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“We change laws.”

Driving Under the Influence Laws and Medical Marijuana Patients: Zero Room for “Zero Tolerance”

MPP believes that the soundest approach to criminalizing driving under the influence of medical marijuana is what most medical marijuana states have done: treating medical marijuana like other prescription medications. In most states, a driver is guilty of driving under the influence of drugs (DUID) if the state proves, using the totality of the circumstances, that the driver was actually impaired at the time of arrest. However, a minority of states have “zero tolerance” laws, meaning an individual will automatically be guilty of DUID if THC and/or marijuana metabolites are found in his or her blood. Other states have “*per se*” laws, meaning drivers can be convicted solely for having a certain concentration of THC and/or metabolites in their blood. THC can stay in one’s system for as long as a week, and metabolites can be detected for weeks after impairment wears off. To avoid criminalizing patients who drive long after marijuana’s effects have worn off, most medical marijuana states with zero tolerance laws have carved out an exception for patients.

DUID laws in medical marijuana states

Sixteen states plus the District of Columbia have effective medical marijuana laws on their books. Under 11 of these laws, an individual is guilty of driving under the influence of marijuana if the state proves through a totality of the circumstances that the driver was impaired.¹ These laws do not single out marijuana impairment from other forms of impairment: the same standard applies to Oxycontin, Benadryl, and all other drugs. Many of these states explicitly allow blood to be drawn based on reasonable suspicion and allow the test results to be admitted as evidence. However, in these states, the mere presence of THC will not automatically lead to a conviction. Instead, the evidence as a whole must prove that the person was impaired. In addition to the results of blood tests, factors can include erratic driving and roadside sobriety tests.

Three medical marijuana states — Arizona, Delaware, and Rhode Island — generally have “zero tolerance” laws criminalizing driving with any amount of THC or marijuana metabolites in one’s system, even if the driver is not impaired. However, these three laws include an exception for medical marijuana patients.² In a fourth state, Michigan, the state generally has a zero tolerance law for THC, but the question of whether the state’s medical marijuana law creates an exemption for patients is currently being litigated.

Nevada and Montana have *per se* DUID laws. In Nevada, a driver is *per se* guilty of DUID if the level of THC in his or her blood exceeds two nanograms per milliliter (ng/mL) of blood. In Montana, the *per se* limit is five ng/mL for patients. In 2011, the Colorado Legislature debated setting a five ng/mL *per se* limit similar to Montana’s, but decided against it due to a lack of scientific consensus and concerns that many legal medical marijuana users’ blood would exceed the THC limits even when they are not legally impaired.

¹ The 11 jurisdictions with those laws are: Washington, D.C., Alaska, California, Colorado, Hawaii, Maine, New Jersey, New Mexico, Oregon, Vermont, and Washington.

² In Delaware, a patient’s conviction cannot be based *solely* on metabolites or components of marijuana. In Rhode Island, a patient’s conviction cannot be based *solely* on metabolites. In Arizona, a patient’s conviction cannot be based *solely* on metabolites or components of marijuana in a concentration that is insufficient to cause impairment.

Prescription medications, over-the-counters, and driving while intoxicated

While many prescription and over-the-counter (OTC) medications cause physical or mental impairment, no state has created a *per se* DUID offense for simply testing positive for a prescription or OTC medication. Like THC and its metabolites, many prescriptions can stay in one's system for days or weeks. To avoid criminalizing sober drivers who have used medications in the past, states instead criminalize driving while impaired by a prescription or OTC medication by requiring the state to prove impairment by the totality of the circumstances. The state can present evidence relevant to impairment at the time of driving – such as an active prescription for an impairment inducing drug – but evidence of use will not, on its own, lead to a conviction.

The science behind detecting current marijuana intoxication

Most scientists researching the issue acknowledge the difficulty of pegging THC impairment to a number (in a way similar to drunk driving laws), and epidemiological evidence on the risk of accidents associated with marijuana is much less conclusive than data regarding alcohol. The most meaningful recent study measuring driver "culpability" (i.e., who is at fault) in 3,400 crashes over a 10-year period indicated that drivers with THC concentrations of less than five ng/mL in their blood have a crash risk no higher than that of drivers without any THC in their bodies.³ The crash risk begins to rise above the risk for sober drivers when a marijuana user's THC concentrations in whole blood reach five to 10 ng/mL.⁴

However, heavy marijuana users' blood can contain detectable amounts of THC even after periods of abstinence. In one controlled study, six of 25 participants tested positive for active levels of THC a full seven days after abstinence, with the highest concentration detected being three ng/mL of whole blood.⁵ In addition, the blood serum of heavy to moderate users may contain more than two ng/mL of THC at 24 or even 48 hours after smoking a single joint, a level that studies have shown does not produce impairment.⁶

This is a particular concern for medical marijuana patients who are regularly using marijuana in compliance with state laws and their doctors' advice, but who would likely test positive for marijuana while sober. While the Colorado Legislature debated a *per se* THC limit of five ng/mL, *Denver News* medical marijuana critic, William Breathes, subjected himself to blood draws to test his THC levels. After a 15-hour period of abstinence that included a full night's sleep, Mr. Breathes' THC levels were still 13.5 ng/mL. According to his physician, Mr. Breathes was in "no way incapacitated" at the time.⁷ This first person account demonstrates the very real possibility that medical marijuana patients and other heavy marijuana users could face criminal charges under a *per se* or zero tolerance system even if they are not actually impaired.

³ O.H. Drummer, et al., "The involvement of drugs in drivers of motor vehicles killed in Australian road traffic crashes," *Accident Analysis and Prevention*, 2004, 36, pp. 239-48.

⁴ "When reporting THC levels in blood or adopting legal limits one must always specify the reference fluid ... For THC, concentrations measured in whole blood are typically 1.6–2.2 times lower than those measured in serum or plasma. For example, five ng/mL of THC in whole blood corresponds to about 10 ng/mL in serum or plasma." (F. Grotenhermen, et al., "Testing for Impairment by Cannabis," 2004.)

⁵ Erin L. Karschner et al., "Do Δ^9 -Tetrahydrocannabinol Concentrations Indicate Recent Use in Chronic Cannabis Users?" *Addiction*, 2009, 104(12), pp. 2041-2048.

⁶ G. Skopp, et al., "Serum cannabinoid levels 24 to 48 hours after cannabis smoking," *Archiv fur Kriminologie* [German publication], 2003, 212(3-4), pp. 83-95.

⁷ William Breathes, "THC blood test: Pot critic William Breathes nearly 3 times over proposed limit when sober," *Denver News*, April 18, 2011.