

# COMMENTS

## MEDICAL MARIJUANA AND DRIVING UNDER THE INFLUENCE IN PENNSYLVANIA\*

### I. INTRODUCTION

As of October 2019, all but four states have legalized marijuana in some form.<sup>1</sup> Of these, thirty-three states, the District of Columbia, Guam, Puerto Rico, and the U.S. Virgin Islands have a comprehensive medical marijuana program.<sup>2</sup> The legalization of marijuana is a complex issue with a broad range of challenges, impacts, and legal uncertainties.<sup>3</sup> The federal government has not endorsed the legalization of marijuana for any purpose.<sup>4</sup> While the federal government has taken a fairly hands-off approach to criminal enforcement in light of the nationwide trend,<sup>5</sup> under the Federal Controlled Substances Act (CSA), marijuana remains classified as a Schedule I controlled substance—a substance that has no medical purpose and is considered the most dangerous and addictive.<sup>6</sup> Other Schedule I drugs include heroin, ecstasy, and LSD.<sup>7</sup>

Pennsylvania legalized marijuana for medical use in 2016.<sup>8</sup> However, the state legislature chose not to amend its classification of marijuana within the Controlled

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1. Idaho, Kansas, Nebraska, and South Dakota are the only four states with no public marijuana access program. *State Medical Marijuana Laws*, NAT'L CONF. ST. LEGISLATURES (Oct 16, 2019), <http://www.ncsl.org/research/health/state-medical-marijuana-laws.aspx> [<https://perma.cc/VQ6T-LDLM>].

2. *Id.* This count includes thirteen states that have instituted CBD or low-THC programs. *Id.* Note that these programs do not qualify as “comprehensive medical marijuana programs” according to the National Conference of State Legislatures. *Id.*

3. See generally COLO. DEP'T OF PUB. SAFETY, IMPACTS OF MARIJUANA LEGALIZATION IN COLORADO: A REPORT PURSUANT TO SENATE BILL 13-283 (2018), [http://cdpsdocs.state.co.us/ors/docs/reports/2018-SB13-283\\_Rpt.pdf](http://cdpsdocs.state.co.us/ors/docs/reports/2018-SB13-283_Rpt.pdf) [<https://perma.cc/7NZA-JGQ5>] (outlining the myriad effects of marijuana legalization including topics such as traffic safety, illegal cultivation, crime around marijuana establishments, hospitalization, treatment, suicide rates, youth usage and schooling, licensing, and revenue).

4. See *id.* at 11.

5. See *id.* at 13–15 (discussing the series of memos issued by the federal government over the past ten years).

6. See 21 U.S.C. § 812(b)(1), (c)(10) (2018).

7. *Id.*

8. S. 3, 199th Gen. Assemb., Reg. Sess. (Pa. 2016); see also *Pennsylvania Medical Marijuana Program*, PA. DEP'T HEALTH, <http://www.health.pa.gov/topics/programs/Medical%20Marijuana/Pages/Medical%20Marijuana.aspx> [<https://perma.cc/VQ5J-LMBG>] (last visited Nov. 1, 2019).

Substance, Drug, Device, and Cosmetic Act (CSDDCA),<sup>9</sup> which mimics the CSA. Marijuana remains a Schedule I controlled substance in Pennsylvania.<sup>10</sup> This designation creates an obvious conflict: marijuana is legal for medical use but remains classified as a substance with “no currently accepted medical use . . . and a lack of accepted safety for use under medical supervision.”<sup>11</sup>

This disparity in definition is particularly meaningful when considering Pennsylvania’s driving under the influence (DUI) laws. The state statute governing drugged driving makes it illegal to drive with “any amount of a . . . Schedule I controlled substance” in a person’s body.<sup>12</sup> This is a *per se*<sup>13</sup> standard that requires no proof of impairment by the prosecution.<sup>14</sup> Marijuana remains detectable in a person’s blood long after the psychoactive and impairing effects of the drug have worn off.<sup>15</sup> Moreover, detectable levels of Delta-9-tetrahydrocannabinol (THC) have been found in medical marijuana users’ blood up to seven days after their last use.<sup>16</sup> This suggests that under current Pennsylvania law, a licensed medical marijuana user would always be at risk of being considered under the influence for purposes of the DUI statute, regardless of the presence of any impairing effects.

On December 20, 2018, the governor of Pennsylvania, Tom Wolf, held a press conference in which he expressed his willingness to consider legalizing recreational marijuana.<sup>17</sup> Governor Wolf went on to say that he was looking at the ways other states were implementing marijuana-related legislation and the lessons learned nationwide.<sup>18</sup>

This Comment explores how Pennsylvania’s legalization of medical marijuana conflicts with Pennsylvania’s drugged driving laws. Much like Governor Wolf’s approach, it not only examines the issue through Pennsylvania’s laws and court cases but will also incorporate the efforts of other states to tackle the same issue.

Section II of this Comment provides an overview of the history of DUI enforcement; Pennsylvania’s DUI statute; marijuana and its effects, particularly those on driving ability; Pennsylvania’s medical marijuana statute; and Pennsylvania case law

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9. 35 PA. STAT. AND CONS. STAT. ANN. §§ 780-101, 780-104 (West 2019).

10. *Id.* The most recent state legislation to amend the statute in any substantive way, Pennsylvania House of Representatives Bill 353, which took effect on October 24, 2019, did not amend the classification of marijuana. See H.R. 353, 202nd Gen. Assemb., Reg. Sess. (Pa. 2018).

11. Tit. 35, § 780-104.

12. 75 PA. STAT. AND CONS. STAT. ANN. § 3802(d)(1) (West 2019).

13. “Per se” by definition means “by himself or itself.” *Per se*, BLACK’S LAW DICTIONARY (10th ed. 2014).

14. See tit. 75, § 3802(d)(1).

15. See Doug Wyllie, *Testing Drivers for Marijuana Impairment*, POLICE: L. ENFORCEMENT MAG. (Feb. 26, 2019), <http://www.policemag.com/505866/testing-drivers-for-marijuana-impairment> [https://perma.cc/VQ5J-LMBG]. See also *infra* Part II.C for an in-depth analysis of marijuana, its effects, and its detectability in the human body.

16. COLO. DEP’T OF PUB. SAFETY, *supra* note 3, at 34 (“[C]hronic cannabis users had measurable concentrations of . . . THC during a seven-day abstinence period.”).

17. Charles Thompson, *Is Pa. Ready for Recreational Pot? Gov. Wolf Is Looking for a ‘Conversation’ About Marijuana Laws*, PENNLIVE (Dec. 20, 2018), <http://www.pennlive.com/news/2018/12/about-gov-tom-wolfs-marijuana-comments-hes-open-to-a-look-but-likely-not-ready-to-lead.html> [https://perma.cc/H6PS-8S9C].

18. *Id.*

regarding marijuana-related DUIs. Section III then suggests how to balance Pennsylvania's dilemma between maintaining public safety through tough DUI laws and ensuring legal protections to medical marijuana patients. As part of this proposed solution, Part III.C analyzes Colorado, Arizona, and New York's medical marijuana laws and how those laws interact with each state's DUI laws.

## II. OVERVIEW

To understand the effect of legalizing marijuana on Pennsylvania's DUI laws, there are several areas of law, statutes, and case law that must first be explored. First, Part II.A reviews the development and purpose of DUI laws in the United States and the legal challenges to enforcement methods. Next, Part II.B analyzes Pennsylvania's DUI statute in detail to establish the basics of how DUIs are prosecuted in the Commonwealth. Part II.C then shifts to the topic of marijuana, the history of its use and criminalization in the United States, and an examination of its effects on the human body and mind. This is followed by Part II.D, which reviews Pennsylvania's new medical marijuana statute and the protections it offers users. Finally, Part II.E reviews current DUI case law from the Pennsylvania Supreme Court and Superior Court, focusing primarily on drug-related DUIs.

### A. A Brief History of DUI Enforcement

DUI enforcement goes back as far as 1906 when the first statutes outlawed impaired or intoxicated driving.<sup>19</sup> Early DUI laws were subjective in nature and only required outward exhibition of symptoms of impairment for conviction.<sup>20</sup> Identification of these symptoms is still relevant in modern DUI enforcement. When the National Highway Traffic Safety Administration (NHTSA) developed its system of Standardized Field Sobriety Testing (SFST), its methodology involved identification of such symptoms to identify potentially impaired drivers.<sup>21</sup> SFST taught officers to "[k]now and recognize typical vehicle maneuvers and human indicators symptomatic of [driving while impaired,] . . . typical sensory and other clues of alcohol and/or other drug impairment[, and] . . . typical behavioral clues of alcohol and/or other drug impairment."<sup>22</sup> Sensory

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19. *Birchfield v. North Dakota*, 136 S. Ct. 2160, 2167 (2016).

20. *Id.*

21. NHTSA, DWI DETECTION AND STANDARDIZED FIELD SOBRIETY TESTING 2 (2006) [hereinafter NHTSA, DWI DETECTION], <http://oag.dc.gov/sites/default/files/2018-03/2006-NHTSA-SFST-Manual.pdf> [<https://perma.cc/8C2C-45UA>].

22. *Id.* at I–2. NHTSA created a three-tiered system of training and certification for police officers in the detection of impaired drivers. NHTSA, DWI DETECTION AND STANDARDIZED FIELD SOBRIETY TESTING REFRESHER COURSE INSTRUCTOR GUIDE 16 (2018), [http://www.nhtsa.gov/sites/nhtsa.dot.gov/files/documents/sfst\\_refresher\\_full\\_instructor\\_manual\\_2018.pdf](http://www.nhtsa.gov/sites/nhtsa.dot.gov/files/documents/sfst_refresher_full_instructor_manual_2018.pdf) [<https://perma.cc/9BDA-M5JE>]. SFST is the first tier. *Id.* The second tier is Advanced Roadside Impaired Driver Enforcement (ARIDE), which teaches officers two additional field tests and certifies officers in the detection of drug impairment. *Id.* at 15. ARIDE-certified officers are not certified to identify the specific drug or combination of drugs causing a driver's impairment, however. *Id.* at 15–16. Such certification is only possessed by officers certified under the third tier as Drug Recognition Experts. *Id.* at 16. Drug recognition experts are just that: experts. *Id.* at 16–17. They possess the certification to testify as an expert in court regarding the specific drug or combination of drugs causing a driver's impairment based on an extensive evaluation and observation of specific symptomatic responses, including such factors as heart rate, pulse, pupil response, and body temperature. *Id.* at 16.

and behavior cues remain the primary source of probable cause for police officers when evaluating drivers for DUI.<sup>23</sup> However, modern advances in technology have led courts to rely on chemical testing to prove intoxication beyond a reasonable doubt.<sup>24</sup>

Chemical testing is generally conducted by analyzing the suspect's breath through a testing instrument, which uses infrared technology to provide almost instantaneous results regarding the suspect's blood-alcohol content (BAC).<sup>25</sup> The other accepted method of BAC identification is having a licensed medical professional draw the suspect's blood—usually at a hospital or other medical facility—followed by analysis of the blood at a court-approved laboratory.<sup>26</sup> While breath tests are the preferred, and “most common and economical” method of capturing BAC,<sup>27</sup> only a blood test can reveal the presence of controlled substances in a suspect's system.<sup>28</sup>

The mission of DUI enforcement has always been public safety. When NHTSA was founded in 1970, its mission was to “[s]ave lives, prevent injuries, and reduce economic costs due to road traffic crashes, through education, research, safety standards, and enforcement activity.”<sup>29</sup> Drunk driving was then—and remains today—one of the primary focuses of NHTSA.<sup>30</sup> Campaigns such as “Drive Sober or Get Pulled Over” and “Buzzed Driving is Drunk Driving” are well-known nationwide—prominently displayed on billboards and featured in television ads, especially during holidays and major events.<sup>31</sup>

The reason behind such intensive efforts to combat drunk driving is simple: drunk driving kills. The most recent study by NHTSA revealed that in 2018 there were 10,511

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23. See NHTSA, DWI DETECTION, *supra* note 21, at IV–1. Sensory and behavior cues include the following: lack of balance when standing or walking; difficulty handling identification and registration cards; swaying; leaning on a fixed object for balance; inability to follow simple directions; belching or vomiting; slurred, confused, or unintelligible speech; and glassy and/or bloodshot eyes. See *id.* at VI–3 to –4. These behaviors can be observed through basic interactions with the driver, as well as during field sobriety tests, which are designed specifically to further expose impairment in such areas as balance, coordination, comprehension, and involuntary responses such as nystagmus or eyelid tremors. See *id.*

24. *Birchfield*, 136 S. Ct. at 2167–70, 2184 (holding that the science of breathalyzer testing was sufficiently advanced such that an officer conducting a warrantless test did not violate the Fourth Amendment).

25. *Id.* at 2167.

26. See *id.*

27. *Id.*

28. *Id.* at 2184 (“One advantage of blood tests is their ability to detect not just alcohol but also other substances that can impair a driver’s ability to operate a car safely. A breath test cannot do this . . .” (citations omitted)).

29. NHTSA’s Core Values, NAT’L HIGHWAY TRAFFIC SAFETY ADMIN., <http://www.nhtsa.gov/about-nhtsa/nhtsas-core-values> [<https://perma.cc/F2ZH-2E6H>] (last visited Nov. 1, 2019).

30. See *id.* “Drunk Driving” is the first link that appears on the website’s “Risky Driving” page. *Risky Driving*, NAT’L HIGHWAY TRAFFIC SAFETY ADMIN., <http://www.nhtsa.gov/risky-driving> [<https://perma.cc/V8ZJ-7QUC>] (last visited Nov. 1, 2019). The “Drunk Driving” page is filled with information gathered from over thirty years of research on the subject. *Drunk Driving*, NAT’L HIGHWAY TRAFFIC SAFETY ADMIN., <http://www.nhtsa.gov/risky-driving/drunk-driving> [<https://perma.cc/M4J9-XHHY>] (last visited Nov. 1, 2019).

31. See *Drunk Driving*, *supra* note 30; see also *Drunk Driving*, U.S. DEP’T TRANSP., TRAFFIC SAFETY MARKETING, <http://www.trafficsafetymarketing.gov/get-materials/drunk-driving> [<https://perma.cc/8NHN-ENKY>] (last visited Nov. 1, 2019) (providing free materials to the public from NHTSA campaigns).

fatalities involving drivers with a BAC of 0.08% or higher.<sup>32</sup> This accounted for twenty-nine percent of all traffic-related fatalities that year and translates to one person killed in a drunk-driving-related accident every forty-eight minutes.<sup>33</sup> There were 397 fewer alcohol-related fatalities in 2018 than in 2017, accounting for a 3.6% decrease.<sup>34</sup> Overall, 2018 had the lowest percentage of alcohol-related fatalities since NHTSA began collecting such data in 1982.<sup>35</sup>

Today, all fifty states have DUI laws in place under which it is per se illegal to operate a motor vehicle with a BAC of 0.08% or higher.<sup>36</sup> Under this standard, states must only prove that the driver's BAC was greater than or equal to 0.08% to achieve a conviction.<sup>37</sup> In the context of DUI laws, per se means that no additional evidence of a person's impairment is required for prosecution. If a person's BAC is greater than or equal to 0.08%, that alone is sufficient proof that the person is impaired.

As well-researched and documented as the effects of drunk driving are, a new subject has come into focus that poses an equal threat to public safety, with a more complicated solution: drugged driving. On August 14, 2018, NHTSA launched its first ever drugged driving campaign with the message: "If You Feel Different, You Drive Different. Drive High, Get a DUI."<sup>38</sup> The campaign was part of a new U.S. Department of Transportation initiative to combat drug-impaired driving.<sup>39</sup> The message of the initiative is simple: "Driving either drunk or high is a DUI; impairment is impairment."<sup>40</sup>

Drugged driving has long taken a back seat to drunk driving. NHTSA admits, "While evidence shows that drug-impaired driving is dangerous, we still have more to learn about the extent of the problem and how best to address it."<sup>41</sup> True to its word, NHTSA has begun focusing research in the area of drug-impaired driving.<sup>42</sup> The most recent roadside survey found that 20% of weekend drivers tested positive for some kind

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32. NAT'L HIGHWAY TRAFFIC SAFETY ADMIN., NAT'L CTR. FOR STATISTICS AND ANALYSIS, TRAFFIC SAFETY FACTS 2018 DATA: ALCOHOL-IMPAIRED DRIVING (2019), <http://crashstats.nhtsa.dot.gov/Api/Public/ViewPublication/812826> [<https://perma.cc/4TFD-DDWV>].

33. *Id.* The 2018 statistics also broke down the numbers by individual states. *See id.* at 9 tbl.7. Pennsylvania actually saw an increase in both total fatalities and alcohol-related fatalities in 2018. *Id.*

34. *Id.* at 1.

35. *Id.* at 6.

36. *Id.*

37. *See, e.g.*, 75 PA. STAT. AND CONS. STAT. ANN. § 3802(a)(2) (West 2019) ("An individual may not drive, operate or be in actual physical control of the movement of a vehicle after imbibing a sufficient amount of alcohol such that the alcohol concentration in the individual's blood or breath is at least 0.08% . . .").

38. Press Release, Nat'l Highway Traffic Safety Admin., U.S. Department of Transportation Launches New Ad Campaign to Stop Impaired Driving (Aug. 14, 2018), <http://www.nhtsa.gov/press-releases/us-department-transportation-launches-new-ad-campaign-stop-impaired-driving> [<https://perma.cc/UR7Z-GGPB>].

39. *Drug-Impaired Driving*, NAT'L HIGHWAY TRAFFIC SAFETY ADMIN., <http://www.nhtsa.gov/risky-driving/drug-impaired-driving#nhtsa-action> [<https://perma.cc/6XQ2-RVRN>] (last visited Nov. 1, 2019).

40. Press Release, Nat'l Highway Traffic Safety Admin, *supra* note 38.

41. *Drug-Impaired Driving*, *supra* note 39.

42. *See, e.g.*, JOHN H. LACEY ET AL., NAT'L HIGHWAY TRAFFIC SAFETY ADMIN., DRUG AND ALCOHOL CRASH RISK: A CASE-CONTROL STUDY 1 (2016).

of drug in their system,<sup>43</sup> compared to only 1.5% that were found with a BAC of 0.08% or higher.<sup>44</sup>

Working from this data, the Department of Transportation initiative has three goals: (1) conduct research and gather valuable data to improve understanding of drugged driving; (2) educate the public, legislatures, and highway safety professionals on drugged driving; and (3) explore ways to assist law enforcement in efforts to prevent drugged driving and drug-related crashes.<sup>45</sup> While the initiative recognizes that drugged driving has long been an issue nationwide, NHTSA cites the “national opioid epidemic and states legalizing marijuana” specifically as impetuses of the need for the new initiative.<sup>46</sup>

#### B. *Pennsylvania’s DUI Statute*

DUI laws vary state to state. It is important to understand these variances, particularly when considering drugged driving enforcement. Because this Comment argues for amending Pennsylvania’s DUI statute, it is necessary to review the relevant Pennsylvania laws.

Pennsylvania breaks driving under the influence into several categories based on the offender’s BAC and/or the presence of controlled substance(s) in their blood.<sup>47</sup> Pennsylvania law also contains two “general impairment” sections for prosecuting drivers with an unknown BAC or unknown amount/type of controlled substance in their system.<sup>48</sup> Offenders are prosecuted based on the specific section that applies to their BAC and/or controlled substance use (or under general impairment if no evidence of BAC/controlled substance use is available).<sup>49</sup>

Drugged driving in Pennsylvania is categorized by the Schedule of Controlled Substances under the CSDDCA.<sup>50</sup> Pennsylvania’s CSDDCA closely mirrors the federal

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43. AMY BERNING ET AL., NAT’L HIGHWAY TRAFFIC SAFETY ADMIN., OFFICE OF BEHAVIORAL SAFETY RESEARCH, RESULTS OF THE 2013–2014 NATIONAL ROADSIDE SURVEY OF ALCOHOL AND DRUG USE BY DRIVERS 3 tbl.4 (2015), [http://www.nhtsa.gov/sites/nhtsa.dot.gov/files/812118-roadside\\_survey\\_2014.pdf](http://www.nhtsa.gov/sites/nhtsa.dot.gov/files/812118-roadside_survey_2014.pdf) [<https://perma.cc/SE5A-8UDP>].

44. *Id.* at 1.

45. *See Drug-Impaired Driving*, *supra* note 39.

46. Press Release, Nat’l Highway Traffic Safety Admin., NHTSA Launches Drug-Impaired Driving Initiative and Announces March 15 Summit (Jan. 15, 2019), <http://www.nhtsa.gov/press-releases/nhtsa-launches-drug-impaired-driving-initiative-and-announces-march-15-summit> [<https://perma.cc/2KWQ-Y65K>].

47. 75 PA. STAT. AND CONS. STAT. ANN. § 3802 (West 2019). Pennsylvania separates alcohol-related DUIs into three tiers based on BAC. *Id.* The lowest tier is 0.08%–0.099%. *Id.* § 3802(a)(2). The second tier is 0.10%–0.159%. *Id.* § 3802(b). The third and highest tier is any BAC 0.16% or above. *Id.* § 3802(c); *see also id.* § 3804 (defining penalties based on multiple factors including level of intoxication, number of prior convictions, and severity of injuries).

48. *See id.* § 3802(a)(1) (addressing general impairment of alcohol); *id.* § 3802(d)(2) (discussing general impairment of controlled substances).

49. *Id.* § 3804. General impairment sections serve two main purposes: (1) as a method of prosecution if the offender refuses to submit to chemical testing, and (2) to prove when an offender is under the influence of a drug for which they possess a valid prescription. *See id.* The statute also includes a section for prosecuting minors for driving with a BAC of just 0.02% or higher. *Id.* § 3802(e). The statute also contains specific regulations for commercial and school bus drivers. *Id.* § 3802(f).

50. 35 PA. STAT. AND CONS. STAT. ANN. § 780–104 (West 2019); *see also id.* § 780–101 (defining the short title of the chapter as the “Controlled Substance, Drug, Device, and Cosmetic Act”).

system of drug scheduling.<sup>51</sup> Pennsylvania law breaks down all known, controlled substances into five “Schedules” based primarily on three factors: (1) potential for abuse, (2) current acceptable medical use, and (3) risk of physical and/or psychological dependence.<sup>52</sup> Schedule I controlled substances have a high potential for abuse, no current acceptable medical use, and “a lack of accepted safety for use under medical supervision.”<sup>53</sup> Meanwhile, Schedule V controlled substances have a low potential for abuse, current accepted medical use in the United States, and limited risk of physical or psychological dependence.<sup>54</sup> Schedules II, III, and IV represent everything in between and run the gamut of potential for abuse, accepted medical use, and risk of dependence.<sup>55</sup> Under the CSDDCA, marijuana is a Schedule I controlled substance.<sup>56</sup>

Pennsylvania’s drugged driving laws can be separated into two categories: per se and general impairment.<sup>57</sup> The per se sections are based on the presence of a specific controlled substance in a driver’s blood.<sup>58</sup> These sections break down further into three subsections: (1) any amount of a Schedule I controlled substance, (2) any amount of a Schedule II or III controlled substance without a proper prescription, and (3) any amount of a metabolite of a Schedule I, II, or III substance.<sup>59</sup>

The primary general impairment section states that it is illegal to operate a motor vehicle “under the influence of a drug or combination of drugs to a degree which impairs the individual’s ability to safely drive, operate or be in actual physical control of the movement of the vehicle.”<sup>60</sup> There is an additional general impairment section for persons under the influence of a combination of drugs and alcohol.<sup>61</sup>

The difference between the per se and general impairment sections will be a large focus of this Comment. The key difference between the two is that per se DUI only requires proof that the driver had *any* amount of the controlled substance in their system when operating a vehicle.<sup>62</sup> Meanwhile, general impairment requires proof that the driver was impaired, affecting his or her ability to safely drive.<sup>63</sup> Per se does not require this

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51. See *Drug Scheduling*, U.S. DRUG ENFORCEMENT ADMIN., <http://www.dea.gov/drug-scheduling> [https://perma.cc/389S-4PJ4] (last visited Nov. 1, 2019).

52. Tit. 35, § 780-104.

53. *Id.* § 780-104(1).

54. *Id.* § 780-104(5).

55. See *id.* § 780-104(2)–(4).

56. *Id.* § 780-104(1)(iv).

57. See 75 PA. STAT. AND CONS. STAT. ANN. § 3802(d) (West 2019).

58. *Id.* § 3802(d)(1).

59. *Id.* § 3802(d)(1)(i)–(iii).

60. *Id.* § 3802(d)(2).

61. *Id.* § 3802(d)(3). This section can be used to prosecute a driver who has controlled substances in their system but has a BAC below the per se level; the combination of which impairs their overall ability to drive safely. See NHTSA, DWI DETECTION, *supra* note 21, at III–4. Additionally, this section can be used when evidence, such as admissions by the driver or the odor of alcohol, is sufficient for a police officer to establish probable cause that the driver has both consumed alcohol and used a controlled substance even if the driver refuses to submit to chemical testing. *Id.* at III–5.

62. Tit. 75, § 3802(d)(1).

63. *Id.* § 3802(d)(2).

proof of impairment,<sup>64</sup> just as general impairment does not require proof of controlled substances in the driver's blood.<sup>65</sup>

C. *Marijuana: The History of its Use and an Examination of its Effects*

Marijuana is the most frequently used illicit drug in the United States.<sup>66</sup> Of the thirty million people who reported using illicit drugs in the past month, over eighty-five percent reported using marijuana.<sup>67</sup> The largest group of reported users are between the ages of eighteen to twenty-five.<sup>68</sup> While marijuana use, particularly among teens, declined from the 1990s to the early 2000s, the recent nationwide trend toward legalization has reduced perceptions of the risks of marijuana use.<sup>69</sup> However, the availability and potency of marijuana has greatly increased, leading to more incidents of medical emergencies involving marijuana use than ever before.<sup>70</sup>

Marijuana comes from the plant *cannabis sativa* and is known colloquially by many names: weed, pot, grass, etc.<sup>71</sup> Marijuana has been prevalent throughout the United States for decades, but never at the level of potency as is prevalent today.<sup>72</sup> Potency is based on the chemical concentration of THC, which causes the psychoactive effect sought by users.<sup>73</sup>

There are many ways marijuana is consumed. The most popular method is by smoking.<sup>74</sup> Smoking marijuana causes the THC to pass rapidly from the lungs to the bloodstream and into the brain.<sup>75</sup> This causes an almost immediate effect, resulting in euphoria, heightened sensory perception, altered perception of time, and increased appetite (i.e., "the munchies").<sup>76</sup>

Edible forms of marijuana have become particularly popular since the legalization of marijuana, particularly recreational marijuana use.<sup>77</sup> Consuming marijuana through "edibles" results in slower absorption of THC as the drug must first pass through the

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64. *Commonwealth v. Etchison*, 916 A.2d 1169, 1174 (Pa. Super. Ct. 2007) ("[A] conviction under Section 3802(d)(1) does not require that a driver be impaired . . .").

65. *Commonwealth v. Giron*, 155 A.3d 635, 638 (Pa. Super. Ct. 2017) (holding that appellant's argument for lack of sufficient evidence to convict under the general impairment section was "wholly frivolous" because "[t]here is no requirement that . . . physical evidence be presented at trial").

66. *Drug Facts: Marijuana*, NAT'L INST. ON DRUG ABUSE, <http://www.drugabuse.gov/publications/drugfacts/marijuana> [<https://perma.cc/2D77-UC2H>] (last updated Sept. 1, 2019).

67. JONAKI BOSE ET AL., SUBSTANCE ABUSE AND MENTAL HEALTH SERVS. ADMIN., KEY SUBSTANCE USE AND MENTAL HEALTH INDICATORS IN THE UNITED STATES: RESULTS FROM THE 2017 NATIONAL SURVEY ON DRUG USE AND HEALTH 13 (2018) <http://www.samhsa.gov/data/sites/default/files/cbhsq-reports/NSDUHF2017/NSDUHF2017.pdf> [<https://perma.cc/5HGV-H4XY>].

68. *Id.* at 13–14.

69. *See Drug Facts: Marijuana*, *supra* note 66.

70. *See id.* (noting an increase in emergency room visits involving marijuana use).

71. *Id.*

72. *See id.* (citing Zlatko Mehmedic et al., *Potency Trends of Delta-9-THC and Other Cannabinoids in Confiscated Cannabis Preparations from 1993 to 2008*, 55 J. FORENSIC SCI. 1209 (2010)).

73. *See id.*

74. *See id.*

75. *Id.*

76. *See id.*

77. *See id.*



digestive system.<sup>78</sup> While less THC is ultimately absorbed via this method in comparison to smoking, the lack of an immediate effect may result in overconsumption of THC.<sup>79</sup>

Despite the persistent myth that marijuana is harmless, a person can overdose on THC.<sup>80</sup> Large doses of marijuana may result in acute psychosis, including hallucinations and delusions.<sup>81</sup> Marijuana has been linked to long-term psychotic disorders, such as schizophrenia, depression, anxiety, and substance abuse disorder.<sup>82</sup> Marijuana has also long been referred to as the “gateway drug” to other harder, more illicit drugs.<sup>83</sup>

One of the greatest dangers with marijuana use, however, is clear and immediate: marijuana impairs a person’s ability to drive.<sup>84</sup> THC affects the areas of the brain responsible for controlling the body’s movements, balance, coordination, memory, and judgment.<sup>85</sup> It slows reaction time and decision-making ability, hinders coordination, distorts perceptions, and reduces the brain’s ability to problem solve.<sup>86</sup> These are all skills that are necessary to safely operate a motor vehicle.<sup>87</sup>

Additionally, studies have shown that the combined use of marijuana and alcohol impairs drivers to a greater degree than either by itself.<sup>88</sup> Meaning a person with a BAC below 0.08% but who is under the influence of marijuana can pose a greater danger on the road than a driver with either a higher BAC or a higher concentration of THC in their

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78. *Id.*

79. *Id.*

80. *See id.*

81. *Id.*

82. *Id.*

83. *Id.* Scientific research in this area remains uncertain. Studies have shown a connection between marijuana use and later substance abuse. *Id.* (citing various articles). Other research has also shown an ability of THC to “prime” the brain from enhanced response to other drugs by reducing overall dopamine levels in the brains of rats. *See id.* However, most marijuana users do not go on to use harder drugs. *Id.* While THC has been shown to “prime” the brain for substance abuse, so do alcohol and nicotine. *Is Marijuana a Gateway Drug*, NAT’L INST. ON DRUG ABUSE, <http://www.drugabuse.gov/publications/research-reports/marijuana/marijuana-gateway-drug> [<https://perma.cc/74SW-EWG5>] (last updated Sept. 1, 2019). Marijuana users are also commonly users of alcohol and tobacco. *See Drug Facts: Marijuana*, *supra* note 66. Note also in the National Survey on Drug Use and Health that while twenty-six million reported using marijuana, the next highest illicit drug (misuse of prescription pain relievers) was only reported by 3.2 million. BOSE ET AL., *supra* note 67, at 1.

84. *Drug Facts: Drugged Driving*, NAT’L INST. ON DRUG ABUSE, <http://www.drugabuse.gov/publications/drugfacts/drugged-driving> [<https://perma.cc/M52B-65Q9>] (last updated Mar. 1, 2019); *What You Need to Know About Marijuana Use and Driving*, CTRS. FOR DISEASE CONTROL AND PREVENTION (2017), <http://www.cdc.gov/marijuana/pdf/marijuana-driving-508.pdf> [<https://perma.cc/E3FZ-CPM2>].

85. *What You Need to Know About Marijuana Use and Driving*, *supra* note 84.

86. *Id.*

87. *Id.* Many of the effects of THC on driver performance are the same as alcohol impairment. *Id.* As such, SFSTs are equally capable of detecting impairment from THC as they are alcohol. *See generally* Amy J. Porath-Waller & Douglas J. Beirness, *An Examination of the Validity of the Standardized Field Sobriety Test in Detecting Drug Impairment Using Data from the Drug Evaluation and Classification Program*, 15 TRAFFIC INJ. PREVENTION 125, 125–131 (2014) (finding that SFSTs are equally capable of identifying drug impairment, as they are alcohol impairment).

88. *What You Need to Know About Marijuana Use and Driving*, *supra* note 84; *see also* Rebecca L. Hartman et al., *Cannabis Effects on Driving Lateral Control with and Without Alcohol*, 154 DRUG ALCOHOL DEPENDENCE 25, 32 (2015) (“Cannabis-alcohol combination effects were additive, not synergistic.”).

system.<sup>89</sup> The effects of alcohol and THC impairment contrast.<sup>90</sup> Marijuana users tend to drive slower but have greater impairment of their overall ability to operate a motor vehicle.<sup>91</sup> Alcohol users drive faster, take bigger risks, and underestimate their level of impairment.<sup>92</sup> Combining all of these factors into one driver results in a complete inability to drive safely.<sup>93</sup>

As dangerous as the effects of marijuana are on a person's ability to drive, the ability to detect this impairment through chemical analysis has proven complicated.<sup>94</sup> When marijuana is smoked, the THC quickly enters the bloodstream, causing an immediate psychoactive effect on the user.<sup>95</sup> The effects of THC then wear off over a period of one to three hours.<sup>96</sup> Critically, however, detectable amounts of THC remain in the blood for days or weeks after use.<sup>97</sup>

DUI laws often use the term "metabolite" when referring to chemical detection of impairment through blood analysis.<sup>98</sup> A metabolite in the most basic terms is "a product of metabolism."<sup>99</sup> It refers to the process by which the body processes drugs.<sup>100</sup> The presence of the metabolite of a drug in a person's blood or urine indicates that the person used that drug.<sup>101</sup> Marijuana has numerous metabolites, known as cannabinoids.<sup>102</sup> When "active" cannabinoids are present, they indicate that the user is currently under the influence of the psychoactive elements of THC.<sup>103</sup> On the other hand, 11-nor-9-carboxy-delta 9-tetrahydrocannabinol (THC-COOH) is the primary *inactive* metabolite and does not indicate psychoactive impairment of the user.<sup>104</sup>

The distinction between these types of metabolites is critical for the purpose of DUI enforcement. Both active and inactive metabolites remain detectable in users' blood for days or weeks after use, long after the psychoactive effects have faded.<sup>105</sup> While the

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89. See Hartman et al., *supra* note 88, at 32–34; *What You Need to Know About Marijuana Use and Driving*, *supra* note 84.

90. See Hartman et al., *supra* note 88, at 32–34.

91. See *id.* at 33.

92. See *id.*

93. See *id.* at 32–34 (noting that cannabis-alcohol combination had detrimental additive effects for a verity of safe driving indicators).

94. See COLO. DEP'T OF PUB. SAFETY, *supra* note 3, at 33–35.

95. See *Drug Facts: Marijuana*, *supra* note 66.

96. See *id.* (stating that a person will "generally feel the effects [of smoking marijuana] after 30 minutes to 1 hour" and the effects of marijuana on heart rate usually last for up to three hours after smoking).

97. See Hartman et al., *supra* note 88, at 26.

98. See, e.g., 75 PA. STAT. AND CONS. STAT. ANN. § 3802(d)(1)(iii) (West 2019) ("An individual may not drive, operate or be in actual physical control of the movement of a vehicle [while] . . . [t]here is in the individual's blood any amount of a . . . metabolite of a [controlled] substance . . .").

99. *Metabolite*, MERRIAM-WEBSTER, <http://www.merriam-webster.com/dictionary/metabolite> [<https://perma.cc/FD8J-JYXZ>] (last updated Sept. 2, 2019).

100. See Priyamvada Sharma et al., *Chemistry, Metabolism, and Toxicology of Cannabis: Clinical Implications*, 7 IRAN J. PSYCHIATRY 149, 149–50 (2012).

101. *Id.* at 152.

102. *Id.* at 149–50.

103. *Id.* at 150–51.

104. *Id.*

105. *Id.* at 151–52.

presence of any metabolite may be valuable to an employer conducting a random test for drug use, the metabolites merely show that someone used marijuana within the past week or month, rather than indicating any level of impairment.<sup>106</sup> But the purpose of DUI enforcement is to prevent *impaired* drivers from being on the road and endangering themselves and the public.<sup>107</sup>

Pennsylvania's DUI statute makes no distinction between the psychoactive elements of THC and the inactive THC-COOH.<sup>108</sup> The law prohibits the operation of a motor vehicle while the presence of "any amount of a . . . metabolite" of a Schedule I controlled substance, such as marijuana, is in a person's system.<sup>109</sup> This contradiction between the law and science has only been further exacerbated by the legalization of medical marijuana.

#### D. *Legalization of Marijuana and Pennsylvania's Medical Marijuana Act*

In 1996, California became the first state to legalize medical marijuana.<sup>110</sup> As of 2019, thirty-three states, the District of Columbia, Puerto Rico, Guam, and the U.S. Virgin Islands have all enacted medical marijuana legislation.<sup>111</sup> However, as discussed, marijuana remains illegal under federal law.<sup>112</sup> It was first outlawed under the Harrison Narcotic Act of 1914 and was later classified as a Schedule I substance with the passing of the Controlled Substances Act in 1970.<sup>113</sup>

The criminalization of marijuana has always been a subject of controversy. It has often been posited that, as part of his war on drugs, President Nixon ordered for the categorization of marijuana as a Schedule I substance—an act seen as political more than scientific, with greater focus on criminalizing those associated with marijuana use than the actual harms of the drug itself.<sup>114</sup>

The movement towards decriminalization and legalization of marijuana has also been a grassroots political movement, not a push by the scientific or medical communities.<sup>115</sup> Activists groups, such as the National Organization for the Reform of Marijuana Laws, have been responsible for organizing and coordinating lobbying efforts throughout the United States.<sup>116</sup>

Medical marijuana laws vary from state to state; however, there are many common trends in states' efforts to regulate and administer their individual programs.<sup>117</sup> Most

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106. *See id.*

107. *See Drug-Impaired Driving*, *supra* note 39.

108. 75 PA. STAT. AND CONS. STAT. ANN. § 3802(d)(1)(iii) (West 2019).

109. *Id.*

110. *See* CAL. HEALTH & SAFETY CODE § 11362.5(B) (West 2019); *see also* Scott C. Martin, *A Brief History of Marijuana Law in America*, TIME (April 20, 2016), <http://time.com/4298038/marijuana-history-in-america/> [<https://perma.cc/6DKC-WH7B>].

111. *State Medical Marijuana Laws*, *supra* note 1.

112. Martin, *supra* note 110.

113. *Id.*

114. *Id.*

115. *Id.*

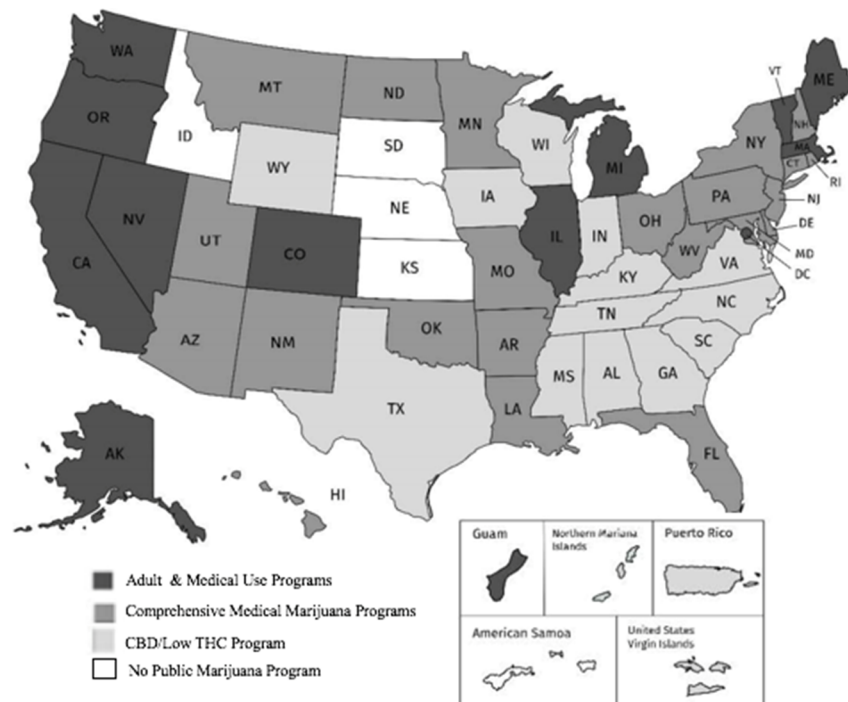
116. *Id.*

117. *See State Medical Marijuana Laws*, *supra* note 1.

states require patient registration and/or the issuance of ID cards.<sup>118</sup> Most states have established dispensaries for the distribution of medical marijuana.<sup>119</sup> However, states differ on whether they accept patients from other states and many have set specific conditions on things like method of consumption or possessional quantity allowed.<sup>120</sup>

As of June 25, 2019, eleven of the thirty-three states with comprehensive medical marijuana programs, as well as the District of Columbia and Guam, have taken the additional step of legalizing the recreational use of marijuana.<sup>121</sup> Additionally, as shown in Figure 1, another thirteen states have passed legislation allowing for “low THC, high cannabidiol (CBD)” programs.<sup>122</sup> Altogether, there are only four states—Idaho, Kansas, Nebraska, and South Dakota—that have no state-approved public marijuana use program whatsoever.<sup>123</sup>

FIGURE 1



118. *See id.* at tbl.1.

119. *See id.*

120. *See id.*

121. *See id.* Note that recreational marijuana programs are officially referred to as “adult-use cannabis” programs. *See State Medical Marijuana Laws*, *supra* note 1. Illinois is the most recent state to legalize recreational marijuana. *Id.* It was passed by the legislature in May 2019 and signed by the governor on June 25, 2019. *Id.* at tbl.1. It will take effect on January 1, 2020. *Id.*

122. *Id.*

123. *Id.*

On April 17, 2016, Governor Tom Wolf signed Pennsylvania's Medical Marijuana Act (MMA) into law.<sup>124</sup> The MMA allows for the use of medical marijuana in the treatment of seventeen newly defined "serious medical condition[s]."<sup>125</sup> To qualify as a medical marijuana patient, a registered practitioner must certify a patient, then a patient must apply for a medical marijuana card from the Pennsylvania Department of Health.<sup>126</sup> Possession of a medical marijuana card permits the patient to purchase medical marijuana from any of the newly established dispensaries within the Commonwealth.<sup>127</sup> The patient must always carry their card whenever they possess any amount of medical marijuana.<sup>128</sup>

The MMA limits the methods in which patients may consume medical marijuana.<sup>129</sup> The only acceptable forms for use are pills, oils, topical gels, creams or ointments, vaporization, tinctures, or liquids.<sup>130</sup> Smoking medical marijuana is specifically prohibited.<sup>131</sup> Additionally, medical marijuana can only be incorporated into edible forms if medically necessary to assist in consumption.<sup>132</sup>

These two restrictions suggest the legislature's intention to separate the medical use of marijuana from recreational use. Smoking marijuana has historically been the most common form of recreational consumption and remains so today.<sup>133</sup> The rise of edible forms of marijuana has also been linked to the legalization of recreational marijuana in other states.<sup>134</sup>

The MMA provides a single, broad protection stating that a patient shall not be subject to "arrest, prosecution or penalty in any manner" if acting in accordance with the MMA.<sup>135</sup> The MMA does not offer any guidance regarding how the MMA applies to state DUI laws.<sup>136</sup> However, under the MMA, all medical marijuana is required to be

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124. S. 3, 199th Gen. Assemb., Reg. Sess. (Pa. 2016); *see also Pennsylvania Medical Marijuana Program*, *supra* note 8.

125. 35 PA. STAT. AND CONS. STAT. ANN. § 10231.103 (West 2019) (allowing for the use of medical marijuana for conditions such as cancer, HIV/AIDS, and multiple sclerosis).

126. *Id.* § 10231.303(b)(1).

127. *Id.* § 10231.801.

128. *Id.* § 10231.303(b)(7).

129. *Id.* § 10231.303(b)(2).

130. *Id.*

131. *Id.* § 10231.304(b)(1). The sale of dry leaf medical marijuana—the form most commonly used for smoking—was originally prohibited. *See id.* § 10231.303(b)(2). However, on August 1, 2018, dry leaf forms of medical marijuana became legal, but only for use in vaporizers. 28 PA. CODE § 1151.28 (2019) (changing the fourth manner of dispensable forms to read "including dry leaf or plant form for administration by vaporization"); *see also* David Wenner, *Pa. Begins Dry Leaf Medical Marijuana Sales, Reminds Users Not to Smoke It*, PENNLIVE (Aug. 1, 2018), [http://www.pennlive.com/news/2018/08/pa\\_begins\\_dry\\_leaf\\_medical\\_mar.html](http://www.pennlive.com/news/2018/08/pa_begins_dry_leaf_medical_mar.html) [https://perma.cc/5MBM-U8SH].

132. Tit. 35, § 10231.304(c).

133. *See Drug Facts: Marijuana*, *supra* note 66.

134. *See id.*

135. Tit. 35, § 10231.2103.

136. The word "vehicle" does not appear anywhere in the language of the statute. *See id.* §§ 10231.101–10231.2110.

dispensed in a sealed package containing a label that includes the warning, “This product might impair the ability to drive or operate heavy machinery.”<sup>137</sup>

With the passing of the MMA, the Pennsylvania state legislature did not amend the CSDDCA nor state DUI laws.<sup>138</sup> Marijuana remains a Schedule I controlled substance, and as such, is prosecutable under section 3802(d)(1) as a per se offense when any amount of marijuana, or its metabolite, is found in a person’s system.<sup>139</sup> No showing of impairment is required.<sup>140</sup>

Other states have taken different approaches to reconciling the legalization of medical marijuana with state DUI laws. Part III.C discusses three of these approaches: (1) creating a “legal limit” for THC, (2) relying on the judicial system to establish precedent, and (3) removing the per se standard from drugged driving prosecution. Furthermore, Part III.C analyzes the shortcomings of each method and argues that these methods are not suitable solutions for Pennsylvania.

#### E. *Pennsylvania DUI Case Law*

DUI enforcement remains a primary goal of not only the state legislature but also the state judiciary system.<sup>141</sup> The Pennsylvania Supreme Court and Superior Court have issued several decisions involving the operation of motor vehicles while under the influence of marijuana. The following subsections discuss the issues considered by Pennsylvania’s courts. Part II.E.1 discusses the applicability of per se and general impairment laws. Parts II.E.2–4 discuss the necessity of expert testimony and sufficiency of nonexpert testimony. Finally, Part II.E.5 discusses the establishment of probable cause.<sup>142</sup>

##### 1. *Drugged Driving Per Se*

In *Commonwealth v. Etchison*,<sup>143</sup> the Pennsylvania Superior Court upheld a conviction under section 3802(d)(1) despite there being no evidence that the defendant’s ability to safely drive was impaired.<sup>144</sup> The court held that section 3802(d)(1) was clear in its prohibition of the operation of a motor vehicle with any amount of a controlled substance, or its metabolite, in the driver’s system, “regardless of impairment.”<sup>145</sup>

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137. *Id.* § 10231.801(i)(4).

138. *See id.* §§ 10231.101–10231.2110; S. 3, 199th Gen. Assemb., Reg. Sess. (Pa. 2016).

139. Tit. 35, § 780-104.

140. 75 PA. STAT. AND CONS. STAT. ANN. § 3802(d)(1) (West 2019).

141. On December 24, 2018, the Pennsylvania legislature enacted an amendment to the DUI statute increasing penalties for repeat DUI offenders. *See* S. 961, 201st Gen. Assemb., Reg. Sess. (Pa. 2017) (amending tit. 75, § 1543(b)(1) and enhancing many penalties for repeat DUI offenders and making it a felony of the third degree for any fourth or subsequent DUI offense). Drug-related DUIs are punished as severely as the alcohol-related DUIs with the highest rate of alcohol. *See* tit. 75, § 3804(c).

142. *See Commonwealth v. Gary*, 91 A.3d 102, 105 (Pa. 2014); *Commonwealth v. Jones*, 121 A.3d 524, 527–29 (Pa. Super. Ct. 2015).

143. 916 A.2d 1169 (Pa. Super. Ct. 2007).

144. *Etchison*, 916 A.2d at 1174.

145. *Id.*

Nathan Etchison was pulled over by a state trooper after he was observed driving his car the wrong way on a highway on-ramp.<sup>146</sup> Upon speaking with Etchison, the trooper smelled alcohol and subsequently had Etchison perform field sobriety tests.<sup>147</sup> After Etchison failed the tests, he was arrested for suspicion of DUI.<sup>148</sup> The chemical blood test results revealed that Etchison not only had a BAC of 0.05%, but also had marijuana metabolites in his system.<sup>149</sup> At trial, Etchison was found guilty of three drugged driving charges: section 3802(d)(1)(i) (any amount of a Schedule I substance), section 3802(d)(2) (general impairment of drugs), and section 3802(d)(3) (general impairment of a combination of drugs and alcohol).<sup>150</sup>

In his appeal to the Superior Court, Etchison fought all three convictions on the basis that the Commonwealth failed to prove that he was impaired by his intoxication.<sup>151</sup> Of particular concern was the Commonwealth's expert's testimony at trial.<sup>152</sup> The expert testified that the presence of metabolites of marijuana alone did not prove that Etchison was impaired.<sup>153</sup> Additionally, it was uncontested (and not even mentioned in the appellate opinion) that the 0.05% BAC was not sufficient to prove impairment.<sup>154</sup> The Commonwealth did not provide additional testimony to prove impairment.<sup>155</sup>

The court overturned the two general impairment convictions but upheld the per se impairment conviction.<sup>156</sup> Etchison claimed that section 3802(d)(1) was overbroad because it applied to situations in which no impairment was proven.<sup>157</sup> In response, the Commonwealth noted that its expert testified at trial that "[s]ection 3802(d) allows for the conviction of an individual based solely on the presence of metabolites, regardless of actual impairment."<sup>158</sup>

The court agreed with the Commonwealth and denied Etchison's arguments that the statute was overbroad and unfairly applied.<sup>159</sup> In response to the overbroad claim, the court stated that "[t]here is no constitutional right to the use of marijuana prior to driving; . . . under Pennsylvania's [CSDDCA] . . . an individual is prohibited from any use of marijuana."<sup>160</sup> Furthermore, the statute was fairly applied, because "[section 3802(d)(1)] prohibits the operation of a motor vehicle by *any* driver who has *any* amount of specifically enumerated controlled substances in his blood, regardless of impairment."<sup>161</sup>

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146. *Id.* at 1171.

147. *Id.*

148. *Id.*

149. *Id.*

150. *Id.* at 1170.

151. *Id.* at 1171–73.

152. *See id.* at 1172.

153. *Id.*

154. *See id.* at 1171–72.

155. *See id.*

156. *Id.* at 1171–73.

157. *Id.* at 1172–73.

158. *Id.* at 1173.

159. *Id.*

160. *Id.*

161. *Id.* at 1174.

Judge Bender's dissent in *Etchison* disagreed with the majority opinion's analysis of section 3802(d)(1), arguing that the statute *was* overbroad and therefore unconstitutional.<sup>162</sup> Judge Bender disagreed with the majority's statement that "there is no constitutional right to use marijuana prior to driving."<sup>163</sup> He relied heavily on the Commonwealth's own expert testimony, much like the majority opinion.<sup>164</sup> His dissent opined that the statute as written was overbroad because "punishing mere presence in one's blood of metabolites of Schedule I drugs, without proof of impairment" does not fall within the state's "legitimate interest in keeping impaired drivers off the road."<sup>165</sup>

Judge Bender compared the majority's opinion to prior United States Supreme Court review on the overbreadth of a statute.<sup>166</sup> In *Stanley v. Georgia*,<sup>167</sup> the Supreme Court held that a state could prohibit and punish the distribution of obscene materials but could not prohibit the mere possession of such materials.<sup>168</sup> The Supreme Court stated that obscene materials were not constitutionally protected; however, punishing mere possession went beyond the legitimate interest of the state.<sup>169</sup> Judge Bender believed that this was analogous to the mere presence of metabolites.<sup>170</sup>

Judge Bender separated the majority's justification into two parts: "no constitutional right to use marijuana" and "prior to driving."<sup>171</sup> First, Judge Bender noted that marijuana use can be legal.<sup>172</sup> As the majority noted in its response to *Etchison*'s unfair application argument, Pennsylvania's drugged driving laws apply to *any* driver.<sup>173</sup> Therefore, the dissent opined that the laws' reach goes beyond Pennsylvania residents.<sup>174</sup> While at the time of the *Etchison* decision there was no legal right to use marijuana in Pennsylvania, many other countries (the dissent used Amsterdam for example) have legalized the use of marijuana.<sup>175</sup>

Second, based on the expert's testimony, metabolites of marijuana remain detectable up to a month after use, far beyond the half-life of any psychoactive effects.<sup>176</sup> The dissent postulated that a Pennsylvania resident could fly to Amsterdam on vacation, legally use marijuana, return to Pennsylvania, and be arrested and convicted for DUI on his way home from the airport.<sup>177</sup> In this scenario, the state's interest in protecting the public from an impaired motorist is unserved.<sup>178</sup> Furthermore, the court's justification

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162. *Id.* at 1174 (Bender, J., concurring and dissenting).

163. *Id.* at 1176.

164. *See id.* at 1175–78.

165. *Id.* at 1178.

166. *Id.*

167. 394 U.S. 557 (1969).

168. *Etchison*, 916 A.2d at 1178 (Bender, J., concurring and dissenting) (citing *Stanley*, 394 U.S. at 557).

169. *Id.* (citing *Stanley*, 394 U.S. at 564).

170. *Id.*

171. *Id.* at 1175–78.

172. *Id.* at 1176–77.

173. *Id.* at 1177.

174. *Id.*

175. *Id.*

176. *Id.* at 1175.

177. *Id.* at 1177.

178. *Id.*



that there is no right to use marijuana is misleading because the driver legally used marijuana in Amsterdam.<sup>179</sup>

## 2. General Impairment and the Need for Expert Testimony

In *Commonwealth v. Griffith*,<sup>180</sup> the Pennsylvania Supreme Court discussed what constitutes a proper showing of impairment to satisfy section 3802(d)(2) or section 3802(d)(3), the two sections of Pennsylvania's drugged driving statute that require proof of impairment.<sup>181</sup> The court considered whether expert testimony was required to prove impairment when the defendant was under the influence of legally prescribed medication.<sup>182</sup> The court ruled that a police officer's testimony alone—without any corroborating expert testimony—was sufficient to prove impairment in violation of sections 3802(d)(2) and 3802(d)(3).<sup>183</sup>

A witness watched Griffith driving erratically and called the police.<sup>184</sup> By the time police arrived, Griffith had parked her vehicle and was standing outside.<sup>185</sup> The police officer later testified to his observations of Griffith's behavior, including her inability to balance while standing, swaying, and difficulty lighting a cigarette.<sup>186</sup> Furthermore, the officer conducted three field sobriety tests, which Griffith was unable to perform.<sup>187</sup> As a result of these observations, Griffith was arrested and subsequently consented to a blood test.<sup>188</sup> Griffith admitted to taking one prescription Schedule IV drug, Soma.<sup>189</sup> Blood testing also revealed the presence of two other prescription Schedule IV drugs, Diazepam (valium) and Nordiazepam (a metabolite of Diazepam).<sup>190</sup> All levels were within normal, therapeutic range.<sup>191</sup>

The court looked to answer one question: Can a person be convicted of general impairment under section 3802(d)(2) based strictly on nonexpert testimony?<sup>192</sup> To answer this question, the court conducted an analysis of legislative intent and a review of case law from the Pennsylvania Superior Court.<sup>193</sup>

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179. *Id.*

180. 32 A.3d 1231 (Pa. 2011).

181. *See Griffith*, 32 A.3d at 1235–38; *see also* 75 PA. STAT. AND CONS. STAT. ANN. § 3802(d)(2)–(3) (West 2019) (requiring an individual be under the influence “to a degree which impairs the individual’s ability to safely drive, operate, or be in actual physical control of the movement of the vehicle”).

182. *Griffith*, 32 A.3d at 1233.

183. *See id.* at 1240.

184. *See id.* at 1234.

185. *Id.* at 1240.

186. *Id.*

187. *Id.* at 1233–34.

188. *See id.*

189. *Id.* at 1234.

190. *Id.* Note that all three drugs found in Griffith's blood were Schedule IV, for which there is no per se DUI prosecution available under section 3802(d)(1). *See* 75 PA. STAT. AND CONS. STAT. ANN. § 3802(d)(1) (West 2019).

191. *Griffith*, 32 A.3d at 1234.

192. *See id.* at 1233.

193. *Id.* at 1235–39.

In its analysis of legislative intent, the court compared the state's drugged driving laws with its drunk driving laws.<sup>194</sup> First, it noted the similarities between the sections prohibiting operation of a motor vehicle with a certain BAC,<sup>195</sup> and section 3802(d)(1), which prohibits driving with "any amount" of a controlled substance.<sup>196</sup> These drunk driving sections parallel the drugged driving section, which is also a *per se* standard.<sup>197</sup>

The court then compared section 3802(d)(2), the general impairment section for drugged driving, with section 3802(a)(1), the general impairment section for drunk driving.<sup>198</sup> The court found the sections analogous in their purpose and intended application.<sup>199</sup> Both sections do not require the measurement of any intoxicating substances, whether drugs or alcohol, in the defendant's blood.<sup>200</sup> Similarly, both sections lack any guidance on *how* the prosecution can prove general impairment.<sup>201</sup> The court thus concluded that the legislation placed no limits on such proof and, therefore, did not intend to require expert testimony.<sup>202</sup>

After reviewing prior state case law,<sup>203</sup> the court found no established requirement of expert testimony to prove impairment.<sup>204</sup> The court then turned to the lower court's review of the case at hand. The court noted that the Pennsylvania Superior Court made a distinction between prescription drug impairment and nonprescription drug impairment—requiring expert testimony for the former.<sup>205</sup>

The Pennsylvania Supreme Court, however, found no merit in this distinction.<sup>206</sup> The argument for requiring expert testimony relies on the information relayed to the jury being beyond the understanding of a layperson.<sup>207</sup> Impairment is not necessarily so complex an issue to require expert interpretation.<sup>208</sup> Furthermore, impairment by prescription drugs is no more complicated than nonprescription drugs, and drug impairment is no more complicated than alcohol impairment.<sup>209</sup> The standard is the same for both drug impairment under section 3802(d)(2) as alcohol impairment under section 3802(a)(1): it must be shown that the driver was "rendered incapable of safely driving."<sup>210</sup>

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194. *See id.* at 1239.

195. *See* tit. 75, § 3802(a)(2)–(c).

196. *Griffith*, 32 A.3d at 1239.

197. *Compare* tit. 75, § 3802(a)(2)–(c), *with id.* § 3802(d)(1).

198. *Griffith*, 32 A.3d at 1239.

199. *Id.*

200. *Id.*

201. *See id.*

202. *Id.*

203. *See* *Commonwealth v. Segida*, 985 A.2d 871 (Pa. 2009); *Commonwealth v. DiPanfilo*, 993 A.2d 1262 (Pa. Super. Ct. 2010); *Commonwealth v. Williamson*, 962 A.2d 1200 (Pa. Super. Ct. 2008); *Commonwealth v. Etchison*, 916 A.2d 1169 (Pa. Super. Ct. 2007).

204. *Griffith*, 32 A.3d at 1238.

205. *See id.* at 1234.

206. *Id.* at 1238.

207. *Id.* at 1239.

208. *See id.*

209. *Id.*

210. *Id.*

Ultimately, the *Griffith* decision refused to establish a bright-line rule on the expert testimony issue, opting instead for a case-by-case determination based on the strength of the presented evidence.<sup>211</sup> The court went on to hold that the nonexpert testimony provided in *Griffith* was sufficient to prove general impairment.<sup>212</sup> The testimony of the citizen witness as to the defendant's erratic driving, coupled with the experienced police officer's testimony regarding the defendant's actions, behavior, statements, and performance in field sobriety testing, was adequate to prove violation of drugged driving under section 3802(d)(2).<sup>213</sup>

The court reasoned that impairment can be proven solely by nonexpert testimony.<sup>214</sup> The Commonwealth made their case with only two witnesses: the police officer and a civilian.<sup>215</sup> It is noteworthy, however, that the court did state that expert testimony may be necessary in certain circumstances, though it did not provide any examples or guidance to illustrate what circumstances would require such testimony.<sup>216</sup>

Furthermore, the court reasoned that proving impairment is the same for alcohol-related DUIs and drug-related DUIs.<sup>217</sup> The goal of prosecution in a general impairment DUI case is to prove that the defendant was incapable of safe driving.<sup>218</sup> While there must be some established link between the driver's impairment and an intoxicating source, a trained and experienced police officer can testify to signs of impairment without distinguishing between alcohol and drugs, as well as prescription and nonprescription drugs.<sup>219</sup>

### 3. Expert Versus Nonexpert Testimony

The Pennsylvania Superior Court's decision in *Commonwealth v. Hutchins*<sup>220</sup> came on the heels of the *Griffith* opinion, again considering when expert testimony was necessary in a section 3802(d)(2) prosecution.<sup>221</sup> The *Hutchins* decision is the most recent application of the case-by-case analysis directed by the Pennsylvania Supreme Court in *Griffith*.<sup>222</sup> Significantly, the majority opinion identifies both circumstances in which expert testimony is required and those in which nonexpert testimony is sufficient.<sup>223</sup>

The defendant, Hutchins, caused a head-on car accident when he attempted to make a left turn in front of oncoming traffic.<sup>224</sup> The responding state troopers, as well as the

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211. *Id.* at 1239–40.

212. *Id.* at 1240.

213. *See id.* at 1234, 1240.

214. *Id.* at 1240.

215. *Id.* at 1234.

216. *See id.* at 1239 (“The need for expert testimony in a subsection 3802(d)(2) prosecution must be evaluated on a case-by-case basis . . .”).

217. *Id.*

218. *See id.*

219. *Id.* at 1240.

220. 42 A.3d 302 (Pa. Super. Ct. 2012).

221. *Hutchins*, 42 A.3d at 307.

222. *See id.* at 307; *see also Griffith*, 32 A.3d at 1239.

223. *See Hutchins*, 42 A.3d at 308–09.

224. *Id.* at 304.

other motorist, all testified that it was a clear day and the accident occurred on a straight, flat road.<sup>225</sup> This was important because it meant that Hutchins should have seen the oncoming motorist and known that it was unsafe for him to turn at that time. Furthermore, the investigating trooper spoke with Hutchins on scene and noticed that he was unusually calm, particularly given that his three daughters, who were passengers in his vehicle, were injured by flying glass and rushed to the hospital.<sup>226</sup> Hutchins accompanied them before the trooper could conduct further interviews and field sobriety tests.<sup>227</sup>

A second trooper on scene entered Hutchins's car to retrieve his vehicle registration and insurance.<sup>228</sup> He smelled marijuana and upon further searching, found marijuana inside Hutchins's vehicle.<sup>229</sup> Based on the roadway conditions, the nature of the accident, Hutchins's demeanor, and the discovery of the marijuana, the investigating trooper went to the hospital to arrest Hutchins for DUI.<sup>230</sup> When he advised Hutchins of his arrest, Hutchins admitted to smoking marijuana earlier in the day.<sup>231</sup> He consented to a blood test.<sup>232</sup>

The blood test ultimately revealed the presence of marijuana metabolites in Hutchins's blood.<sup>233</sup> Hutchins was charged with, and convicted of, two DUI violations: section 3802(d)(1) and section 3802(d)(2).<sup>234</sup> He appealed the section 3802(d)(2) conviction on grounds of insufficient evidence for failure to prove impairment.<sup>235</sup>

The Superior Court, guided by the recent Pennsylvania Supreme Court decision in *Griffith*, conducted an analysis to determine if the facts of this particular case were sufficient such that a reasonable jury could reach a guilty verdict based solely on nonexpert testimony.<sup>236</sup> In proving the section 3802(d)(2) violation, the Commonwealth put forth the nonexpert testimony of the civilian witness (the other motorist) and the two state troopers.<sup>237</sup> While the blood test conducted was sufficient to support the section 3802(d)(1) charge of driving under the influence of any amount of a Schedule I substance, no expert testimony was offered to connect the blood results to impairment.<sup>238</sup>

The Superior Court held that blood results could not be presented as evidence of impairment to prove section 3802(d)(2) without corroborating expert testimony.<sup>239</sup>

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225. *Id.* at 304–05.

226. *Id.*

227. *Id.* at 305.

228. *Id.* at 304.

229. *Id.*

230. *Id.* at 305.

231. *Id.*

232. *Id.*

233. *Id.*

234. *Id.* at 304 & n.1.

235. *Id.* at 306. Hutchins raised two other issues on appeal, one arguing the validity of the physical evidence and one challenging the conviction for reckless driving. *Id.* Neither of these issues are relevant for the discussion of section 3802(d)(2).

236. *See id.* at 307–08.

237. *Id.* at 308–09.

238. *Id.* at 310.

239. *Id.* at 308.

Because only metabolites were found in Hutchins's blood, and the presence of metabolites alone does not prove impairment, a reasonable jury could not find that Hutchins was impaired by the blood results alone.<sup>240</sup> Interpreting the presence of metabolites as an indicator of impairment was beyond the understanding of a layperson and therefore required the Commonwealth to use expert testimony to show impairment.<sup>241</sup> However, while the blood test results required expert testimony to indicate impairment alone, proving impairment and an inability to safely operate a motor vehicle can be proven solely by nonexpert testimony, as held in *Griffith*.<sup>242</sup>

All three nonexpert witnesses testified to the conditions of the roadway at the time of the accident, concluding that a normal, sober driver should have had no issue seeing the approaching vehicle and recognizing that it would be unsafe to turn in that moment.<sup>243</sup> Next, the investigating trooper testified to Hutchins's unusually calm demeanor at the accident scene.<sup>244</sup> Furthermore, the trooper called upon his experience and training to testify to the general effects of marijuana impairment, including a lack of depth perception, a slowed reaction time, and an inability to concentrate.<sup>245</sup> The trooper also testified to Hutchins's admission to smoking marijuana earlier in the day.<sup>246</sup> Finally, the assisting trooper testified to finding the fresh marijuana in Hutchins's vehicle.<sup>247</sup>

Considering the totality of the circumstances as presented by the three nonexpert witnesses, the Superior Court concluded that sufficient evidence had been presented to the jury to convict Hutchins of violating section 3802(d)(2).<sup>248</sup>

#### 4. Prosecuting Drugged Driving

Together, the three cases provide critical guidance for prosecuting both per se and general DUI impairment in Pennsylvania. The Superior Court directly applied *Griffith* in the *Hutchins* decision and identified both circumstances requiring expert testimony and those in which nonexpert testimony is sufficient.<sup>249</sup> *Etchison* previously showed that the presence of metabolites revealed through blood testing insufficiently proves impairment without expert testimony stating such.<sup>250</sup> *Hutchins* reinforced this opinion after the *Griffith* decision.<sup>251</sup> The scientific nature of the evidence is simply beyond the understanding of a layperson, and a reasonable juror cannot conclude impairment.<sup>252</sup> Notably, both *Etchison* and *Hutchins* involved only the presence of metabolites, and no THC was revealed through the chemical tests.<sup>253</sup>

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240. *Id.*

241. *See id.*

242. *See* Commonwealth v. Griffith, 32 A.3d 1231, 1239–40 (Pa. 2011).

243. *Hutchins*, 42 A.3d at 304–05.

244. *Id.*

245. *Id.* at 305.

246. *Id.*

247. *Id.* at 304.

248. *Id.* at 309.

249. *Id.* at 307–08.

250. Commonwealth v. Etchison, 916 A.2d 1169, 1172 (Pa. Super. Ct. 2007).

251. *Hutchins*, 42 A.3d at 307.

252. *Id.* at 308.

253. *See id.* at 307; *Etchison*, 916 A.2d at 1173.

The Superior Court's conclusions in *Hutchins* regarding the nonexpert testimony are significant in three ways. First, following the Pennsylvania Supreme Court's statement in *Griffith*, the Superior Court did not restrain its sufficiency analysis to the blood results in *Hutchins*.<sup>254</sup> Instead, after noting the requirement of expert testimony to introduce the blood result evidence, it quickly dismissed the blood evidence as unnecessary in a general impairment prosecution—turning instead to the totality of nonexpert testimony provided.<sup>255</sup>

Second, the Superior Court in *Hutchins*, much like the Pennsylvania Supreme Court in *Griffith*, relied on lay civilian witnesses providing common sense descriptions of the defendant's driving behavior.<sup>256</sup> A key part of proving a driver's inability to safely operate a motor vehicle is a showing of a driver's actions behind the wheel.<sup>257</sup> In both cases, the only witness to such actions were civilians.<sup>258</sup> Both courts found the witnesses' testimonies reliable enough to include their conclusions as to the abnormal or erratic driving actions of the defendants in the courts' opinions when describing the defendants' impairment.<sup>259</sup>

Third, the *Hutchins* court set the bar rather low in what it required from investigating officers to prove impairment. In this situation, the trooper's interaction was limited to just a brief moment before Hutchins left the scene.<sup>260</sup> The trooper did not conduct any field sobriety tests.<sup>261</sup> The trooper obtained Hutchins's admission to smoking marijuana *after* arresting him.<sup>262</sup> The marijuana found in the vehicle was fresh, not burnt, which indicated that Hutchins had not consumed it.<sup>263</sup> The trooper's testimony was limited to describing Hutchins's behavior as unusually calm.<sup>264</sup> The description of the scene as straight, flat, and clear of adverse weather conditions hardly proves that Hutchins was impaired.<sup>265</sup> While intoxication is one possible reason for his poor judgment, the simple act of looking down to change the radio or interact with one of his three daughters in the vehicle, could also have led to his mistake of turning in front of an oncoming vehicle.

The reason why the Superior Court found this evidence sufficient, however, is the fourth and final significant point of the opinion. The court relied on the trooper's testimony, based on his training and experience, to combine all the elements above into a showing of impairment.<sup>266</sup> The trooper testified to the effects of marijuana and how impairment by the drug could explain all the small, separate details.<sup>267</sup> Hutchins's

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254. See *Hutchins*, 42 A.3d at 308–09.

255. *Id.*

256. See *Commonwealth v. Griffith*, 32 A.3d 1231, 1240 (Pa. 2011); *Hutchins*, 42 A.3d at 304–05.

257. See *Griffith*, 32 A.3d at 1234; *Hutchins*, 42 A.3d at 304.

258. *Griffith*, 32 A.3d at 1234; *Hutchins*, 42 A.3d at 304.

259. *Griffith*, 32 A.3d at 1240; *Hutchins*, 42 A.3d at 309.

260. *Hutchins*, 42 A.3d at 305.

261. *Id.*

262. *Id.*

263. See *id.*

264. *Id.*

265. See *id.*

266. *Id.* at 308–09.

267. *Id.*

diminished depth perception, slowed reaction time, calm demeanor, and lack of concentration caused him to misjudge the distance and speed of the approaching vehicle.<sup>268</sup>

The Superior Court's reliance on the trooper's testimony is both a blessing and a curse to DUI prosecutions. It means that the Pennsylvania judiciary is willing to rely on police officers, trained and experienced as they are, to the point that an entire DUI prosecution—with or without blood results—can be carried solely on an officer's word. However, this also means that police officers need to have the right training in DUI enforcement, the right knowledge of drugs and their effects, and the ability to articulate all of this to a jury.

##### 5. “Plain Smell” Doctrine and Establishing Probable Cause

Two final cases from the Pennsylvania Supreme Court illustrate the judiciary's support for the prosecution of DUIs in Pennsylvania. In *Commonwealth v. Gary*,<sup>269</sup> the Pennsylvania Supreme Court established that the “plain smell” of marijuana emanating from a vehicle is sufficient to establish probable cause for a search of the vehicle.<sup>270</sup> And in *Commonwealth v. Jones*,<sup>271</sup> the Pennsylvania Superior Court held that the smelling an odor of burnt marijuana from inside a vehicle was sufficient to establish probable cause to arrest the driver under section 3802(d)(1).<sup>272</sup> It is important to note that the driver in *Jones* was the sole occupant of the vehicle, removing any doubt that he was the source of the odor of burnt marijuana.<sup>273</sup>

Both *Gary* and *Jones* were decided prior to the enactment of the Medical Marijuana Act.<sup>274</sup> However, as previously noted, because the MMA does not permit the smoking of dry leaf marijuana, both decisions remain applicable. Importantly, the *Jones* decision is specifically based on prosecution under section 3802(d)(1) and relies on the “any amount” language of the statute to establish probable cause for arrest.<sup>275</sup>

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268. *Id.* at 305; see also *Drug Facts: Drugged Driving*, *supra* note 84 (noting how the psychological effects of marijuana affect driving); *Drug Facts: Marijuana*, *supra* note 66 (explaining the general effects of marijuana on human behavior including altered senses, changes in mood, difficulty with thinking, and hallucinations).

269. 91 A.3d 102 (Pa. 2014).

270. *Gary*, 91 A.3d at 105. The *Gary* opinion was also significant in that it extended the automobile exception to the warrant requirement under the Fourth Amendment to Pennsylvania. *Id.* at 124. The court, basing its decision on an extensive review of prior federal and state case law regarding warrantless searches of automobiles, established that there was sufficient exigency in a traffic stop of a motor vehicle to allow for warrantless searches based on properly established probable cause. *Id.* at 106–38.

271. 121 A.3d 524 (Pa. Super. Ct. 2015).

272. *Jones*, 121 A.3d at 527–29.

273. *Id.* at 528.

274. Pennsylvania's MMA was enacted in 2016. See S. 3, 199th Gen. Assemb., Reg. Sess. (Pa. 2016). The courts decided *Gary* and *Jones* in 2014 and 2015, respectively. See *Gary*, 91 A.3d at 102; *Jones*, 121 A.3d at 524.

275. *Jones*, 121 A.3d at 529.

### III. DISCUSSION

The Pennsylvania legislature's failure to amend the status of marijuana under the CSDDCA as a Schedule I controlled substance when it enacted the MMA was a mistake. This error is most apparent in the prosecution of per se drugged driving offenses under section 3802(d)(1) of the Pennsylvania Vehicle Code. This error can be resolved while still ensuring the safety of the highways of the Commonwealth by redefining marijuana as a Schedule II or III controlled substance.

Part III.A makes the assertion that marijuana should be reclassified from a Schedule I to a Schedule II or III controlled substance under the CSDDCA. Part III.B then examines the effect of that reclassification and the benefits of requiring a showing of general impairment for medical marijuana-based DUIs. Finally, Part III.C focuses on how three other states—Colorado, Arizona, and New York—have reconciled their DUI laws in light of their state medical marijuana legislation. Specifically, it examines the shortcomings of those methods and how reclassification is the best option.

#### A. *Resolving the MMA's Tension with the CSDDCA*

The first and simplest argument in support of reclassification is that the Pennsylvania legislature found an accepted medical purpose for marijuana when it passed the MMA.<sup>276</sup> The CSDDCA reserves categorization of substances under Schedule I for drugs that have no accepted medical purpose.<sup>277</sup> Continuing to define marijuana under Schedule I contradicts this categorization and threatens the validity of the CSDDCA.

The MMA provides protections for prosecution of medical marijuana users under the CSDDCA. The MMA sets forth lawful and unlawful use of medical marijuana, as well as a system of registration and certification to control the possession and distribution of medical marijuana.<sup>278</sup> As long as a patient acts in accordance with the MMA, they will be protected from state prosecution for offenses under the CSDDCA, even while marijuana remains a Schedule I substance.<sup>279</sup> The same cannot be said for violations of Pennsylvania's DUI statute.<sup>280</sup>

The danger of driving while impaired by the effects of marijuana is clear.<sup>281</sup> No one should be allowed to drive while impaired by any controlled substance, whether its possession and use is lawfully permitted or not.<sup>282</sup> However, Pennsylvania's DUI statute protects citizens from drivers impaired by legally prescribed controlled substances that are Schedule II or III; defining marijuana under Schedule I is not necessary for protection from marijuana-impaired driving.<sup>283</sup> As a Schedule II or III controlled substance,

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276. See Pa. S. 3 (establishing a medicinal marijuana program as a result of the Commonwealth's finding that marijuana is a therapy that can minimize suffering and enhance quality of life for some patients).

277. 35 PA. STAT. AND CONS. STAT. ANN. § 780-104(1) (West 2019).

278. *Id.* §§ 10231.303, 10231.304, 10231.401, 10231.403.

279. *Id.* § 10231.2103.

280. See *id.*

281. *Drug Facts: Drugged Driving*, *supra* note 84.

282. See *id.*

283. 75 PA. STAT. AND CONS. STAT. ANN. § 3802(d) (West 2019) (containing multiple subsections criminalizing the operation of motor vehicles while impaired by Schedule II or III controlled substances).



marijuana-related DUIs can be prosecuted successfully under both per se and general impairment standards.<sup>284</sup>

Per se prosecution of Schedule I substances requires no proof of impairment so long as there are metabolites of the drug in the operator's system.<sup>285</sup> Scientific research of marijuana indicates that the metabolites of marijuana, cannabinoids, come in both psychoactive and nonpsychoactive forms.<sup>286</sup> The nonpsychoactive forms remain detectable in human blood well beyond the half-life of the psychoactive, impairing effects of marijuana.<sup>287</sup> This results in the detection of marijuana metabolites in the blood of persons who are no longer under the influence of the psychoactive, impairing effects of marijuana.<sup>288</sup> The Pennsylvania Supreme Court in *Etchison* confirmed that such detection is sufficient to warrant conviction of DUI per se, without any evidence of impairment, because marijuana is a Schedule I controlled substance.<sup>289</sup>

Judge Bender's dissent proposed a scenario in which a Pennsylvania resident traveled to Europe to use marijuana legally, only to be arrested for drugged driving under section 3802(d)(1) upon his return to Pennsylvania.<sup>290</sup> The hypothetical driver had the legal right to use marijuana in the foreign country and yet was being prosecuted based on the mere presence of metabolites of the drug still in his system.<sup>291</sup> The scenario is much easier to contemplate in 2019. Thirty-three states, the District of Columbia, Puerto Rico, Guam, and the U.S. Virgin Islands have legalized the use of medical marijuana—including Pennsylvania—and eleven states have legalized recreational use.<sup>292</sup> The driver in Judge Bender's hypothetical does not even have to leave the country—or even the state—anymore; he just has to possess a medical marijuana card.

#### B. *The Benefits of Rescheduling Marijuana as Schedule II or Schedule III*

Prosecution of drugged driving while under the influence of a Schedule II or III controlled substance is different than a Schedule I substance. First and foremost, the protections granted to users of Schedule II or III controlled substances only apply if the drugs have been legally prescribed to the user.<sup>293</sup> A Schedule II or III substance that is not legally prescribed to the user is treated exactly the same as a Schedule I substance under section 3802(d)(1).<sup>294</sup> Therefore, redefining marijuana under Schedule II or III will

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284. *See id.*

285. *Id.* § 3802(d)(1).

286. Sharma et al., *supra* note 100, at 150–51.

287. *Id.* at 152.

288. *Id.*

289. *Commonwealth v. Etchison*, 916 A.2d 1169, 1174 (Pa. Super. Ct. 2007).

290. *Id.* at 1177 (Bender, J., concurring and dissenting).

291. *Id.*

292. *State Medical Marijuana Laws*, *supra* note 1; *see also* Skye Gould & Jeremy Berke, *Illinois Just Became the First State to Legalize Marijuana Sales Through the Legislature—Here Are All the States Where Marijuana Is Legal*, BUS. INSIDER (June 25, 2019, 1:52 PM), <http://www.businessinsider.com/legal-marijuana-states-2018-1> [https://perma.cc/EL9L-Z3YW] (discussing states that have passed recreational legislation).

293. *See* 75 PA. STAT. AND CONS. STAT. ANN. § 3802(d)(1)(ii) (West 2019) (allowing per se prosecution of any individual who drives a vehicle with any amount of a Schedule II or III controlled substance in their system, “which has not been medically prescribed for the individual”).

294. *Id.*

only affect DUI prosecutions for legally certified medical marijuana patients acting within the scope of the MMA.<sup>295</sup>

Second, prosecution under general impairment requires a easily attainable standard of proof and focuses prosecutions on the proper target: actually impaired drivers. When a person is found to have used a legally prescribed Schedule II or III controlled substance, they are no longer subject to prosecution of a per se DUI.<sup>296</sup> Prosecution then defaults to general impairment under section 3802(d)(2) (or section 3802(d)(3) if alcohol is also present).<sup>297</sup> The *Hutchins* court held that under a general impairment prosecution, the mere presence of metabolites is insufficient to prove impairment unless supported by expert testimony presenting scientific or medical evidence of impairment.<sup>298</sup> This would protect medical marijuana users from prosecution for the mere presence of nonpsychoactive metabolites in their system. Meanwhile, in cases in which psychoactive metabolites were present, the prosecution could present expert testimony to prove impairment.<sup>299</sup>

The *Hutchins* court also set a very low standard for sufficient proof of impairment by nonexpert testimony: the police officer did not observe any driving behaviors of the defendant, had very little interaction with the defendant at the scene, and did not conduct field sobriety testing.<sup>300</sup> However, his articulation of the events of the car accident, the behavioral cues observed, and the physical evidence found at the scene (fresh, not burnt, marijuana), were sufficient to prove impairment.<sup>301</sup> Proving impairment by nonexpert testimony is not a formidable obstacle in the way of successful DUI prosecution. The Superior Court also allowed the testimony of a lay witness to support its conclusion of impairment.<sup>302</sup> Much like the Pennsylvania Supreme Court in *Griffith*, the basic observations of the defendant's driving and behavior were considered relevant to showing general impairment.<sup>303</sup>

Reliance on expert and nonexpert testimony to show impairment in a DUI prosecution for a person allegedly under the influence of a prescribed controlled substance is fair to both the defendant and the prosecution. Defendants are protected from misapplication of the "any amount" standard under section 3802(d)(1)(i). And prosecutors are given multiple options to prove their case. It also encourages police departments to seek better training and certifications for their officers.<sup>304</sup>

The legalization of marijuana has had many effects nationwide. One of these effects is the increase in training for police officers.<sup>305</sup> Police departments are beginning to

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295. *See id.*

296. *See id.*

297. *Id.* § 3802(d)(2) (prohibiting anyone who is under the influence of any controlled substance "to a degree which impairs the individual's ability to safely drive" from operating a vehicle).

298. *Commonwealth v. Hutchins*, 42 A.3d 302, 308 (Pa. Super. Ct. 2012).

299. *Id.*

300. *Id.*

301. *Id.*

302. *Id.* at 304.

303. *Commonwealth v. Griffith*, 32 A.3d 1231, 1234 (Pa. 2011); *Hutchins*, 42 A.3d at 304.

304. *See* COLO. DEP'T OF PUB. SAFETY, *supra* note 3, at 53–54 (noting an increase in drug-detection training of Colorado police officers since Colorado legalized marijuana).

305. *See id.*

require officers to be trained in Advanced Roadside Impaired Driver Enforcement (ARIDE) in addition to SFST.<sup>306</sup> A 2018 review of drugged driving enforcement in Colorado stated that all Colorado state troopers were ARIDE-certified, and there was a twenty-five percent increase in the number of drug recognition experts statewide.<sup>307</sup>

Pennsylvania is not far behind. The Pennsylvania State Police is currently pushing for its troopers to become ARIDE-certified, with the goal of making certification a mandatory element of training in the coming years.<sup>308</sup>

### C. *Peer State Solutions: Methods and Shortcomings*

Pennsylvania was not the first state to legalize medical marijuana. The criminalization of drugged driving is also not unique to the Commonwealth. As such, every state that has legalized medical marijuana has been confronted with the issue of reconciling state DUI laws with the medical marijuana legislation. Three such methods include: (1) the establishment of a “legal limit” for THC, (2) the reliance on judicial review, (3) and the removal of the per se standard from drugged driving prosecutions. The following discussion will review the statutes of three states—Colorado, Arizona, and New York—that have each relied on one of these methods, the shortcomings of each method, and how each method is not the right solution for Pennsylvania.

Part III.C.1 begins with Colorado, which amended its DUI laws by adding a “legal limit” of nanograms per milliliter (ng/mL) of THC in a person’s blood like the BAC standard for per se alcohol-related DUIs. Part III.C.2 discusses Arizona, which relied on judicial review and case law to create an affirmative defense for certified medical marijuana users. Part III.C.3 examines New York, which did not require any amending of its DUI laws, because the state does not have per se drugged driving laws and always requires a showing of general impairment. Finally, Part III.C.4 explains why none of these methods are the right solution for Pennsylvania.

#### 1. Colorado

Colorado legalized the use of medical marijuana in 2000.<sup>309</sup> With almost twenty years of experience dealing with the effects of the legislation, it makes sense to look to Colorado for guidance. However, Colorado’s reliance on a minimum limit for per se prosecution of marijuana-related DUIs jeopardizes the validity of their current DUI laws.

Along with the passage of the bill, known as the Colorado Medical Marijuana Code (CMMC), Colorado also amended its state constitution to include the right to use medical marijuana and, importantly, to provide protections from criminal prosecution.<sup>310</sup> The

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306. *See id.*

307. Robert L. Ticer, *Colorado DUID Picture*, NHTSA DRUGGED DRIVING CALL TO ACTION (Mar. 15, 2018), [http://www.nhtsa.gov/sites/nhtsa.dot.gov/files/documents/ticer\\_legalization\\_of\\_marijuana\\_for\\_nhtsa\\_2018.pdf](http://www.nhtsa.gov/sites/nhtsa.dot.gov/files/documents/ticer_legalization_of_marijuana_for_nhtsa_2018.pdf) [https://perma.cc/4GYC-K4WW].

308. Based on the author’s personal knowledge as a member of the department and the observable, current trends in departmental training.

309. COLO. REV. STAT. ANN. § 25-1.5-106 (West 2019); *see State Medical Marijuana Laws*, *supra* note 1.

310. COLO. CONST. art. XVIII, § 14(2).

language of CMMC mirrors that of the state constitutional amendment.<sup>311</sup> Colorado uses the term “[d]ebilitating medical condition” to define those conditions that qualify a person as a patient eligible to receive medical marijuana.<sup>312</sup> Colorado’s term is broader in scope than Pennsylvania’s “serious medical condition”<sup>313</sup> in that while it defines some specific qualifying conditions, it also includes very broad language, such as “a chronic or debilitating disease” and “any other medical condition . . . approved by the state health agency.”<sup>314</sup>

Between the CMMC, the constitutional amendment, and the language of Colorado’s DUI statute, the state legislature provided a comprehensive explanation of the protections from criminal prosecution granted to medical marijuana patients and their limits.<sup>315</sup> Considered an affirmative defense, patients must show proof that they were diagnosed with a debilitating medical condition, their physician recommended the use of medical marijuana, and they were in possession of an amount of marijuana within the quantity allowable under the CMMC.<sup>316</sup> The CMMC also provides a list of prohibited behaviors regarding the use of medical marijuana, including open use in public and endangering the “health and well-being of a person.”<sup>317</sup> While the latter is a very broad prohibition open to interpretation, the CMMC is more specific regarding the operation of motor vehicles.<sup>318</sup>

The use of medical marijuana while in a vehicle—not just while in operation or control—is prohibited.<sup>319</sup> It is also a violation to operate a vehicle while under the influence of medical marijuana.<sup>320</sup> Again, the latter of those restrictions could be considered broad and open to interpretation: What does “under the influence” mean? However, Colorado’s DUI statute offers the necessary clarification.<sup>321</sup> Colorado’s DUI statute includes both general impairment and *per se* sections.<sup>322</sup> The general impairment section does not discern between alcohol and drugs; however, the *per se* section is only applicable to alcohol-related DUIs.<sup>323</sup>

311. Compare COLO. REV. STAT. ANN. § 25-1.5-106, with COLO. CONST. art. XVIII, § 14. The CMMC begins with a direct reference to acting in accordance with the constitutional amendment. COLO. REV. STAT. ANN. § 25-1.5-106(1).

312. COLO. CONST. art. XVIII, § 14(1)(a).

313. See 35 PA. STAT. AND CONS. STAT. ANN. § 10231.103 (West 2019).

314. COLO. CONST. art. XVIII, § 14(1)(a).

315. See *id.* § 14; COLO. REV. STAT. ANN. §§ 25-1.5-106(1)(a)(I), 42-4-1301.

316. COLO. CONST. art. XVIII, § 14(2)(a).

317. COLO. REV. STAT. ANN. § 25-1.5-106(12)(b).

318. See *id.* § 25-1.5-106(12)(b)(VI).

319. *Id.* § 25-1.5-106(12)(b)(V)(C).

320. *Id.* § 25-1.5-106(12)(b)(VI).

321. *Id.* § 42-4-1301(1)(a) (“A person who drives a motor vehicle or vehicle under the influence of alcohol or one or more drugs, or a combination of both alcohol and one or more drugs, commits driving under the influence.”).

322. *Id.* § 42-4-1301(1)(f)–(g), (2)(a).

323. See *id.* § 42-4-1301(1)(f)–(g). General impairment under Colorado law is broken into two categories: DUI and “[d]riving while ability impaired” (DWAI). *Id.* DUI requires a showing that the defendant was “substantially incapable” of safe driving, while DWAI only requires a showing of impairment to the “slightest degree.” *Id.*

All drug-related DUI prosecutions are brought under the general impairment sections.<sup>324</sup> To support such prosecutions through forensic chemical analysis of breath or blood, the statute establishes a series of presumptions.<sup>325</sup> The statute also includes a subsection stating that a person being legally permitted to use the drug in question, including medical marijuana, is not a defense against general impairment.<sup>326</sup>

If analysis of the defendant's blood contains "five nanograms or more of [THC] per milliliter in whole blood," then the defendant is presumed to be "under the influence."<sup>327</sup> Despite the comprehensive nature of the statutes in setting forth the protections and limitations regarding medical marijuana use and DUI, Colorado's approach suffers from one major flaw: a lack of scientific evidence to support the assertion that 5 ng/mL of THC is presumptive of impairment.<sup>328</sup>

Studies of marijuana-related crashes conducted both in the United States and abroad came to the similar conclusion that the operation of a motor vehicle with 5 ng/mL or more of THC resulted in a statistically significant increase in the likelihood of causing a collision.<sup>329</sup> However, evaluation of those studies has since shown that other factors, such as age and gender, may be more responsible for the statistical significance.<sup>330</sup>

Crash analysis data revealed that while marijuana is the most commonly detected drug among persons involved in crashes, when this same data is cross-referenced for demographic factors, marijuana use becomes a statistically insignificant contributor to the likelihood of a crash.<sup>331</sup> The fact is that the population that most commonly uses marijuana—young men between the ages of eighteen and twenty-five—is also the same population at the greatest risk of being involved in a motor vehicle accident.<sup>332</sup> As such, analysis of crash data, which was previously relied on to support the 5 ng/mL standard, is not reliable to state that marijuana use was a prime factor in the collision.<sup>333</sup>

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324. *See id.* § 42-4-1301(1).

325. *Id.* § 42-4-1301(6).

326. *Id.* § 42-4-1301(1)(e).

327. *Id.* § 42-4-1301(6)(a)(IV). Other presumptions include: the presumption that a person with a BAC under 0.05% is not under the influence or impaired, the presumption that a person with a BAC between 0.05% and 0.08% is impaired and possibly under the influence, and the presumption that a person with a BAC of 0.08% and above is under the influence. *Id.* § 42-4-1301(6)(a)(I)–(III).

328. *See, e.g.,* Hartman et al., *supra* note 88, at 32 ("The lowest criterion of drug-induced driving impairment is considered to be . . . consistent with 0.05 BAC . . . . In this study, ≥8.2 [ng/mL] THC met that criterion.").

329. J.G. Ramaekers et al., *Dose Related Risk of Motor Vehicle Crashes After Cannabis Use*, 73 *DRUG & ALCOHOL DEPENDENCE* 109, 111 (2004); cf. Mark Asbridge et al., *Acute Cannabis Consumption and Motor Vehicle Collision Risk: Systematic Review of Observational Studies and Meta-Analysis*, 344 *BMJ* 536 (2012) ("The pooled risk of a motor vehicle collision while driving under the influence of cannabis was almost twice the risk while driving unimpaired . . . ."); Rune Elvik, *Risk of Road Accident Associated with the Use of Drugs: A Systematic Review and Meta-Analysis of Evidence from Epidemiological Studies*, 60 *ACCIDENT ANALYSIS & PREVENTION* 254, 262 (2013) ("[T]he risk of becoming involved in an accident at any level of severity increases moderately (by about 25–50%) when using cannabis."); Mu-Chen Li et al., *Marijuana Use and Motor Vehicle Crashes*, 34 *EPIDEMIOLOGIC REV.* 65, 69 (2012).

330. *See* LACEY ET AL., *supra* note 42, at 4.

331. *Id.*

332. *See id.* at 4–5.

333. *See id.*

Furthermore, in NHTSA's 2017 report to Congress on marijuana-impaired driving, it opined that there was no standard limit that could be used to show impairment definitively.<sup>334</sup> In fact, based on the standard timeline of testing, basing marijuana-related DUI prosecution on the results of chemical blood testing was highly inaccurate in determining the actual level of impairment of drivers at the time they were driving.<sup>335</sup>

Generally, chemical testing of drivers occurs within one to three hours of driving due to the time it takes for a police officer to both determine the motor vehicle operator is under the influence and get the operator to a facility at which blood can be drawn.<sup>336</sup> Meanwhile, research reveals that smoking marijuana results in a peak level of THC in the bloodstream at ten to twenty minutes after smoking.<sup>337</sup> THC levels significantly drop off immediately following this peak to negligible levels by comparison.<sup>338</sup> However, impairment of cognitive abilities and motor skills is maintained over the course of one to three hours.<sup>339</sup> In order to get an accurate reading based on THC levels, a police officer would have to observe a driver actively smoking marijuana while driving and then get that person to a blood-drawing facility within ten to twenty minutes.<sup>340</sup>

In October 2018, the Colorado Department of Public Safety issued a report on the effects of marijuana legalization.<sup>341</sup> The report includes a section on marijuana's impact on traffic safety.<sup>342</sup> Among the data collated was an analysis of conviction rates for DUI charges broken down by combinations of BAC and THC, as shown in Figure 2.<sup>343</sup> The analysis revealed that in cases where no BAC was detected, drivers with less than 5 ng/mL of THC were still convicted of DUI in fifty to fifty-seven percent of cases based on other indicia of impairment.<sup>344</sup>

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334. RICHARD P. COMPTON, NAT'L HIGHWAY TRAFFIC AND SAFETY ADMIN., MARIJUANA-IMPAIRED DRIVING: A REPORT TO CONGRESS 13 (2017), <http://www.nhtsa.gov/sites/nhtsa.dot.gov/files/documents/812440-marijuana-impaired-driving-report-to-congress.pdf> [<https://perma.cc/FZV4-68Z4>].

335. *See id.*

336. *Id.* at 7.

337. *Id.* at 3, 5.

338. *Id.* at 5.

339. *Id.* at 13.

340. *See id.* at 3, 5.

341. COLO. DEP'T OF PUB. SAFETY, *supra* note 3, at 8.

342. *Id.* at 33–55.

343. *Id.* at 42 tbl.16 (citing BECKY BUI & JACK K. REED, COLO. DEP'T OF PUB. SAFETY, DRIVING UNDER THE INFLUENCE OF DRUGS AND ALCOHOL: A REPORT PURSUANT TO HOUSE BILL 17-1315, at 54 tbl.36 (2018), [https://cdpsdocs.state.co.us/ors/docs/reports/2018-DUI\\_HB17-1315.pdf](https://cdpsdocs.state.co.us/ors/docs/reports/2018-DUI_HB17-1315.pdf) [<https://perma.cc/42H5-HWBT>]).

344. *Id.*

FIGURE 2

BAC level	THC level								Grand Total
	Not Detected		Present but <1.0		1.0 - 4.9		5.0+		
	Total Cases	Conviction Rate	Total Cases	Conviction Rate	Total Cases	Conviction Rate	Total Cases	Conviction Rate	
Not Detected	38	63.2%*	6	50.0%	70	57.1%	115	84.3%	229
< 0.05	16	50.0%	5	20.0%	63	60.3%	85	88.2%	169
0.05 - 0.079	14	92.9%	4	75.0%	60	81.7%	34	85.3%	112
0.08 +	162	93.2%	36	94.4%	403	94.8%	320	95.9%	921
Grand Total	230		51		596		554		1431

\*Final non-DUI charges were included in the analysis.

Drivers over the “permissible inference level” of five nanograms were convicted 84.3% of the time.<sup>345</sup> While this number is significantly higher than convictions for lower levels of THC, it still does not compare to the conviction rate for *per se* alcohol-related DUIs. Drivers with a BAC above 0.08% and no THC were convicted 93.2% of the time.<sup>346</sup> Overall, BAC was a more reliable predictor of conviction than THC.<sup>347</sup> Regardless of how much THC was present, when a driver’s BAC was above 0.08%, the conviction rate ranged from 93–96%.<sup>348</sup>

The Colorado report stated that its findings “suggest that convictions are more common at the *per se* level for alcohol and at the permissible inference level for Delta-9 THC.”<sup>349</sup> While this correlation between conviction rates and impairment is facially true, there may be other factors to consider. For starters, conviction rates may be evidence that “permissible inference” is a self-fulfilling prophecy. The law allows for the presumption of impairment; therefore, conviction—whether by plea or verdict—is simply more likely.<sup>350</sup> Moreover, different combinations of BAC and THC, all under the *per se* and permissible inference levels, resulted in varying yet significant conviction rates.<sup>351</sup> These rates corroborate research that the combination of alcohol and marijuana, even at levels that individually would not be *per se* illegal, can produce significant levels of impairment.<sup>352</sup>

Furthermore, conviction rates for drivers *not* over the permissible influence level speak more to the issues with setting a minimum THC level.<sup>353</sup> These cases are evidence of two things: (1) a person under the permissible influence level can still be impaired, and (2) conviction of such drivers can be achieved.

345. *Id.*

346. *Id.*

347. *Id.*

348. *Id.*

349. *Id.* at 42.

350. See COLO. REV. STAT. ANN. § 42-4-1301(6)(a) (West 2019) (defining the permissible inference standard); COLO. DEP’T OF PUB. SAFETY, *supra* note 3, at 42 (suggesting that convictions are more common at the permissible level for THC).

351. See COLO. DEP’T OF PUB. SAFETY, *supra* note 3, at 42 tbl.16.

352. See *id.*

353. See *id.*

Finally, the data did not include convictions rates for drivers who refused to submit to a blood test.<sup>354</sup> While these drivers could not fit into any of the categories in the table, their data could still be helpful. Such cases must be prosecuted on an impairment standard with no hope of a “permissible inference.”<sup>355</sup> The choice to leave this data out should be considered when evaluating the conclusion that prosecutions at the permissible influence level are more common and achievable.<sup>356</sup>

The Colorado report was also significant in identifying the shortcomings of current research in the field of marijuana-related DUIs and drugged driving in general.<sup>357</sup> First, data collection in the field is relatively new, with significant changes to testing and evaluation protocols implemented as recently as 2016.<sup>358</sup> More than once, the report noted that data revealing increasing drug trends are in some way at least the result of increased enforcement efforts against drugged driving.<sup>359</sup>

A different phenomenon may also be skewing data against drugged driving detection. Police officers who determine that a driver has a BAC of 0.08% or greater are more likely not to conduct a screening for THC.<sup>360</sup> In eighty-nine percent of cases evaluated, when a driver had a BAC above 0.08%, no screening for THC (or other drugs) was conducted.<sup>361</sup> A police officer with evidence of a *per se* alcohol-related DUI does not need to conduct further testing to make an arrest nor for the prosecution to be successful in obtaining a conviction.<sup>362</sup> Meanwhile, police officers conducted drug screenings more than half of the time when a BAC below 0.05% was detected.<sup>363</sup> This discretionary enforcement results in reduced reporting of drug-related DUIs.<sup>364</sup>

Based on the totality of the current research and its hindrances, basing DUI prosecution on a “permissible inference” based on a potentially arbitrarily set limit is unreliable. The data does not support the resulting higher conviction rate for persons above the level. Moreover, the emphasis placed on such a level only serves to hinder prosecution of impaired drivers who remain under the limit.

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354. *See id.*

355. *See* COLO. REV. STAT. ANN. § 42-4-1301(1)(f)–(g) (defining the general impairment standard); *id.* § 42-4-1301(6)(a) (discussing permissible inferences in DUI and DWAI prosecution).

356. *See* COLO. DEP’T OF PUBLIC SAFETY, *supra* note 3, at 42 tbl.16.

357. *See id.* at 33–35 (evaluating data and discussing the difficulties in determining the scope of driving while under the influence of drugs).

358. *Id.* at 48 (noting that, when evaluating fatal accident statistics, “improved reporting for the specific level of . . . THC occurred in 2016, which makes comparison to prior years invalid”).

359. *Id.* at 33 (highlighting the increase in drug recognition experts from 129 to 214 between 2012 and 2018).

360. *Id.* at 38.

361. *Id.*

362. *Id.* at 38–39 (“[O]fficers may confirm the presence of alcohol above the *per se* limit and stop further testing at that point.”).

363. *Id.* at 38.

364. *See id.*



## 2. Arizona

Arizona passed its medical marijuana legislation, the Arizona Medical Marijuana Act (AMMA), in 2010.<sup>365</sup> The AMMA included in its language under section 36-2811 a broad immunization from prosecution for medical marijuana users acting within the scope of their treatment.<sup>366</sup> The AMMA addressed DUIs through its “limitations” section. Section 36-2802 states that the law does not authorize a person to “[o]perat[e] . . . any motor vehicle . . . while under the influence of marijuana.”<sup>367</sup> However, it also states 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 concentrations to cause impairment.”<sup>368</sup>

Much like Pennsylvania’s statute, Arizona’s section 28-1381(A)(3) prohibits the operation of a motor vehicle “[w]hile there is any drug defined in [the Arizona Drug Definitions statute]<sup>369</sup> or its metabolite in the person’s body.”<sup>370</sup> Arizona, unlike Pennsylvania, does not divide drugs into schedules, and section 28-1381(A)(3) is not restricted in application to a single subset of drugs (e.g., Pennsylvania’s section 3802(d)(1) only applies to Schedule I drugs). However, section 28-1381(D) states that “[a] person using a drug as prescribed by a medical practitioner . . . is not guilty of violating [section 28-1381(A)(3)].”<sup>371</sup>

Under Pennsylvania law, a Schedule I substance has no medical purpose and therefore cannot be prescribed by a medical practitioner.<sup>372</sup> A person under the influence of a Schedule II or higher drug is only excused from per se prosecution if that drug has been prescribed.<sup>373</sup> Similarly, while Arizona does not define its drugs by schedule, it only excuses drivers from per se prosecution if they have been prescribed the drug.<sup>374</sup>

There is, however, a key difference in the language between the statutes. While the Pennsylvania legislature effectively restricted marijuana from being considered a legitimate medically prescribed substance for purposes of DUI by maintaining its status as a Schedule I substance, Arizona law does not have this restriction. With the passing of the AMMA, medical marijuana seemingly fell under the protections of section 28-1381(D), section 36-2802(D), and section 36-2811.<sup>375</sup>

365. ARIZ. REV. STAT. ANN. §§ 36-2801 to -2821 (West 2019); see *State Medical Marijuana Laws*, *supra* note 1.

366. ARIZ. REV. STAT. ANN. § 36-2811(B) (“A registered qualifying patient . . . is not subject to arrest, prosecution or penalty in any manner . . . [f]or the registered qualifying patient’s medical use of marijuana . . .”).

367. *Id.* § 36-2802(D).

368. *Id.*

369. *Id.* § 13-3401 (including marijuana in this list).

370. *Id.* § 28-1381(A)(3).

371. *Id.* § 28-1381(D).

372. See 35 PA. STAT. AND CONS. STAT. ANN. § 780-104(1) (West 2019).

373. 75 PA. STAT. AND CONS. STAT. ANN. § 3802(d)(1)(ii) (West 2019).

374. ARIZ. REV. STAT. ANN. § 28-1381(D).

375. Arizona’s DUI statute also includes a general impairment drugged driving section. See *id.* § 28-1381(A)(1). In fact, Arizona’s general impairment section does not separate alcohol and drugs. *Id.* It simply states that no motorist shall operate a motor vehicle while under the influence of “intoxicating liquor, any drug, a vapor releasing substance . . . or any combination . . . if the person is impaired to the *slightest degree*.” *Id.*

However, these protections, and the limitation thereof, are broadly defined. The AMMA did not set a minimum amount of ng/mL of THC to qualify as a sufficient concentration to cause impairment, such as Colorado's 5 ng/mL standard.<sup>376</sup> Instead, the Arizona Supreme Court had the final say in the matter in the 2015 decision in *Dobson v. McClennen*.<sup>377</sup>

The Arizona Supreme Court established a complex and unnecessary system of affirmative defense and burden shifting that applies only to medical marijuana. *Dobson* combined two cases in which the facts were substantively identical.<sup>378</sup> Both petitioners, Dobson and Anderson, were charged with two counts of DUI: one under the general impairment statute and one under the per se statute.<sup>379</sup> Both petitioners attempted to enter their medical marijuana cards into evidence as proof of their status as "registered qualifying patients" under the AMMA.<sup>380</sup> The trial courts denied their attempts.<sup>381</sup> Subsequently, the state dropped the general impairment charges in both cases and proceeded under a per se prosecution.<sup>382</sup> Both petitioners were convicted and appealed.

The Arizona Supreme Court granted review to determine "whether the AMMA immunizes a medical marijuana cardholder from DUI prosecution under [the per se statute]." <sup>383</sup> The court reviewed the issue of statutory interpretation *de novo*.<sup>384</sup>

The Arizona Supreme Court ultimately found that both sides overreached in their arguments.<sup>385</sup> Dobson and Anderson were wrong in their belief that the protections of the AMMA immunized registered qualifying patients from per se DUI prosecution under section 28-1381(A)(3).<sup>386</sup> However, the state was also wrong that the AMMA did not affect per se prosecutions because the AMMA only protects users from a presumption of impairment and section 28-1381(A)(3) does not require proof of impairment.<sup>387</sup>

The court held that under the AMMA a registered qualified patient was required to raise an affirmative defense that the concentration of marijuana in their system was insufficient to cause impairment.<sup>388</sup> If the patient could prove this by a preponderance of the evidence, then the burden would shift back to the prosecution to rebut the claim.<sup>389</sup>

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(emphasis added). Neither section 28-1381 nor the AMMA offer any protections or immunizations from this general impairment section. *See id.* § 36-2802.

376. *See* COLO. REV. STAT. ANN. § 42-4-1301(6)(a)(IV) (West 2019).

377. 361 P.3d 374 (Ariz. 2015).

378. *See Dobson*, 361 P.3d at 375. The only factual difference mentioned by the court was that Dobson possessed a medical marijuana card from the state of Oregon, while Anderson possessed an Arizona-issued card. *Id.*

379. *Id.*

380. *Id.*

381. *Id.*

382. *Id.*

383. *Id.*

384. *Id.*

385. *See id.* at 377 ("Neither position urged by the parties represents the best reading of the statutory provisions.").

386. *Id.*

387. *Id.*

388. *Id.* at 378.

389. *Id.*

In support of this decision, the Arizona Supreme Court had several justifications, each of which overcomplicated the issue. First, the court held that it is difficult to identify concentrations of certain drugs that “definitely establish whether a defendant is impaired.”<sup>390</sup> Therefore, section 28-1381(A)(3) purposely does not require a showing of impairment, even to the slightest degree.<sup>391</sup>

This argument goes directly against the purpose of DUI laws. The argument suggests that the purpose of the lack of requirement for proof of impairment under section 28-1381(A)(3) is because the effects of different drugs vary. Additionally, there is no definitive concentration of a controlled substance that proves impairment. However, if the purpose of DUI laws is to prevent impaired drivers from operating motor vehicles and endangering themselves as well as the public, then it follows that impairment is an essential element. Per se DUI laws, such as section 28-1381(A)(3), rely on the fact that legislatures have decided that any amount of certain controlled substances is itself evidence of impairment rendering the driver unfit to drive.<sup>392</sup> The Arizona Supreme Court’s argument weakens this basic assumption of impairment.

Next, the Arizona Supreme Court held that the qualifications under the AMMA for “medical providers” capable of authorizing medical marijuana use are not the same as “medical practitioners” referenced in section 28-1381(D) capable of prescribing medication.<sup>393</sup> Medical marijuana is thus not “prescribed” as per section 28-1381(D) and does not receive the same protection from per se prosecution as other drugs.<sup>394</sup>

This is an argument of semantics that only serves to separate medical marijuana from other prescription drugs solely in consideration of DUI prosecutions. The court’s opinion states that one should compare the DUI statute’s definition of “medical providers” with the AMMA’s definition of “physicians.”<sup>395</sup> The opinion then gives examples of the practitioners under each definition.<sup>396</sup> After reviewing both, there is one basic commonality: they are all licensed physicians.<sup>397</sup> There is no justification in the argument that the legislature in passing the AMMA meant to define “physicians” differently than it did “medical providers.”<sup>398</sup>

The court unnecessarily placed medical marijuana in its own category of medicines separate from all other drugs and purely for the purposes of DUI prosecutions.<sup>399</sup> The court did not amend Arizona’s drug definitions under section 13-3401, which included

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390. *Id.* at 377 (citing *State ex rel. Montgomery v. Harris*, 322 P.3d 160, 164 (Ariz. 2014)).

391. *Id.*

392. *Id.*

393. *See id.* at 377–78.

394. *Id.*

395. *Id.* at 378.

396. *Id.*

397. Compare ARIZ. REV. STAT. ANN. § 28-1381(D) (West 2019) (defining “medical practitioners” as those licensed under title 32 (i.e., podiatrists, dentists, medical doctors, and osteopathic physicians)), with *id.* § 36-2801(12) (defining “physician” as including licensed medical doctors and osteopathic, naturopathic, and homeopathic physicians).

398. *See id.* § 28-1381(D).

399. *See Dobson*, 361 P.3d at 377–78.

“marijuana” as a drug.<sup>400</sup> It only said that under the DUI statute, marijuana was not “prescribed” and, therefore, was not protected.<sup>401</sup>

The purpose of section 28-1381(D) is to protect patients from wrongful prosecution for using their prescribed medication as directed.<sup>402</sup> This protection does not excuse driving while impaired by such medications; it prevents per se prosecutions and requires a showing of impairment because, again, impairment is the essential element of DUI laws.<sup>403</sup> The Arizona state legislature sought to offer the same protections under the AMMA.<sup>404</sup> It provided a broad, overarching protection from prosecution for patients and a more specific protection concerning DUI prosecution.<sup>405</sup> Treating marijuana differently than other prescribed medications goes against the legislature’s intent of protecting patients from wrongful prosecution.<sup>406</sup>

Finally, the Arizona Supreme Court argued that placing the requirement of proving lack of impairment by a preponderance of the evidence on defendants does not overburden them.<sup>407</sup> The defendants “should know if they are impaired and can control when they drive.”<sup>408</sup> The court also held that simply producing a medical marijuana card, as both petitioners had, was insufficient to prove lack of impairment, and the court affirmed the petitioners’ convictions.<sup>409</sup>

The court wrongly required defendants to prove their own innocence and gave little guidance as to how to achieve the preponderance of the evidence standard.<sup>410</sup> It is the burden of the prosecution to prove beyond a reasonable doubt that the defendant violated the law.<sup>411</sup> In both Dobson’s and Alexander’s cases, the government chose not to proceed with prosecution under the general impairment section, opting instead for a purely per se prosecution.<sup>412</sup> In both cases, the defendants responded by presenting their medical marijuana cards, placing them under the protection of section 28-1381(D).<sup>413</sup> However, the trial court denied admission of the medical marijuana cards and allowed the prosecution to proceed under a per se prosecution.<sup>414</sup>

How then were the defendants to prove their lack of impairment? The Arizona Supreme Court held that there is no definitive level of concentration of a controlled

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400. See ARIZ. REV. STAT ANN. § 13-3401(4).

401. *Dobson*, 361 P.3d at 377.

402. See ARIZ. REV. STAT ANN. § 28-1381(D).

403. See *id.*

404. See *id.* § 36-2811(B).

405. *Id.*

406. See *id.*

407. *Dobson v. McClennen*, 361 P.3d 374, 378 (Ariz. 2015).

408. *Id.*

409. *Id.*

410. See *id.*

411. See, e.g., *In re Winship*, 397 U.S. 358, 361 (1970) (holding that the standard of beyond a reasonable doubt is “the measure of persuasion by which the prosecution must convince the trier of all the essential elements of guilt”).

412. *Dobson*, 361 P.3d at 375.

413. *Id.*

414. *Id.*

substance that proves impairment.<sup>415</sup> Is there a level of concentration that *disproves* impairment?

The Arizona Supreme Court held that the defendants did nothing other than offer their medical marijuana cards and that was insufficient to disprove impairment.<sup>416</sup> Would it have been sufficient for the defendants to make the simple statement that they were not impaired? The court stated that defendants were in the best position to know when they were safe to drive.<sup>417</sup> Is their decision to drive then an assertion of their belief that they were safe to drive?

The court offered no guidance beyond its holding that possession of a medical marijuana card was insufficient to meet the standard.<sup>418</sup> It even refused to allow the defendants an opportunity to present any form of evidence in furtherance of an affirmative defense.<sup>419</sup> After making critical decisions on “a recurring issue of statewide importance” the court affirmed the defendants’ conviction without any opportunity to come into compliance with its new standard of interpretation.<sup>420</sup>

### 3. New York

New York’s DUI Code is closest to the ideal for prosecution of marijuana-related DUIs in a state where medical marijuana is legalized. New York passed its medical marijuana legislation in 2014.<sup>421</sup> The New York “Medical Use of Marijuana” statute is more similar to Pennsylvania’s MMA than the CMMC or AMMA. New York’s statute does not contain explicit language regarding the operation of motor vehicles and contains only a general protection clause with broad language guaranteeing protection from arrest and prosecution for patients.<sup>422</sup>

Also, like Pennsylvania, New York did not amend its DUI statute with the legalization of marijuana.<sup>423</sup> However, unlike Pennsylvania, it was not necessary because New York’s DUI Code does not include per se prosecution of drug-related DUIs.<sup>424</sup> The statute does allow for per se prosecution of alcohol-related DUIs with a BAC greater than 0.08%,<sup>425</sup> as well as a section for “aggravated” DUI when BAC is greater than 0.18%.<sup>426</sup> However, all drug-related DUIs are prosecuted under a general impairment standard.<sup>427</sup> While New York defines marijuana as a Schedule I controlled substance, the

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415. *See id.* at 377.

416. *Id.* at 378.

417. *Id.*

418. *See id.*

419. *See id.*

420. *Id.* at 376, 378–79.

421. *See* Assemb. 6357, 237th Leg., Reg. Sess. (N.Y. 2014).

422. N.Y. PUB. HEALTH LAW § 3306(1) (West 2019).

423. *See* N.Y. Assemb. 6357.

424. *See* N.Y. VEH. & TRAF. LAW § 1192 (West 2019).

425. *Id.* § 1192(2).

426. *Id.* § 1192(2-a).

427. *Id.* § 1192(4).

state's DUI laws do not differentiate between drug schedules and there is no per se DUI for Schedule I controlled substances.<sup>428</sup>

The judicial system of New York strongly supports this general impairment standard and has set a low bar for proving drug impairment. In *People v. Davis*,<sup>429</sup> the Supreme Court of New York Appellate Term held that impairment is the same for both alcohol and drugs and dismissed the defendant's assertion that he was not "ability impaired."<sup>430</sup> The court held that probable cause to arrest for DUI is established by showing that the defendant "was impaired 'to any extent.'"<sup>431</sup>

In reaching its decision, the court considered the arresting officer's nonexpert testimony regarding his observations of the defendant's driving, his detection of the odor of marijuana coming from the defendant's vehicle, the defendant's admission to smoking marijuana, and the officer's observation of the defendant's bloodshot eyes.<sup>432</sup> No evidence of field sobriety testing was mentioned in the court's opinion.<sup>433</sup>

New York's DUI statute presents one simple but potentially detrimental issue when considering amending Pennsylvania's law. The complete lack of per se prosecution for drug-related DUIs would make for a much more substantial, and unnecessary, change. It would require justifying the removal of per se prosecution for all Schedule I and nonprescribed Schedule II and III drug-related DUIs. In the face of the current opioid epidemic,<sup>434</sup> which has lawmakers focused on both heroin (Schedule I)<sup>435</sup> and prescription pill misuse and abuse (Schedule II and III),<sup>436</sup> such a drastic change would surely meet heavy opposition.

#### 4. Pennsylvania

Together, the three states represent three unique methods of amending state DUI laws with medical marijuana legalization. Colorado took a legislative approach, Arizona relied on its judiciary, and New York's DUI statute required no amending. None of these approaches, however, are the best method for Pennsylvania. Colorado's reliance on the 5 ng/mL standard is based on debatable scientific evidence. Arizona's case law establishing an affirmative defense lacks a clear standard for application. Meanwhile, the

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428. See N.Y. PUB. HEALTH LAW § 3306(d)(13) (West 2019) (defining "marihuana" as a Schedule I substance under hallucinogens); VEH. & TRAF. § 1192(4) ("No person shall operate a motor vehicle while the person's ability to operate such a motor vehicle is impaired by the use of a drug as defined in this chapter.").

429. 879 N.Y.S.2d 268 (N.Y. App. Term 2009).

430. *Davis*, 879 N.Y.S.2d at 269.

431. *Id.* (quoting *People v. Cruz*, 399 N.E.2d 513, 516 (N.Y. 1979)).

432. *Id.*

433. See *id.* at 269–70.

434. The opioid epidemic has gained national attention in recent years due to the increasing number of deaths related to overdose. See, e.g., *One Nation Overdosed*, NBC NEWS, <http://www.nbcnews.com/americas-heroin-epidemic> [<https://perma.cc/3BU9-SENV>] (last visited Nov. 1, 2019) (providing a clearinghouse of news articles related to the opioid epidemic); see also *Opioid Overdose Crisis*, NAT'L INST. ON DRUG ABUSE, <http://www.drugabuse.gov/drugs-abuse/opioids/opioid-overdose-crisis> [<https://perma.cc/VGV4-YEQ4>] (last updated Jan. 1, 2019) ("The misuse of and addiction to opioids—including prescription pain relievers, heroin, and synthetic opioids such as fentanyl—is a serious national crisis that affects public health as well as social and economic welfare.").

435. 35 PA. STAT. AND CONS. STAT. ANN. § 780-104(1) (West 2019).

436. *Id.* § 780-104(2)–(3).

Arizona Supreme Court continues to treat and define medical marijuana differently than other prescribed controlled substances. New York's statute lacks any *per se* prosecution for drug-related DUIs, which would likely be highly contested and unreasonable to achieve in Pennsylvania. Perhaps the best lesson to take from the unique and myriad solutions offered by these other states is for Pennsylvania to develop its own individualized solution.

#### IV. CONCLUSION

The redefining of marijuana from Schedule I to Schedule II or III is necessary to bring the CSDDCA and Pennsylvania's DUI laws into line with the enactment of the MMA. Failure to do so may result in unfair prosecution and conviction of medical marijuana patients for *per se* DUIs. Moreover, the current contradictory nature of the three statutes could result in unwanted judicial decisions that threaten the validity and constitutionality of both the CSDDCA and the DUI Code.

Amending the categorization of marijuana would formally recognize Pennsylvania's acceptance of a medical purpose for marijuana. The change also encourages better training for and certification of police officers to face the continuing and increasing threat posed by increasing numbers of actually-impaired drivers on the highways of the Commonwealth.