Medical Marijuana

Ocheen vs. Somebody or Other?

What Happened?

- AMMA does NOT immunize defendants from (A)(3)
- State does NOT have to prove impairment on (A)(3)
- State does NOT have to prove marijuana concentration

Affirmative Defense

- Our Case in Chief does not change
- Defendant has the burden
- Only available to Medical Marijuana Program participants
- Only applies to (A)(3)

Trial Questions

- How does this work?
- What evidence is the Defense going to come up with?
- What should we be doing to combat that?

What is the Affirmative Defense?

- "such [registered qualifying] patients cannot be deemed under the influence – and thus cannot be convicted under (A)(3) – based solely on concentrations of marijuana or its metabolite insufficient to cause impairment."

Joe Dobson ¶ 19

What is the Affirmative Defense?

- "such [registered qualifying] patients cannot be deemed under the influence – and thus cannot be convicted under (A)(3) – based **SOLELY** on concentrations of marijuana or its metabolite **INSUFFICIENT** to cause impairment."

Joe Dobson ¶ 19

- This is a very limited defense
- It should not affect cases with observed impairment
- It does not require us to prove impairment on (A)(3)
- It does not require us to prove sufficiency to impair

What's the Standard?

"concentration insufficient to cause impairment"	Preponderance of the evidence
Use pursuant to AMMA	??

See Dodson § 20

Who Decides?

"concentration insufficient to cause impairment"	Jury
Use pursuant to AMMA	??

- Possession of a registry card creates a presumption that a qualifying patient is engaged in the use of marijuana pursuant to the AMMA, so long as the patient does not possess more than the permitted quantity of marijuana.
- This is a Rebuttable Presumption.
- In most DUI cases, are you going to have rebuttal evidence on this point?

Don't Let the AMMA Take Over!

- The "Medical Marijuana Program" should be a very small part of your trial.
- Participation is NOT the defense!

> Although evidence of possession of a registry card would generally be admissible in an (A)(3) prosecution to invoke the presumption that the patient was using marijuana pursuant to the AMMA, it does not suffice to establish the § 36-2811(D) affirmative defense.
>
> Dobson ¶ 22

There is no .08 for THC

- Dobson ¶ 21 – Supreme Court acknowledges current science "no commonly accepted threshold for identifying such (impaiting) concentrations."
- Everyone is different – studies show impairment at very low blood concentrations.
- Not aware of any study that finds an mount "insufficient to cause impairment

So what will your Defendant try to do?

- Argue that the concentration *could* be insufficient.
- Reword the affirmative defense.
- Argue that he/she was not impaired.

"30 Ng/ML?
Sure, that ***could be*** insufficient"!"

Resist Attempts to Edit the Statute (Especially in Jury Instructions)

- The subtle:
  - Removing the word "solely."
  - Changing "insufficient" to "sufficient."
  - Changing "to cause impairment" to "to impair defendant."
- And the not-so-subtle:
  - Shifting the burden to the state.
  - Suggesting there's an (A)(3) immunity.
  - Applying the affirmative defense to (A)(1).

Hold Them to Their Burden

- Must be alleged 20 days before trial
- We are entitled to discovery
- Not an element
- Defendant's burden to raise & prove

- Use Motions in Limine
- Prepare Jury Instructions for the Court
- Jury Selection is Crucial

The Best Defense is a Good Offense

You get the first shot with your case-in-chief, so make it hurt!

- Don't skimp on impairment evidence.
- Use your expert(s)!

The Totality of the Circumstances

We're supposed to believe it's a coincidence?

- Slow, overly-cautious driving
- Poor reactions to the unexpected
- Slow internal clock
- Poor coordination and balance
- Divided attention impairment
- Odor of marijuana
- Reddening of conjunctiva
- Body tremors
- Disorientation
- Relaxed inhibitions
- Increased appetite
- Debris in mouth
- Possible paranoia
- Impaired perception of distance
- Eyelid tremors
- Admissions
- Paraphernalia in car
- Lack of Convergence
- Saying "Dude!!"

Explain How Observations Show Impairment

- Some obviously relate directly to driving
  - Impaired perception of time & distance
  - Disorientation
  - Impaired attention
  - Dilated pupils
- But others demonstrate the drug is actively affecting the person
  - Body/eyelid tremors
  - Decreased blood pressure, pulse
  - Lack of convergence

Know What *Not* to Expect.

DRUG CATEGORY	CNS Depressant	CNS Stimulant	Hallucinogen	DAs	Narcotic Analgesics	Inhalants	Cannabis
HGN	Present	None	None	Present	None	Present	None
VGN	Present	None	None	Present	None	Present	None
Lack of Convergence	Present	None	None	Present	None	Present	Present
Pupil Size	Normal	Dilated	Dilated	Normal	Constricted	Normal	Dilated
Reaction to Light	Slow	Slow	Normal	Normal	Little to None	Slow	Normal
Pulse	Down	Up	Up	Up	Down	Up	Up
Blood Pressure	Down	Up	Up	Up	Down	Up/Down	Up
Temperature	Normal	Up	Up	Up	Down	Up/Down??	Normal

Do not Expect Marijuana Impairment to Look Like Alcohol Impairment

Know the symptoms & educate the jury regarding what marijuana impairment looks like

Use Stereotypes

Your First Expert:

Your Second Expert:

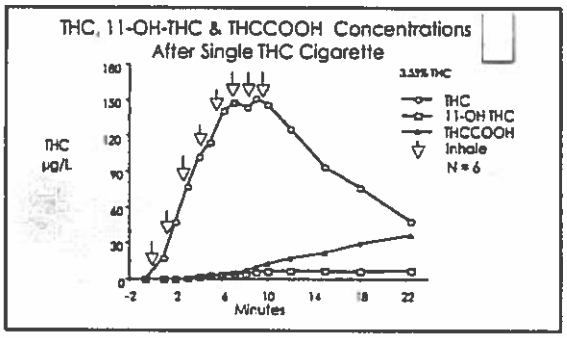
Educate Your Jury

(If you don't – the defense will)

- % of weekend nighttime drivers testing positive for THC increased almost 50% from 2007 to 2013-14. 2013-2014 NHTSA Roadside Survey.
- Marijuana use by drivers = significantly increased risk of automobile crash. Marijuana Use & Motor Vehicle Crashes. Li, Brady, et al.
- Recent users of Cannabis 3 – 7 times more likely to be responsible for crash. Dose related risk of motor vehicle crashes after cannabis use. Ramaekers, et al 2003.
- Fatal car crashes involving marijuana use tripled in one decade. Trends in Alcohol and other Drugs Detected in Fatally Injured Drivers in the United States. Li and Brady.

Prepare Them to Be Skeptical of the Defense

- "If the State's nice expert says there is no concentration for impairment, how is the Defendant going to prove his was too low?"
- "Wow, studies have shown impairment as low as 1 ng/ml?"
- "He had Hydroxy-THC so he used recently."
- "If Marijuana levels go down rapidly, the test result could be much lower than when he was driving!"



By the time you rest, it should be very hard to establish this affirmative defense.

Establishing the Affirmative Defense

#1: The Card

#2: The Concentration

Defense: Bringing in the Card

- Through the defendant:
  - Expect this when your defendant looks sympathetic or has a sympathetic backstory
  - Expect a lot of irrelevant testimony in this scenario
  - Don't let it hijack your trial!

Defense: Bringing in the Card

- Through a DHS Custodian of Records
  - Expect this when your defendant has Rule 609 criminal history
  - The goal is to get the presumption while shielding the defendant from cross-examination

Rebut the Presumption?

Illegal sharing/illegal source | More than 2/3 oz. limit | Admissions of non-medical use

Defense: Insufficiency of Concentration

- THC in system is the harmless leftover of previous medicinal use.
  - Concentration is really small (compared to...what?)
  - Explain away any impairment you've presented

Tips for Defense Experts

- Chester will say "could be" to, apparently, just about any number.
  - Expect similar testimony from the rest of them
- Call out limited expertise.
  - Have they ever tested blood for drugs?
  - Where are they getting these opinions?
- Confront them with any impairment the defense skimmed over.
  - Or don't, and hammer it in closing
- Emphasize that there is no known level!
  - We don't have to prove one, so this only hurts the defense

Can they prove this without an expert?

- Defense is insufficient **concentration** to cause impairment.
  - This is a question of science – is the concentration found in defendant's body inadequate (or not enough) to cause impairment?
    - Question is <u>not</u> did this concentration actually impair the defendant? (That is (A)(1)).

Can they prove this without an expert?

- (A)(3) is about the drug, not the person.
  - It is Defendant's burden to show the concentration itself is insufficient to cause impairment.
  - Analogize to Alcohol *per se* charges?

Rebuttal

- Evidence of active marijuana? (Hydroxy, signs or symptoms?).
  - If affecting defendant – it was not insufficient to cause impairment.
- Rebutting fairness argument – not fair to punish sick person using ther medicine.
  - Unlike prescription medicine, medical marijuana does not have known drug concentrations or dosing information, so to protect the motoring public the law requires defendant to prove the concentration in his/her body could not have been impairing.

Strategies to Consider

- If you have strong impairment, dismiss (A)(3)
  - Keep "medical marijuana" out of the trial entirely
- If not, dismiss (A)(1)
  - Put the emphasis on their burden to prove insufficiency
- Go on both charges
- Look for ways to rebut medical use
  - Priors, admissions, possession of more than allowed amount
- ...

Resources We Have Provided

- *Voir Dire* Questions
- Motions in limine
- Jury Instructions
- DRE Matrix

Conclusion: Same Drug, Same Crime

Thank You!

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