

## **Basic Marijuana Voir Dire Questions**

**(To be used in addition to general DUI voir dire questions.)**

**For the A.R.S. 28-1381(A)(3) charge, a driver is in violation of the law if the defendant drove or was in actual physical control of a vehicle after ingesting a controlled drug and the drug ingested was not taken as prescribed by a licensed doctor. This charge does not require impairment. Would any of you have difficulties following this law?**

**Have you, any member of your family or close friend ever used marijuana? (Pursue yes in individual voir dire – when, how recently, other issues.)**

**Did you, your family member or close friend drive after taking this drug? (Pursue yes in individual voir dire.)**

**Have you, any member of your family or close friend ever used the drug called Spice? (Pursue yes in individual voir dire.)**

**Did you, your family member or close friend drive after taking this drug? (Pursue yes in individual voir dire.)**

**Do any of you consider yourselves, any member of your family or close friend to be a "recovered substance abuser", "substance abuser", "recovered alcoholic" or an "alcoholic"? (Pursue in individual voir dire.)**

**Do any of you have personal feelings about the charge of DUI that might make it difficult for you to be completely fair and objective? (Pursue in individual voir dire.)**

**Do any of you believe the drug marijuana should always be legal?**

**How many of you believe it is never illegal to smoke marijuana and drive?**

**Are any of you, any members of your family or close friends medical marijuana card holders. (Pursue yes in individual voir dire.)**

**Are any of you, any members of your family or close friends members of any organization that is working to legalize marijuana?**

**The fact that a defendant may be a medical marijuana card holder is not a defense to the 28-1381(A)(1) impairment charge. Would any of you have a difficult time following this law?**

## **VOIR DIRE**

### **Marijuana**

1. Who thinks that all drugs should be legal?
  - a. What drugs?
  - b. Why?
2. Who has ever smoked marijuana?
  - a. When? (If smoked today, move to have them struck for cause)
  - b. Do you have a valid Medical Marijuana card?

3. Who believes that a person under the influence of cannabis is going to act the same way as someone who is under the influence of alcohol?
  - a. Please explain
  - b. Have you ever been around someone who is under the influence of alcohol?
  - c. Have you ever been around someone who was under the influence of Cannabis?
4. Who believes that marijuana that was available 30 years ago is the same marijuana that people are smoking nowadays?
  - a. Please elaborate
5. Who believes that a person who is impaired by marijuana should be allowed to drive if they have a medical marijuana card?
6. Who believes that a person under the influence of marijuana is going to act the same way as someone who is under the influence of alcohol?
  - a. Please explain
  - b. Have you ever been around someone who is under the influence of alcohol?
  - c. Have you ever been around someone who was under the influence of marijuana?
- 6.

## **MOTIONS IN LIMINE**

### **Marijuana**

- Preclude the marijuana card if defendant cannot prove he/she:
  - Is a qualifying patient
  - In possession of more than 2.5 ounces of marijuana
  - Out of state card doesn't fit the requirements under 36-3801(17)
- Preclude argument/evidence that passive inhalation is not a defense
- If A1 only: preclude all evidence of medical marijuana card
- If A3: preclude reference to impairment
- Preclude reference or details about defendant's medical condition/treatment

## STATE'S REQUESTED INSTRUCTION

### **A.R.S. § 28-1381(A)(1) Medical Marijuana Card is Not a Defense**

It is not a defense to a charge of A.R.S. § 28-1381(A)(1) that a person is or has been entitled to use a drug under the laws of this state. You may not consider whether the defendant had a valid medical marijuana card in determining whether the defendant was impaired to the slightest degree by the drugs in his/her system.

Source A.R.S. § 28-1381(B); *Dobson v. McClennen (City of Mesa, Real Party in Interest)*, 238 Ariz. 389, \_\_\_, ¶ 11 (2015)

## STATE'S REQUESTED INSTRUCTION

You may not consider whether the defendant had a valid medical marijuana card in determining whether the defendant was impaired to the slightest degree by the drugs in his/her system under the A.R.S. § 28-1381(A)(1) charge.

Source A.R.S. § 28-1381(B)

**28.1381(A)(3) – Driving or Actual Physical Control While There Is a Drug in the Defendant’s Body (RAJI)**

The crime of driving or actual physical control while there is a drug in the defendant’s body requires proof that:

1. The defendant [drove] [was in actual physical control of] a vehicle in this state; *and*
2. The defendant had in [his] [her] body [(name of drug)] [a metabolite of (name of drug)] at the time of [driving] [being in actual physical control of] the vehicle.

**28-1381(A)(3) - DRIVING WITH AN ILLEGAL DRUG (variation)**

The crime of driving or actual physical control while there is a drug in the defendant's body requires proof that:

1. The defendant [drove] [was in actual physical control of] a vehicle in this state; *and*
2. That at the time of driving (actual physical control), a drug defined in section 13-3401, or its metabolite, was in the defendant's body.

Include in jury instruction that the drug/s are defined in A.R.S. § 13-3401

For example

Cannabis is a drug defined in A.R.S. § 28-13-3401. AND/OR

Hydroxy THC is a metabolite of Cannabis which is a drug defined in A.R.S. § 13-3401.

Instructions for the Affirmative Defense.

STATE'S REQUESTED INSTRUCTIONS

**A.R.S. § 28-1381(A)(3) Medical Marijuana Affirmative Defense Instruction**

It is a defense to the A.R.S. § 28-1381(A)(3) charge that the cannabis or cannabis metabolite in the defendant's system was authorized by the Arizona Medical Marijuana Act (AMMA) and in a concentration insufficient to cause impairment. If you find that the defendant had cannabis or a metabolite of cannabis capable of causing impairment [or a drug or drugs defined in section 13-3401 or their metabolites (add this section only if other drugs are present)] in his/her body while driving or being in actual physical control you must then decide:

- 1) whether the defendant's use of cannabis was authorized by the AMMA and;
- 2) whether the defendant has proven that the concentration was insufficient to cause impairment.

There is a presumption that the defendant's use was authorized by the AMMA if the defendant was in possession of a registry identification card and no more than 2.5 ounces of marijuana on the date of violation. [This presumption disappears if rebutted with evidence the use of marijuana was not for the purpose of treating or alleviating the debilitating medical condition or symptoms associated with the condition.] (Editorial for the Trial Attorney, not included in instruction.)

It is the defendant's burden to prove this defense by a preponderance of the evidence. You must find the defendant not guilty of the A.R.S. § 28-1381(A)(3) charge if you find by a preponderance of the evidence that the concentration of marijuana or its metabolite was in an insufficient concentration to cause impairment.

Source: *Dobson v. McClennen (City of Mesa, RPI)*, 238 Ariz. 389 (2015); A.R.S. §§ 36-2811(A)(1); 36, 2801(1), 36-2802(D).

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It is the defendant's burden to prove this defense by a preponderance of the evidence. You must find the defendant not guilty of the A.R.S. § 28-1381(A)(3) charge if you find by a preponderance of the evidence that the concentration of marijuana or its metabolite was in an insufficient concentration to cause impairment.

Source: *Dobson v. McClennen (City of Mesa, RPI)*, 238 Ariz. 389 (2015); A.R.S. § 36-2802(D)

NOTE: only given if the person has proven his/her use was authorized by the AMMA (in possession of a registry identification card and 2.5 ounces or less) A.R.S. § 36-2811(A)(1); *Dobson*. This establishes a presumption. The presumption disappears if rebutted with evidence conduct was not for purpose of treating or alleviating the debilitating medical condition or symptoms associated with the condition. [§ 36-2811(2)]. If rebutted defense should not be allowed.

**A.R.S. § 28-1381(A)(3) Medical Marijuana Affirmative Defense Instruction -  
derived from criminal RAJIS 2.025**

The defendant has raised the affirmative defense of being an authorized medical marijuana user with a concentration of cannabis or its metabolite insufficient to cause impairment with respect to the charged offense of driving or being in actual physical control of a vehicle while there is a drug defined in 13-3401 or its metabolite in his system. The burden of proving each element of the offense beyond a reasonable doubt always remains on the State. However, the burden of proving the affirmative defense of being an authorized medical marijuana user with a concentration of cannabis or its metabolite insufficient to cause impairment is on the defendant. The defendant must prove that he/she was an authorized medical marijuana user with a concentration of cannabis or its metabolite in insufficient concentration to cause impairment by a preponderance of the evidence. If you find that the defendant has proven the affirmative defense of being an authorized medical marijuana user with a concentration of cannabis or its metabolite insufficient to cause impairment by a preponderance of the evidence you must find the defendant not guilty of the offense of driving or being in actual physical control of a vehicle while there is a drug defined in 13-3401 or its metabolite in his system.

**A.R.S. § 36-2801(17) Visiting Qualifying Patient Instruction (for out-of-state cards)**

An out-of-state medical marijuana card may qualify a person as an authorized user of marijuana under the Arizona Medical Marijuana act if he/she is a Visiting Qualifying Patient. A Visiting qualifying Patient is a person who:

- 1) is not an Arizona resident or had been an Arizona resident for less than thirty days on the date of violation and;
- 2) was diagnosed with a debilitating medical condition by a person licensed in the person's state of residence or, in the case of a person who has been a resident of Arizona less than thirty days, the state of the person's former residence.

"Debilitating medical condition" means one or more of the following:

- a) Cancer, glaucoma, positive status for human immunodeficiency virus, acquired immune deficiency syndrome, hepatitis C, amyotrophic lateral sclerosis, crohn's disease, agitation of alzheimer's disease or the treatment of these conditions.
- b) A chronic or debilitating disease or medical condition or its treatment that produces one or more of the following: cachexia or wasting syndrome; severe and chronic pain; severe nausea; seizures, including those characteristic of epilepsy; or severe and persistent muscle spasms, including those characteristic of multiple sclerosis.

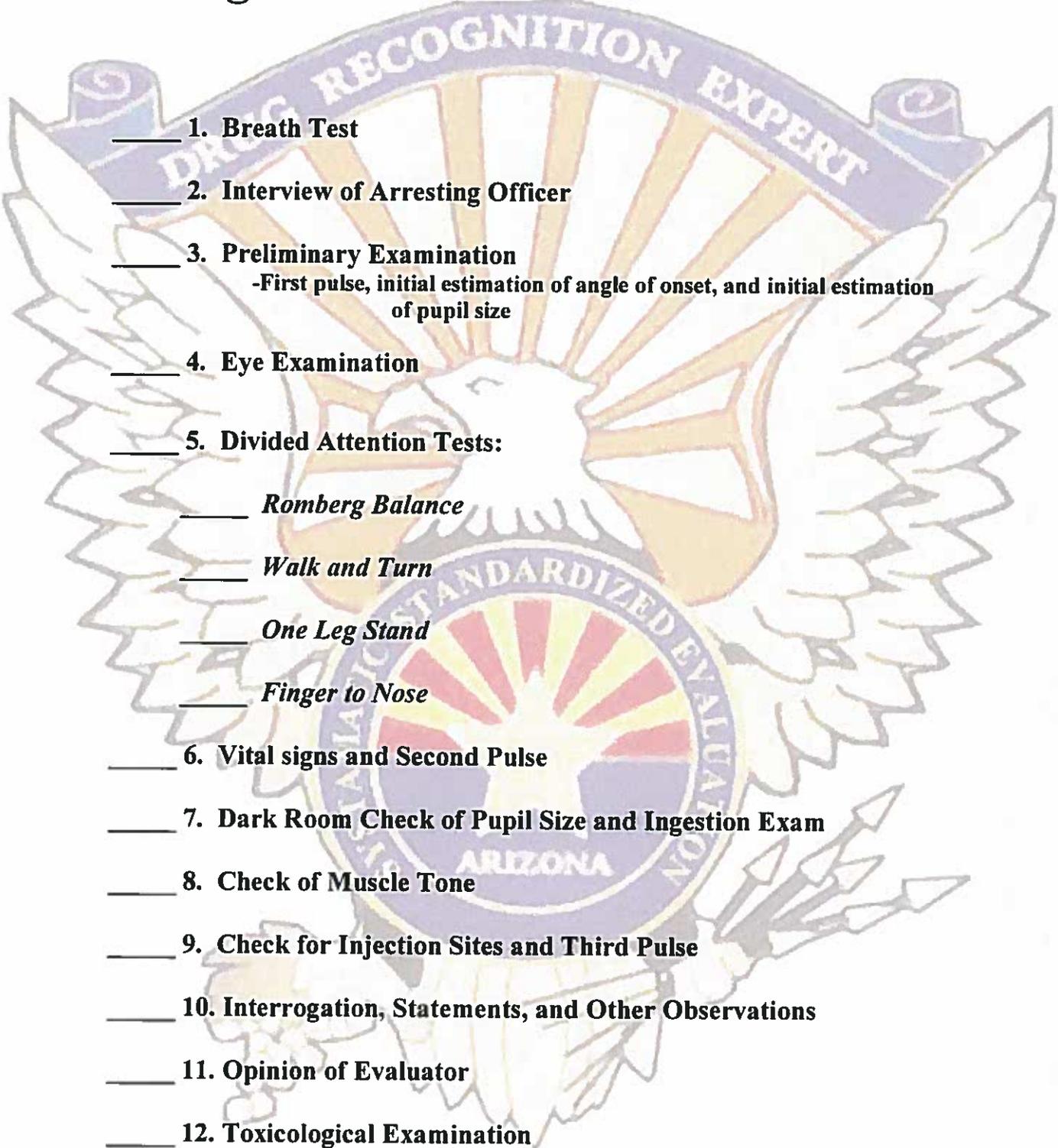
It is the defendant's burden to prove, by a preponderance of the evidence, that he/she is a Visiting Qualifying Patient.

Source: A.R.S. §§ 36-2801(17) & (3)

## **Preponderance of the evidence Standard Criminal 5b(2) – Standards for the Burden of Proof**

Preponderance of the Evidence – A party having the burden of proof by a preponderance of the evidence must persuade you, by the evidence, that the claim or a fact is more probably true than not true. This means the evidence that favors that party outweighs the opposing evidence.

# Drug Influence Evaluation Checklist

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- 1. **Breath Test**
  - 2. **Interview of Arresting Officer**
  - 3. **Preliminary Examination**  
-First pulse, initial estimation of angle of onset, and initial estimation of pupil size
  - 4. **Eye Examination**
  - 5. **Divided Attention Tests:**
    - Romberg Balance*
    - Walk and Turn*
    - One Leg Stand*
    - Finger to Nose*
  - 6. **Vital signs and Second Pulse**
  - 7. **Dark Room Check of Pupil Size and Ingestion Exam**
  - 8. **Check of Muscle Tone**
  - 9. **Check for Injection Sites and Third Pulse**
  - 10. **Interrogation, Statements, and Other Observations**
  - 11. **Opinion of Evaluator**
  - 12. **Toxicological Examination**

**DRUG CATEGORY SYMPTOMOLOGY MATRIX**

MAJOR INDICATORS	CNS DEPRESSANTS	CNS STIMULANTS	HALLUCINOGENS	DISSOCIATIVE ANESTHETICS	NARCOTIC ANALGESICS	INHALANTS	CANNABIS
HGN	PRESENT	NONE	NONE	PRESENT	NONE	PRESENT	NONE
VERTICAL GAZE NYSTAGMUS	PRESENT * HIGH DOSES	NONE	NONE	PRESENT	NONE	PRESENT * HIGH DOSES	NONE
LACK OF CONVERGENCE	PRESENT	NONE	NONE	PRESENT	NONE	PRESENT	PRESENT
PUPIL SIZE	NORMAL (1)	DILATED	DILATED	NORMAL	CONSTRICTED	NORMAL (4)	DILATED (6)
REACTION TO LIGHT	SLOW	SLOW	NORMAL (3)	NORMAL	LITTLE OR NONE VISIBLE	SLOW	NORMAL
PULSE RATE	DOWN (2)	UP	UP	UP	DOWN	UP	UP
BLOOD PRESSURE	DOWN	UP	UP	UP	DOWN	UP/DOWN (5)	UP
BODY TEMPERATURE	NORMAL	UP	UP	UP	DOWN	UP/DOWN/ NORMAL	NORMAL
MUSCLE TONE	FLACCID	RIGID	RIGID	RIGID	FLACCID	FLACCID OR NORMAL	NORMAL
GENERAL INDICATORS	UNCOORDINATED DISORIENTED SLUGGISH THICK, SLURRED SPEECH DRUNK-LIKE BEHAVIOR DROWSINESS DROOPY EYES FUMBLING GAIT ATAXIA BLOODSHOT WATERY EYES	RESTLESSNESS BODY TREMORS EXCITED EUPHORIC TALKATIVE EXAGGERATED REFLEXES ANXIETY BRUXISM - (GRINDING OF THE TEETH) REDNESS TO NASAL AREA RUNNY NOSE LOSS OF APPETITE INSOMNIA INCREASED ALERTNESS DRY MOUTH IRRITABILITY	DAZED APPEARANCE BODY TREMORS SYNESTHESIA HALLUCINATIONS PARANOIA UNCOORDINATED NAUSEA DISORIENTED SPEECH DIFFICULTIES PERSPIRING POOR PERCEPTION OF TIME & DISTANCE MEMORY LOSS FLASHBACKS PILOERECTION *NOTE: WITH LSD, PILOERECTION MAY BE OBSERVED (GOOSE BUMPS, HAIR STANDING ON END)	PERSPIRING WARM TO THE TOUCH BLANK STARE VERY EARLY ANGLE OF HGN ONSET SPEECH DIFFICULTIES INCOMPLETE VERBAL RESPONSES REPETITIVE SPEECH INCREASED PAIN THRESHOLD CYCLIC BEHAVIOR CONFUSED AGITATED HALLUCINATIONS POSSIBLY VIOLENT & COMBATIVE CHEMICAL ODOR *MOON WALKING*	PTOSIS - (DROOPY EYELIDS) *ON THE NOD* DROWSINESS DEPRESSED REFLEXES LOW, RASPY, SLOW SPEECH DRY MOUTH FACIAL ITCHING EUPHORIA FRESH INJECTION SITES TRACK MARKS NAUSEA  *NOTE: TOLERANT USERS EXHIBIT RELATIVELY LITTLE PSYCHOMOTOR IMPAIRMENT	RESIDUE OF SUBSTANCE AROUND NOSE & MOUTH ODOR OF SUBSTANCE POSSIBLE NAUSEA SLURRED SPEECH DISORIENTED CONFUSION BLOODSHOT, WATERY EYES LACK OF MUSCLE CONTROL FLUSHED FACE NON COMMUNI- CATIVE INTENSE HEADACHES	MARKED REDDENING OF CONJUNC- TIVA ODOR OF MARIJUANA DEBRIS IN MOUTH BODY TREMORS EYELID TREMORS RELAXED INHIBITIONS INCREASED APPETITE IMPAIRED PERCEPTION OF TIME & DISTANCE POSSIBLE PARANOIA
DURATION OF EFFECTS	BARBITURATES: 1-16 HOURS TRANQUILIZERS: 4-8 HOURS METHAQUALONE: 4-8 HOURS	COCAINE: 5-90 MINUTES AMPHETAMINES: 4-8 HOURS METHAMPHET- AMINES: 12 HOURS	DURATION VARIES WIDELY FROM ONE HALLUCINOGEN TO ANOTHER	ONSET: 1-5 MINUTES PEAK EFFECTS: 15-30 MINUTES EXHIBITS EFFECTS UP TO 4-6 HOURS	HEROIN: 4-6 HOURS METHADONE: UP TO 24 HOURS OTHERS VARY	VOLATILE SOLVENTS: 6 - 8 HOURS ANESTHETIC GASES AND AEROSOLS VERY SHORT DURATION	EUPHORIA: 2 - 3 HOURS IMPAIRMENT MAY LAST UP TO 24 HOURS WITHOUT AWARENESS OF EFFECT.
USUAL METHODS OF INGESTION	ORAL INJECTED OCCASIONALLY	INSUFFLATION (SNORTING) SMOKED INJECTED ORAL	ORAL INSUFFLATION SMOKED INJECTED TRANSDERMAL	SMOKED ORAL INSUFFLATION INJECTED EYE DROPS	INJECTED ORAL SMOKED INSUFFLATION	INHALED	SMOKED ORAL
OVERDOSE SIGNS	SHALLOW BREATHING COLD CLAMMY SKIN PUPILS DILATED RAPID WEAK PULSE. COMA	AGITATION INCREASED BODY TEMPERATURE HALLUCINATIONS CONVULSIONS	LONG INTENSE TRIP	LONG INTENSE TRIP	SLOW SHALLOW BREATHING CLAMMY SKIN COMA CONVULSIONS	COMA	FATIGUE PARANOIA

FOOTNOTE: THESE INDICATORS ARE THE MOST CONSISTENT WITH THE CATEGORY. KEEP IN MIND THAT THERE MAY BE VARIATIONS DUE TO INDIVIDUAL REACTION, DOSE TAKEN AND DRUG INTERACTIONS.

NORMAL RANGES

PULSE: 60 - 90 BEATS PER MINUTE

PUPIL SIZE: ROOM LIGHT: 2.5 - 5.0 (AVERAGE 4.0)  
NEAR TOTAL DARKNESS: 5.0 - 8.5 (AVERAGE 6.5)  
DIRECT LIGHT: 2.0 - 4.5 (AVERAGE 3.0)

BLOOD PRESSURE: 120 - 140 SYSTOLIC  
70 - 90 DIASTOLIC.

BODY TEMPERATURE: 98.6 +/- 1.0 DEGREE

1. SOMA, QUAALUDES AND SOME ANTI-DEPRESSANTS USUALLY DILATE PUPILS
2. QUAALUDES, ETOH AND POSSIBLY SOME ANTI-DEPRESSANTS MAY ELEVATE
3. CERTAIN PSYCHEDELIC AMPHETAMINES CAUSE SLOWING
4. NORMAL BUT MAY BE DILATED
5. DOWN WITH ANESTHETIC GASES, BUT UP WITH VOLATILE SOLVENTS AND AEROSOLS
6. PUPIL SIZE POSSIBLY NORMAL

### **ARS 28-1381A3 Affirmative Defense – Concentration Insufficient to Cause Impairment<sup>1</sup>**

It is an affirmative defense to ARS 28-1381(A)(3) if the evidence against Defendant consists solely of the presence of metabolites or components of marijuana that appear in insufficient concentration to cause impairment. It is the defendant's burden to prove this defense by a preponderance of the evidence.

Source: Dobson v. McClennen, 238 Ariz. 389, 361 P.3d 374 (2015).

### **Drug Defined in 13-3401**

Cannabis, Marijuana, and Tetrahydrocannabinol (THC) are drugs defined in 13-3401. THC is the primary active component of Marijuana.

Source: ARS 13-3401 (19); (20)(w); (4)(b).

### **Affirmative Defense – Burden on Defendant**

The burden of proving each element of the offense beyond a reasonable doubt always remains on the State. However, the burden of proving the affirmative defense is on the defendant. The defendant must prove the affirmative defense by a preponderance of the evidence.

Source: A.R.S. § 13-205 (A); RAJI Standard Criminal 2.025

### **Preponderance of the Evidence**

A party having the burden of proof by a preponderance of the evidence must persuade you, by the evidence, that the claim or a fact is more probably true than not true. This means the evidence that favors that party outweighs the opposing evidence.

Source: RAJI Standard Criminal 5b(2)

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<sup>1</sup> Affirmative Defense instructions should be given only after Defendant has established the defense by presenting evidence.