

Felony Level of Driving While Ability Impaired Vehicular Homicide & Vehicular Assault

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**Presentation to the Sentence Structure Working Group of the Sentencing
Reform Task Force of the Colorado Commission on Criminal Justice**

VH/DWAI and VA/DWAI F3/F4

- DUI victims agree:
 - VH/DWAI should be F3 –
 - not F4 approved by the legislature
 - VA/DWAI should be F4 –
 - Not F5 approved by the legislature

DUI - Driving under the Influence
 DWAI - Driving While Ability Impaired
 VH - Vehicular Homicide
 VA - Vehicular Assault
 BAC - Blood Alcohol Content
 ng - nanograms

	Currently	3/1/2022	It should be
VH/DUI	F3	F3	F3
VH/DWAI	Not unlawful*	F4	F3
VH/Reckless	F4	F4	F4
VA/DUI	F4	F4	F4
VA/DWAI	Not unlawful*	F5	F4
VA/Reckless	F5	F5	F5

* 42-4-1402 notwithstanding

Why F3/F4 and not F4/F5?

Justice for victims

- Impaired drivers (DUI or DWAI) make two choices:
 - Becoming impaired
 - Driving while impaired

- When those choices result in death or SBI, justice for victims requires that drivers be sentenced for those deaths or SBIs *regardless of the degree of impairment.*

Why F3/F4 and not F4/F5?

Justice for victims

- VH/DUI and VH/DWAI are substantially more serious than VH/Reckless, even though the consequences are identical because of additional actions taken by the driver:
- VH/DUI and VH/DWAI; VA/DUI and VA/DWAI
 - Decision to become impaired
 - Decision to drive while impaired
 - Commit a traffic offense (e.g. run a red light)
 - Causing a crash that results in death or SBI
- VH/Reckless; VA/Reckless
 - Commit a traffic offense (e.g. run a red light)
 - Causing a crash that results in death or SBI
- Do NOT “fix” the inconsistency problem by lowering the offense level of VH/DUI and/or VA/DUI

Why F3/F4 and not F4/F5?

Consistency

Factor evaluated	VH DUI vs DWAI VA DUI vs DWAI
Crime severity	Identical
Choices made by defendant	Identical
Impact on the victim	Identical

Why F3/F4 and not F4/F5?

Comparability

- All states have DUI laws – DWI, OUI, OWI, etc.
 - 34 states define DUI in statute
 - 16 define like our DUI – incapable of safe driving
 - 14 define like our DWAI – impairment to slightest degree
 - 4 including Colorado, have other definitions
- VH due to impaired driving is a felony in all states.
- Penalties for VH due to impaired driving does not vary from state to state as a function of how impaired the driver is.

But isn't DUI more serious than DWAI?

Rebuttal #1:

- *No. DUI & DWAI have identical classifications:*

	DUI	DWAI
Today	M	M
3/1/2022*	TM	TM

- *DWAI criminal penalties are slightly lower than DUI for first time offense only:*

	Penalty	DUI 1 st	DWAI 1 st	DUI or DWAI 2nd	DUI or DWAI 3 rd
Criminal	Jail	5-365 day	2-180 day	10-365 day	60-365
Criminal	Fine	600-1000	200-500	600-1500	600-1500
Criminal	Comm Servc	48-96 Hr	24-48 Hr	48-120 Hr	48-120 Hr
Criminal	Probation	< 2 yr	< 2 yr	2+ yr	2+
Admin	Suspend license	9 mo	None	12 mo	24 mo
Admin	Points	12	8	8 DWAI 12 DUI	8 DWAI 12 DUI

* When SB21-271 takes effect

But isn't DUI more serious than DWAI?

Rebuttal #2:

When DUI or DWAI are part of a more serious crime, penalty differences between DUI and DWAI become irrelevant.

- Felony DUI and Felony DWAI are both F4.
- Different classifications for VH/DUI and VH/DWAI is inconsistent with the precedent of felony DUIs.

But isn't DUI more serious than DWAI?

Rebuttal #3:

DWAI is more of a plea bargain tool than an indication of a lower level of impairment.

- In 2018 the mean and median BACs for drivers convicted of DUI where alcohol was the *only* drug present were .166 and .160 – at least twice the DUI *per se* limit.
 - Yet 43% of those convictions were for DWAI, not for DUI.
- In 2018 3,962 drivers with a BAC ≥ 0.08 where alcohol was the *only* drug present were convicted of DWAI, not of DUI.

DWAI convictions are very common, especially for THC

Drug	% guilty of DWAI, not DUI
Alcohol	43%
Polydrug	43%
THC <i>only</i>	74%

For drivers impaired by THC *only*, DWAI convictions outnumbered DUI convictions by a 3:1 ratio.

VH/DWAI F3 and VA/DWAI F4

Summary

- VH/DWAI should be F3 –
- VA/DWAI should be F4 –
 - Justice for victims
 - Internal consistency
 - External comparability
- The fact that DWAI 1st offense penalties are lower than DUI 1st offense does NOT justify F4/F5 for VH/DWAI and VA/DWAI.
- A DWAI conviction does not necessarily mean less impairment.
- A lower class for VH/DWAI and VA/DWAI is a gift to stoned drivers.
- A lower class for VH/DWAI and VA/DWAI is an assault on victims.

THC Impaired Driving Cases

Charge Category	Number Charged	Number Convicted	Conviction Rate
DUI – 5.0 ng +	252	177	70%
DUI – 1.0-4.9 ng	156	14	9%
DWAI – 5.0 ng +	467	464	99%
DWAI – 1.0-4.9 ng	76	71	93%
Totals	951	726	76%

DUI – incapable of safe driving

DWAI – impaired to the slightest degree

Cases where Delta 9-THC was the *only* intoxicant found

Only the highest charge/conviction shown – no case duplications

5 ng permissible inference law applies only to DUI charges

2018 Data courtesy of CDPS, Office of Research and Statistics