

# HIGHway Driving in Tennessee

## The Growing Problem of Drug-Related DUI

By the Hon. Tom Wright  
and Christopher Graham



*Drugged driving is the new drunk driving. And Tennessee has four of the top five counties in the United States for most traffic fatalities by depressant drug-impaired drivers.*

Ask any police officer, prosecutor or General Sessions judge and you will find drugged driving is the new drunk driving. More and more DUI investigations involve little or no alcohol but a wide variety of prescription and non-prescription drugs. The pill epidemic has received the most notoriety recently, but marijuana is the third most commonly used recreational drug worldwide behind alcohol and tobacco.<sup>1</sup> Twenty-three states and the District of Columbia have

legalized medical marijuana, four states and the District of Columbia allow recreational use of marijuana as well as medical use, and 15 states have essentially decriminalized recreational possession of marijuana.<sup>2</sup> It has been estimated that Tennessee had 350,000 to 500,000 marijuana smokers in 2007, including 27 percent of our 18- to 25-year-olds.<sup>3</sup> Drivers use marijuana more than any other illicit drug according to a National Highway Traffic Safety Administration roadside survey.<sup>4</sup> More drivers under the age of 30 involved in fatal automobile accidents were using marijuana than

alcohol or any other drug type.<sup>5</sup>

Even though marijuana possession remains a crime in Tennessee, is there any real doubt that use of marijuana and other drugs is likely to figure prominently in the prosecution of DUI cases in the future? A review of DUI charges in Greene County for a couple of weeks in August 2015 revealed 27 DUI's. Only 7 of those charges were based on alcohol alone. The other 20 involved drug usage. Tennessee has four of the top five counties in the United States for most traffic fatalities by depressant drug-

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impaired drivers.<sup>6</sup> Nationwide, one in three traffic fatalities involved a driver who tested positive for drugs in 2009.<sup>7</sup>

If you handle DUI cases you need to know more than this article will convey, but it will highlight the issues of the drugged driving epidemic. Prosecutors and defense lawyers need to become educated on these issues. It may also be time for the legislature to get involved by enacting state laws that prohibit driving when certain levels of THC are present in a driver's system.<sup>8</sup>

## Marijuana Impairment

The effects of marijuana are different than those of alcohol: it induces light-headedness, sedation, euphoria, sociability and increased appetite, and affects sensory perception and mental processes.<sup>9</sup> More importantly for driving, it slows reaction times, hampers concentration, impairs judgment, affects short-term memory, distorts perceptions of time and space, and diminishes eye-hand-foot-coordination.<sup>10</sup> Additionally, users of marijuana frequently mix it with alcohol, and when combined the two create a synergistic effect: they amplify the effects beyond that which either one possesses alone.<sup>11</sup>

Unlike alcohol, which exits the system quickly, metabolites of marijuana can stay in a user's system for several weeks, and may result in a positive drug test even though the user is no longer under the influence.<sup>12</sup> The "high" from ingestion of marijuana, however, lasts only a few hours.<sup>13</sup> So, positive drug tests for the marijuana metabolite are of little value in actually proving impairment.<sup>14</sup>

## Drug Recognition Experts

Since positive drug screens for marijuana are of limited value in determining impairment, properly trained police officers utilize additional testing methods to determine drug impairment in drivers. During the 1970s, the Los Angeles Police Department started the "Drug Recognition Evaluation Program," which provided training for officers to

recognize signs and symptoms of drug use. These specially trained officers are referred to as "Drug Recognition Experts."<sup>15</sup> A formalized national certification program for DRE's is now administered by the National Association of Chiefs of Police.<sup>16</sup>

Studies have found DRE's to be correct on whether a subject had used drugs other than alcohol 94 percent of the time, and to be correct in 91.8 percent of cases in identifying cannabis intoxication.<sup>17</sup> DRE testimony has been widely admitted in the United States.<sup>18</sup> However, no appellate cases in Tennessee have specifically addressed admissibility of DRE opinion testimony.<sup>19</sup> With the rise in drugged driving, issues related to DRE testimony are sure to be litigated in Tennessee over the next several years.<sup>20</sup>

DRE's utilize other medical or scientific tests, in addition to the standard field sobriety tests, to determine whether a person is under the influence of a type of drug. The 12-step DRE protocol includes evaluating the subject for horizontal gaze nystagmus (HGN), vertical gaze nystagmus (VGN) and lack of visual convergence, among a number of other things.<sup>21</sup>

Tennessee has precluded testimony about the results of the HGN test in DUI cases when there is no expert testimony to explain the underlying scientific basis for the test and the significance of the results.<sup>22</sup> Thus, HGN, VGN and lack of convergence — along with medical tests such as blood pressure and pulse, pupil measurements and muscle tone evaluation, all of which are used in the drug recognition evaluation — would appear to require expert testimony to be admissible. The results of those tests do not convey impairment to a lay person like failing a one-legged stand would. It will be interesting to see if officers who are certified as DRE's will be allowed to testify as "experts" about these tests in Tennessee.<sup>23</sup> If not, the state should prepare to present medical and/or toxicological testimony about the validity of such tests and their relationship to impaired driving.<sup>24</sup>

Other factors that are influential in a DRE determination of drug-impaired driving include an "ingestion examination" (which is viewing the suspect's nose and mouth for signs of inhalation, smoking or remnants of drugs), a search for needle marks, the arresting officer's opinion on whether or not the defendant was acting "high," whether or not drugs were on the defendant's person or in the vehicle, and a defendant's answers to questions about drug use.<sup>25</sup> Testimony about these factors does not appear to require expert testimony to assist the factfinder in understanding how this information is relevant to the impairment determination. Even if DRE trained officers are not allowed to testify at trial as experts, at the very least, a DRE evaluation should provide probable cause for arrest of an erratic driver and a request for chemical testing of the suspect.

## Drug Testing Drivers

As breathalyzer tests are ineffective in determining whether a drug has been used, the preferred testing methods are blood and urine tests.<sup>26</sup> Blood tests are superior. Urine tests are not as accurate.<sup>27</sup> Neither test is going to be conducted on the roadside during a traffic stop with current technology. And because of their invasiveness many suspected drugged drivers will refuse such tests.

Non-consensual blood tests in suspected drugged driving cases will almost always require a search warrant.<sup>28</sup> The natural dissipation of drugs and their metabolites in a person's blood, which occurs over time, will not create an exigency justifying a warrantless blood draw without other facts or circumstances.<sup>29</sup> What those other facts and circumstances are in Tennessee remains to be developed. We do know that an officer's lack of experience or knowledge in how to obtain a search warrant, including not knowing how to contact a judge at night, has been held not to create an exigency for a warrantless blood draw in Tennessee.<sup>30</sup>

## Tennessee Law Related to Drugged Driving

Tennessee law does not provide much guidance in terms of a standard to prove a drug-impaired DUI. In Tennessee, there is no proscribed blood or urine measurement of drug intoxication or use while driving.<sup>31</sup>

The three elements to a DUI offense in the state of Tennessee are "(a) driving or being in physical control of a motor vehicle, (b) upon a public thoroughfare and (c) while under the influence of an intoxicant or narcotic drug,"<sup>32</sup> or when the defendant's blood alcohol content (BAC) is .08 percent or more.<sup>33</sup> Although there are no proscribed drug levels for substances other than alcohol, Tennessee law does provide that the legal use of an intoxicant, including marijuana and other drugs, is no defense to a DUI charge.<sup>34</sup>

Despite the lack of a statutory standard for determining drug-related DUI, Tennessee courts have demonstrated a willingness to uphold a DUI conviction when drugs are involved. One scenario is when drugs are present along with alcohol.<sup>35</sup> For instance, DUI convictions have been upheld when the defendant had a .03 blood alcohol level in conjunction with inactive marijuana metabolites found in blood and urine samples,<sup>36</sup> or when the defendant admitted drinking one beer and tested positive for multiple drugs.<sup>37</sup>

There are also Tennessee cases where a DUI conviction was affirmed where no alcohol was involved. A few examples include cases where there was evidence of a defendant's use of marijuana and cocaine,<sup>38</sup> marijuana, cocaine and opiates,<sup>39</sup> xanax and bath salts,<sup>40</sup> or marijuana and multiple types of prescription drugs.<sup>41</sup> Additionally, courts in Tennessee have been willing to convict when the only evidence of drug use are metabolites, regardless of the fact that expert witnesses were not able to confirm that the defendant was impaired at the time of arrest.<sup>42</sup>

In each of these cases the courts have taken a totality of the circumstances approach to determining drug-impaired

driving, looking at factors such as collisions or erratic driving, poor performance on field sobriety tests, presence of drugs or paraphernalia, and general observations such as slurred speech and unsteadiness, in addition to a positive drug test. Convictions have also been upheld without drug test results and only circumstantial evidence of drug use such as the odor of burnt marijuana and the presence of marijuana and other drugs in the vehicle.<sup>43</sup> However, instituting a law prohibiting a certain drug level in a person's system, similar to a blood alcohol level, would help sustain DUI convictions based on drugs alone or drugs in conjunction with alcohol.

## Other States

Looking nationally, 18 states have enacted some form of a standard to test for drugs in a blood or urine sample in DUI cases. Arizona,<sup>44</sup> Delaware,<sup>45</sup> Georgia,<sup>46</sup> Illinois,<sup>47</sup> Indiana,<sup>48</sup> Michigan,<sup>49</sup> Minnesota,<sup>50</sup> North Carolina,<sup>51</sup> Oklahoma,<sup>52</sup> Pennsylvania,<sup>53</sup> Rhode Island,<sup>54</sup> South Dakota,<sup>55</sup> Utah,<sup>56</sup> and Wisconsin<sup>57</sup> have all enacted some form of "Zero Tolerance" statute. In these states a person caught driving with any amount of a drug in their system is guilty of driving under the influence of drugs. These states differ from the other 32 states (including Tennessee) by specifically outlawing driving with any amount of drugs in a driver's system. The other states require proof of a specified level of drugs in a driver or that the driver was "under the influence of drugs."

However, even Zero Tolerance states have some exceptions. For instance in Arizona, the law does not apply to medical users.<sup>58</sup> In Delaware, it only applies to drugs found in a blood test within four hours of operating a vehicle.<sup>59</sup> Michigan has a strict Zero Tolerance law, but the Michigan Supreme Court has found that inert metabolites of marijuana do not constitute a controlled substance, and thus cannot be used to prove DUI.<sup>60</sup> Minnesota's Zero Tolerance law, only applies to schedule I and II controlled

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substances or associated metabolites and not to marijuana.<sup>61</sup> Pennsylvania has a Zero Tolerance law, but in order for test results to be admitted as evidence in a DUI case there must be a minimum 1 ng/ml (nanograms per milliliter) level present.<sup>62</sup> In both Rhode Island<sup>63</sup> and Wisconsin<sup>64</sup> their Zero Tolerance statutes exclude metabolites. In Wisconsin<sup>65</sup> THC is also excluded, but they do test for Delta-9, which is an active ingredient in cannabis that passes through the body faster than other metabolites. In South Dakota, the Zero Tolerance statute only applies to drivers under the age of 21.<sup>66</sup>

A few other states have enacted laws that proscribe various levels of certain drugs and/or metabolites. In Iowa, the only measured substance is THC metabolite in a urine test, and the limit is 50 ng/ml.<sup>67</sup> Montana has a 5 ng/ml THC limit for a blood test.<sup>68</sup> Nevada and Ohio break the limits down in different measurements for blood and urine tests, as well as for the drug itself and metabolites. In Nevada, to be guilty of a DUI by marijuana there must be at least 10 ng/ml in a urine sample, or 2 ng/ml in a blood sample.<sup>69</sup> For marijuana metabolite, there must be at least 15 ng/ml in urine, or 5 ng/ml in blood.<sup>70</sup> In Ohio, to be found guilty of a DUI by marijuana there must be at least 10 ng/ml in a urine sample, or 2 ng/ml in a blood sample.<sup>71</sup> For marijuana metabolite, there must be at least 35 ng/ml in urine or 50 ng/ml in blood.<sup>72</sup> Ohio also has an additional measurement for marijuana metabolite in combination with alcohol or other drugs, and that standard is 15 ng/ml in urine or 5 ng/ml in blood.<sup>73</sup> Colorado law provides a permissible inference that a defendant was under the influence upon a positive test result for delta 9-THC in whole blood at the level of 5 ng/ml or higher.<sup>74</sup>

## Conclusion

Unfortunately, there is no uniform standard nor even widespread agreement on how to set a standard. This is likely because of the paucity of research on

drug use and driving impairment, as well as the number of variables that may affect a drug's impact on an individual. The NHTSA Office of Behavioral Safety Research has stated as recently as 2014 that "specific drug concentration levels cannot be reliably equated with a specific degree of impairment."<sup>75</sup> That is one reason Zero Tolerance laws are subject to challenge — no scientific support for the proposition that a positive drug test means a person is less safe to drive.<sup>76</sup>


The research regarding marijuana use and impairment should be gathered and reviewed by the legislature to determine if there is sufficient scientific support to enact legislation that would at least impose a presumption that a driver was impaired when a certain level of THC is present in a drug test or that reduces the per se BAC level below .08 when a driver also tests positive for marijuana.<sup>77</sup>

DUI practitioners who will be involved in drugged driving cases should:

- Become educated on the DRE certification and the 12 step protocol.
- Be ready to argue about the admissibility of DRE tests and testimony under Rule 702, *McDaniel* and *Murphy*.<sup>78</sup>
- Learn about the effects of commonly abused drugs that might impact driving and how those effects can vary from person to person.
- Know how blood and urine tests are conducted, how the chain of custody is maintained, what the results actually tell about impairment, and the extent to which false positives may occur.
- Develop a relationship with a toxicologist or laboratory analyst who could be used as an expert on the testing issues and/or the effects of drug use by a driver.
- Be familiar with the Winek Drug and Chemical Blood Level Data Chart.<sup>79</sup>
- Prosecutors should try to implement a process to expedite obtaining search warrants for blood samples in suspected drugged driving cases.<sup>80</sup>

All of us need to be vigilant in keeping ourselves, our friends, and our family members from driving with any level of impairment. Remember that a therapeutic level of a prescription

medication is not necessarily safe for driving.<sup>81</sup> And keep a sharp lookout for impaired drivers when you are on the road. Growing acceptance and legalization of marijuana combined with the explosion of prescription drug abuse and the ever-present consumption of alcohol can only make driving less and less safe.

Finally, if you think you or a colleague might have an issue with alcohol or drug abuse, the Tennessee Lawyers Assistance Program stands ready to help in a confidential, non-judgmental way.<sup>82</sup> 



**JUDGE TOM WRIGHT** is circuit judge in Tennessee's 3rd Judicial District, which he has done since his election in 2006 and reelection in 2014.

Before that he served for eight years as the General Sessions and juvenile judge for Greene County, having been elected to that position in 1998. Wright graduated from the University of Tennessee College of Law with high honors in 1983 and was selected for membership in the Order of the Coif. He served as a judicial law clerk for U.S. District Judge Thomas G. Hull, then was in private practice for several years. He was then assistant federal community defender for upper East Tennessee for six years before his election as judge in 1998.



Originally from Asheville, North Carolina, **CHRISTOPHER GRAHAM** moved to Knoxville in 2014, where he is in his second year at the University of Tennessee College of Law. He

received his bachelor's degree in political science from the University of North Carolina at Asheville. After graduation, Graham hopes to start his own practice, concentrating in criminal law.

## Notes

1. Larkin, "Medical or Recreational Marijuana and Drugged Driving," 52 *Am. Crim. L. Rev.* 453, 456 (2015).
2. [Wikipedia.org/wiki/legality\\_of\\_cannabis\\_by\\_U.S.\\_jurisdiction](http://Wikipedia.org/wiki/legality_of_cannabis_by_U.S._jurisdiction).
3. [drugscience.org/States/TN/TN.pdf](http://drugscience.org/States/TN/TN.pdf); see also, [samhsa.gov/data/sites/default/files/NSDUHsaeSpecificStates2013/NSDUHsaeTennessee2013.pdf](http://samhsa.gov/data/sites/default/files/NSDUHsaeSpecificStates2013/NSDUHsaeTennessee2013.pdf).

4. Compton & Berning, NHTSA, USDOT, DOT HS 811 174, "Results of the 2007 National Roadside Survey of Alcohol and Drug Abuse by Drivers," (2009).
5. [Drugtreatment.com/expose/roadway-fatalities-drug-alcohol](http://Drugtreatment.com/expose/roadway-fatalities-drug-alcohol).
6. *Id.*
7. [whitehouse.gov/sites/default/files/docs/state\\_profile\\_-\\_tennessee.pdf](http://whitehouse.gov/sites/default/files/docs/state_profile_-_tennessee.pdf) (the study only reviewed cases where there were known drug test results).
8. THC stands for tetrahydrocannabinol. This is the psychoactive ingredient in marijuana, *supra* note 1 at 483.
9. *Supra* note 1 at 474.
10. *Id.* at 474; see also, [drugabuse.gov/publications/research-reports/marijuana/letter-director](http://drugabuse.gov/publications/research-reports/marijuana/letter-director).
11. *Id.* at 478.
12. *Id.* at 486.
13. Cordova, "DWI and Drugs: A Look at Per Se Laws for Marijuana," 7 *Nev. L. J.* 570(2007); [drugabuse.gov/publications/marijuana/what-are-marijuana-effects](http://drugabuse.gov/publications/marijuana/what-are-marijuana-effects).
14. *Id.*; *supra* note 1 at 487.
15. 3-10 Defense of Narcotics Cases, § 10.03 (Matthew Bender).
16. [decp.org/experts](http://decp.org/experts).
17. *State v. Daly*, 775 N.W.2d 47 (Neb. 2009).
18. E.g. *State v. Pulliam*, 348 P.3d 670(Mont. 2015); *State v. Baity*, 991 P.2d 1151(Wash. 2000); *State v. Aleman*, 194 P.3d 110(N.M. App. 2008); *Williams v. State*, 710 So.2d 24(Fla. App. 1998). All 50 states and the District of Columbia have DRE programs, [decp.org/experts/states.htm](http://decp.org/experts/states.htm). Tennessee's is under the Governor's Highway Safety Office, [tntrafficsafety.org/training/dre-school](http://tntrafficsafety.org/training/dre-school).
19. At least three Tennessee trial courts have permitted DRE testimony and one has precluded it according to Tom Kimball in a telephone interview Aug. 11, 2015. ADA Kimball is the Tennessee Traffic Safety Resource Prosecutor with the Tennessee District Attorneys General Conference.
20. See generally, Sandler, "Expert and Opinion Testimony of Law Enforcement Officers Regarding Identification of Drug Impaired Drivers," 23 *Hawaii L. Rev.* 151.
21. [decp.org/experts/12steps.htm](http://decp.org/experts/12steps.htm).
22. *State v. Murphy*, 953 S.W.2d 200(Tenn 1997).
23. For a list of questions designed to establish the DRE as an expert see, *supra* note 20 at Appendix I; recent DRE training has been conducted with the Memphis School of Optometry to better prepare them to qualify as "experts," according to ADA Kimball, *supra* note 19.
24. E.g., an optometrist and a forensic toxicologist were used in *State v. Aleman*, 194 P.3d 110(N.M. App 2008).
25. [decp.org/experts/12steps.htm](http://decp.org/experts/12steps.htm).
26. *Supra* note 1 at 483.
27. *Supra* note 14.
28. *Missouri v. McNeely*, 133 S. Ct. 1552, 2013 U. S. LEXIS 3160(2013).
29. *Id.*; accord, *State v. Turner*, E 2013-02034-CCA-R3-CD, 2014 Tenn. Crim. App. LEXIS 1173 (Tenn. Crim. App. 2014).
30. *State v. Gardner*, E 2014-00310-CCA-R3-CD, 2014 Tenn. Crim. App. LEXIS 1023 (Tenn. Crim. App. 2014).
31. *Tenn. Code Ann.* § 55-10-401.
32. *State v. Gilbert*, 751 S.W.2d 454 at 459 (Tenn. Crim. App. 1988).
33. T.P.I. – Crim. 38.01.
34. *Tenn. Code Ann.* '55-10-411(e).
35. *State v. Profitt*, No. E2002-02396-CCA-R3-CD, 2004 Tenn. Crim. App. LEXIS 137 (Tenn. Crim. App. 2004), (0.5 percent BAC and inactive marijuana metabolite).
36. *State v. Wright*, No. E2008-00522-CCA-R3-CD, 2009 Tenn. Crim. App. LEXIS 971 (Tenn. Crim. App. 2009).
37. *State v. Myers*, 2011 Tenn. Crim. App. LEXIS 406(Tenn. Crim. App. 2011).
38. *State v. Hurd*, No. E2002-00832-CCA-R3-CD, 2003 Tenn. Crim. App. LEXIS 850 (Tenn. Crim. App. 2003).
39. *State v. Sinks*, No. E2006-00626-CCA-R3-CD, 2008 Tenn. Crim. App. LEXIS 456 (Tenn. Crim. App. 2008).
40. *State v. Wilson*, No. E2013-00371-CCA-R3-CD, 2014 Tenn. Crim. App. LEXIS 766 (Tenn. Crim. App. 2014).
41. *State v. Johnson*, No. M2013-02503-CCA-R3-CD, 2015 Tenn. Crim. App. LEXIS 281 (Tenn. Crim. App. 2015).
42. *State v. Lee*, No. M2004-00598-CCA-R3-CD, 2005 Tenn. Crim. App. LEXIS 399 (Tenn. Crim. App. 2005).
43. *Supra* note 38; see also, *State v. Killian*, 2012 Tenn. Crim. App. LEXIS 1011(Tenn. Crim. App. 2012).
44. *Ariz. Rev. Stat. Ann.* §§ 28-1381.
45. *Del. Code. Ann.* 21 § 4177.
46. *Ga. Code. Ann.* § 40-6-391(a).
47. *Ill. Comp. Stat. Ann.* § 5/11-501(a).
48. *Ind. Code. Ann.* §9-30-5-1(c).
49. *Mich. Comp. Laws. Ann.* §§257.625.
50. *Minn. Stat. Ann.* §169A.20[1](7).
51. *N.C. Gen. Stat. Ann.* § 20-138.1(a).
52. *Okla. Stat. Ann. tit.* 47, § 11-902.
53. *75 Pa. C.S.A.* §3802(d)(1)-(3).
54. *GLRI* §31-27-2(b)(2).
55. *SD Codified Laws Ann.* § 32-23-21
56. *Utah Code Ann.* § 41-6a-517(2).
57. *Wis. Stat. Ann.* §346.63 (1)(a).
58. *Ariz. Rev. Stat. Ann.* §28-1381(D).
59. *Del. Code. Ann.* 21 § 4177.
60. *People v. Feezel*, 783 N.W.2d 67 (Mich. 2010).
61. *Minn. Stat. Ann.* §169A.20[1](7).
62. *75 Pa. C.S.A.* §3802(d)(1)-(3).
63. *GLRI* § 31-27-2 (2).
64. *Wis. Stat. Ann.* §346.63 (1)(a).
65. *Id.*
66. *Supra* note 55.
67. *Iowa Code Ann.* § 321J.2 (1)(a),(c).
68. *Mont. Code Ann.* §61-8-401(1)(b)-(d).
69. *Nev. Rev. Stat.* §484C.110.
70. *Id.*
71. *Ohio Rev. Code Ann.* § 4511.19.
72. *Id.*
73. *Id.*
74. *C.R.S.* 42-4-1301.
75. [decp.org/documents/pdfs/whatnew/Roadside\\_Survey\\_2014.pdf](http://decp.org/documents/pdfs/whatnew/Roadside_Survey_2014.pdf) at p. 4.
76. *Supra* note 1 at 490.
77. A good place to start is with the work of Marilyn Huestis, Ph.D, [irp.drugabuse.gov/Huestis.php](http://irp.drugabuse.gov/Huestis.php); see also "Developing Science-Based Per Se Limits for Driving Under the Influence of Cannabis: Findings and Recommendations by an Expert Panel," [canorml.org/healthfacts/DUIcreport.2005.pdf](http://canorml.org/healthfacts/DUIcreport.2005.pdf).
78. Rule 702, *Tenn. R. Evid.*; *McDaniel v. CSX*, 955 SW2d 257(Tenn. 1997); *supra* note 21.
79. [abmdi.org/documents/winek\\_tox\\_data\\_2001.pdf](http://abmdi.org/documents/winek_tox_data_2001.pdf). A chart that provides therapeutic, toxic and lethal blood levels for drugs.
80. According to ADA Tom Kimball, *supra* note 19, Warren County, Tennessee has such a process in place.
81. [induiguy.blogspot.com/2010/01/dreg-davis-on-drug-levels-winek.html](http://induiguy.blogspot.com/2010/01/dreg-davis-on-drug-levels-winek.html).
82. [tlap.org](http://tlap.org); 615-741-3238.