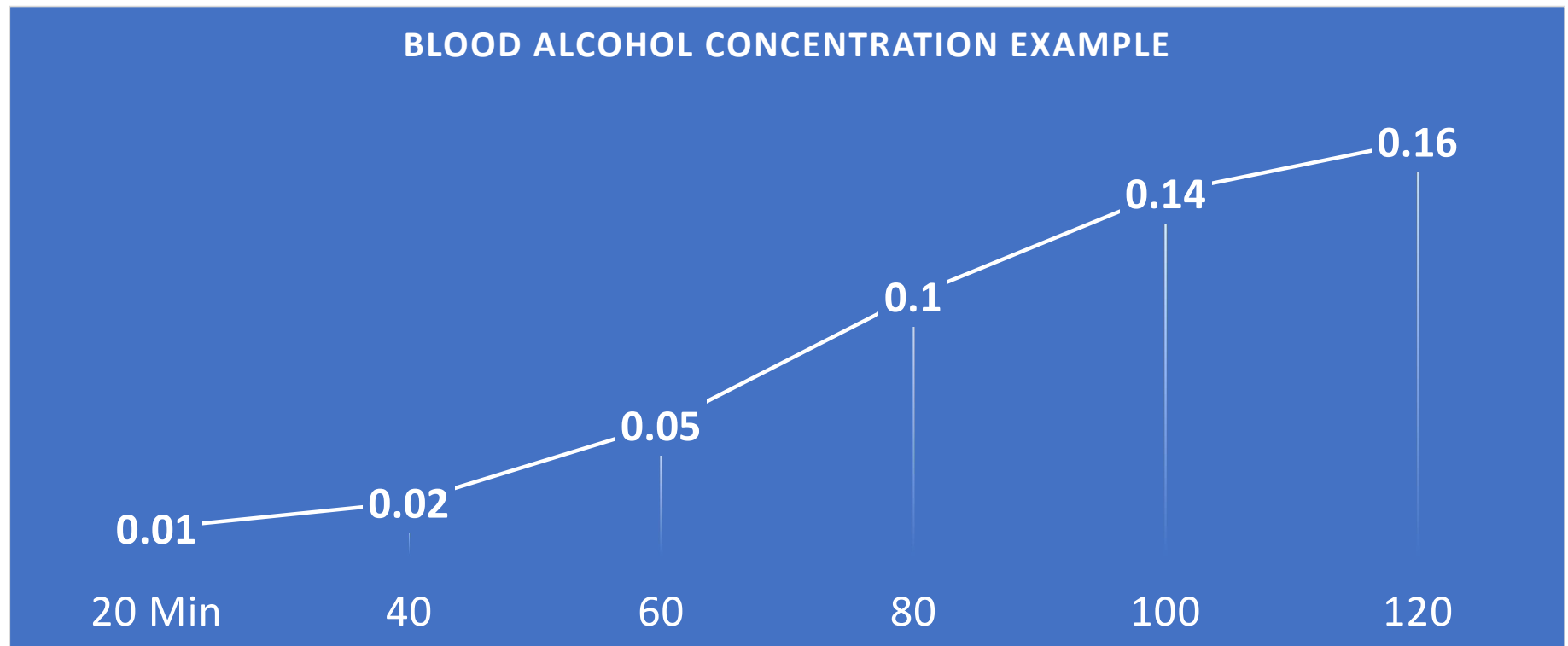
Distribution of Alcohol

Getting the ethanol into the
body's tissues and organs

Basic Principle

Ethanol goes wherever it finds water

Absorption (Numbers Go Up)





Metabolism in Liver (Numbers go Down)

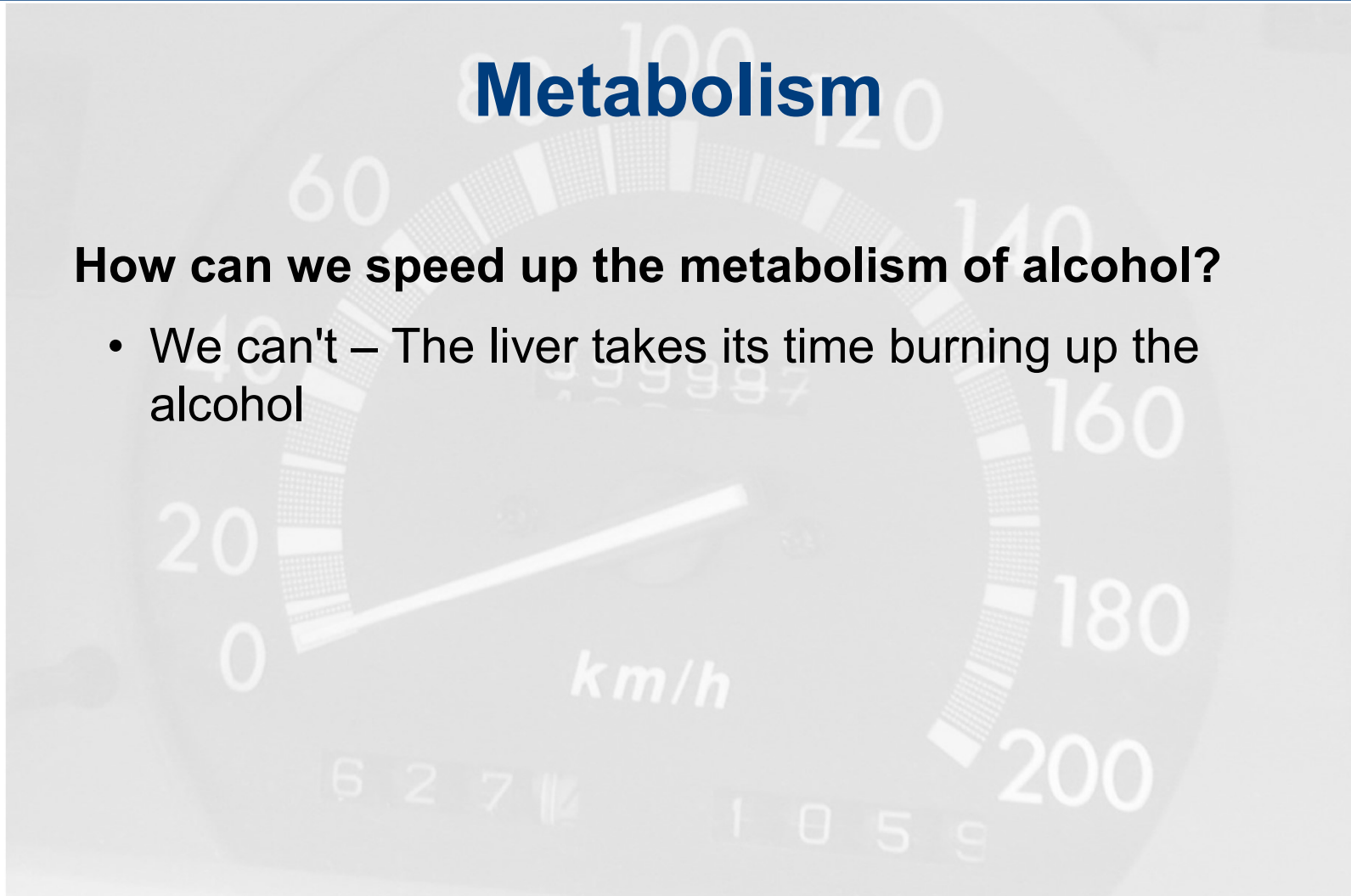
- Burns ethanol
- Aided by alcohol dehydrogenase enzyme
- Ultimate products of chemical reaction are carbon dioxide and water
- Average person's BAC drops by about 0.015 per hour



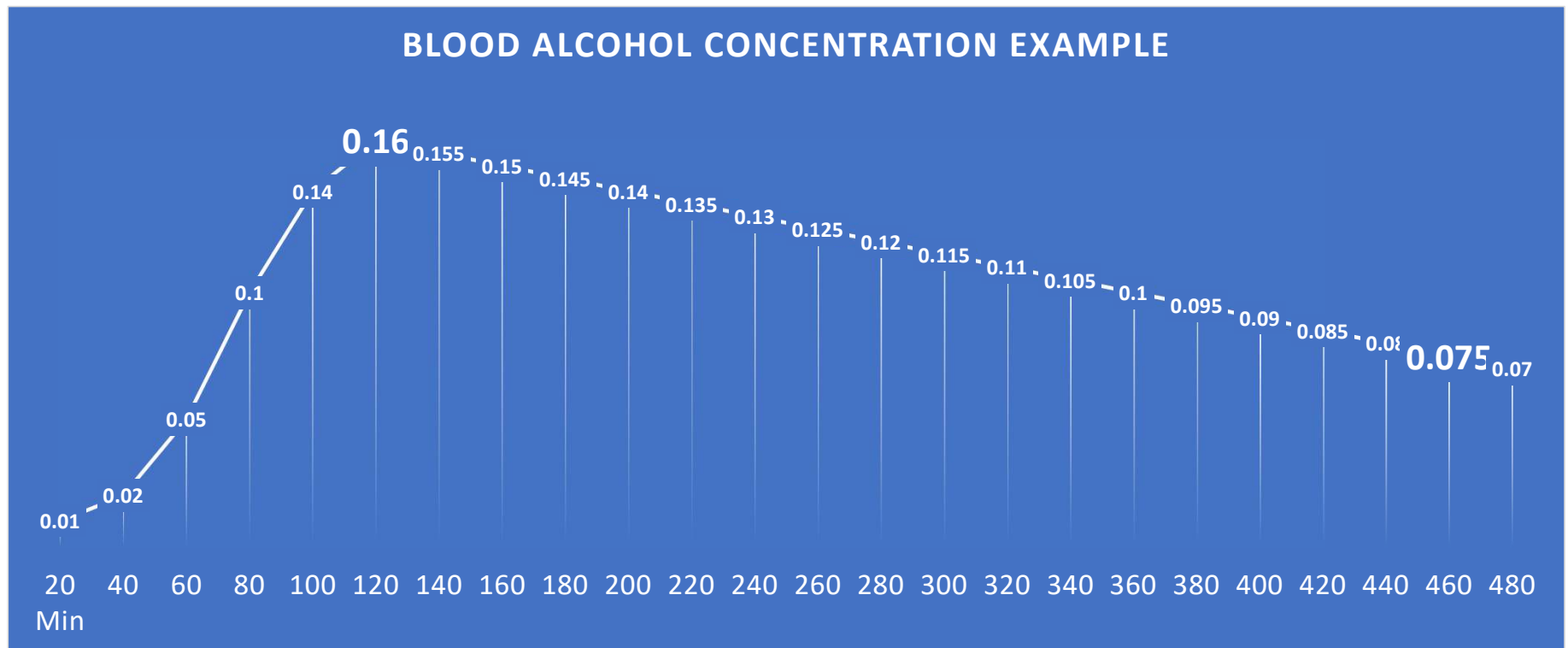
Metabolism

How can we speed up the metabolism of alcohol?

- We can't – The liver takes its time burning up the alcohol



Elimination (Numbers Go Down)



→ ~ 6 Hours from Peak BAC →

The Mellanby Effect

- Our brain is pretty good at telling us “We aren’t safe to drive” while our alcohol concentration is rising (during absorption).
- Remember alcohol impairs judgment and perception. So...
- The Mellanby Effect is a well documented phenomenon where, during the elimination phase (our alcohol concentration is going down), we are *substantially* less likely to accurately perceive our own impairment and much more likely to decide to drive.
- The alcohol is deceiving us.
- Analogy: On ramp -> Interstate - > Off ramp

Other Confounding Factors

- Alcohol increases our ability to fall asleep (Central Nervous System Depressant).
- Decreases our ability to *stay* asleep.
- Wake up a few hours later, “feel better” (Mellanby Effect deception), and start driving.
- We see a lot of DUI crashes at ~4am.

A photograph showing a man in a green t-shirt leaning into the driver's side of a car at night. The interior of the car is visible, including the steering wheel and a water bottle in a cup holder. A bright light source is visible through the car window, creating a lens flare effect. The text "Actual Physical Control" is overlaid in white on the image.

Actual Physical Control

Montana DUI Offenses:

- **Primary focus today:**
- Driving Under the Influence (1)(a)
- **4 x Other “flavors” of DUI:**
- “DUI Per Se”
- “CDL DUI”
- “THC DUI”
- “Minor/Baby DUI”

Driving Under the Influence MCA § 61-8-1002

- “DUI Per Se” (1)(b) Elements:
- A person drives or is in actual physical control of a non commercial vehicle
- Upon the ways of the state open to the public
- With a breath/blood alcohol concentration of 0.08 or more.

- *Doesn't matter if there was diminished safety*
- This is where the term “Legal Limit” comes from – it's a bit of a misnomer but serves well enough (Still possible to be DUI under a 0.08, depending on circumstances).

Driving Under the Influence MCA § 61-8-1002

- “CDL DUI” (1)(c) Elements:
- A person drives or is in actual physical control of a commercial vehicle
- Within this state
- With a blood/alcohol concentration of 0.04 or more.

- *Doesn't matter if there was diminished safety*

Driving Under the Influence MCA § 61-8-1002

- “Minor DUI” (1)(e) Elements:
- A person drives or is in actual physical control of a vehicle
- While under 21 years of age
- Upon the ways of the state open to the public
- With a blood/breath alcohol concentration of 0.02 or more.
- *Doesn't matter if there was diminished safety*

Driving Under the Influence MCA § 61-8-1002

- “THC DUI” (1)(d) Elements:
- A person drives or is in actual physical control of a vehicle
- Upon the ways of the state open to the public
- With 5ng/ml or more of Tetrahydrocannabinol in their blood.

- *Doesn't matter if there was diminished safety*

Disclaimer: Science still catching up

- This is based upon our *current* working understanding of how cannabis affects the human body.
 - First DUI Alcohol Law?
- As science advances, recommendations may change.
- This is the normal scientific process.
- Keep in mind when reviewing THC DUI studies: If is uses *oral* testing to measure THC, highly likely to skew data
 - (Active vs residual THC)

Marijuana Misconception:

- Blood concentration does not correlate to THC impairment.
- True, but misleading.

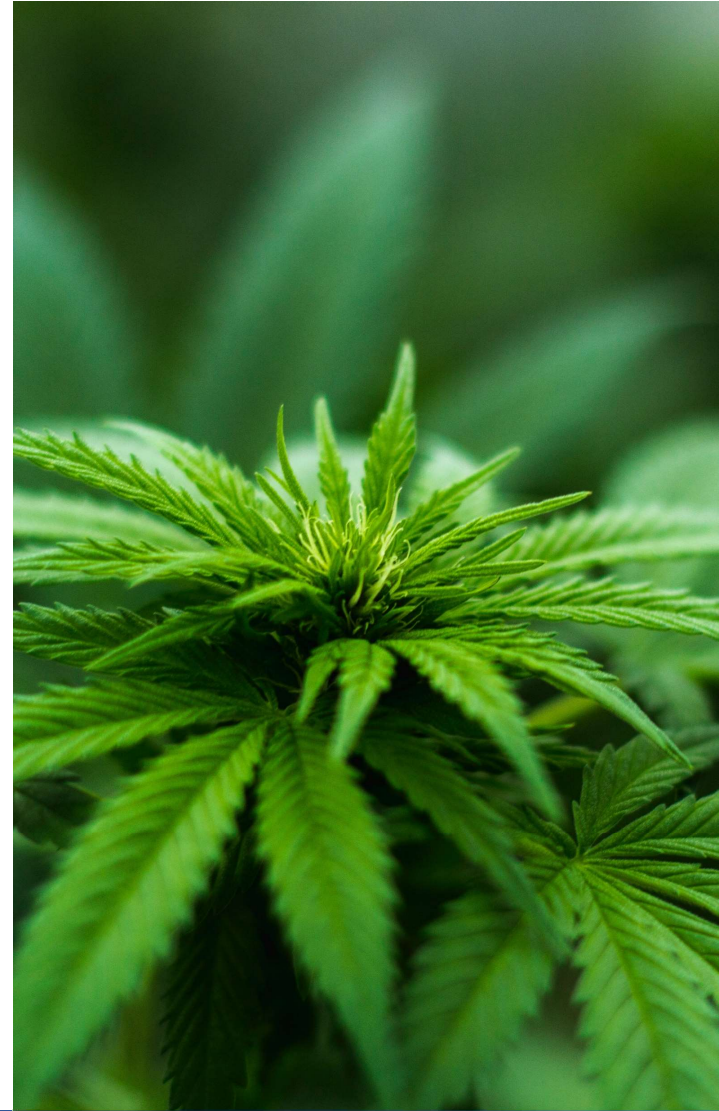
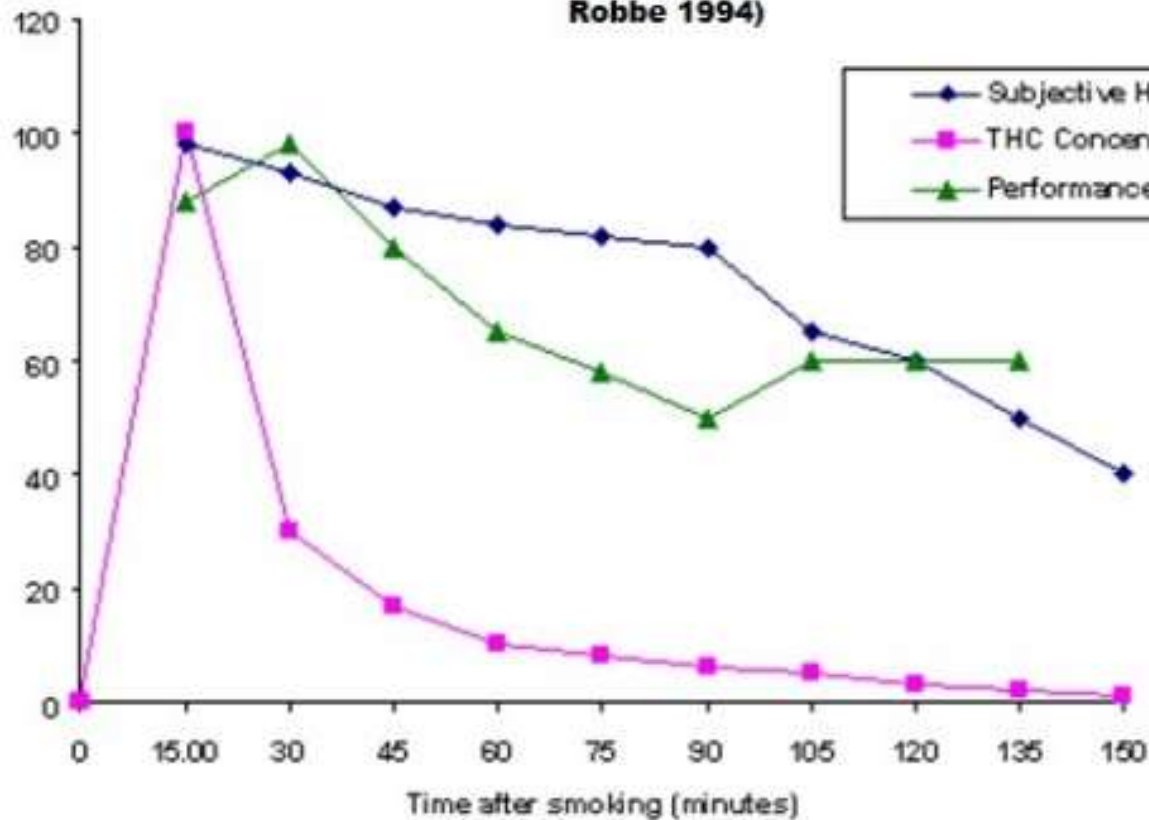


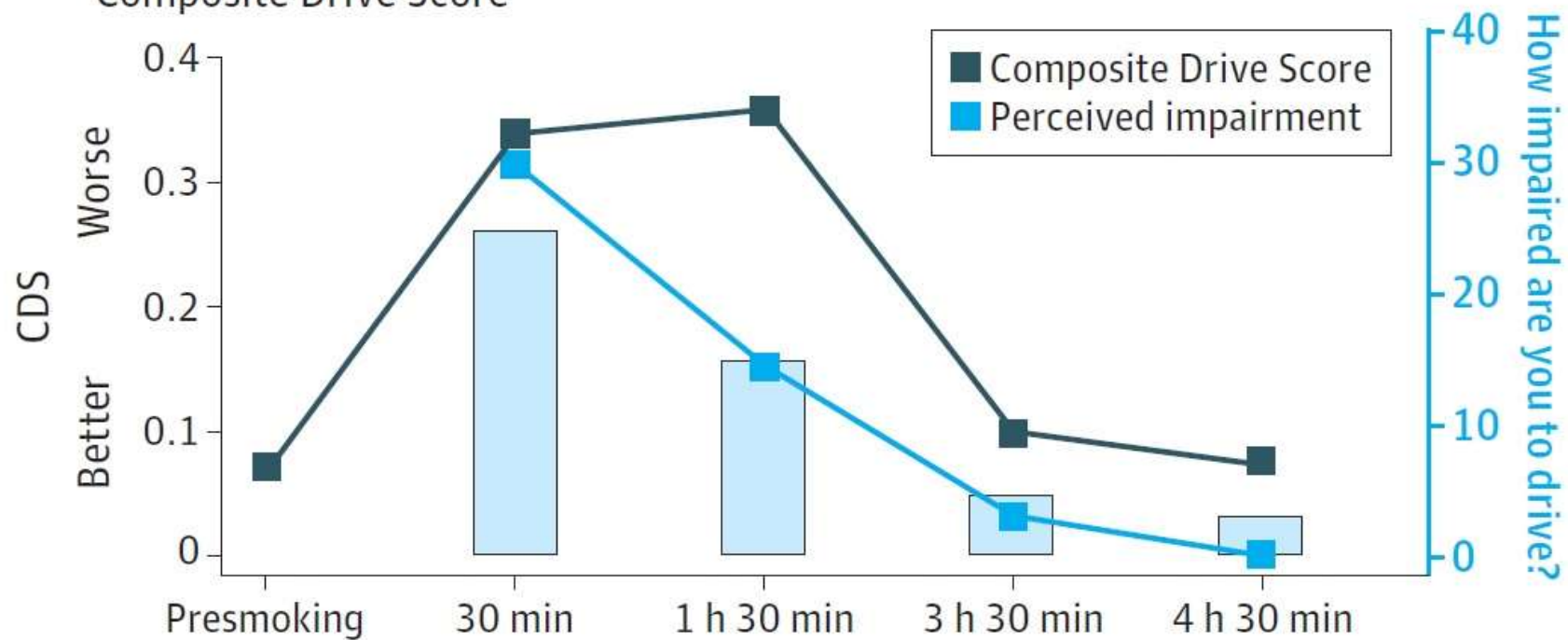
Figure 4

Time Course of Standardized THC Concentration in Plasma, Performance Deficit and Subjective High after Smoking Marijuana (Adapted from Berghaus et al. 1998, Sticht and Käferstein 1998 and Robbe 1994)



- *Marijuana-Impaired Driving, A Report to Congress, NHTSA (2017) (Citing Ward, N.J. and Dye, L. 1999)*

C Perceived driving impairment, refraining from driving, and Composite Drive Score



**Driving Performance and Cannabis Users' Perception of Safety
A Randomized Clinical Trial**

Thomas D. Marcotte, PhD; Anya Umlauf, MS; David J. Grelotti, MD; Emily G. Sones, BA; Philip M. Sobolesky, PhD;
 Breland E. Smith, PhD; Melissa A. Hoffman, PhD; Jacqueline A. Hubbard, PhD; Joan Severson, MS;
 Marilyn A. Huestis, PhD; Igor Grant, MD; Robert L. Fitzgerald, PhD

Realities:

- Investigation:
 - LEO have very short time to get the blood draw from consumption.
 - (Ideally less than 90 minutes)
 - Delayed draw may result in misleading THC levels in blood
- Prosecution:
 - Being below per se limit does not mean they are not impaired.
 - Some DUIC cases below the “legal limit,” depending on timing of consumption/blood draw will go to trial
 - Doesn’t mean the prosecutor is being “overzealous”



Final Thoughts:

- Know thine enemy. The science of alcohol & drugs are critical to our mission.
- Actual Physical Control DUI is supported by the science
- THC blood concentration is not the whole story