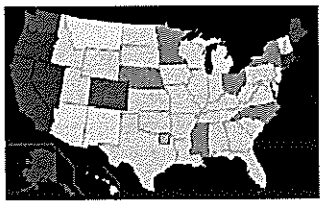
Arizona
Medical Marijuana

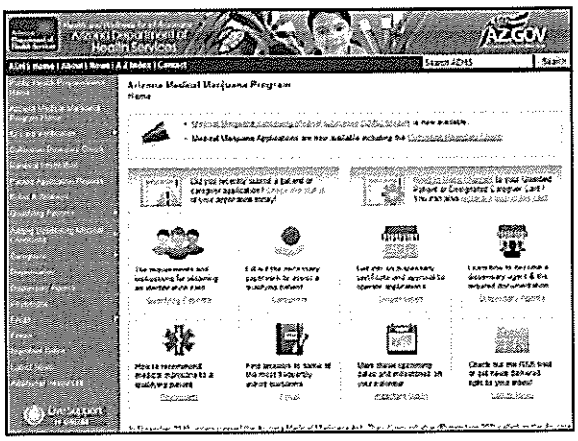
Marijuana Laws at a Glance



Map of the US showing US cannabis laws.
- State with legal medical cannabis.
- State with decriminalized cannabis possession laws
- State with both medical and decriminalization laws.
- State with legalized cannabis.

Arizona
Medical Marijuana Act

- A.R.S. §§ 36-2801 thru 36-2819
- Effective - December 15, 2010
- DHS Rules – March 28, 2011



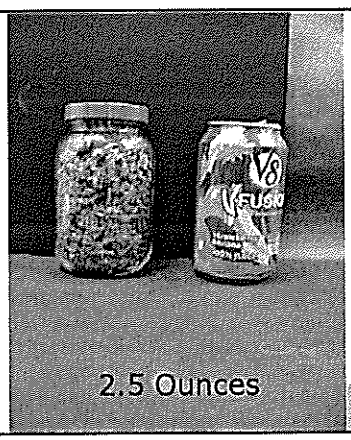
A.R.S. §36-2801(17)

- Visiting Qualifying Patient:
  - Not AZ resident or resident < 30 days
  - Diagnosed with debilitating medical condition by person licensed in state of residence or former residence

Alaska, California, Colorado, Connecticut, Hawaii, Main, Massachusetts, Michigan, Montana, Nevada, New Jersey, New Mexico, Oregon, Rhode Island, Vermont, Washington

Medical Marijuana Act

- Permits physician approved use of marijuana by registered patients with debilitating medical conditions such as: cancer, glaucoma, HIV, AIDS, hepatitis C, MS, crohn's disease, agitation of alzheimer's disease, cachexia or wasting syndrome', severe & chronic pain, severe nausea, seizures, or severe & persistent muscle spasms.
- Permits registered individuals to grow limited amounts of marijuana in an enclosed, locked facility. [12 plants]
- Permits registered patients & primary caregivers to assert medical reasons for using marijuana as a defense to <u>most</u> prosecutions involving marijuana.



What is Prohibited?
A.R.S. § 36-2802

Possessing or Engaging in the Medical Use of Marijuana:

- on a school bus
- on the grounds of any school or day care facility (Amended this session)
- in any correctional facility

Smoking Marijuana

- in any public place
- on any form of public transportation

Use by a person who has no serious or debilitating medical condition

**Operating, navigating, or being in APC of any motor vehicle, aircraft, or motorboat while under the influence of marijuana

Not Going to See Prescriptions

℞ :

Marijuana
for pain

I M Feelgood MD

Written Certifications

- Are **NOT** prescriptions
  - Cannot be – marijuana is a Schedule I drug
    - Doctors cannot prescribe *21 U.S.C. § 812b*
  - Do not have appearance or contents of prescriptions
    - No brand
    - No dosage amounts/strength
    - No specific times to take

What is a Schedule I Drug?

- Schedule I drug – "no currently acceptable medical use"

Medical Marijuana

2011 - US Drug Enforcement Agency (DEA) declares marijuana to be still "dangerous", "addictive" & "unsafe" even under medical/professional supervision.

12

Medical Marijuana

2006 - US Food & Drug Administration (FDA) issued advisory against *smoked* medical marijuana stating: "marijuana has a high potential for abuse, has no currently accepted medical use in treatment in the United States, and has a lack of accepted safety for use under medical supervision."

13

The Feds Take:

Q: What is "Medical Marijuana"?

A: Any marijuana

- Grown, Distributed, or Possessed for claimed "medical" purposes.

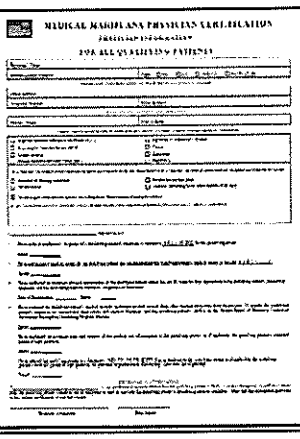
Marijuana=Marijuana under federal law

Identification Cards

DHS has established an ID card system for patients qualified to use Marijuana & for primary caregivers.

Expire one year after date of issue

Written Certificate



But How Does it Impact DUI Cases?

- Act does not reference Arizona's current DUI laws.
- DUI laws do not reference MM.

How Does it Impact DUI Cases?

- 36-2082 "does not authorize . . . and does not prevent . . . any civil, criminal or other penalties for . . . :
  - D. Operating . . . or being in APC of any **motor vehicle** . . . while **under the influence of marijuana,** 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**."

DUI Impairment Statute 28-1381(A)(1)

It is unlawful for a person to

- drive (operate) or be in **actual physical control**
- a (motor) vehicle
- within this state
- while under the influence of intoxicating liquor, any drug, a vapor releasing substance, or any combination if impaired to the slightest degree

Consistent with A.R.S. § 36-2082

A.R.S. § 28-1381(B)

- "It 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."

Quantification is Not Required For (A)(1)

- 36-2082 "does not authorize . . . and does not prevent . . . any civil, criminal or other penalties for . . . :
  - D. Operating . . . or being in APC of any motor vehicle . . . while under the influence of marijuana, 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."

Quantification Not Required for (A)(1)

- (A)(1) always requires State to prove impairment
- State does not/cannot prove under the influence SOLELY with THC presence
- ALWAYS have to prove impairment
- When DUI statutes require specific amt. of substance they say so i.e. .08, .10

Per se DUI Drugs 28-1381(A)(3)

- drive (operate) or APC
- while there is any drug defined in 13-3401 or its metabolite in the person's body.

Marijuana/Cannabis/THC defined in 13-3401

Prescription Drug Defense 28-1381(D)

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

Medical marijuana is **NOT** prescribed (written certification) so **NO defense**

"Written Certification" Not a Defense

- "Prescribed", "Prescription" not in Med. Marijuana statues
- Title 36 – no provision written certification = prescription

Written Certificate is not a Prescription

- Courts are not to supply meaning not found in the specific statute. *Kiley v. Jennings, Strouss and Salmon*, 187 Ariz. 136 (App. 1996).
- Judiciary should not add provisions to statutes. *Werner v. Prins*, 168 Ariz. 271 (App. 1990).
- Where statutes include a phrase in one section and exclude it in others, courts will not read it into excluded sections. *Redhair v. Kinerk, Beal, Schmidt, Dyer & Sethi, P.C.*, 218 Ariz. 293 (App. 2008).

§ 28-1381(D) Does Not Apply to Naturopaths or Homeopaths

- Most written certificates for MM are from Naturopaths & Homeopaths
- § 28-1381(D) only allows prescriptions from medical practitioners licensed under Title 32, Chapters 7, 11,13, or 17
- Does not include Naturopaths (Chapter 14) or Homeopaths (Chapter 29)

Quantification Not Required for (A)(3)

"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."

- Only place DUI statutes speak of "under the influence" is (A)(1).
- (A)(3) only requires presence of drug or metabolite

It's Just Marijuana Why do we Care??

- Marijuana use by drivers = significantly increased risk of being involved in an automobile crash. *Marijuana Use & Motor Vehicle Crashes*, Li, Brady, *et.al*,
- Recent users of Cannabis are 3 – 7 times more likely to be responsible for a crash. *Dose related risk of motor vehicle crashes after cannabis use.* Ramaekers, *et.al* 2003
- Combined use of ETOH & cannabis produce severe impairment of cognitive, psychomotor, & actual driving performance & sharply increase crash risk. *Id.*

Medical Dangers for Users (examples)

- Increased chance of cancer & lung disease
- New Zealand study of more than 1000 habitual THC smokers before age 18 had an 8-point drop in IQ between age 13 & 38.
  - If one has the average 100 point IQ an 8 point drop takes one from the 50th percentile to the 29th percentile
  - Occasional users had a smaller hit to IQ
  - Abstainers IQ increased 1 point
- Males who smoke may have lower testosterone levels & sperm count

Search/Blood Draws 36-2811(H)

- Mere possession of ID card is not probable cause or reasonable suspicion, nor may it be use to support the search of the person or property.
- Does not preclude probable cause if it exists on other grounds

Constitutional Challenges to (A)(3)

- Equal Protection – Defense Challenge
  - Because med marijuana is legal – those with MM card can drive those without cannot
  - Treated differently under statute.

Constitutional Challenges to (A)(3)

- Equal Protection - responses
  - Def. burden to prove all Const. Challenges
  - Standing (is the defendant harmed)?
  - MM is not a defense – treat all marijuana users equally
  - Not a suspect class
  - DOV – is it under MM?
- *State v. Phillips*, 178 Ariz. 368 (App. 1994).

Constitutional Challenges to (A)(3)

Responses

- Overbreadth/Vagueness
  - *Standing for overbreadth?*
  - *Phillips, supra.*
  - *State v. Hammonds,* 192 Ariz. 528 (App. 1998)
- No Rational Basis / metabolites
  - Case Law
  - *The Mirage of Impairing Drug Concentration Thresholds: A Rational for Tolerance*

State v. Phillips

(meth & marijuana metabolite)

- Def. claim: (A)(3) vague & overbroad; violates equal protection & due process

State v. Phillips

- Ct. ruling:
  - Statue is clear
  - Non-innocent Def. lacks standing for overbreadth
  - State has compelling interest in protecting public against potentially impaired drivers
  - Drugs are inherently dangerous & potency levels of illegal drugs is unpredictable
  - Complete ban meets rational basis test

State v. Hammonds

(carboxy THC & Soma metabolite)

- Def. Claim: (A)(3) is overbroad & violates equal protection because:
  - encompasses metabolites which may not be impairing
  - State cannot rule out drug may have been taken long before driving

State v. Hammonds

- Ct Ruling:
  - No quantification impairment level for drugs
  - Presence of inactive metabolite in urine does not rule out active in blood
  - Even if broader than needed, OK if furthers a legit government interest
  - (A)(3) furthers government interest of deterring illegal drug use

Def. Claim – (A)(3) does not apply to Carboxy THC

- (A)(3) states drug listed in 13-3401 or its metabolite
- Defs. claim because carboxy THC is a metabolite of another metabolite, the statute would have to say "metabolites"
- Carboxy is not impairing
- Rely on Commissioner Harris minute entry (*Shilgevorkyan*)

Def. Claim – (A)(3) does not apply to Carboxy THC

RESPONSES:

- *Phillips* & *Hammonds*
- *Fannin*
- Commissioner Harris reversed (1 CA-SA 12-0211) [In materials]
  - Motion to publish pending

§ 36-2811 Presumption

- Presumption that qualifying patient is engaged in the medical use of marijuana if:
  - In possession of a registry ID card
  - In possession of less than 2 ounces of marijuana
- May be rebutted with evidence conduct was not for purpose of treating or alleviating the debilitating medical condition or symptoms associated with the condition.
- Does not apply to DUI cases
- No presumption jury instruction in DUI – not a defense to 28-1381(A)(1) or 28-1381(A)(3)

Quick Tips for Marijuana Cases

Motions *in limine*

(examples in materials)

- Preclude "medical marijuana" defense & all evidence (including registry cards)
  - It is not a defense to (A)(1)
  - Prescription defense does not apply to (A)(3)
  - It is NOT relevant
- Don't let them make the argument by not saying the words

Voir Dire &/or Jury Instructions

(examples in materials)

- Med marijuana is not a defense to (A)(1) or (A)(3)
- Jurors/family use of marijuana/spice
  - Did they drive?
  - Certifications for marijuana
- No "legal limit"
- Should it be legal to drive on THC
- (A)(3) does not require impairment
- Others?

DRE Matrix

DRUG CATEGORY	CNS Depressants	CNS Stimulants	Hallucinogen	DAs	Narcotic Analgesics	Inhalants	Cannabis
HGN	Present	None	None	Present	None	⇨	None
VGN	Present	None	None	Present	None	⇨	None
Lack of Convergence	Present	None	None	Present	None	⇨	Present
Pupil Size	Normal	Dilated	Dilated	Normal	Constricted	⇨	Dilated
Reaction to Light	Slow	Slow	Normal	Normal	Little to None	⇨	Normal
Pulse	Down	Up	Up	Up	Down	⇨	Down (Up)
Blood Pressure	Down	Up	Up	Up	Down	⇨	Down (Up)
Temperature	Normal	Up	Up	Up	Down	⇨	Normal

Not Your (Grand)Parents' Marijuana

- Average THC:
  - 1983: <4%
  - 2007:7.3%
  - 2008:10.1%

- *Voir dire*
- Work with witnesses
- Use for cross

46

Challenges

- Marijuana does not impair driving – obtain & look at the studies

Marijuana Smoking Associated With Minimal Changes In Driving Performance, Study Finds
FRIDAY, 28 MAY 2010 13:00 PRESS RELEASE AUTOMOTIVE

Hartford, CT—(ENEWSPF)—May 28, 2010 Subjects exhibit virtually identical psychomotor skills on a battery of driving simulator tests prior to and shortly after smoking marijuana, according to clinical trial data published in the March issue of the *Journal of Psychoactive Drugs*.

47

Investigators reported that volunteers performed virtually the same after smoking cannabis as they did sober and/or after consuming a placebo. "No differences were found during the baseline driving segment (and the) collision avoidance scenarios," authors reported.

48

Whose Marijuana?

Subjects performed the tests sober and then again 30 minutes after smoking a single marijuana cigarette containing either 2.9 percent THC or zero THC (placebo).

- Remember Average THC:
  - 1983: <4%
  - 2007:7.3%
  - 2008:10.1%

49

Thank you

Tobin Sidles
Oro Valley Town Prosecutor
tsidles@orovalleyaz.gov

Jon Eliason
Mesa City Prosecutor
Jon.Eliason@MesaAZ.gov

Beth Barnes
Arizona TSRP
beth.barnes@phoenix.gov

1 **Arizona**
Medical Marijuana

2 **Medical Marijuana**

2011 - US Drug Enforcement Agency (DEA) declares marijuana to be still "dangerous", "addictive" & "unsafe" even under medical/professional supervision.

3 **Medical Marijuana**

2006 - US Food & Drug Administration (FDA) issued advisory against *smoked* medical marijuana stating: "marijuana has a high potential for abuse, has no currently accepted medical use in treatment in the United States, and has a lack of accepted safety for use under medical supervision."

4

5

6 **Arizona**
Medical Marijuana Act

- A.R.S. §§ 36-2801 thru 36-2819
- Effective - December 15, 2010
- DHS Rules – March 28, 2011

7 **A.R.S. §36-2801(17)**

- Visiting Qualifying Patient:
  - Not AZ resident or resident < 30 days
  - Diagnosed with debilitating medical condition by person licensed in state of residence or former residence

8 **Medical Marijuana Act**

- Permits physician approved use of marijuana by registered patients with debilitating medical conditions such as: cancer, glaucoma, HIV, AIDS, hepatitis C, MS.
-
- Permits registered individuals to grow limited amounts of marijuana in an enclosed, locked facility.
- Permits registered patients and primary caregivers to assert medical reasons for using marijuana as a defense to <u>most</u> prosecutions involving marijuana.

9

10 **What is Prohibited?**
A.R.S. § 36-2802

11 **A.R.S. § 36-2802 Amended This Session**

<u>Cannot Possess or Engage in Medical Use of Marijuana</u>:

- On grounds of any preschool, primary, or secondary school
-
- Filled in gaps – colleges & all schools

12 **Not Going to See Prescriptions**

R_x :

Marijuana
for pain

I M Feelgood MD

13 **Written Certifications**
- Are NOT prescriptions

14 **Identification Cards**

15

16 **But How Does it Impact DUI Cases?**
- Act does not reference Arizona's current DUI laws.
- DUI law do not reference MM.

17 **How Does it Impact DUI Cases?**
- 36-2082 "does not authorize . . . and does not prevent . . . any civil, criminal or other penalties for . . . :
  - D. Operating . . . or being in APC of any motor vehicle . . . while under the influence of marijuana, 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."

18

19 **A.R.S. § 28-1381(B)**
- "It 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."

20 **Quantification is Not Required**
- 36-2082 "does not authorize . . . and does not prevent . . . any civil, criminal or other penalties for . . . :
  - D. Operating . . . or being in APC of any motor vehicle . . . while under the influence of marijuana, 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."

21 **Quantification is Not Required**
- 36-2082 "does not authorize . . . and does not prevent . . . any civil, criminal or other penalties for . . . :
  - D. Operating . . . or being in APC of any motor vehicle . . . while under the influence of marijuana, 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."

22 **Quantification Not Required for (A)(1)**
- (A)(1) always requires the State to prove impairment
- State does not/cannot prove under the influence SOLELY THC presence
- ALWAYS have to prove impairment
- When DUI statutes require specific amt. of substance say so i.e. .08, .10

23 ***Per se* DUI Drugs**
28-1381(A)(3)
- drive (operate) or APC

- while there is any drug defined in 13-3401 or its metabolite in the person's body.

24 **Prescription Drug Defense**
28-1381(D)
- "a person using a drug as prescribed by a medical practitioner . . . is not guilty of violating subsection A, paragraph 3 of this section."

25 **"Written Certification" Not a Defense**
- "Prescribed", "Prescription" not in Med. Marijuana statues
- Title 36 – no provision written certification = prescription
-

26 **Quantification Not Required for (A)(3)**
"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."

- Only place DUI statutes speak of "under the influence" is (A)(1).
- (A)(3) only requires presence of drug or metabolite
-

27 **Search/Blood Draws**
36-2811(H)
- Mere possession of ID card is not probable cause or reasonable suspicion, nor may it be use to support the search of the person or property.
- Does not preclude probable cause if it exists on other grounds

28

29 **Constitutional Challenges to (A)(3)**
- Equal Protection
  - Because med marijuana is legal – those with MM card can drive those without cannot
  - Treated differently under statute.

30 **Constitutional Challenges to (A)(3)**
- Equal Protection
  - DOV – is it under MM
  - Standing (harmed)?
  - MM is not a defense – treat all the same
  - Not a suspect class
- *State v. Phillips*, 178 Ariz. 368 (App. 1994).

31 **Constitutional Challenges to (A)(3)**
- Overbreadth/Vagueness

  Phillips, supra.
  State v. Hammonds, 192 Ariz. 528 (App. 1998)
- No Rational Basis / metabolites
  Case Law
  The Mirage of Impairing Drug Concentration Thresholds: A Rational for Tolerance

32 **Def. Claim – (A)(3) does not apply to Carboxy THC**
- (A)(3) states drug listed in 13-3401 or its metabolite
- Def. claim because carboxy THC is a metabolite of another metabolite, the statute "metabolites"

- Rely on Commissioner Harris minute entry

33 **Def. Claim – (A)(3) does not apply to Carboxy THC**

RESPONSES

- *Phillips* & *Hammonds*
- *Fannin*
- Commissioner Harris reversed
  - Motion to publish pending
-
  -

34 **How it Does Not Impact DUI**

36-2812 - Affirmative defense

- Repealed as of the date DHS begins to issue registry cards
- "Sec. 5" of the initiative contains the repeal
- Only going to apply to cases before April - visiting qualifying patients
-
- If get one of these cases contact me
-
  -

35 **§ 36-2811 Presumption**

- Presumption that qualifying patient is engaged in the medical use of marijuana if:
  - In possession of a registry ID card
  - In possession of less than 2 ounces of marijuana
- May be rebutted with evidence conduct was not for purpose of treating or alleviating the debilitating medical condition or symptoms associated with the condition.
-
- Should not apply to DUI cases
- No presumption jury instruction in DUI – not a defense to 28-1381(A)(1) or 28-1381(A)(3)

36

37 **New Criminal Offenses**

- A.R.S. § 36-2816(D):
  - It is unlawful for any person, including an employee or official of ADHS or another state agency or local government, to breach confidentiality of information obtained pursuant to this Act.
  -

  Violation is a class 1 misdemeanor

38 **Confidentiality**

- Section 36-2810: the following are confidential:
  - Applications of renewals of patients & caregivers
  - Individual names and other identifying information of people issued registry ID cards

39 **Suggestions for Medical Marijuana Cases**

40 **Motions *in limine***

- Preclude "medical marijuana" defense and all evidence (including registry cards)
  - It is not a defense to the (A)(1) charge
  - Prescription defense does not apply to the (A)(3)
  - It is NOT relevant

41 ***Voir Dire* &/or Jury Instructions**

-
  - Med marijuana does not apply in this case.
  - Med marijuana not a defense to (A)(1) or (A)(3)
    - Jurors/family use of marijuana/spice
    - Certifications for marijuana
    - No "legal limit"
    - Should it be legal to drive on THC
  -
-

42

43 **Not Your (Grand)Parents' Marijuana**

- Average THC:
  - 1983: <4%
  - 2007: 7.3%
  - 2008: 10.1%
  -
  Voir dire & work
  with witnesses

44 **Challenges**

- Marijuana does not impair driving

45

46 **Whose Marijuana?**

-
-
-
-
- Remember Average THC:
  - 1983: <4%
  - 2007: 7.3%
  - 2008: 10.1%
-

47

48

Only the Westlaw citation is currently available.NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES. See Ariz. R. Supreme Court 111(c); ARCAP 28(c); Ariz. R.Crim. P. 31.24.

Court of Appeals of Arizona,
Division 1, Department D.
STATE of Arizona, ex rel. William G. MONTGOMERY, Maricopa County Attorney, Petitioner,
v.
The Honorable Myra HARRIS, Commissioner of the Superior Court of the State of Arizona, in and for the County of Maricopa, Respondent Commissioner,
Hrach Shilgevorkyan, Real Party in Interest.

No. 1 CA–SA 12–0211.
Nov. 8, 2012.

Petition for Special Action from the Superior Court in Maricopa County; Cause No. LC2011–100433–001DT; The Honorable Myra Harris, Commissioner. JURISDICTION ACCEPTED; RELIEF GRANTED.
William G. Montgomery, Maricopa County Attorney By Andrea L. Kever, Deputy County Attorney, Phoenix, Attorneys for Petitioner.

Kimerer & Derrick, P.C. By Michael Alarid, III, Phoenix, Attorneys for Real Party in Interest.

MEMORANDUM DECISION

BROWN, Presiding Judge.

*1 ¶ 1 In this special action, the State challenges the superior court's order affirming the Arcadia Justice Court's decision granting Defendant's motion to dismiss for insufficiency of the State's complaint under Arizona Rule of Criminal Procedure 16.6(b). For the following reasons, we disagree that the complaint was insufficient.

BACKGROUND

¶ 2 On December 11, 2010, Hrach Shilgevorkyan ("Defendant") was pulled over by Deputy Powe of the Maricopa County Sheriff's Office. Powe noticed Defendant had slurred speech, bloodshot eyes, and a flushed face. Defendant admitted to smoking "weed" but did not specify when that occurred. Powe then took Defendant to the command post for processing and eventually Defendant agreed to submit to a blood test, which revealed a concentration of 8ng/ml of Carboxy–Tetrahydrocannabinol ("Carboxy–THC").

¶ 3 Powe filed an Arizona Traffic Ticket and Complaint [FN1] in the justice court, charging Defendant with two counts of driving under the influence, in violation of Arizona Revised Statutes ("A.R .S.") section 28–1381 (2012). Count B alleged that Defendant had violated § 28–1381(A)(3) based on "Drugs." [FN2] Defendant moved to dismiss the complaint, asserting it would be impossible for him to be found guilty under § 28–1381(A)(3) because Hydroxy–Tetrahydrocannabinol ("Hydroxy–THC"), *the* metabolite of **marijuana**, was not found in his blood. The state opposed the motion, asserting that Carboxy–THC is also a metabolite of **marijuana** and thus falls within the scope of § 28–1381(A)(3). After an evidentiary hearing in which the State presented expert testimony as to the differences between Hydroxy–THC and Carboxy–THC, the court granted Defendant's motion to dismiss. The State appealed to the superior court.[FN3]

FN1. We take judicial notice of the complaint, which is part of the superior court's record. *See City of Phoenix v. Superior Court In & For Maricopa County*, 110 Ariz. 155, 157, 515 P.2d 1175, 1177 (1973).

FN2. Count A alleged Defendant drove while impaired to the slightest degree in violation of § 28–1381(A)(1). The State dismissed Count A prior to the appeal. Regarding Count B, § 28–1381(A)(3) provides that "[i]t is unlawful for a person to drive or be in actual physical control of a vehicle in this state under any of the following circumstances: (3) While there is any drug defined in section 13–3401 or *its metabolite* in the person's body." (Emphasis added.)

FN3. Prior to appealing to the superior court, the State filed a motion for reconsideration. For the first time, the State brought *State v.*

© 2012 Thomson Reuters. No Claim to Orig. US Gov. Works.

Phillips, 178 Ariz. 368, 873 P.2d 706 (App.1994) and *State v. Hammonds*, 192 Ariz. 528, 968 P.2d 601 (App.1998) to the justice court's attention. In light of these authorities, the judge stated, "I would have reversed myself on the merits once I heard the appellate court cases that involved carboxy. I think I made a mistake on this." However, the judge declined to reconsider, finding there was no longer jurisdiction because of the State's appeal to the superior court.

¶ 4 After submission of briefs, the superior court affirmed the dismissal of Count B, concluding the justice court did not err. The court determined the statute was ambiguous because there was "significant argument about whether the term 'metabolite' is singular or plural." The court recognized it was permitted to interpret the singular form in the plural to overcome the ambiguity, but declined to do so. Instead, the court reasoned that the State had not shown "the legislature necessarily intended to include all possible derivatives of drugs—particularly inactive end products that no longer affect an individual."

¶ 5 The court then turned more specifically to Carboxy–THC and found it was a metabolite of **marijuana**. Finding that the legislature did not intend to include Carboxy–THC within the term "its metabolite," the court relied on the State's expert, who testified Carboxy–THC was not psychoactive and could take up to four weeks to completely evacuate the body. Additionally, the court rejected the State's reliance on *State v. Hammonds* and *State v.. Phillips* and focused on the inactive nature of Carboxy–THC. The court therefore concluded that the "the legislature did not intend for the term metabolite to include more than the single active metabolite—[H]ydroxy THC." The State then filed its petition for special action to this court.

SPECIAL ACTION JURISDICTION

*2 ¶ 6 Special action review seeks extraordinary relief and is therefore highly discretionary. *State ex rel. Romley v. Fields*, 201 Ariz. 321, 323, ¶ 4, 35 P.3d 82, 84 (App.2001). Because this case involves a pure question of law, and it appears the State has no adequate remedy by appeal, in the exercise of our discretion we accept jurisdiction.[FN4] *See Chartone, Inc. v. Bernini*, 207 Ariz. 162, 165–66, ¶¶ 8–9, 83 P.3d 1103, 1106–07 (App.2004); Ariz. R.P. Spec. Act. 1(a) (2012).

FN4. Defendant argues the State has an equally plain, speedy, and adequate remedy by appeal under A.R.S. § 12–2101(A)(1). It does not appear, however, that we would have appellate jurisdiction over the superior court's order in this case. *See* A.R.S. § 22–375(B) ("[T]here shall be no appeal from the judgment of the superior court given in an action appealed from a justice of the peace or a police court."). In any event, because we have elected to accept jurisdiction under our discretionary authority, we need not address Defendant's contention.

DISCUSSION

¶ 7 Arizona Rule of Criminal Procedure 16.6(b) requires that a complaint be dismissed if, on a motion by a defendant, the court finds that the charging document is insufficient as a matter of law. Ariz. R.Crim. P. 16.6(b). Our supreme court has held that "[i]f a defendant can admit to all the allegations charged in the [complaint] and still not have committed a crime, then the [complaint] is insufficient as a matter of law." *Mejak v. Granville*, 212 Ariz. 555, 556, ¶ 4, 136 P.3d 874, 875 (2006).

¶ 8 Here, it is undisputed that Carboxy–THC is a metabolite of **marijuana** and was the only metabolite found in Defendant's blood. Defendant's sole contention is that he can admit to all the allegations in the State's complaint for Count B and still not be convicted because Carboxy–THC is not included in the phrase "its metabolite" found in A.R.S. § 28–1381(A)(3). We disagree.

¶ 9 Our legislature has determined that it is unlawful for a person to drive a vehicle while there is any drug, as defined in A.R .S. § 13–3401, or "its metabolite" in the person's body. A.R.S. § 28–1381(A)(3). This statutory prohibition "was enacted as part of Arizona's comprehensive law regulating drivers under the influence of intoxicating liquor or drugs ("DUI") and designed to protect the public by reducing the terrible toll of life and limb on our roads." *State v. Phillips*, 178 Ariz. 368, 371, 873 P.2d 706, 709 (App.1994) (internal quotations omitted). To effectuate this legislative intent, this court has broadly construed A.R.S. § 28–1381(A)(3) and upheld it against several constitutional challenges.

© 2012 Thomson Reuters. No Claim to Orig. US Gov. Works.

¶ 10 In *Phillips,* the defendant challenged the facial validity of A.R.S. § 28–692(A)(3) (1994) (now A.R.S. § 28–1381(A)(3)), arguing it was unconstitutionally vague and overbroad. 178 Ariz. at 370, 873 P.2d at 708. We disagreed and noted the legislature intended to create a "per se prohibition" and a "flat ban on driving with *any* proscribed drugs in one's system." *Id.* at 372, 873 P.2d at 710 (emphasis added). This flat ban extended to all substances, whether capable of causing impairment or not. As a result, we concluded that the statute "precisely defines, in unequivocal terms, the type of behavior prohibited[.]" *Id.* at 371, 873 P.2d at 709. The defendant also argued the statute could not withstand any level of scrutiny under the equal protection clause. *Id.* We rejected that argument as well, concluding the "legislature was reasonable in determining that there is no level of illicit drug use which can be acceptably combined with driving a vehicle." *Id.* at 372, 873 P.2d at 710. To buttress our conclusion, we emphasized the "compelling legitimate interest" the state has to protect the public from impaired driving because the "potential for lethal consequences is too great." *Id.* It was thus reasonable for the legislature to create this statutory flat ban. *Id.* Based on this interpretation of the statute, we upheld the constitutionality of § 28–692(A)(3). *Id.*

*3 ¶ 11 Similarly, in *State v. Hammonds,* 192 Ariz. 528, 530, ¶ 6, 968 P.2d 601, 603 (App.1998), we were presented with another constitutional challenge to A.R.S. § 28–692(A)(3). In that case, the defendant displayed symptoms of intoxication and was arrested for DUI. *Id.* at ¶ 2. After tests revealed low alcohol concentrations, the arresting officers suspected drug use and asked the defendant to provide a urine sample, which he did. *Id.* at ¶¶ 3–4. The sample revealed the presence of Carboxy–THC as well as metabolites of the prescription drug, Soma. *Id.* at ¶ 4. The State charged the defendant with two counts of DUI. *Id.* at ¶ 5. As relevant here, Count 2 was premised on driving with a drug or its metabolite in the body. *Id.* A jury acquitted the defendant of Count 1, driving while impaired, but convicted him on Count 2. *Id.* at ¶ 6. He appealed, arguing the statute violated the equal protection clause. *Id.*

¶ 12 Using the rational basis test, we held the statute did not violate the equal protection clause. *Id.* at 533, ¶ 17, 968 P.2d at 606. We reiterated our court's broad statement in *Phillips* that the "statute created a flat ban on driving with any proscribed substance in the body, whether capable of causing impairment or not." *Id.* at 531, ¶ 9, 968 P.2d at 604. We also found other "cogent reasons" for broadly interpreting the ban on drug use while driving. *Id.* at ¶ 10. For example, we noted, based on the expert's testimony, that metabolic rates differ from drug to drug and that the "presence of an illicit drug's metabolite [whether active or inactive] establishes the possibility of the presence of the active, impairing component of the drug." *Id.* This fact, we concluded, "justifies the legislature banning entirely the right to drive" with any metabolite present. *Id.* at ¶ 11. Moreover, in affirming Hammonds' conviction on Count 2, we found it was irrelevant to determine precisely which metabolite evidence the jury relied on to convict Hammonds because, regardless, the "conviction [under the statute was] sustainable for the **marijuana** metabolite," Carboxy–THC. *Id.* at 530 n. 2, ¶ 6, 873 P.2d at 603 n. 2.

¶ 13 Although these cases do not directly interpret the phrase "its metabolite," they stand for the proposition that § 28–1381(A)(3) must be interpreted broadly to appropriately effectuate the purpose and legislative intent underpinning the statutory language. We follow this established precedent and hold that § 28–1381(A)(3)'s provision prohibiting driving with a proscribed drug or "its metabolite" includes the metabolite Carboxy–THC.

¶ 14 Our holding is consistent with A.R.S. § 1–214(B) (2012), which allows us to interpret "[w]ords in the singular number [to] include the plural" in order to effectuate legislative intent. *Estate of McGill ex rel. McGill v. Albrecht,* 203 Ariz. 525, 529, ¶ 11, 57 P.3d 384, 388 (2002) (explaining that § 1–214(B) is "a permissive statute" and allows us to interpret the singular as the plural "when such an interpretation will enable us to carry out legislative intent."). Defendant has not cited, nor has our research revealed, any authority suggesting the legislature intended that § 28–1381(A)(3) be construed only in "the singular number." *See* A.R.S. § 1–214(B). We therefore conclude the superior court erred as a matter of law in concluding Carboxy–THC was not included in the phrase "its metabolite."

CONCLUSION

*4 ¶ 15 For the foregoing reasons, we reverse the superior court's order dismissing Count B of the State's complaint and remand to the superior court for

© 2012 Thomson Reuters. No Claim to Orig. US Gov. Works.

further proceedings.

CONCURRING: ANDREW W. GOULD and DONN KESSLER, Judges.

Ariz.App. Div. 1,2012.
State ex rel. Montgomery v. Harris
Not Reported in P.3d, 2012 WL 5458059 (Ariz.App. Div. 1)

END OF DOCUMENT

© 2012 Thomson Reuters. No Claim to Orig. US Gov. Works.

ISSN 0146-4760 (Print)
ISSN 1945-2403 (Online)

JOURNAL OF

Analytical Toxicology®

JANUARY/FEBRUARY 2013

Volume 37
Number 1
Pages 1–50

The Official Journal of the
Society of Forensic Toxicologists

Annual Meeting:
October 28–November 1, 2013
Orlando, Florida
www.soft-tox.org

OXFORD
UNIVERSITY PRESS

http://jat.oxfordjournals.org/

JAT®

Journal of Analytical Toxicology 2013;37:47–49
doi:10.1093/jat/bks089

Position on the Use of Cannabis (Marijuana) and Driving

Adopted August 14, 2012, by the National Safety Council Committee on Alcohol and Other Drugs

The National Safety Council (NSC) was asked to develop a policy on the impact of medical marijuana. As a result of this request, the NSC Committee on Alcohol and Other Drugs (CAOD) conferred to provide a position statement to the NSC and the public on cannabis (marijuana) and driving. The CAOD, as part of its mission to provide recommendations to the NSC and the public on drugs and alcohol and public safety, recommends the following policy on cannabis and driving.

It is the position of the NSC CAOD that it is unsafe to operate a vehicle or other complex equipment while under the influence of cannabis (marijuana), its primary psychoactive component, delta-9-tetrahydrocannabinol (THC) or synthetic cannabinoids with comparable cognitive and psychomotor effects, due to the increased risk of death or injury to the driver and the public.

This position statement reflects the views of the members of the NSC Committee on Alcohol and Other Drugs and may or may not be an official policy of the National Safety Council.

Commentary

Nearly two-thirds of United States trauma center admissions are due to motor vehicle accidents, with almost 60% positive for drugs or alcohol (1). In 2009, 12.0% of Americans aged 12 or older drove under the influence of alcohol at least once in the past year, and 10.5 million people reported driving under the influence of illicit drugs (2). Despite real or perceived impairment, individuals report willingness to drive if they have a good reason to do so (3–4) or they believe they have developed tolerance (5). Alcohol and cannabis are the most frequently detected drugs in drivers (6).

Cannabis (marijuana) is the most widely consumed illicit substance worldwide (7). In 2009, the United Nations Office on Drugs and Crime (UNODC) estimated that 125–203 million individuals from ages 15–64 had ingested cannabis (7). In the United States in 2009, there was an increase over the previous two years to 6.6% of those 12 years or older who had smoked cannabis in the last month (2). The 2007 National Roadside Survey reported that cannabis was the most common drug quantified in drivers' blood or oral fluid (OF), with 8.6% of nighttime drivers found to be positive for THC (6, 8). Thus, driving under the influence of cannabis is a growing public health concern.

Acute cannabis intoxication produces dose-related impairment in cognitive and psychomotor functioning, in addition to risk-taking behavior (9–14). Reaction time (RT), perception, short-term memory and attention, motor skills, tracking and skilled activities are altered (15–17). These cannabis-induced decrements can impair driving skills.

Early epidemiological studies had difficulty documenting increased odds ratios (OR; risks of an accident) for motor vehicle accidents or driving fatalities for four primary reasons: (i) the cannabis-exposed group included individuals positive for THC or its inactive metabolite 11-nor-Δ9-carboxy-THC (THCCOOH) in blood or urine; (ii) sample collection was delayed after the event and THC concentrations decreased rapidly; (iii) there were few cannabis-only cases because many drivers ingested multiple drugs; and (iv) the cannabis-driving population demographics are similar to other high-risk driving populations: young, male, high-risk taking and high incidence of drunk driving; thus, after adjusting for these confounders, many results were equivocal. In 2004, Drummer *et al.* accrued sufficient cannabis-only cases to demonstrate a statistically significant increase in adjusted driver crash responsibility OR (2.7) when any blood THC was measureable relative to drug-free drivers (18). This increased to OR 6.6, comparable to culpability associated with a 0.15 g/100 mL BAC, when blood THC was ≥5 ng/mL. Driving within one hour of smoking cannabis increased crash risk [ORs 1.84 (19) and 2.61 (20)], even after adjustment for demographic characteristics. In France, drivers in fatal crashes with detectable THC in blood had 3.17 OR for crash responsibility (1.7 adjusted for demographics, BAC, blood THC concentration and time of crash) (21). Drivers who are responsible for an accident have an increased OR with increasing blood THC. Crude (adjusted) ORs were 2.18 (1.57), 2.54 (1.54), 3.78 (2.13) and 4.72 (2.12) for <1, 1–2, 3–4 and ≥5 ng/mL, respectively. Two recent meta-analyses, each evaluating data from nine epidemiological studies (only two in common) documented significantly increased motor vehicle accident risk [OR (95% confidence index; CI): 2.66 (2.07–3.41) (22) and 1.92 (1.35–2.73) (23)], even after controlling for confounding variables.

Driving simulator studies are useful for measuring THC effects on driving because they have greater validity than laboratory studies regarding individual psychomotor or cognitive tasks, while eliminating crash risk to participants. Simulators also allow the measurement of specific performance decrements in ways unachievable in real-road driving experiments. RT, road tracking, speed, and standard deviation (SD) of speed were the most commonly measured outcomes. Four of six experiments evaluating RT showed that THC dose-dependently increased this measure (24–29). When RT was measured including a secondary task (divided attention), lower (13 and 17 mg) THC doses produced significant and dose-dependent increases (24), suggesting that divided attention is particularly sensitive to THC effects.

Only one simulator experiment included a headway maintenance task; 19 and 38 mg of smoked THC significantly and dose-dependently increased mean and SD headway relative to placebo (25). The most sensitive road tracking measure was the SD of lateral position (SDLP). In one study, both 13 and 17 mg of smoked THC increased SDLP relative to placebo in light (1–4 × /month) smokers (24), whereas two other studies showed no significant SDLP increase after 13 mg in 1–4 × /month smokers (3) or after 22.9 mg in 1–10 × /month smokers (29). In contrast, 19 and 38 mg of THC significantly increased SDLP by 4 and 7 cm, respectively (25). Percent time in lane (30) and straddled line (31) demonstrated significant THC-induced impairment 60–330 min (30) and 80 min (31) after doses ranging from 14–52 mg.

© The Author [2013]. Published by Oxford University Press. All rights reserved. For Permissions, please email: journals.permissions@oup.com

In a 22 km road-tracking closed course test, 100, 200 and 300 μg/kg (~7, ~14 and ~21 mg) of smoked THC increased SDLP relative to placebo with no significant differences in mean or SD speed (4). A second experiment conducted on the highway administered THC (100, 200 and 300 μg/kg) in an ascending-dose order for safety reasons. Beginning 45 min after the start of smoking, 16 participants performed a 64 km road-tracking segment (approximately 50 min) (32). THC increased SDLP in a dose-dependent manner, such that the lowest dose produced a slight and nonsignificant elevation, the medium dose produced a significant but modest increase and the highest dose produced a highly significant and substantial increase.

Multiple studies showed increased crash and culpability risks, even after adjusting for potential confounders such as age, sex, risky behaviors and polydrug use. Elevated blood THC concentrations and driving several hours after smoking were strongly associated with higher crash and culpability risks. Human laboratory controlled drug administration studies showed that THC-induced decrements in driving performance began within the first hour and lasted several hours after smoking, which was consistent with epidemiological data.

Laboratory-based impairment experiments identified divided attention tasks and executive functions as the most sensitive to cannabis' effects. Studies evaluating actual driving performance demonstrated dose-dependent THC impairment in road tracking, even following low to moderate THC doses that were required due to safety concerns.

Driving under the influence of cannabis is an important public safety concern. Impaired driving endangers those both inside and outside the driver's vehicle. Smoking or eating cannabis with or without alcohol before driving is a common occurrence and increases the risks of motor vehicle accidents and fatalities. The position of the NSC CAOD is that smoking or ingesting cannabis, THC or synthetic cannabinoids before or during driving increases the risk of death or injury to the driver and the public.

References

1. Walsh, J.M., Flegel, R., Cangianelli, L.A. *et al.* (2004) Epidemiology of alcohol and other drug use among motor vehicle crash victims admitted to a trauma center. *Traffic Injury Prevention*, 5, 254–260.
2. Substance Abuse and Mental Health Services Administration. (2010) Results from the 2009 National Survey on Drug Use and Health: Volume I. Summary of National Findings (Office of Applied Studies, NSDUH Series H-38A, HHS Publication No. SMA 10-4586Findings). Rockville, MD.
3. Ronen, A., Chassidim, H.S., Gershon, P. *et al.* (2010) The effect of alcohol, THC and their combination on perceived effects, willingness to drive and performance of driving and non-driving tasks. *Accident Analysis & Prevention*, 42, 1855–1865.
4. Lamers, C.T., Ramaekers, J.G. (2001) Visual search and urban driving under the influence of marijuana and alcohol. *Human Psychopharmacology*, 16, 393–401.
5. Ramaekers, J.G., Kauert, G., Theunissen, E.L. *et al.* (2009) Neurocognitive performance during acute THC intoxication in heavy and occasional cannabis users. *Journal of Psychopharmacology*, 23, 266–277.
6. Compton, R., Berning, A. (2009) Results of the 2007 National Roadside Survey of Alcohol and Drug Use by Drivers. (NHTSA, Publication No. DOT HS 811 175), Washington, DC.
7. United Nations Office on Drugs and Crime (UNODC). (2011) World Drug Report. (United Nations, Publication No. E.11.XI.10), Vienna.
8. Lacey, J.H., Kelley-Baker, T., Furr-Holdenm, D. *et al.* (2009) 2007 National Roadside Survey of Alcohol and Drug Use by Drivers: Drug Results. (National Highway Traffic Safety Administration, Office of Behavioral Safety Research, Publication No. DOT HS 811 249), Washington, DC.
9. Chait, L.D., Pierri, J. (1992) Neurobiology and Neurophysiology. Murphy, L, Bartke, A. (eds). CRC Press, Boca Raton, FL, pp. 387–423.
10. Goodwin, R.S., Gustafson, R.A., Barnes, A. *et al.* (2006) Delta(9)-tetrahydrocannabinol, 11-hydroxy-delta(9)-tetrahydrocannabinol and 11-nor-9-carboxy-delta(9)-tetrahydrocannabinol in human plasma after controlled oral administration of cannabinoids. *Therapeutic Drug Monitoring*, 28, 545–551.
11. Huestis, M.A., Smith, M.L. (2009) Pharmacokinetics and pharmacodynamics of drugs abused in driving. Verster, J.C., Pandi-Perumal, S.R., Ramaekers, J.G. *et al.* Birkhauser-Verlag, pp. 151–185.
12. Lane, S.D., Cherek, D.R., Tcheremissine, O.V. *et al.* (2005) Acute marijuana effects on human risk taking. *Neuropsychopharmacology*, 30, 800–809.
13. McDonald, J., Schleifer, L., Richards, J.B. *et al.* (2003) Effects of THC on behavioral measures of impulsivity in humans. *Neuropsychopharmacology*, 28, 1356–1365.
14. Ramaekers, J.G., Kauert, G., van Ruitenbeek, P. *et al.* (2006) High-potency marijuana impairs executive function and inhibitory motor control. *Neuropsychopharmacology*, 31, 2296–2303.
15. Ramaekers, J.G., Berghaus, G., van Laar, M. *et al.* (2004) Dose related risk of motor vehicle crashes after cannabis use. *Drug and Alcohol Dependence*, 73, 109–119.
16. Hall, W., Lemon, J., Solowij, N. (1994) The health and psychological consequences of cannabis use. Publication No. 25, Australian Government, Canberra, Australia.
17. Riedel, G., Davies, S.N. (2005) Cannabinoid function in learning, memory and plasticity, Volume 168. Pertwee, R.G. (ed). Springer-Verlag, New York, NY, pp. 446–470.
18. Drummer, O.H., Gerostamoulos, J., Batziris, H. *et al.* (2004) The involvement of drugs in drivers of motor vehicles killed in Australian road traffic crashes. *Accident Analysis and Prevention*, 36, 239–248.
19. Asbridge, M., Poulin, C., Donato, A. (2005) Motor vehicle collision risk and driving under the influence of cannabis: Evidence from adolescents in Atlantic Canada. *Accident Analysis and Prevention*, 37, 1025–1034.
20. Mann, R.E., Adlaf, E., Zhao, J. *et al.* (2007) Cannabis use and self-reported collisions in a representative sample of adult drivers. *Journal of Safety Research*, 38, 669–674.
21. Laumon, B., Gadegbeku, B., Martin, J.L. *et al.* (2005) Cannabis intoxication and fatal road crashes in France: Population based case-control study. *British Medical Journal*, 331, 1371–1374.
22. Li, M.C., Brady, J.E., DiMaggio, C.J. *et al.* (2012) Marijuana use and motor vehicle crashes. *Epidemiologic Reviews*, 34, 65–72.
23. Asbridge, M., Hayden, J.A., Cartwright, J.L.; Acute cannabis consumption and motor vehicle collision risk: Systematic review of observational studies and meta-analysis. British Medical Journal, *February 9*, 2012: 10.1136/PubMed/e536.
24. Ronen, A., Gershon, P., Drobiner, H. *et al.* (2008) Effects of THC on driving performance, physiological state and subjective feelings relative to alcohol. *Accident Analysis and Prevention*, 40, 926–934.
25. Lenne, M.G., Dietze, P.M., Triggs, T.J. *et al.* (2010) The effects of cannabis and alcohol on simulated arterial driving: Influences of driving experience and task demand. *Accident Analysis and Prevention*, 42, 859–866.
26. Liguori, A., Gatto, C.P., Robinson, J.H. (1998) Effects of marijuana on equilibrium, psychomotor performance, and simulated driving. *Behavioural Pharmacology*, 9, 599–609.

27. Rafaelsen, O.J., Beck, P., Rafaelsen, L. (1973) Simulated car driving influenced by cannabis and alcohol. *Pharmakopsychiatrie, Neuro-Psychopharmakologie*, 6, 71–83.
28. Liguori, A., Gatto, C.P., Jarrett, D.B. (2002) Separate and combined effects of marijuana and alcohol on mood, equilibrium and simulated driving. *Psychopharmacology*, 163, 399–405.
29. Anderson, B.M., Rizzo, M., Block, R.I. *et al.* (2010) Sex differences in the effects of marijuana on simulated driving performance. *Journal of Psychoactive Drugs*, 42, 19–30.
30. Menetrey, A., Augsburger, M., Favrat, B. *et al.* (2005) Assessment of driving capability through the use of clinical and psychomotor tests in relation to blood cannabinoids levels following oral administration of 20 mg dronabinol or of a cannabis decoction made with 20 or 60 mg Delta9-THC. *Journal of Analytical Toxicology*, 29, 327–338.
31. Papafotiou, K., Carter, J.D., Stough, C. (2005) The relationship between performance on the standardised field sobriety tests, driving performance and the level of Delta9-tetrahydrocannabinol (THC) in blood. *Forensic Science International*, 155, 172–178.
32. Robbe, H. (1998) Marijuana's impairing effects on driving are moderate when taken alone but severe when combined with alcohol. *Human Psychopharmacology: Clinical Experimental*, 13, S70–S78.

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 for A.R.S. § 28-1381(A)(1).

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. *State v. Bayardi* (*Fannin,* Real Party in Interest), 230 Ariz. 195, 281 P.3d 1063 (App. 2012). It is the defendant's burden to raise it and prove it. *Id.;* A.R.S. § 13-205. The defense must meet all of its requirements. *Id.* 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.

1. Quantification and metabolites are not defenses.

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 also 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 and prescriptions

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. *State v. Bayardi* (*Fannin,* Real Party in Interest), 230 Ariz. 195, 281 P.3d 1063 (App. 2012); 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.

2. A.R.S. § 28-1381(D) does not apply to Naturopaths or Homeopaths

It appears that most of the written certificates for medical marijuana are given to patients by Naturopaths or Homeopaths. Even if medical marijuana "written certificates" were somehow found to be prescriptions, A.R.S. § 28-1381(D) would still not provide a defense for any medical marijuana certificate issued by Naturopaths or Homeopaths. The defense afforded by this statute only allows prescriptions from medical practitioners licensed under title 32, Chapters 7, 11,13, or 17. This does not include Naturopaths (Chapter 14) or Homeopaths (Chapter 29). Because A.R.S. § 28-1381(D) is an affirmative defense, it is the defendant's burden to prove the "prescription" was issued by an authorized medical practitioner who is properly licensed. See, *Fannin, supra.*

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.

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.)

Did you, your family member or close friend drive after taking this drug?

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?

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?

Are any of you, any members of your family or close friends medical marijuana card holders

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

(To be used if judge refuses to preclude mention of medical marijuana during trial) The fact that a defendant may be a medical marijuana card holder is not a defense to any of the DUI charges in this case. Would any of you have a difficult time following this law?

Michael K. Jeanes, Clerk of Court
*** Filed ***
11/27/2012 8:00 AM

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

LC2012-000427-001 DT 11/13/2012

THE HON. CRANE MCCLENNEN

CLERK OF THE COURT
J. Eaton
Deputy

STATE OF ARIZONA WEBSTER CRAIG JONES

v.

MIKE A SCARPELLI (001) NEAL W BASSETT

MESA MUNICIPAL COURT - COURT ADMINISTRATOR
MESA MUNICIPAL COURT - PRESIDING JUDGE
REMAND DESK-LCA-CCC

RECORD APPEAL RULING / REMAND

Lower Court Case No. 2010–069831.

Defendant-Appellant Mike A. Scarpelli (Defendant) was convicted in Mesa Municipal Court of violating A.R.S. § 28–1381(A)(3) (DUI—drug or its metabolite in person's body). Defendant contends A.R.S. § 28–1381(A)(3) is void due to the enactment of the Arizona Medical Marijuana Act ("AMMA"). For the reasons stated below, this Court affirms the judgment and sentence imposed.

I. FACTUAL BACKGROUND

On December 7, 2010, the State filed a long-form complaint against Defendant alleging that, on July 21, 2010, Defendant violated A.R.S. § 28–1381(A)(3) and 28–1381(A)(1) (DUI—impaired to the slightest degree). On May 11, 2011, Defendant filed two motions: a Motion To Suppress Evidence Due to Lack of Reasonable Suspicion for a Traffic Stop and Probable Cause for Arrest; and a Motion To Suppress Statements Made By Defendant After State Violated Defendant's Miranda Rights and Were Involuntary. On June 27, 2011, the trial court held an evidentiary hearing on the motions. Based on the evidence presented, the trial court denied the motions. The trial court held a jury trial on July 26 and August 2, 2011. At the beginning of the trial, and upon the State's motion, the A.R.S. § 28–1381(A)(1) charge was dismissed. Based on the evidence presented, the jury found Defendant guilty of violating A.R.S. § 28–1381(A)(3). On August 15, 2011, Defendant filed a timely notice of appeal. This Court has jurisdiction pursuant to ARIZONA CONSTITUTION Art. 6, § 16, and A.R.S. § 12–124(A).

II. ISSUES:

A. Did Defendant Properly Raise His Issue Below.

Defendant contends A.R.S. § 28–1381(A)(3) is void due to the enactment of the AMMA. Nothing in the record transmitted to this Court shows Defendant raised this issue below. Nevertheless, an appellate court has discretionary authority to consider an argument for the first time on appeal when a defendant asserts that a statute is void. *State v. Ochoa*, 189 Ariz. 454, 459, 943 P.2d 814, 819 (Ct. App. 1997); *Fuenning v. Superior Ct. in and for the County of Maricopa,* 139 Ariz. 590, 594, 680 P.2d 121, 125 (1983); *State v. Junkin,* 123 Ariz. 288, 290, 599 P.2d 244, 246 (Ariz. App. 1979), *cert. denied,* 444 U.S. 983, 100 S.Ct. 489, 62 L.Ed.2d 411 (1979). An appellate court may appropriately exercise that discretion where, as in the case sub justice, the issue involves public policy or is of broad general or statewide concern. *Fuenning, supra,* at 594, 680 P.2d at 125. This Court concludes it is appropriate to consider the pertinent issues in this case.

B. Does the Arizona Medical Marijuana Act Apply in This Case.

Defendant contends A.R.S. § 36–2802(D)[1] trumps 28–1381(A)(3), thus permitting "people who have marijuana metabolites in their system (but who are not impaired) to drive."[2] A.R.S. § 36–2802(D) is part of the AMMA, which consists of §§ 36–2801 to 36–2819. AMMA was added by 2010 Prop. 203 (an initiative measure), approved by the voters at the November 2, 2010, general election, and became effective on December 14, 2010. Notably, Defendant committed the charged offense on July 21, 2010, nearly 5 months before the AMMA was effective. A.R.S. § 1–244 provides that "No statute is retroactive unless expressly declared therein." This Court finds no provision for retroactivity in the AMMA. Accordingly, AMMA does not apply to the case *sub justice*.

C. Does A.R.S. § 36–2802(D) Permit Drivers To Drive With Marijuana Metabolites in Their System Provided They Are Not Under the Influence of Marijuana.

After a careful review of the law, this Court finds nothing to support a conclusion that A.R.S. § 36–2802(D), or any subsection of the AMMA, trumps 28–1381(A)(3), thereby permitting a driver to operate a vehicle with marijuana metabolites in his system as long as he was not doing so while under the influence of marijuana. A.R.S. § 36–2802(D) simply states that a driver who is a registered, qualifying patient (for whom a physician recommended medicinal mari-

---

[1] A.R.S. § 36–2802(D) provides as follows:

> This chapter does not authorize any person to engage in, and does not prevent the imposition of any civil, criminal or other penalties for engaging in, the following conduct:
>
> D. Operating, navigating or being in actual physical control of any motor vehicle, aircraft or motorboat while under the influence of marijuana, 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.

[2] Appellant's Memorandum, p. 6.

juana), "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." Clearly, this precludes an erroneous presumption about the presence of marijuana metabolites and a driver being "under the influence." While A.R.S. § 36–2802(D) might be relevant in a prosecution for a violation of A.R.S. § 28–1381(A)(1), it has no application to 28–1381(A)(3). Consequently, A.R.S. § 28–1381(A)(3) is neither unconstitutional nor void.

III. CONCLUSION

Based on the foregoing, this Court concludes A.R.S. § 36–2802(D) in inapplicable in this case, and A.R.S. § 28–1381(A)(3) is neither unconstitutional nor void.

IT IS THEREFORE ORDERED affirming the judgment and sentence of the Mesa Municipal Court.

IT IS FURTHER ORDERED remanding this matter to the Mesa Municipal Court for all further appropriate proceedings.

IT IS FURTHER ORDERED signing this minute entry as a formal Order of the Court.

/s/ Crane McClennen
THE HON. CRANE MCCLENNEN
JUDGE OF THE SUPERIOR COURT

112020120851

_____
Assistant City Prosecutor
PO Box 4500
Phoenix AZ 85030-4500
(602) 262-6461/FAX (602) 262-7052
Attorney for Plaintiff

PHOENIX CITY PROSECUTOR
P.O. Box 4500
Phoenix, Arizona 85030-4500
(602) 262-6461

IN THE MUNICIPAL COURT OF THE CITY OF PHOENIX

COUNTY OF MARICOPA, STATE OF ARIZONA

STATE OF ARIZONA, Plaintiff, vs. _____, Defendant.	No. _____ STATE'S MOTION *IN LIMINE* CCJT: _____, 2013 Courtroom ___ at _____

COMES NOW the State of Arizona, by and through its attorney and moves *in limine* pursuant to Rules 402 and 403 of the *Arizona Rules of Evidence*, to preclude and prohibit the Defendant from arguing, mentioning or insinuating at trial that he has a Medical Marijuana identification card, written certificate or that this is a "prescription" for marijuana. Medical marijuana should not be mentioned at all in this matter. Medical marijuana provides no defense in this case and is not relevant at trial

A. **Preclude All Testimony Related to "Medical" Marijuana.**

The medical marijuana provisions are found in A.R.S. §§ 36-2801 thru 36-2819. Arizona's DUI statutes are not mentioned in any of these provisions. This is significant because it is presumed that if the medical marijuana act meant to address or make an exception to any of our DUI statutes, the legislature would have done so through a

statute enactment. It did not do so. Where statutes include a phrase in one section and exclude it in others, courts will not read it into the excluded sections. *Samaritan Health Services v. AHCCS,* 178 Ariz. 534, 875 P.2d 193 (App. 1994). 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).

It is not a defense to 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. A "written certificate is not a prescription. The Defendant cannot have a valid "prescription" for marijuana as this is a controlled substance and Schedule I classified drug. A.R.S. §28-1381(A)(3) 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.

Defendant cannot argue that her written certification for medical marijuana is an affirmative defense to a §28-1381(A)(3) charge under A.R.S. § 28-1381(D). Under this statute, it is the Defendant's burden to raise an affirmative defense and prove it. The Defendant must meet all of the statutory requirements, and 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 . . . is not guilty of violating subsection A, paragraph 3 of this section." (Emphasis added.). This statute requires the Defendant to prove he has a valid prescription and that the

PHOENIX CITY PROSECUTOR
P.O. Box 4500
Phoenix, Arizona 85030-4500
(602) 262-6461

PHOENIX CITY PROSECUTOR
P.O. Box 4500
Phoenix, Arizona 85030-4500
(602) 262-6461

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" appear 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). "Written Certification" as defined in A.R.S. §36-2801(18) means:

> "means a document dated and signed by a physician, stating that in the physician's professional opinion the patient is likely to receive therapeutic or palliative benefit from the medical use of marijuana to treat or alleviate the patient's debilitating medical condition or symptoms associated with the debilitating medical condition... the physician must: (a) specify the qualifying patient's debilitating medical condition in the written certification; (b) sign and date the written certification only in the course of a physician-patient relationship after the physician has completed a full assessment of the qualifying patient's medical history."

Similarly, the Title 36 medical marijuana provisions do not contain any provisions 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, it is presumed that if these provisions were making such an exception, the legislature would have said so. 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 find that a written certification provides a defense under A.R.S. § 28-1381(D), this Court would have to read in meaning that is not there. This is contrary to the basic tenets of statutory interpretation.

[ONLY USE THIS PARAGRAPH IF IT APPLIES TO YOUR CASE.] As stated above, A.R.S. § 28-1381(D) is an affirmative defense to driving with an illegal drug or its metabolite in one's system, and it is the Defendant's burden to raise it and prove it. The State was provided what purports to be defendant's out of state "Physician

Certification" One notes, it does not even resemble a prescription in that it does not have dosage amounts, specific times to take it, etc. This is also an indication that it is not one and does not qualify as such under A.R.S. § 28-1381(D). Even if the "Physician Certification" had dosage amounts, brand of marijuana, specific times to take etc. it would not have been be a prescription. It cannot be. Marijuana is a Schedule I drug which a doctor cannot prescribe. Simply put, there is no defense under 28-1381(D), and this evidence and testimony should be precluded.

Medical marijuana is not a defense to A.R.S. § 28-1381(A)(3). It is, accordingly, simply irrelevant to this case. Any attempt by either the Defendant or his counsel to argue or make statements about medical marijuana or a medical marijuana card are not relevant and would only mislead, confuse the jury and be a waste of time in direct violation of Rules 402 and 403 of the *Arizona Rules of Evidence*. For the forgoing reasons, the State asks that a Motion *in Limine* be granted to ensure a fair trial.

B. **Preclude Testimony Regarding Specific Amounts of Marijuana Present and Impairment.**

The State also requests this Court to exclude from trial any and all testimony by the defense regarding specific amounts of the marijuana that were present in the Defendant's sample and testimony regarding impairment. Specific amounts (i.e. nanograms) of any drug or drug metabolite that may be found in a urine or blood sample are not an element of, nor relevant to, proving the charge of §28-1381(A)(3). This testimony should be excluded as the danger of unfair prejudice substantially outweighs its probative value. The only purpose of allowing evidence showing the amount of a drug or drug metabolite is to mislead or confuse the jury as to the statutory elements they must decide. There is no "quantity" of a drug or drug metabolite required to reach a verdict on this specific charge; just whether marijuana or its metabolite were present or not in the system of the Defendant

PHOENIX CITY PROSECUTOR
P.O. Box 4500
Phoenix, Arizona 85030-4500
(602) 262-6461

at the time of driving.

As such, the presentation of any evidence regarding "how much marijuana or its metabolite were present in the Defendant's sample" is not relevant to proving the statutory elements of A.R.S. §28-1381(A)(3) and should be precluded. The State respectfully requests that any and all information or testimony regarding the specific amount of marijuana or its metabolite in the Defendant's sample be precluded in this matter pursuant to Rules 402 and 403 of the Arizona Rules of Evidence.

Lastly, the State moves *in limine* to preclude the Defendant and his counsel from arguing impairment in this case. The only charge against the Defendant is for driving with an illegal drug or its metabolite in his system in violation of A.R.S. § 28-1381(A)(3). There is no charge for driving while impaired. As such, any attempt by either the Defendant or his counsel to argue facts specific to impairment would not be relevant and would only mislead, confuse the jury and be a waste of time in direct violation of Rules 402 and 403 of the Arizona Rules of Evidence. As such, any comment on or attempt to argue the Defendant was not impaired while driving should be precluded to ensure both parties receive the fair trial to which they are entitled.

RESPECTFULLY SUBMITTED this _____ day of _____, 2013.

PHOENIX CITY PROSECUTOR

By:_____

Assistant City Prosecutor

Original filed with the Court.

Copy of the foregoing mailed/delivered
this ____ day of _____, 2013, to:

Attorney for Defendant

PHOENIX CITY PROSECUTOR
P.O. Box 4500
Phoenix, Arizona 85030-4500
(602) 262-6461

PHOENIX CITY PROSECUTOR
P.O. Box 4500
Phoenix, Arizona 85030-4500
(602) 262-6461

_____,
Assistant City Prosecutor
PO Box 4500
Phoenix AZ 85030-4500
(602) 262-6461/FAX (602) 262-7052
Attorney for Plaintiff

PHOENIX CITY PROSECUTOR
P.O. Box 4500
Phoenix, Arizona 85030-4500
(602) 262-6461

IN THE MUNICIPAL COURT OF THE CITY OF PHOENIX

COUNTY OF MARICOPA, STATE OF ARIZONA

STATE OF ARIZONA, Plaintiff, vs. _____, Defendant.	No. _____ STATE'S MOTION *IN LIMINE* CCJT: _____, 2013 Courtroom _____ at _____ AM

COMES NOW the State of Arizona, by and through its attorney and moves *in limine* pursuant to Rules 402 and 403 of the *Arizona Rules of Evidence*, to preclude and prohibit the Defendant from arguing, mentioning or insinuating at trial that he has a Medical Marijuana identification card, written certificate or that this is a "prescription" for marijuana. Medical marijuana should not be mentioned at all in this matter. Medical marijuana provides no defense in this matter and is, therefore, not relevant at trial

The medical marijuana provisions are found in A.R.S. §§ 36-2801 thru 36-2819. Arizona's DUI statutes are not mentioned in any of these provisions. This is significant because it is presumed that if the medical marijuana act meant to address or make an exception to any of our DUI statutes, it would have done so. . It did not do so. Likewise,

the DUI statutes do not refer to the medical marijuana provisions. Where statutes include a phrase in one section and exclude it in others, courts will not read it into the excluded sections. *Samaritan Health Services v. AHCCS,* 178 Ariz. 534, 875 P.2d 193 (App. 1994). 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).

A. Medical Marijuana is not a Defense to A.R.S. § 28-1381(A)(3).

It is not a defense to 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. A "written certificate is not a prescription. The Defendant cannot have a valid "prescription" for marijuana as this is a controlled substance and Schedule I classified drug. A.R.S. §28-1381(A)(3) 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.

Defendant cannot argue that her written certification for medical marijuana is an affirmative defense to a §28-1381(A)(3) charge under A.R.S. § 28-1381(D). Under this statute, it is the Defendant's burden to raise an affirmative defense and prove it. A.R.S.§ 13-205. The Defendant must meet all of the statutory requirements, and 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

PHOENIX CITY PROSECUTOR
P.O. Box 4500
Phoenix, Arizona 85030-4500
(602) 262-6461

medical practitioner . . . is not guilty of violating subsection A, paragraph 3 of this section." (Emphasis added.). This statute requires the Defendant to prove she has a valid prescription 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" appear 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).

Similarly, the Title 36 medical marijuana provisions do not contain any provisions 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, it is presumed that if these provisions were making such an exception, the provision would have said so. 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 find that a written certification provides a defense under A.R.S. § 28-1381(D), this Court would have to read in meaning that is not there. This is contrary to the basic tenets of statutory interpretation.

[Only use this paragraph if it applies to your case.] As stated above, A.R.S. § 28-1381(D) is an affirmative defense to driving with an illegal drug or its metabolite in one's system, and it is the Defendant's burden to raise it and prove it. The State was provided what purports to be defendant's out of state "Physician Certification" One notes, it does not even resemble a prescription in that it does not have dosage amounts, specific times to take it, etc. This is also an indication that it is not a prescription and

PHOENIX CITY PROSECUTOR
P.O. Box 4500
Phoenix, Arizona 85030-4500
(602) 262-6461

does not qualify as such under A.R.S. § 28-1381(D). Even if the "Physician Certification" had dosage amounts, brand of marijuana, specific times to take etc. it would not have been be a prescription. It cannot be. Marijuana is a Schedule I drug which a licensed physician cannot prescribe. Simply put, there is no defense under 28-1381(D), and this evidence and testimony should be precluded.

B. **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.

The fact that the defendant may have a "written certification" for the marijuana found in his 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."

PHOENIX CITY PROSECUTOR
P.O. Box 4500
Phoenix, Arizona 85030-4500
(602) 262-6461

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.

CONCLUSION

Any attempt by either the Defendant or his counsel to argue or make statements about medical marijuana or a medical marijuana card are not relevant and would only mislead, confuse the jury and be a waste of time in direct violation of Rules 402 and 403 of the *Arizona Rules of Evidence*. For the forgoing reasons, the State asks that a Motion *in limine* be granted to ensure a fair trial.

RESPECTFULLY SUBMITTED this _____ day of _____, 2013.

PHOENIX CITY PROSECUTOR

By:_____

Assistant City Prosecutor

Original filed with the Court.

Copy of the foregoing mailed/delivered
this ____ day of _____, 2013, to:

Attorney for Defendant

LBB/887626

PHOENIX CITY PROSECUTOR
P.O. Box 4500
Phoenix, Arizona 85030-4500
(602) 262-6461

PHOENIX CITY PROSECUTOR
P.O. Box 4500
Phoenix, Arizona 85030-4500
(602) 262-6461

MEDICAL MARIJUANA PHYSICIAN CERTIFICATION

PHYSICIAN INFORMATION

FOR ALL QUALIFYING PATIENTS

Physician's Name:	
Arizona License Number:	Type: ☐ MD ☐ DO ☐ NMD/ND ☐ MD(H)/DO(H)

PHYSICIAN INFORMATION ON FILE WITH LICENSING BOARD

Office Address:	
Telephone Number:	Email Address:

QUALIFYING PATIENT INFORMATION

Patient's Name:	Date of Birth:

CHECK ONE OR MORE BOXES TO INDICATE QUALIFYING PATIENT'S DEBILITATING MEDICAL CONDITION

- ☐ Acquired immune deficiency syndrome (AIDS)
- ☐ Amyotrophic lateral sclerosis (ALS)
- ☐ Crohn's disease
- ☐ Human immunodeficiency virus (HIV)
- ☐ Agitation of Alzheimer's disease
- ☐ Cancer
- ☐ Glaucoma
- ☐ Hepatitis C

IF A CHRONIC OR DEBILITATING DISEASE OR MEDICAL CONDITION OR THE TREATMENT FOR A CHRONIC OR DEBILITATING DISEASE OR MEDICAL CONDITION CAUSES:

- ☐ Cachexia or wasting syndrome
- ☐ Severe nausea
- ☐ Severe and chronic pain
- ☐ Seizures, including those characteristic of epilepsy
- ☐ Severe or persistent muscle spasms, including those characteristic of multiple sclerosis

IF ANY CONDITION ABOVE IS CHECKED, INDICATE THE UNDERLYING CHRONIC OR DEBILITATING DISEASE OR MEDICAL CONDITION:

I, _____, THE PHYSICIAN:

- Have made or confirmed a diagnosis of a debilitating medical condition, as defined in A.R.S. § 36-2801, for the qualifying patient.

  Initial: _____

- Have established a medical record for the qualifying patient and am maintaining the qualifying patient's medical record as required in A.R.S. § 12-2297.

  Initial: _____

- Have conducted an in-person physical examination of the qualifying patient within the last 90 calendar days appropriate to the qualifying patient's presenting symptoms and the debilitating medical condition I diagnosed or confirmed.

  Date of Examination: _____ Initial: _____

- Have reviewed the qualifying patient's medical records, including medical records from other treating physicians from the previous 12 months, the qualifying patient's responses to conventional medications and medical therapies, and the qualifying patient's profile on the Arizona Board of Pharmacy Controlled Substances Prescription Monitoring Program database.

  Initial: _____

- Have explained the potential risks and benefits of the medical use of marijuana to the qualifying patient or, if applicable, the qualifying patient's custodial parent or legal guardian.

  Initial: _____

- Have referred the qualifying patient to a dispensary. YES ☐ NO ☐ If YES, I have disclosed to the qualifying patient or, if applicable, the qualifying patient's custodial parent or legal guardian any personal or professional relationship I have with the dispensary.

  Initial: _____

PHYSICIAN'S ATTESTATION

I, _____, in my professional opinion believe that the qualifying patient is likely to receive therapeutic or palliative benefit from the qualifying patient's medical use of marijuana to treat or alleviate the qualifying patient's debilitating medical condition. I attest that the information provided in this written certification is true and correct.

_____ _____

Physician's Signature Date Signed