



### 2019 Fall Education Conference

**Dave Gaba:**  
Labor Arbitrator Since 1994,  
Former Management Counsel, Former Union Counsel  
Avoided all science courses in college  
Idiot

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### What is Marijuana?

<u>Botanical</u>	<u>Cannabis</u>
Source plant(s)	<i>Cannabis sativa</i> , <i>Cannabis forma indica</i> , <i>Cannabis ruderalis</i>

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## How Does Federal Law Define Marijuana?

(16) The term "marihuana" means all parts of the plant *Cannabis sativa* L., whether growing or not; the seeds thereof; the resin extracted from any part of such plant; and every compound, manufacture, salt, derivative, mixture, or preparation of such plant, its seeds or resin.

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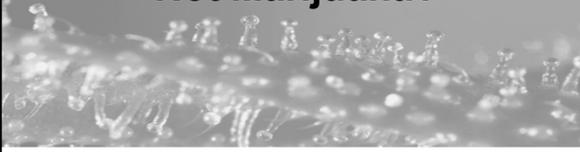
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## Not Marijuana?



Such term does not include the mature stalks of such plant, fiber produced from such stalks, oil or cake made from the seeds of such plant, any other compound, manufacture, salt, derivative, mixture, or preparation of such mature stalks (except the resin extracted therefrom), fiber, oil, or cake, or the sterilized seed of such plant which is incapable of germination.

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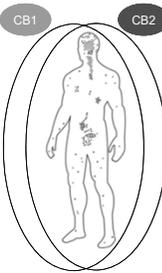
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### Cannabinoids Background



**100 Identified Cannabinoids**

- All cannabis is not the same
- Billions of combinations of cannabinoids exist
  - On average, the cannabis plant produces 4 of the 100 cannabinoids at a time
- THC ((-)-trans-Δ<sup>9</sup>-tetrahydrocannabinol) is the only known psychedelic compound in cannabis
- Cannabinoids target two known receptors in humans
  - CB1: Brain / central nervous system
  - CB2: Immune cells / gastrointestinal system / peripheral nervous system
  - Cannabinoid affinities differ for these receptors
  - Cannabinoids have synergistic effects at receptor sites
  - Additional identified putative receptors: GPR55 and GPR18



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### Montana's Marijuana Penalties



Cannabis was banned in Montana in 1929, following a Health Committee meeting which was described in the local paper as "great fun." One representative justified the ban due to marijuana's effects on Mexicans: "When some beet field peon takes a few rares of this stuff... he thinks he has just been elected president of Mexico so he starts out to execute all his political enemies."

Robert M. Hardaway (2003). *No Price Too High: Victimless Crimes and the Ninth Amendment*. Greenwood Publishing Group. pp. 92-. ISBN 978-0-275-95056-9.

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**Montana's Marijuana Penalties**

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**Possession for Personal Use**  
 Possession of 60 grams or less of marijuana is a misdemeanor punishable by up to 6 months imprisonment and a fine of \$100 - \$500.

A second offense is punishable by up to 3 years imprisonment and/or a fine up to \$1,000.  
 Possession of more than 60 grams is a felony punishable by up to 5 years imprisonment and/or a fine up to \$50,000. See Montana Code Ann. § 45-9-102

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**Montana's Medical Marijuana**

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In November 2016 Initiative I-182 was proposed. The initiative loosened the rules on quantities as well as conditions for which medical cannabis can be prescribed including adding Post Traumatic Stress Disorder (PTSD) as a qualifying condition. On November 6, 2016, passed with 58% approval.

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**Montana's Medical Marijuana**

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**Medical marijuana** is legal in the state of Montana for registered patients with the following conditions:

- Cachexia or wasting syndrome
- Cancer
- Chronic pain
- Crohn's disease
- Glaucoma
- HIV/AIDS
- Intractable vomiting or nausea
- Seizures
- Severe or persistent muscle spasms
- Posttraumatic stress disorder (PTSD)

Registered cardholders can possess up to an ounce of usable marijuana, and can grow it on private property (up to four mature plants and 12 seedlings).

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## Why Do Patients Do It?

*"The evidence is overwhelming that cannabis can relieve certain types of pain, nausea, vomiting and other symptoms caused by such illnesses such as multiple sclerosis, cancer and AIDS — or by the harsh drugs sometimes used to treat them; and it can do so with remarkable safety. Indeed, cannabis is less toxic than many of the drugs that physicians prescribe every day."*

**Joycelyn Elders, MD**  
Former US Surgeon General

"... a subpopulation of patients do not respond well to other medications and have no effective alternative to smoking marijuana." Inst. of Medicine

"Results of short term controlled trials indicate that smoked cannabis reduces neuropathic pain, improves appetite and caloric intake..." American Medical Association

"Evidence not only supports the use of medical cannabis in certain conditions but also suggests numerous indications for cannabinoids." American College of Physicians

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## How Are We Trained to Think of Medication



**Doctor**

- Prescription

**Pharmacist**

- Fills

**Prescription**

- Regulated Product
- Insured

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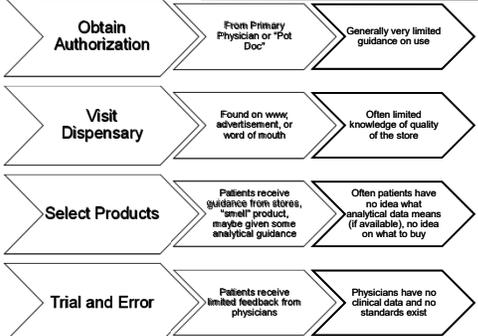
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## What Does a Medical Marijuana Patient Do?



**Obtain Authorization**

- From Primary Physician or "Pot Doc"
- Generally very limited guidance on use

**Visit Dispensary**

- Found on www, advertisement, or word of mouth
- Often limited knowledge of quality of the store

**Select Products**

- Patients receive guidance from stores, "small" product, maybe given some analytical guidance
- Often patients have no idea what analytical data means (if available), no idea on what to buy

**Trial and Error**

- Patients receive limited feedback from physicians
- Physicians have no clinical data and no standards exist

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**What Is Marinol?**

Marinol (**dronabinol**) is the only US FDA-approved synthetic cannabinoid. It is often marketed as a legal pharmaceutical alternative to natural cannabis. Marinol is manufactured as a **gelatin capsule** containing synthetic delta-9-tetrahydrocannabinol (**THC**) in sesame oil.

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**What Is Nabixmols?**

**Nabiximols** (trade name **Sativex**) is a specific extract of *Cannabis* that was approved in the United Kingdom in 2010 as a mouth spray for multiple sclerosis (MS) patients, who can use it to alleviate neuropathic pain, spasticity, overactive bladder, and other symptoms; it was developed by the UK company GW Pharmaceuticals. Its principal active cannabinoid components are the cannabinoids: tetrahydrocannabinol (THC) and cannabidiol (CBD). Each spray delivers a near 1:1 ratio of CBD to THC, with a fixed dose of 2.7 mg THC and 2.5 mg CBD.

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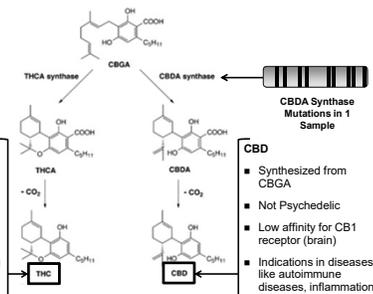
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**Genetic Data: Effect of Mutations on Synthesis**



**THC**

- Synthesized from CBGA
- Psychedelic
- High affinity for CB1 receptor (brain)
- Indications in wasting diseases, neural disease including Alzheimer's, and MS

**CBD**

- Synthesized from CBGA
- Not Psychedelic
- Low affinity for CB1 receptor (brain)
- Indications in diseases like autoimmune diseases, inflammation & epilepsy

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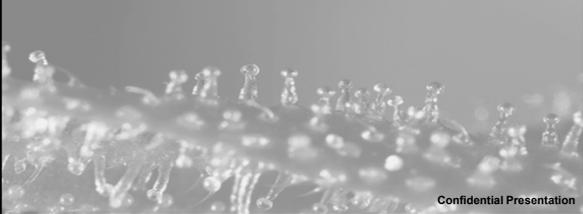
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## The Science of Detecting Marijuana Use



Confidential Presentation

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### Drug Testing

#### Positive Result for Marijuana: Blood Specimen

- Initial test screens for the parent drug (THC), not the metabolite. Confirmation is for THC, 11-Hydroxy-THC and 11-nor-9-carboxy-THC (THCA). Both THC and 11-Hydroxy THC are psychoactive. THCA is inactive.
- Only detectable within 3-4 hours after use
- Further study needed to establish limits for blood and oral fluid testing for impairment

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### Type of Specimens Collected

- **Urine**
  - Subject provides specimen into a cup
  - 45 ml of specimen
- **Blood**
  - Specimen collected by trained professional
- Other fluids
- Hair

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**Laboratory Testing: Procedures**

- Chain of custody continues throughout the handling of the specimens
- Initial Testing
  - Immunoassay by automated chemistry analyzer
- Confirmation
  - Separate aliquot tested by a more specific and sensitive procedure

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**DRUG COURT PRACTITIONER FACT SHEET**

- Science is not black and white and the state of our knowledge is continually evolving.
- Every day drug courts grapple with two seemingly disparate imperatives—the need for rapid therapeutic intervention (sanctioning designed to produce behavioral change) and the need to ensure that the evidentiary standards, crafted to protect client rights, are maintained.

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**Laboratory Testing: Safeguards**

<ul style="list-style-type: none"> <li>■ Initially positive, but confirms negative:           <ul style="list-style-type: none"> <li>■ Reported as negative</li> </ul> </li> <li>■ Initially positive, and confirms positive:           <ul style="list-style-type: none"> <li>■ Reported as positive</li> </ul> </li> <li>■ "Not consistent with human urine"</li> </ul>	<ul style="list-style-type: none"> <li>■ Medical Review Officer           <ul style="list-style-type: none"> <li>■ Determine if there is a medical reason (prescription) for the reported result</li> <li>■ MRO acts as liaison between the client and laboratory</li> <li>■ MRO, based on a donor request, can order a 'split specimen' be sent to another lab for reconfirmation testing.</li> </ul> </li> </ul>
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**Positive Test for Marijuana: Urine Specimen** 

- Detected as its carboxylic acid metabolite = THCA
- Confirmed positive
  - Usage within 4 hours to 90 days
  - Up to several months for a heavy user high BMI user
- Cannot establish impairment
  - The psychoactive effects of marijuana and hashish do not correlate with urinary metabolite levels obtained by any method.
  - Test contain evidence of use long after effects have dissipated

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**Positive Result for Marijuana: Blood Specimen** 

- Initial test screens for the parent drug (THC), not the metabolite. Confirmation is for THC, 11-Hydroxy-THC and 11-nor-9-carboxy-THC (THCA). Both THC and 11-Hydroxy THC are psychoactive. THCA is inactive.
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**Boston police hair test case** 

- In a 2005 lawsuit, the Massachusetts Association of Minority Law Enforcement Officers and 10 former officers alleged the test is discriminatory because black officers' hair texture makes them more susceptible to testing positive when they're really not. The case has moved through federal district and appeals courts over the years and has wound up back before the US Court of Appeals for the First Circuit.
- In a related case, the Massachusetts Civil Service Commission has determined that the hair test is unreliable and ordered the Boston Police Department to reinstate six officers who were fired because of positive test results. The city is appealing that decision. <https://www.bostonglobe.com/metro/2016/09/08/court-decide-police-department-controversial-hair-test/20160908MGZ-78awdHH4yTQI/story.html>

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**What about Second Hand Smoke?**

■ **Health effects of exposure to second- and third-hand marijuana smoke: a systematic review**

■ Hannah Holitzki, BHSc, Laura E. Dowsett, MSc, Eldon Spackman, PhD, Tom Noseworthy, MD, MPH, and Fiona Clement, PhD

■ <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5741419/>

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**How Many Studies Are There?**

■ All 15 records were experimental studies on the immediate effects of marijuana smoke exposure in humans in a controlled environment. They all followed a similar protocol whereby nonsmokers sat in proximity to people who were actively smoking. Physiological or psychological outcomes were measured after a period of exposure. None of the included studies investigated third-hand marijuana smoke.

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**Stronger Marijuana Leads to Stronger Second Hand Smoke (Duh!)**

■ In 13 reports from 9 studies, the investigators assessed THC metabolite concentrations in urine samples.<sup>19-21,23-27,29-33</sup> The evidence suggests that a higher percentage of THC content in smoked marijuana results in higher THC metabolite content in urine (Figure 2).<sup>20,22,27</sup> For example, 4 hours after exposure to marijuana with 1.5% THC, 1 of 5 participants had more than the 20 ng/mL threshold for urine testing, and 4 hours after exposure to marijuana with 11.3% THC, all participants had more than 15 ng/mL, with a maximum concentration of cannabinoid metabolites of 28.3 ng/mL in the urine.<sup>23,33</sup>

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**What Affects Second Hand Metabolite Results?**

- In 2 studies, multiple trials were conducted in ventilated and unventilated environments. Ventilation was manipulated by opening a door or altering the air circulation rate in the room. Both urine THC metabolite concentrations and blood THC levels were higher in those exposed to second-hand smoke in an unventilated environment than in a ventilated environment. Other factors that mediated the effects of exposure to second-hand smoke included air volume, number of participants inhaling second-hand smoke, THC content, number of marijuana cigarettes lit and number of active smokers.
- Passive inhalation of marijuana smoke; urinalysis and room air levels of delta-9-tetrahydrocannabinol. *Cone EJ, Johnson RE, Darwin WD, Yousefnejad D, Moll LD, Paul BD, Mitchell J. J Anal Toxicol. 1987 May-Jun; 11(3):89-96.*
- Non-smoker exposure to secondhand cannabis smoke. I. Urine screening and confirmation results. *Cone EJ, Bigelow GE, Herrmann ES, Mitchell JM, LoDico C, Fiegel R, Vandrey R. J Anal Toxicol. 2015 Jan-Feb; 39(1):1-12.*

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**Positive Result for Marijuana: Blood Specimen**

- Second-hand exposure to marijuana smoke can lead to cannabinoid metabolites in bodily fluids sufficient for positive results on testing of oral fluids, blood and urine, and can lead to psychoactive effects.
- <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5741419/>

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**The Real World**

- However, exposure in closed spaces such as in cafés, bars and clubs may occur, depending on the regulations prohibiting smoking in indoor spaces. In addition, exposure in unventilated spaces such as vehicles or small rooms in private homes is still likely to occur. Thus, the observed relation between second-hand smoke exposure and cannabinoid metabolites in bodily fluids is likely to be generalizable to real-world contexts.
- <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5741419/>

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**Conclusion**

- Using levels of cannabinoid or THC metabolites found in blood or urine samples to determine marijuana use or intoxication is challenging. **There is no universal threshold that can differentiate between those who have actively smoked marijuana and are intoxicated, those who have actively smoked marijuana in the past and those who have been exposed to second-hand smoke.**
- <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5741419/>

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**Freightliner v. Teamsters**

**336 F. Supp. 2d 1118 (D. Or. 2004)**

- Following forklift accident, urinalysis showed high THC and employee discharged
- Prior to test, employee told employer that he had prescription under the Oregon Marijuana Act
- Arbitrator Carlton Snow reinstated employee
  - Even though CBA provides that positive test alone is "under the influence," OMA controls
- Federal District Court vacated Award
  - Snow disregarded the law & failed to draw essence from CBA
  - OMA cannot affect CBA language
  - Result may have been different if union had argued and Snow relied on CBA prescription drug provision

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**United Paperworkers v. Misco, 484 U.S. 29 (1987)**

- Arbitrator reinstated employee, finding that he did not violate employer rule against use of possession of marijuana on company property
- Fifth Circuit's overturned arbitrator's award on ground that it violated public policy; Supreme Court reversed:
  - Arbitrator's factual finding must be respected
  - Award drew its essence from the CBA
  - Award did not conflict with a well-defined and dominant public policy ascertained by reference to laws and legal precedents, even if marijuana had been found in employee's car parked in company lot

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**City of Portland, 123 LA 1444 (2007)**

- Grievant, a City of Portland employee, was terminated after being arrested for having pot in his car while parked in a public lot owned by the City
- The City had a policy that prohibited employees' possession, use or sale of intoxicating beverages or controlled substances while on City property
- Ordering reinstatement, the Arbitrator found:
  - Grievant inadvertently left marijuana in his car in a parking lot; he did not take the marijuana into his workplace
  - **The City's policy is "just silly";** "a literal reading of the rule would prevent any employee from bringing alcohol home from a liquor store since this would require use of the City streets." As such, the policy is overbroad and unreasonable
  - Oregon laws are lenient when it comes to marijuana possession. Possessing 3.7 grams of marijuana is a violation and not a crime.

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**King Soopers Inc., 131 LA 459 (Sass, 2012)**

- Grievant terminated after positive marijuana test taken a few days after job accident
- Company's usual practice was **urine samples**, but it used **hair sample** to target marijuana use farther back
- Arbitrator held termination without just cause:
  - Hair test would not show anything about recent drug use
  - "Off duty use of marijuana is not really much different [than alcohol], and should be treated similarly."
  - The fact that marijuana is an illegal drug, at least under federal law, is not particularly significant

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**Signs of Changing Judicial Attitudes?**

- **Coats v. Dish Network**, 303 P. 3d 147 (Colo. Ct. of Appeals 2013)
  - Colorado Lawful Activities Statute prohibits employers from disciplining employees for lawful off-duty activity
  - Employee terminated for off-duty use of medical marijuana
  - Lower court held medical marijuana use is a violation of federal law and is not "lawful activity" under the statute
- Colorado Supreme Court, 350 P.3d 849 (2015):
  - Off-duty use of medical marijuana pursuant to Colorado Medical Marijuana Amendment is not "lawful activity" because of the federal Controlled Substance Act

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**Signs of Changing Judicial Attitudes?**

- **BARBUTO v. ADVANTAGE SALES AND MARKETING** Massachusetts Supreme Court 477 Mass. 456 (2017)
- Under Massachusetts law, as a result of the act, the use and possession of medically prescribed marijuana by a qualifying patient is as lawful as the use and possession of any other prescribed medication. Where, in the opinion of the employee's physician, medical marijuana is the most effective medication for the employee's debilitating medical condition, and where any alternative medication whose use would be permitted by the employer's drug policy would be less effective, an exception to an employer's drug policy to permit its use is a facially reasonable accommodation. A qualified handicapped employee has a right under G. L. c. 151B, § 4 (16), not to be fired because of her handicap, and that right includes the right to require an employer to make a reasonable accommodation for her handicap to enable her to perform the essential functions of her job.

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**Dept. of Justice , 135 LA 185 (Arb. 2015)**

Whether grievant used marijuana a month or a day prior to the random test on July 04, 2013, is not established in this record. Nevertheless, grievant participated in the random test and the laboratory report records the grievant with a positive test for marijuana. In its post-hearing brief the Union challenges the validity of the test; this belated challenge to the test was not raised during the grievance processing or clearly articulated at hearing. The challenge is not considered.

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**Dept. of Justice , 135 LA 185 (Arb. 2015)**

As noted in these findings and conclusions, the Agency asserted and labeled grievant with "egregious" misconduct but it did not respond in a manner supportive of its assertion and labeling. Grievant did not engage in "egregious" misconduct but he did engage in misconduct, e.g., positive test for marijuana... Grievant's positive test did not place the institution's security at risk or impair its operations.

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**Dept. of Justice , 135 LA 185 (Arb. 2015)**

There is just and sufficient cause to discipline, but not remove, the grievant.... a thirty (30) day suspension for the grievant is an appropriate remedy for his misconduct.

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**Should a Positive Metabolite Test provide Just Cause for discharge for:**

A warehouse picker?  
 A bartender?  
 A grocery checker?  
 An electrician at Bangor?  
 A school teacher?  
 A police officer?

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**Valero Services, 134 LA 1704 (Arb. 2015)**

Dr. Jones' conclusion is based on the scientific study of the elimination half-life of marijuana from a human body. He testified,

"Marijuana is broken down by the liver into a number of different metabolites or breakdown products and then by measuring the breakdown product or the amount of breakdown product, one could determine what's called the elimination half-life, which means how long it takes for 50 percent of the drug to leave the body. And for marijuana, there are a number of metabolites, one of which is a chemical, an acid product that's typically measured in the GC/MS process and the elimination rate for about 50 percent, it varies somewhat, but in most of the literature, it suggests it's around a day-and-a-half or a half-life elimination."

The evidence proved that if Grievant had not used marijuana after October 31, 2012 when he had 27 ng/ml in his body he would have been at a zero level on about November 5 or 6, 2012.

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**Zurn Indus., LLC, 135 LA 319 (Arb. 2015)**

- Kenneth Marvin Goodwich, M.D., testified that he graduated from the University of Maryland in 1974 and he specializes in substance abuse & tests... The other value is the screening threshold which is the actual result from the test. Dr. Goodwich reported that marijuana typically remains in urine for one to three days; however, it can be longer for an extremely high user (someone who uses three or four times every day). He indicated that the finding of 116 ng/ml in the report for B\_\_ is pretty high and indicates consumption within a day or two of the test. He pointed out that marijuana is a mind altering substance and in cases of an accident such a positive finding must be considered as a contributing factor.

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**Zurn Indus., LLC, 135 LA 319 (Arb. 2015)**

- On cross-examination, Dr. Goodwich maintained that traces of marijuana do not stay in the urine for 30 days. However, he asserted that sometimes a substance will show presence in a hair test. He pointed out that blood tests are not standard protocols for drug testing. Dr. Goodwich confirmed that he has testified as an expert in many cases and it is almost always the employer who contacts him to testify.

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Ellis, G.M., Mann, M.A., Judson, B.A., Schramm, N.T., & Tashchian, A. (1988). Excretion patterns of cannabinoid metabolites after last use in a group of chronic users. *Clinical Pharmacology and Therapeutics*, 58(3), 372-378

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Drug testing manufacturers' pamphlets state the time to last cannabinoid positive urine sample as "Mean = 27.1 days; Range = 3-77 days."

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**U.S. Steel Corp., 133 LA 907 (Arb. 2014)**

- The Union defends Grievant, in part, by arguing that the positive test resulted from passive inhalation of second hand smoke. Although Grievant claimed there was a scientific disagreement about whether second hand marijuana smoke can cause a positive drug test, the Union introduced no evidence to rebut Tokowitz's testimony that the testing cutoff level was designed, in part, to account for the effects of passive inhalation.

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**Johns Hopkins**

The new study, published this month in *The Journal of Drug and Alcohol Dependence*, tested secondhand exposure under "extreme conditions" in an unventilated room filled with pot smoke. After spending an hour in such conditions, nonsmokers showed "positive drug effects in the first few hours, a mild sense of intoxication, and mild impairment on measures of cognitive performance," said study author Ryan Vandrey, associate professor of psychiatry and behavioral science at Hopkins.

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**Johns Hopkins** 

In addition, detectable amounts of THC—tetrahydrocannabinol, pot's active ingredient—showed up in their blood and urine samples afterwards, in some cases enough to test positive for workplace or commercial drug testing programs.

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**U.S. Steel, 134 LA 1196 (Arb. 2014)** 

- A sample identified as Grievant's head hair was collected and sent to Psychemedics. The lab found no issues with the chain of custody and reported that the sample was positive for Carboxy THC, a marijuana metabolite that is produced by the body only when marijuana is ingested and metabolized

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**U.S. Steel, 134 LA 1196 (Arb. 2014)** 

- Consistent with past Board decisions, such as USS-47,709, the negative result of the test Grievant had performed by a third party, which tested an underarm hair sample collected a month later, is not a relevant basis on which to reject the positive result reported in this case by Psychemedics, in the absence of any other reason to question the validity or accuracy of the Company's test.

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**AFSCME Council 75 v. Lane County**



The most obvious difference between the facts presented in *Emerald Steel* and this matter is that this case arises under a labor agreement and is about whether the labor agreement and the County policy allegedly violated warranted termination under a just cause standard. *Emerald Steel* did not arise out of a labor agreement and the employer was not subject to a just cause standard in order to discipline its employees. The case arose as a statutory claim of discrimination. Thus, the *Emerald Steel* holding does not strictly apply to this issue. It involved a vastly different issue and a vastly different set of legal rules to be applied. This case does not arise out of state or federal law – it arises out of a labor agreement.

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**AFSCME Council 75 v. Lane County**



The County argued that the exception does not apply here because marijuana cannot legally be “prescribed.” The County’s argument is misplaced on this record and on that language. The County argued that a prescription is required but that is not what the exception actually says. The operative clause of the sentence says, “nothing in this procedure is intended to prohibit the use of a drug taken under supervision by a licensed health care professional.”

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**National Drug Court Institute**

**THE MARIJUANA DETECTION WINDOW:  
DETERMINING THE LENGTH OF TIME  
CANNABINOIDS WILL REMAIN  
DETECTABLE IN URINE FOLLOWING  
SMOKING A CRITICAL REVIEW OF  
RELEVANT RESEARCH AND CANNABINOID  
DETECTION GUIDANCE FOR DRUG  
COURTS**

[https://www.ndci.org/sites/default/files/ndci/THC\\_Detection\\_Window\\_0.pdf](https://www.ndci.org/sites/default/files/ndci/THC_Detection_Window_0.pdf)

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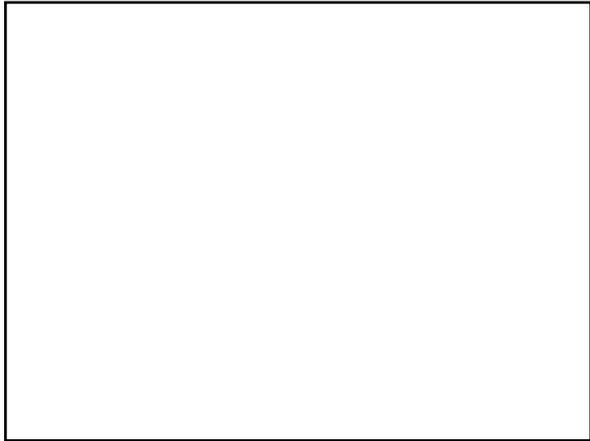
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