2012 Legal Assistant Conference

November 2, 2012
Doubletree Resort
Gilbert, Arizona

BILLS STILLS & PILLS: DUI UPDATE

Presented By:

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Distributed By:

ARIZONA PROSECUTING ATTORNEYS' ADVISORY COUNCIL
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2012 APAAC
Legal Assistant Conference
DUI Legal Updates

TSRP Services

- DUI & traffic training
- Assistance with motions & legal issues
- Bank of materials on DUI defense experts
- TSRP E-mail list
- Three-day DRE School for Prosecutors/Las
- Misc. - *Amicus* briefs, articles, manuals etc.

Legislative Update

Synthetic Stimulants "Bath Salts"

HB 2356

- Added seven most common varieties of "bath salts" to AZ drug schedule.
  - Illegal to possess or drive with in system
  - NOTE: Some AZ Crime Labs cannot test for all seven

***Effective date February 16, 2012*

Amends A.R.S. § 28-1304

Synthetic Stimulants "Bath Salts"

HB 2356

Butylone, Fluoromethcathinone, Methoxymethcathinone, Methylenedioxymethchathinone, Methylenedioxypyrovalerone, Methylmethcathinone, & Naphthylprovalerone

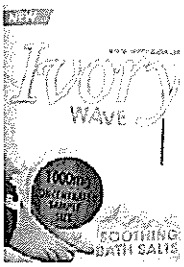
***Effective date February 16, 2012*

Amends A.R.S. § 28-1304

What if Bath Salt is not on drug schedule or lab can't test for?

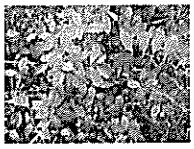
- Proceed under ARS 28-1381(A)(1) [impairment]
- Must prove in defendant's system
  - Admissions
  - Drug found on defendant (can test)
  - Paraphernalia
  - DRE
- Prepare for challenges that it is a drug

Bath Salts
(synthetic stimulants)



Bath Salts – Where do they come from?

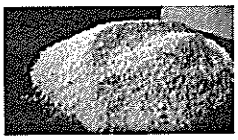
- Bath salts = synthetic cathinone
- Cathinone is a banned stimulant which is derived from the plant Khat



What is it?

Forms

- Crystal
- Powder
- Capsules
- Pills



How Ingested

- Oral
- Inhaled
- Snorted
- Injected
- Smoked
- Other

Bath Salts

- Synthetic drug - mimics effects of cocaine/crack, meth & ecstasy
- Highly addictive – intense cravings & uncontrollable urges for more
- Causing deaths – brain damage, heart attacks, hallucinations, self mutilations, suicidal tendencies – even after effects gone
- Sold on-line/smoke shops - $30 small package

Not Much Jury Appeal for Defendants

2011 Synthetic Marijuana "Spice"

HB 2167

- **Added ten most common varieties of synthetic marijuana "K2/Spice" to AZ drug schedule.**
- **NOTE: Crime Lab cannot test for in urine or blood**

***Effective date February 22, 2011**

Amends A.R.S. § 28-1304

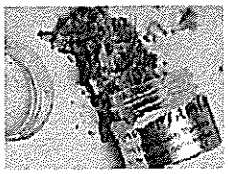
Spice/K2

Spice – What Is It?

- Spice, or K2 - synthetic cannabis chemical product that is added to herbal or plant material.
- Mimics effects of Marijuana.
- Anywhere from 4 to 700 times as potent as marijuana.

Packaging comments to get around Feds:

- Not for human consumption
- Not for sale in United States
- Not to be sold to persons under age 18



The Rise of Spice

- Why Did Spice Become Popular?
  - Initially it was legal – one brand was called "Legal Marijuana"
  - Would/will not show up on drug tests
  - Marketed towards young adults
  - No age restriction

YOU'LL NEVER FAIL A DRUG TEST

"There's never been a case reported by our clients that any of our Herbal Smoke Blends caused them to fail a test."

(example packaging comments.)

State Labs Cannot Test for Spice

- Negative tox result is expected/consistent with spice
- But have to prove is in the defendant's system
- Can test substance if found with defendant
- Impairment DUI
- Call forensic toxicologist?

DUI Jury Trials

HB 2284

Reinstated jury trial provision for first offense non-extreme DUIs.

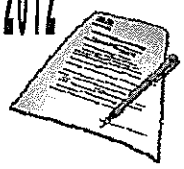
***Effective Immediately & retroactive**

Amends A.R.S. § 28-1381

Sine die was on

May 3rd, 2012 at 8:22 p.m.

Effective Date - August 2, 2012



Proof of Insurance

HB 2677

Allows proof of financial responsibility to officers via wireless communication devices.

Court may require card.

Display of evidence on device is not consent to access other contents of device.

***Effective date August 2, 2012*

Suspended Driver's License

HB 2286

Allows courts to dismiss charges of driving on suspended license when suspension based on failure to pay fines & person presents proof privilege has been reinstated.

***Effective date August 2, 2012* *Amends ARS § 28-3474 & 28-3511*

Statute of Limitations; Moving Violation

HB 2241

Statute of limits for 28-672 (certain moving violations resulting in death or serious physical injury) to "two years after actual discovery...of the offense or discovery...that should have occurred with the exercise of reasonable diligence."

Amends ARS. § 13-107 and § 28-672

Accidents; Failure to Stop

SB 1163

Requires revocation of driving privileges in serious injury H & R cases for 5 years & death cases for 10 years.

If non-serious injury, license will still be revoked for 3 years.

***Effective date August 2, 2012* *Amends ARS § 28-661*

Child Restraint System

HB 2154

Requires each passenger in a motor vehicle between ages of 5 & 8, if not more than four feet nine inches tall, to be restrained in a child restraint system.

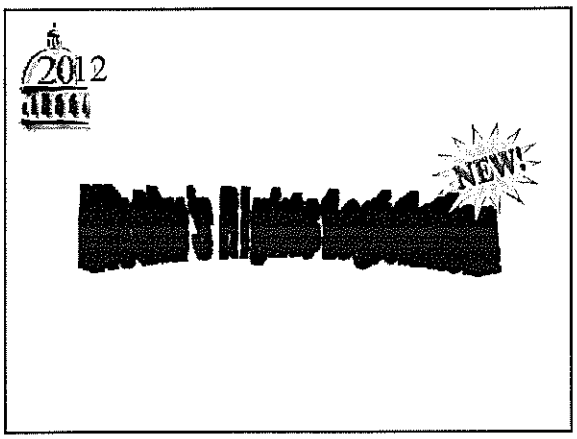
***Effective date August 2, 2012* *Amends ARS § 28-907*

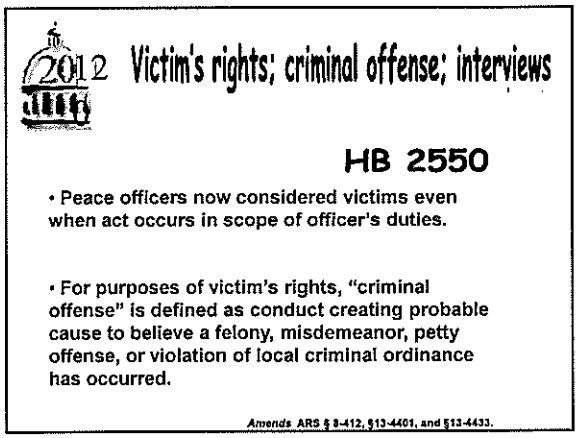
Vehicle Equipment and Inspections

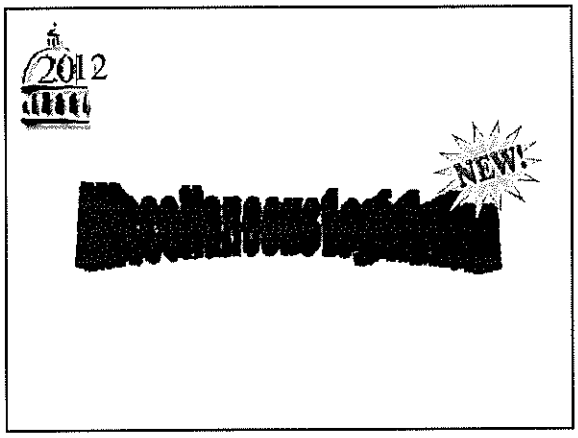
HB 2477

Allows implements of husbandry to drive on highways for travel between farms or to a place of repair, supply or storage.

Amends ARS § 28-921 and § 28-981


2012
NEW!


2012
Victim's rights; criminal offense; interviews
HB 2550
• Peace officers now considered victims even when act occurs in scope of officer's duties.
• For purposes of victim's rights, "criminal offense" is defined as conduct creating probable cause to believe a felony, misdemeanor, petty offense, or violation of local criminal ordinance has occurred.
Amends ARS § 8-412, §13-4401, and §13-4433.


2012
NEW!

Hookah Use HB 2034

Petty offense to sell/provide instrument "solely designed for smoking or ingestion of tobacco or shisha" including a hookah or water-pipe to a minor

$100 fine & 30-hours community service for minors possessing such instruments.

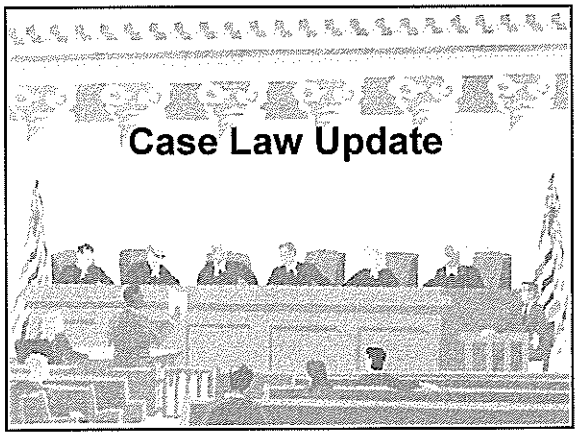
Exemption for: religious use/possession for use in religious ceremonies; gifts or souvenirs that are not intended to be used.

Amends A.R.S. § 13-3622

Medical Marijuana HB 2349

Prohibits possession/use of medical marijuana on campus of any "public university, college, community college or post secondary educational institution" or on campus of any "high school, junior high school, middle school or preschool," or in "any child care facility in this state."

Amends A.R.S. § § 15-108 & 36-804



Right to Counsel for DUI

DUI defendant denied right to counsel if, asks to speak to attny, police provide phone & phone book but reject request for assistance after it is discovered portion of yellow pages containing attnys' names & numbers was ripped from book.

***State v. Penney*, 229 Ariz. 32 (App. 2012).**

Stop of Vehicle Brake Light

No violation of ARS § 28-939 (or 28-921) for vehicle to have brake light at top rear of vehicle not working when other two are.

Officer did not have grounds for stop when didn't observe any other traffic infractions nor articulate any other basis for stop.

***State v. Fikes*, 228 Ariz. 389 (App. 2011).**

Stop of Vehicle Brake Light Post-*Fikes*

If any brake lights work officer cannot stop for violation of ARS § 28-939. None can be working for officer to make a stop.

May allow community caretaking arguments.

If the tail light is broken with white light from the bulb showing through, stop is OK.

Grounds for Stop Reminders

- **Provide ALL Reasons/support for stops**
  - **Avoid *Livingston* situations**
  - Bring out title 28 violations
  - Do not forget signs & symptoms of impairment
    - NHTSA Cues
    - Don't forget your officers experience

Reminders

- **Community Caretaking**
  - ***State v. Organ,*** 225 Ariz. 43 (App. 2010).
  - ***State v. Mendoza-Ruiz,*** 225 Ariz. 473 (App. 2010).
- Look for no stop – *Robles*

Reminders

- Good Faith
- Exclusionary Rule (suppression) is NOT Automatic
  - For 4th Amend. *Herring v. US*, 555 U.S. 35 (2009).
  - For 6th Amend. Right to Counsel. *State v. Rumsey,* 225 Ariz. 374 (App. 2010).
  - If relying on overturned precedent – *Davis v. US,* 564 U.S. ___ (2011)
- Inevitable discovery. *State v. Rojers,* 216 Ariz. 555 (App. 2007).

A Swerve IS Enough to Stop

Distinguish *State v. Livingston*, 206 Ariz. 145 (App. 2003).

- one swerve
- officer's training & experience
- signs & symptoms of impairment
- curvy vs. straight road
- NHTSA cues
- *State v. Superior Court (Blake)* 149 Ariz. 269 (1986) (weaving within one's lane).

Reasonable Grounds to Stop

Even when police pursue a suspect after a show of authority, seizure does not occur until suspect yields.

Evading police in violent, high crime area; placing hands in pockets when officers approach; and refusal to stop or remove hands from pockets after command to do so provided grounds for the stop.

State v. Ramsey, 223 Ariz. 480 (App. 2010).

Disclosure of Lab Results

- Court cannot sanction State under Rule 15.7 for failing to disclose uncompleted test results.
- Can sanction under Rule 15.6 ONLY if not disclosed 7 days before trial & court makes specific findings.
- Court should grant extension if properly requested & supported.

State v. Simon, **229 Ariz. 60, 270 P.3d 887 (App. 2012).**

Disclosure of Scientific Evidence

Rule 15.1(b)(4) only requires the state to disclose completed tests or examinations.

Sanctioning for the state's failure to disclose incomplete test results was an abuse of discretion.

***State v. ex rel. Thomas v. Newell (Milagro*, RPI), 210 P.3d 1283 (App. 2009).**

Motion for Discovery Sanctions

- Court may not consider or set for hearing unless provided separate statement certifying:
  - personal consultation **and**
  - good faith efforts to resolve the matter

    Rule 15.7(b)

  - ❖ Laying in wait is not a good faith effort
  - ❖ Be pro-active when writing discovery responses
  - ❖ Make efforts to resolve & document them

Fishing Expeditions

- Def must show (1) substantial need & (2) unable to obtain on own without substantial hardship. Rule 15.1(g); *State v. Keivel,* 111 Ariz. 240 (1974).
- *State v. Hatton,* 116 Ariz, 142 (1977); *State v. Wallace,* 97 Ariz. 296 (1965).
- Labs/breath test
  - *State v. Bernini, (Daughters-White II)*, 222 Ariz. 607 (App. 2009); *State v. Fields,* 196 Ariz. 580 (App. 1999).

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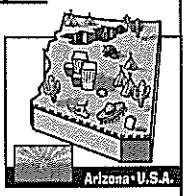

DRUG CATEGORY SYMPTOMOLOGY MATRIX

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 CON-VERGENCE	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, PILORECTION 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 DISORIENTED 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 IMPAIRMENTM AY 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.

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

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

MEDICAL MARIJUANA DUI CASES IN ARIZONA

The Arizona medical marijuana provisions are found in A.R.S. §§ 36-2801 through 36-2819. The Arizona DUI statutes are not mentioned in any of these provisions. This is significant. If the medical marijuana act meant to address or make a specific exception to any of our statutes, it would have done so. It did not.

When interpreting enactments, courts are not to supply meaning that is not found in the specific provision. *Kiley v. Jennings, Strouss and Salmon*, 187 Ariz. 136, 927 P.2d 796 (App. 1996). Absent constitutional infirmities, courts "are required to apply statutes as written." *City of Flagstaff v. Mangum*, 164 Ariz. 395, 401, 793 P.2d 548, 554 (1991). The judiciary should not add to a provision that which the enacting body deemed unnecessary. *Werner v. Prins*, 168 Ariz. 271, 812 P.2d 1089 (App. 1990). *See, Board of Regents v. Public Safety Retirement Fund Manager Administrator,* 160 Ariz. 150, 771 P.2d 880 (App. 1989). Where statutes include a phrase in one section and exclude it in others, courts will not read it into the excluded sections. *Redhair v. Kinerk, Beal, Schmidt, Dyer & Sethi, P.C.,* 218 Ariz. 293, 183 P.3d 544 (App. 2008); *Samaritan Health Services v. AHCCS,* 178 Ariz. 534, 875 P.2d 193 (App. 1994). In order to adopt the defendants' interpretation of the statues at issue, courts would have to read in meaning that is not there. This is contrary to the basic tenets of statutory interpretation.

A. Medical Marijuana Card Holders May be Prosecuted of the A.R.S. § 28-1381(A)(1) Impairment DUI Charge

Arizona Revised Statutes § 28-1381(A)(1) prohibits driving or being in actual physical control of a vehicle while under the influence of any drug if the person is impaired to the slightest degree. Not only do the Medical Marijuana Act provisions not prevent prosecution under this statute, they encourage it. Section 36-2802(D) specifically provides that the medical marijuana provisions do not authorize any person to engage in and do not prevent criminal penalties for "[o]perating, navigating or being in actual physical control of any motor vehicle, aircraft or motorboat while under the influence of marijuana. . ." Marijuana is a drug and one simply cannot operate a motor vehicle while under the influence of it.

1. A written certificate is not a defense to A.R.S. § 28-1381(A)(1).

The fact that the defendant may have a "written certification" for the marijuana found in his/her system is no defense to the A.R.S. § 28-1381(A)(1) charge. As is specifically provided by A.R.S. 28-1381(B):

> "[i]t is not a defense to a charge of . . . [28-1381(A)(1)] that the person is or has been entitled to use the drug under the laws of this state."

If a person is impaired to the slightest degree by marijuana, he or she is not allowed to drive, whether the marijuana is medical marijuana or not.

2. Quantification is not required.

The defense may attempt to argue that, in order to get a conviction of the (A)(1) impairment charge, the State is required to present toxicology results that show how much marijuana was in the defendant's system together with testimony from an expert witness establishing that the amount that was in the defendant's system was at a sufficient concentration to cause impairment. This argument is based on the portion of A.R.S. § 36-2802(D) which states "except that a registered qualifying patient shall not be considered to be under the influence of marijuana solely because of the presence of metabolites or components of marijuana that appear in insufficient concentration to cause impairment." This argument does not hold water.

Arizona Revised Statutes § 36-2802(D) merely states that a medical marijuana patient cannot be considered to be under the influence of marijuana **"solely"** because of metabolites or components that are insufficient to cause impairment. The A.R.S. § 28-1381(A)(1) impairment statute always requires the State to prove impairment i.e. "impaired to the slightest degree." It is for the fact finder (the jury) to decide if the defendant is impaired. If the fact finder finds the defendant is impaired to the slightest degree, this satisfies the impairment portion of both statutes [A.R.S. § 28-1381(A)(1) and A.R.S. § 36-2802(D)]. The State cannot and does not prove a defendant is under the influence of marijuana based solely on its presence. The A.R.S. § 28-1381(A)(1) charge is not a per se offense. There are no DUI presumptions indicating that any particular level of a drug indicates either impairment or a lack of impairment. The State will always be required to prove actual impairment based on driving or other behavior and not solely on the presence of a drug or its metabolite in the suspect's system. This is consistent with A.R.S. § 36-2802(D).

When the DUI statutes require a specific amount of a substance they say so i.e. BAC .08 or greater, BAC .15 or greater, BAC .20 or greater. A.R.S. § 28-1381(A)(1) only requires the State to prove impairment beyond a reasonable doubt, not a certain amount of marijuana in the system. Likewise, A.R.S. § 36-2802 only requires impairment. No per se limit, legal limit or specific amount of marijuana is required.

B. Medical Marijuana Card Holders May be Prosecuted of the A.R.S. § 28-1381(A)(3) Per Se DUI Charge

It is also not a defense to the A.R.S. § 28-1381(A)(3) DUI drug per se charge that the defendant may have had a medical marijuana written certificate or a medical marijuana card. That statute prohibits driving or being in actual physical control of a vehicle while there is any drug defined in A.R.S. § 13-3401 or its metabolite in

the person's body. Marijuana is defined in our drug schedule under all of its names i.e. marijuana, cannabis and THC.

The defense will likely argue that his/her written certification for medical marijuana is a defense to this charge under A.R.S. § 28-1381(D). That is not the case. A.R.S. § 28-1381(D) is an affirmative defense. It is the defendant's burden to raise it and prove it. A.R.S. § 13-205. The defense must meet all of its requirements. A written certification for medical marijuana meets none of them.

The prescription drug defense found in A.R.S. § 28-1381(D) states:

> "A person using a drug, **as prescribed** by a medical practitioner licensed . . . is not guilty of violating subsection A, paragraph 3 of this section."

(Emphasis added.)

This statute requires the defendant to prove he/she has a valid prescription from a licensed US doctor and that the person has taken the drug "as prescribed." Marijuana is a Schedule I drug. As such, it cannot be prescribed by a licensed medical practitioner.

Neither the word "prescribed" nor "prescription" appears in the medical marijuana statutes. Instead the patient gets the marijuana via a "written certification." *See* A.R.S. §§ 36-2801(18) and 36-2804.02(A)(1). The Title 36 medical marijuana provisions do not contain any provision stating that for purposes of A.R.S. § 28-1381(D) a written certification as defined in A.R.S. § 36-2801(18) is a prescription or equivalent to a prescription. Again, if these provisions were making such an exception, they would have said so. Basic statutory interpretation doctrines indicate that because the medical marijuana statutes use the term "written certification" instead of prescription, they are not the same thing. *See, Board of Regents v. Public Safety Retirement Fund Manager Administrator,* at 157, 771 P.2d at 887.

Likewise, the portion of A.R.S. § 36-2802(D) which states "except that a registered qualifying patient shall not be considered to be under the influence of marijuana solely because of the presence of metabolites or components of marijuana that appear in insufficient concentration to cause impairment" is not a defense to the metabolite portion of the A.R.S. § 28-1381(A)(3) per se DUI drug statute. Nor does it require the State to present evidence of a specific amount of marijuana or that the amount found in the blood was in sufficient concentration to cause impairment for the A.R.S. § 28-1381(A)(3) charge. The above language from A.R.S. § 36-2802 only requires evidence establishing impairment in order for a person to be found "**under the influence** of marijuana." (Emphasis added.) The only place the Arizona DUI statutes speak of being "under the influence," and the only statute this language can possibly apply to, is the A.R.S. § 28-1381(A)(1)

impairment charge. A.R.S. § 28-1381(A)(3) does not speak of or require the State to prove the defendant is "under the influence" of anything. This per se offense only requires the presence of a drug or its metabolite while driving or being in actual physical control.

1. The defendant must timely disclose any defenses

As stated above, A.R.S. § 28-1381(D) is an affirmative defense. It is the defendant's burden to raise it and prove it. A.R.S. § 13-205. Accordingly, the defendant must disclose the attempted defense at least 20 days before trial and must also disclose all evidence and witnesses he/she will use to raise the defense. 16A A.R.S. *Rules of Crim. Proc.,* Rule 15.2(b).

If the defendant provides a copy of the defendant's written certification, note: these written certificates do not have the appearance or contents of prescriptions i.e. they do not have dosage amounts, specific times to take the marijuana, etc. This is additional proof that these are not prescriptions and, therefore, do not provide a defense under A.R.S. § 28-1381(D). [The opposite, however, is not the case. Even if the "written certificate" has dosage amounts, brand of marijuana, specific times etc. it is not a prescription. It cannot be. Marijuana is a schedule one drug. So there simply is no prescription defense under 28-1381(D).] Be mindful of the confidentiality provisions in section G below.

C. The Fact that A.R.S. § 36-2802(D) Uses the Word Operating, Rather than Drive or APC is Not an Issue

The DUI statutes use the words "drive" and "actual physical control." The medical marijuana statutes in A.R.S. § 36-2802(D) reference "operating" a motor vehicle. This, however, is not an issue. Arizona Revised Statutes § 28-101(17) defines "drive" as to "operate or be in actual physical control of a motor vehicle." For purposes of Title 28 offenses such as DUI, they all mean the same thing.

D. The A.R.S.§ 36-2012 Affirmative Defense Is No Longer Good Law

Some defense attorneys have attempted to raise the affirmative defense that appeared in the original medical marijuana initiative under A.R.S. § 36-2012. As set forth in section 5 of the initiative, the affirmative defense found in A.R.S. § 36-2012 was repealed effective the date DHS started issuing the medical marijuana certificates. This occurred back in 2011. Accordingly, the affirmative defense no longer applies. In fact, the statute is no longer listed in the revised statues.

Due to its repeal and the timing of the repeal, the old affirmative defense cannot apply to any case where the defendant has an Arizona medical marijuana certificate. At most, it would apply only to the (A)(3) charge and only to cases where the defendant had an out-of-state medical marijuana card and the date of violation was prior to the repeal of the affirmative defense statute. There are ways

to address these obscure cases. They are not, however, addressed in this tip sheet. Please contact the TSRP if you have questions or need assistance in this area

E. The DUI Statutes Are Constitutional

A common constitutional challenge in marijuana cases is that because the drug's metabolite can remain in a person's system long after its use, the A.R.S. § 28-1381(A)(3) statute is unconstitutionally overbroad. This challenge was rejected in *State v. Hammonds*, 192 Ariz. 528, 968 P.2d 601 (App. 1998).

For a more thorough discussion of constitutional challenges to the DUI statutes, including A.R.S. § 28-1381(A)(3), *see* the Legal Review for DRE Cases handout available from the TSRP.

F. A Medical Marijuana Card Cannot Provide any Basis For a Search

Arizona Revised Statutes § 36-2811(H) provides:

> Mere possession of, or application for, a registry identification card may not constitute probable cause or reasonable suspicion, nor may it be used to support the search of the person or property of the person possessing or applying for the registry identification card. The possession of, or application for, a registry identification card does not preclude the existence of probable cause if probable cause exists on other grounds.

Accordingly, the fact that a suspect has a medical marijuana card cannot be considered in the legal determinations of searches or search warrants. Of course, if the officer did include the fact that the defendant may have had a registry identification card in the search warrant application or considered it as a basis for conducting a search, this fact alone will not negate the search or search warrant. The proper course in such circumstances is to not consider the offending evidence from the affidavit (or the evidence the officer had at the time of the search.) If the remaining evidence provides grounds for the search, suppression is not required.

G. The Presumptions in the Medical Marijuana Act Do Not Apply to DUI Cases

Arizona Revised Statutes § 36-2811(A) provides a presumption that "a qualifying patient or designated caregiver is engaged in the medical use of marijuana." Because medical marijuana is not a defense to any DUI charge in Arizona this

presumption is irrelevant in a DUI trial. All marijuana, whether medical or not, is treated the same in a DUI trial.

The prosecutor should object to any attempt by the defense to use the presumptions in a medical marijuana DUI case.

H. Medical Marijuana Confidentiality Provisions

Arizona Revised Statutes 36-2816(D) provides:

> It is a class 1 misdemeanor for a person, including an employee or official of the department or another state agency or local government, to breach the confidentiality of information obtained pursuant to this chapter.

The confidentiality provisions are found in A.R.S. §36-2810.

A. The following information received and records kept by the department for purposes of administering this chapter are confidential, exempt from title 39, chapter 1, article 2, exempt from section 36-105 and not subject to disclosure to any individual or public or private entity, except as necessary for authorized employees of the department to perform official duties of the department pursuant to this chapter.

1. Applications or renewals, their contents and supporting information submitted by qualifying patients and designated caregivers, including information regarding their designated caregivers and physicians.

2. Applications or renewals, their contents and supporting information submitted by or on behalf of nonprofit medical marijuana dispensaries in compliance with this chapter, including the physical addresses of nonprofit medical marijuana dispensaries.

3. The individual names and other information identifying persons to whom the department has issued registry identification cards.

B. Any dispensing information required to be kept under section 36-2806.02, subsection B, or department regulation shall identify cardholders by their registry identification numbers and not contain names or other personally identifying information.

C. Any department hard drives or other data recording media that are no longer in use and that contain cardholder information must be destroyed. The department shall retain a signed statement from a department employee confirming the destruction.

D. Data subject to this section shall not be combined or linked in any manner with any other list or database and it shall not be used for any purpose not provided for in this chapter.

E. Nothing in this section precludes the following notifications:

1. Department employees may notify law enforcement about falsified or fraudulent information submitted to the department if the employee who suspects that falsified or fraudulent information has been submitted has conferred with his supervisor and both agree that the circumstances warrant reporting.

2. The department may notify state or local law enforcement about apparent criminal violations of this chapter if the employee who suspects the offense has conferred with his supervisor and both agree that the circumstances warrant reporting.

3. Nonprofit medical marijuana dispensary agents may notify the department of a suspected violation or attempted violation of this chapter or department rules.

F. Nothing in this section precludes submission of the section 36-2809 report to the legislature. The annual report submitted to the legislature is subject to title 39, chapter 1, article 2.