

# DWI AND DRUGS: A LOOK AT PER SE LAWS FOR MARIJUANA

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## I. INTRODUCTION

The battle against driving while intoxicated (“DWI”) has been long and arduous with many players, successes, and failures. Until relatively recently, most attention has been focused on driving under the influence of alcohol.<sup>1</sup> Accordingly, every state has codified a presumption of impairment for persons driving with a blood alcohol content of 0.08% or above.<sup>2</sup> The state must prove actual impairment for persons driving with blood alcohol levels below 0.08%.<sup>3</sup>

In the shadows of this war against drunk driving resides the problem of driving while under the influence of drugs (“DUID”). Drivers under the influence of drugs inflict no fewer societal costs than do drivers under the influence of alcohol.<sup>4</sup> However, there have been difficulties in enforcing DUID laws for several reasons. First, a driver may be impaired because that driver ingested both drugs and alcohol, but the alcohol level may be so miniscule that a blood alcohol test fails to demonstrate any statistical impairment.<sup>5</sup> The alcohol may effectively mask the effects of drugs such that law enforcement does not suspect any other intoxicants. Thus, without performing qualitative chemical tests on every driver suspected of impairment, it may be difficult to expose this illegal conduct.<sup>6</sup>

Second, unless officers have received specialized training, it is often a difficult task to recognize the effects of or be able to identify an illegal sub-

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<sup>1</sup> Although each state has its own terminology for driving after having consumed a psychoactive substance, for consistency this Article will use the general terms “driving while intoxicated” (“DWI”) to mean driving while impaired due to drugs or alcohol according to law; “DUID” to mean driving while physically impaired due to drugs; and “per se DUID” to mean driving with the presence of either a specific quantity of drugs in the body or any detectable level (varies by state), without respect to whether one is physically impaired.

<sup>2</sup> Mothers Against Drunk Driving, *.08 BAC per se – Issue Brief*, <http://www.madd.org/takeaction/7584> (last visited Feb. 8, 2007).

<sup>3</sup> See, e.g., *infra* note 12.

<sup>4</sup> J. Michael Walsh et al., *Drugs and Driving*, in 5 *TRAFFIC INJURY PREVENTION* 241, 244 (2004).

<sup>5</sup> Mark F. Lewis & Betty J. Buchan, *The Drugged Driver and the Need for a “Per Se” Law*, FLA. B.J., July-Aug. 1998, at 32.

<sup>6</sup> See Mark Hansen, *Drugged State*, ABA J., Dec. 2005, at 12.

stance in the field amongst so many potential intoxicants.<sup>7</sup> It may be that a driver's behavior is suspect due to the illegal use of intoxicants, the legal use of over-the-counter cold remedies, or just fatigue. Lastly, even where law enforcement confirms illegal drug use through testing, prosecutors have found it difficult to prove that the driver is actually impaired and thus convict for DUID.<sup>8</sup>

These circumstances have set the stage for a silent revolution in DWI law<sup>9</sup> advocated by victims of DUID and with the ever-willing participation of well-meaning legislators.<sup>10</sup> Unsatisfied by the inability of prosecutors to convict those charged with DUID with any regularity through standard means,<sup>11</sup> sixteen states and several European nations have instituted per se DUID statutes that burden a defendant with the presumption of impairment when he drives with any detectable amount of an illegal substance in his or her body.<sup>12</sup> One of the architects of Nevada's DUID law was former State Senator Jon Porter. He has since been elected to the United States Congress and has been actively trying to institute a federal provision for DUID.<sup>13</sup>

This Article will examine per se DUID laws in the context of a case regarding marijuana use in Nevada. First, the Article describes the principal case in Nevada. Next, a survey of the relevant scientific issues is undertaken to orient the reader. In conclusion, the Article analyzes constitutional problems

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<sup>7</sup> See INTERNATIONAL COUNCIL ON ALCOHOL, DRUGS AND TRAFFIC SAFETY, ICADTS WORKING GROUP REPORT: ILLEGAL DRUGS AND DRIVING (2000), <http://www.icadts.org/reports/Drugs-FinalReport.pdf> [hereinafter ICADTS REPORT].

<sup>8</sup> Lewis & Buchan, *supra* note 5, at 34.

<sup>9</sup> ICADTS REPORT, *supra* note 7.

<sup>10</sup> See, e.g., *Makes Various Changes Concerning Controlled Substances and Impaired Operation of Vehicles and Vessels*: Hearing on S.B. 481 before the S. Comm. on Judiciary, 1999 Leg., 70th Sess. 2-5 (Nev. 1999) (testimony by parents who had lost children in accidents caused by drugged drivers).

<sup>11</sup> Generally, state statutes demand proof that a driver was actually impaired. See, e.g. CAL. VEH. CODE § 23152 (West 2007); FLA. STAT. ANN. §316.193 (West 2007); TEX. PEN. CODE ANN. § 49.04 (Vernon 2005).

<sup>12</sup> ARIZ. REV. STAT. ANN. § 28-1381(A)(3) (2006); DEL. CODE ANN. tit. 21 § 4177(a)(6) (2006); GA. CODE ANN. § 40-6-391(a)(6) (West 2007); 625 ILL. COMP. STAT. ANN. 5/11-501(a)(6) (West 2007); IND. CODE ANN. § 9-30-5-1(1)(c) (West 2007); IOWA CODE ANN. § 321J.2(1)(c) (West 2007); MICH. COMP. LAWS ANN. § 257.625(8) (West 2007); MINN. STAT. ANN. § 169A.20(1)(7) (West 2007); N.C. GEN. STAT. ANN. § 20-138.1(a)(3) (West 2007); 75 PA. CONS. STAT. ANN. § 3802(d) (West 2007); R.I. GEN. LAWS § 31-27-2(b)(2) (2005); UTAH CODE ANN. § 41-6a-517(2) (West 2007); WIS. STAT. ANN. § 346.63(1)(a) (West 2006) (these statutes irrebuttably presume impairment when certain controlled substances are found in a driver's body). Nevada, Ohio, and Virginia are alone in providing specific quantitative levels. NEV. REV. STAT. ANN. § 484.379 (West 2007); OHIO REV. CODE ANN. § 4511.19(A)(1)(j) (West 2007); VA. CODE ANN. § 18.2-266 (West 2007). Minnesota exempts marijuana and its metabolites from per se status. MINN. STAT. ANN. §169A.20(1)(7) (West 2007). Belgium, Germany, Sweden, Finland, and France all have per se DUID laws. Walsh et al., *supra* note 4, at 249-50.

<sup>13</sup> Rep. Porter introduced H.R. 3907 in the 108th Congress, which died in committee. This bill would have phased in a requirement that the states pass laws providing mandatory minimum sentences for those convicted of driving under the influence of an illegal drug. H.R. 3907, 108th Cong. (2d Sess. 2004). Those portions of the bill relating to research were subsequently passed in the 109th Congress. SAFETEA-LU, Pub. L. No. 109-50, 119 Stat. 1144, 1539-40 (2005).

with per se DUID statutes, strategies employed by other states, and presents a policy argument based on the prohibition against character evidence.

## II. THE JESSICA WILLIAMS CASES

### A. Introduction

Nevadans have had the opportunity to watch a case involving Nevada's per se DUID statute<sup>14</sup> play out publicly over the past several years. On March 19, 2000, twenty-year-old Jessica Williams was driving on Interstate 15 with a female companion when she claims to have fallen asleep at the wheel.<sup>15</sup> Her van then drifted into the median, causing a collision that resulted in the deaths of six teenagers who were performing trash cleanup as a part of the Probation Service Work Program.<sup>16</sup> Williams conceded that she had taken one tablet of ecstasy approximately twelve hours prior and that she had shared one "bowl" of marijuana roughly two hours prior.<sup>17</sup> Her passenger in the vehicle had been sleeping. She testified that she awoke as they were proceeding into the median and saw Williams asleep at the wheel.<sup>18</sup> Other drivers who witnessed the incident testified "that it was apparent that the driver had fallen asleep."<sup>19</sup>

Jessica Williams's criminal case began in Nevada State District Court, twice visited the Supreme Court of Nevada, and she continues to seek relief in the federal system. Williams was charged with (1) driving while under the influence of a controlled substance (DUID)<sup>20</sup> and/or driving with a prohibited

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<sup>14</sup> NEV. REV. STAT. ANN. § 484.379 (West 2007) states in section (1) that it is unlawful to drive: (a) while under the influence of alcohol or (b) with a concentration of alcohol of 0.08 or greater in blood or breath; section (2) states that it is unlawful to drive (a) while under the influence of any controlled substance, or (b) under the combined influence of alcohol and a controlled substance; section (3) states that it is unlawful to drive with an amount of a prohibited substance in blood or urine that is greater than or equal to the enumerated list of quantities for 11 specific controlled substances. For marijuana, the amount is 2 ng per ml of blood/10 ng per ml of urine; for marijuana metabolite, the amount is 5 ng per ml of blood/15 ng per ml of urine. NEV. REV. STAT. ANN. § 484.3795 (West 2007) is the felony DWI law with the same elements as § 484.379.

<sup>15</sup> Williams v. State (Williams I), 50 P.3d 1116, 1118 (Nev. 2002) (en banc); Hugo Martin, *California and the West: Five Killed, Two Hurt As Van Strikes Work Crew Near Las Vegas*, L. A. TIMES, Mar. 20, 2000, at A3.

<sup>16</sup> Peter O'Connell, *Families of Six Teens Killed Picking Up Trash File Lawsuit*, LAS VEGAS REV. J., Aug. 18, 2000 at 1B. The teenagers were working to perform restitution to satisfy their probation requirements to avoid juvenile detention. Joe Schoenmann, *Five Teens in Work Crew Killed in Accident on I-15*, LAS VEGAS REV. J., Mar. 20, 2000, at 1A. The work crew was comprised of many teenagers and there were several civil suits relating to the circumstances of their presence. O'Connell, *supra*. A key question was whether a lack of adequate safety protocols, constituted negligence that was a superseding intervening cause in Williams's case. *Id.*

<sup>17</sup> Petition for a Writ of Habeas Corpus at 7, Williams v. Bodo, No. CV-S-04-1620 (D.Nev. Nov. 22, 2004). The Ninth Circuit, on November 15, 2006, determined that this petition was not a § 2254 petition, leaving her free to file for habeas relief anew. Williams v. Bodo, No. 06-71199, Order (9th Cir. Nov. 15, 2006). On November 27, 2006, the case was reopened. Williams v. Bodo, No. CV-S-04-1620 (D.Nev. Nov. 27, 2006).

<sup>18</sup> Williams I, 50 P.3d at 1118.

<sup>19</sup> *Id.*; Petition for Writ of Habeas Corpus, *supra* note 17.

<sup>20</sup> NEV. REV. STAT. ANN. § 484.3795(1)(d) (West 2007).

substance in her body (per se DUID),<sup>21</sup> (2) reckless driving, (3) involuntary manslaughter, (4) possession of a controlled substance, and (5) use of a controlled substance.<sup>22</sup> After a two-week trial, the court instructed the jury that they could only choose one among the first three counts.

On count (1) the jury could find her guilty of DWI based on two alternate theories: actual impairment (DUID) or presence of an illegal substance (per se DUID), or both.<sup>23</sup> The jury chose to convict Williams of driving while intoxicated based on the presence of an illegal substance (per se DUID), not actual impairment (DUID).<sup>24</sup> Additionally, they found her guilty of use and possession of a controlled substance and being under the influence of a controlled substance.<sup>25</sup>

Williams petitioned the Supreme Court of Nevada for review.<sup>26</sup> There she made four arguments explored below, each challenging the constitutionality of the per se DUID statute.<sup>27</sup> In addition to these four arguments about the per se DUID statute, she claimed a violation of double jeopardy, a lack of proximate cause, and an evidentiary claim related to the preservation of her blood sample.<sup>28</sup>

### B. Equal Protection

Williams first argued that the per se DUID statute was unconstitutional because it violated the Equal Protection Clause of the Nevada Constitution.<sup>29</sup> She claimed the statute treated drivers with controlled substances in their systems differently, depending on the circumstances of their ingestion.<sup>30</sup> Those drivers who ingested controlled substances through legal means were subject to a rebuttable presumption of impairment.<sup>31</sup> Those who used illegal means were subject to an irrebuttable presumption of impairment.<sup>32</sup> Williams claimed that this distinction fails to ascertain whether the proscribed conduct actually causes the harm of driving while impaired that the legislature intended to prohibit.<sup>33</sup>

The court, in framing its decision, seized upon an argument made in a footnote in Williams's opening brief. There she argued for review based on strict scrutiny because driving is a fundamental right.<sup>34</sup> The court explained that only those statutes involving fundamental rights or those based on suspect

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<sup>21</sup> *Id.* § 484.3795(1)(f).

<sup>22</sup> *Williams I*, 50 P.3d at 1118.

<sup>23</sup> *Id.*

<sup>24</sup> *Id.* at 1119.

<sup>25</sup> *Id.*

<sup>26</sup> Nevada has no intermediate appellate court.

<sup>27</sup> NEV. REV. STAT. ANN. § 484.3795(1)(f) (West 2007).

<sup>28</sup> Additionally there were miscellaneous claims of error disposed of by the court in the final paragraph of its decision, unrelated to the issues of DUID. *Williams I*, 50 P.3d at 1127.

<sup>29</sup> *Id.* at 1120.

<sup>30</sup> *Id.*

<sup>31</sup> Brief of Appellant at 14-15, *Williams v. State*, 50 P.3d 1116 (Nev. 2002) (No. 37785) [hereinafter Brief of Appellant].

<sup>32</sup> *Id.*

<sup>33</sup> Brief of Appellant, *supra* note 31, at 10 n.2.

<sup>34</sup> *Williams I*, 50 P.3d at 1120.

classifications are subject to strict scrutiny.<sup>35</sup> Statutes failing to involve these two issues are evaluated under rational basis scrutiny.<sup>36</sup> Rational basis scrutiny only requires the government to demonstrate that the statute is rationally related to a legitimate state interest.<sup>37</sup> The court declared that neither driving nor drug use qualify as fundamental rights and thus were ineligible for review under strict scrutiny.<sup>38</sup>

In determining the constitutionality of a state statute scrutinized under the rational basis standard, the court need only find that there is "any reasonably conceivable state of facts that could provide a rational basis for the classification."<sup>39</sup> A statute shall not fail under rational basis review "because in practice it results in some inequality."<sup>40</sup> The Supreme Court of Nevada concluded that the statute finds its rational basis in the state's dual interests in promoting highway safety and deterring illegal drug use.<sup>41</sup> In coming to its conclusion, the court took note of several sister-state decisions upholding the constitutionality of per se DUID laws, so long as the laws made exception for the legal use of controlled substances.<sup>42</sup>

### C. Due Process

#### 1. Substantive Due Process

Williams next argued that the per se DUID statute was unconstitutional because the statute violated her right to substantive due process.<sup>43</sup> The court concluded that this claim mirrored her Equal Protection argument.<sup>44</sup> She claimed that the state had no legitimate purpose in infringing upon her right to drive with prohibited substances in her body so long as she was not impaired.<sup>45</sup> Preventing her from driving in her unimpaired condition, she argued, was not rationally related to any legitimate state interest.<sup>46</sup> The court again stated that unless the right is fundamental or the class suspect, it will apply rational basis scrutiny.<sup>47</sup>

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<sup>35</sup> *Id.*

<sup>36</sup> *Id.*

<sup>37</sup> *Id.*

<sup>38</sup> *Id.*

<sup>39</sup> *Id.*

<sup>40</sup> *Id.*

<sup>41</sup> *Id.*

<sup>42</sup> *Id.* at 1120-21, n.15. Additionally, the court addressed Williams's claim that the statute failed to differentiate between legal and illegal users of marijuana in the context of the medical marijuana debate. *Id.* at 1121. At that time Nevada had not yet approved medicinal marijuana use, so there were no legal marijuana users. *Id.* It is now legal to use medical marijuana in Nevada. NEV. REV. STAT. ANN. § 453A.310 (West 2007) (effective Oct. 1, 2001).

<sup>43</sup> *Williams I*, 50 P.3d at 1122.

<sup>44</sup> *Id.*

<sup>45</sup> *Id.*

<sup>46</sup> *Id.*

<sup>47</sup> *Id.*

## 2. *Vagueness*

Third, Williams argued that the statute violated her right to due process because the statute is unconstitutionally vague.<sup>48</sup> She argued that an individual of ordinary intelligence is unable to determine which components of the marijuana plant are illegal to consume or which metabolites formed in the body after consumption are illegal.<sup>49</sup> Additionally, an individual cannot know when her body attains the threshold limit of any prohibited substance.<sup>50</sup> The court explained that a statute “may be void for vagueness only if it is void in all of its applications.”<sup>51</sup> A statute provides adequate warning when its language contains “a well-settled and ordinarily understood meaning” within the statutory scheme.<sup>52</sup> The court determined that Williams, as a regular marijuana user, was well aware of the plain meaning of the term marijuana and that the illegal metabolites are reasonably understood to be those formed as a result of using marijuana.<sup>53</sup> Moreover, the court rejected her claim because the law permits no legal use without a prescription,<sup>54</sup> thus her subjective knowledge of the threshold levels in her body was irrelevant.<sup>55</sup>

## 3. *Overbreadth*

Finally, Williams challenged the statute as being overly broad.<sup>56</sup> Here, Williams claimed that the statute imposed punishment not only on those engaged in the targeted conduct of driving while intoxicated, but that it also punished those engaged in legal conduct.<sup>57</sup> Specifically, Williams claimed that the statute’s generic reference to marijuana and its metabolites could potentially be referencing more than 400 compounds, a great number of which are pharmacologically inactive.<sup>58</sup> In the Nevada Controlled Substances Act, marijuana has a specific definition that focuses on those components of the plant that contain pharmacologically active constituents.<sup>59</sup> This demonstrates that there are many specific components of the marijuana plant that may be legally consumed. Williams argued that although legal under the controlled substances act, one may consume various parts of the marijuana plant and still be punished under the per se DUID statute.<sup>60</sup> Here the statute captures otherwise legal conduct in a broad net of prohibition.<sup>61</sup> The court responded that the overbreadth doctrine applies when a statute infringes upon constitutionally protected conduct and

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<sup>48</sup> *Id.* at 1122.

<sup>49</sup> *Id.*

<sup>50</sup> *Id.* at 1123.

<sup>51</sup> *Id.* at 1122.

<sup>52</sup> *Id.*

<sup>53</sup> *Id.* at 1123.

<sup>54</sup> NEV. REV. STAT. ANN. § 453.411 (West 2007) (makes it illegal to knowingly use or to be under the influence of a controlled substance without prescription).

<sup>55</sup> *Williams I*, 50 P.3d at 1123.

<sup>56</sup> *Id.*

<sup>57</sup> *Id.*

<sup>58</sup> Brief of Appellant, *supra* note 31, at 19.

<sup>59</sup> NEV. REV. STAT. ANN. § 453.096 (West 2007).

<sup>60</sup> Brief of Appellant, *supra* note 31, at 20.

<sup>61</sup> *Id.*

since the court had determined that neither driving nor drug use was so protected, this claim was also without merit.<sup>62</sup>

#### D. Claims Unrelated to DWI

##### 1. Double Jeopardy

Williams argued that she was subjected to double jeopardy. She claimed that since she was found not guilty on a theory of actual impairment,<sup>63</sup> a concurrent guilty finding of per se impairment<sup>64</sup> violated her Fifth Amendment right to be free from double jeopardy.<sup>65</sup> She argued that by directing the jury to make separate findings of guilt with respect to actual or per se impairment, the trial court treated each as a separate offense.<sup>66</sup> The Supreme Court of Nevada recognized her claim as asserting a right to be free of "multiple punishments for the same offense."<sup>67</sup> The court applied the *Blockburger* test.<sup>68</sup> The test determines whether the same act violates two distinct statutory provisions.<sup>69</sup> An act results in two distinct offenses when the elements of one require proof of an additional fact not required in the other.<sup>70</sup> Here the court determined that the elements needed to prove actual impairment were different from those required for per se impairment; and additionally, it appears that the legislature had a different intent in passing each.<sup>71</sup> The Supreme Court of Nevada concluded that since the elements of each statute were different, acquittal of one and conviction of another did not violate the constitutional prohibition against double jeopardy.<sup>72</sup>

##### 2. Remaining Claims

Finally, Williams argued that the trial court erred by not allowing her to present evidence of the county's negligence in placing the victims in harm's way.<sup>73</sup> The Supreme Court of Nevada rejected this, agreeing with the trial judge's ruling that such evidence was irrelevant because no third party negligence would relieve her guilt if it was shown that she proximately caused the deaths.<sup>74</sup> Additionally, she argued that the state improperly handled the blood evidence by failing to refrigerate it, thus it was unavailable to the defense for independent testing.<sup>75</sup> The court rejected this argument, stating that the loss or destruction of evidence violates due process "only [where] . . . the state acted in bad faith or . . . the defendant suffers undue prejudice and the exculpatory value

<sup>62</sup> *Williams I*, 50 P.3d at 1123-24.

<sup>63</sup> NEV. REV. STAT. ANN. § 484.379(2)(a) (West 2007) (actual impairment).

<sup>64</sup> *Id.* § 484.379(3) (per se impairment).

<sup>65</sup> U.S. CONST. amend. V; *Williams I*, 50 P.3d at 1124.

<sup>66</sup> *Williams I*, 50 P.3d at 1124.

<sup>67</sup> *Id.*

<sup>68</sup> *Blockburger v. United States*, 284 U.S. 299, 304 (1932).

<sup>69</sup> *Id.*

<sup>70</sup> *Id.*

<sup>71</sup> *Williams I*, 50 P.3d at 1120, 1124-25.

<sup>72</sup> *Id.* at 1124-25. Williams appealed this double jeopardy claim to federal court, where it was rejected. *Williams v. Warden*, 422 F.3d 1006 (9th Cir. 2005).

<sup>73</sup> *Williams I*, 50 P.3d at 1125.

<sup>74</sup> *Id.* at 1126.

<sup>75</sup> *Id.*

of the evidence was apparent before . . . [the] loss or [destruction],” and then finding that she failed to satisfy the elements.<sup>76</sup>

The arguments Jessica Williams presented failed to persuade the Supreme Court of Nevada. The court appreciated the legislature’s desire to protect state roadways and granted it great deference in providing for the public’s protection against drivers under the influence of drugs. The results reached by the court were not unexpected in a direct appeal.

### III. MARIJUANA SCIENCE

It is necessary to understand the basics about marijuana and its interaction with the human body if one is to reach valid conclusions about its effects on driving and make informed policy decisions based on these conclusions. This section will provide an overview of marijuana science as it relates to DUID and per se DUID. It will first explain some basic facts about marijuana; second, it will explain how drug testing can catch marijuana’s presence in the body long after its use; third, it will explain how a person can test positive for marijuana use by using legal, over the counter, commercial products; and lastly, it will explain how drug testing levels are arrived at and used in various settings.

#### A. *The Basics*

Cannabis Sativa is the plant that yields the substance commonly known as marijuana or hemp.<sup>77</sup> The primary psychoactive agent in marijuana is  $\Delta^9$ -tetrahydrocannabinol (THC).<sup>78</sup> The psychoactive THC is most abundant in the upper third of the cannabis stalk, its leaves, and its flowers.<sup>79</sup> THC is also found in the synthetically-produced drug dronabinol, trade named Marinol®.<sup>80</sup>

Naturally occurring THC found in the cannabis plant is classified as a Schedule I controlled substance, meaning it has a high potential for abuse, no currently accepted medical use, and a lack of accepted safety.<sup>81</sup> The synthetic drug dronabinol is classified under Schedule II, meaning it has a high potential for abuse, that there are current accepted medical uses with severe restrictions, and that it may lead to severe psychological or physical dependence.<sup>82</sup>

<sup>76</sup> *Id.* at 1126-27 (quoting *Leonard v. State*, 17 P.3d 397, 407 (Nev. 2001)). Williams also unsuccessfully claimed that the failure to hear evidence on this matter until after trial constituted error. *Williams I*, 50 P.3d at 1127.

<sup>77</sup> DENNIS L. KASPER, M.D., ET AL., *HARRISON’S PRINCIPLES OF INTERNAL MEDICINE* 2571 (16th ed. 2005).

<sup>78</sup> Marilyn A. Huestis et al., *Detection Times of Marijuana Metabolites in Urine by Immunoassay and GC-MS*, 19 J. ANALYTICAL TOXICOLOGY 443, 444 (1995) [hereinafter Huestis et al., *Detection Times*].

<sup>79</sup> T. Z. Bosy & K. A. Cole, *Consumption and Quantitation of Tetrahydrocannabinol in Commercially Available Hemp Seed Oil Products*, 24 J. ANALYTICAL TOXICOLOGY 562, 563 (2000).

<sup>80</sup> PHYSICIANS’ DESK REFERENCE 3334 (60th ed. 2006) [hereinafter PDR].

<sup>81</sup> 21 U.S.C. § 812 (2000). Both Nevada and the federal government maintain similar lists of scheduled drugs. *Id.*; NEV. REV. STAT. ANN. § 453.166 (West 2007).

<sup>82</sup> PDR, *supra* note 80, at 3335 (Dronabinol is indicated for treatment of excessive weight loss in AIDS patients and to treat nausea associated with cancer chemotherapy in those failing to respond to conventional anti-nausea preparations); 21 U.S.C. § 812 (2000); NEV. REV. STAT. ANN. § 453.176 (West 2007).



The National Institute on Drug Abuse reports that in 2004, over 14 million Americans over the age of twelve used marijuana in the month directly preceding their survey, and that from 1995 through 2001 there were approximately 2.6 million new marijuana users each year.<sup>83</sup> Recreational marijuana use has existed for centuries and continues to be the most common positive result in workplace drug testing.<sup>84</sup> The most common method by which to ingest THC is through smoking the constituents of the cannabis plant.<sup>85</sup>

### B. In the Body

When marijuana is smoked, the THC is absorbed into the bloodstream through the lungs.<sup>86</sup> Peak blood concentrations of THC are seen immediately after smoking marijuana.<sup>87</sup> THC is immediately circulated throughout the body where, because of its chemical properties, it is sequestered in fat tissue.<sup>88</sup> Once there, the amount of THC available in the blood is limited by the degree to which it is released by the fat tissue over time.<sup>89</sup> Think of this as an equilibrium, similar to how a river may deposit sediment along its shores at times, while at other times it erodes the sediment. In the body, however, the interplay between THC sequestration in fat tissue and its release into the blood is dependent not on chance but a multitude of biochemical variables. The speed with which THC is released back into the blood stream is highly variable across individuals. It generally occurs almost completely within twenty-four hours after smoking, but it may not end for several weeks.<sup>90</sup>

The behavioral and psychological effects of THC are perceptible within minutes of smoking marijuana; they achieve their peak within ten to thirty minutes, last roughly two hours, and are mostly gone within three to five hours.<sup>91</sup> As THC circulates, it is rapidly broken down into over twenty metabolites,

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<sup>83</sup> U.S. Dep't of Health and Human Serv., National Institute on Drug Abuse, *Marijuana* (2006), <http://www.drugabuse.gov/PDF/InfoFacts/Marijuana06.pdf>; Nora D. Volkow, M.D., U.S. Dep't of Health and Human Serv., National Institute on Drug Abuse, *Marijuana Abuse* (2002), available at <http://www.nida.nih.gov/PDF/RRMarijuana.pdf>.

<sup>84</sup> Albert D. Fraser et al., *Drug and Chemical Metabolites in Clinical Toxicology Investigations: the Importance of Ethylene Glycol, Methanol and Cannabinoid Metabolite Analyses*, 35 CLINICAL BIOCHEMISTRY 501, 507 (2002).

<sup>85</sup> KASPER et al., *supra* note 77, at 2571.

<sup>86</sup> Marilyn A Huestis & Edward J. Cone, *Urinary Excretion Half-Life of 11-nor-9-carboxy- $\Delta^9$ -tetrahydrocannabinol in Humans*, 20 THERAPEUTIC DRUG MONITORING 570 (1998) [hereinafter Huestis & Cone, *Urinary Excretion*].

<sup>87</sup> Marilyn A. Huestis et al., *Blood Cannabinoids I: Absorption of THC and Formation of 11-OH-THC and THCCOOH During and After Smoking Marijuana*, 16 J. ANALYTICAL TOXICOLOGY 276 (1992) [hereinafter Huestis et al., *Blood Cannabinoids I*].

<sup>88</sup> Huestis & Cone, *Urinary Excretion*, *supra* note 86, at 570.

<sup>89</sup> *Id.*; Huestis et al., *Blood Cannabinoids I*, *supra* note 87, at 276.

<sup>90</sup> Huestis et al., *Detection Times*, *supra* note 78, at 444; Huestis et al., *Blood Cannabinoids I*, *supra* note 87, at 276.

<sup>91</sup> U.S. DEP'T OF TRANSP., DRUGS AND HUMAN PERFORMANCE FACT SHEETS (2004), available at <http://www.nhtsa.dot.gov/people/injury/research/job185drugs/index.htm>. The majority of dronabinol's effects are reported to last four to six hours, with only the appetite stimulating effect lasting twenty-four hours or longer. PDR, *supra* note 80, at 2544.

most notably THC-COOH.<sup>92</sup> This is the substance that is used most frequently in testing for marijuana use.<sup>93</sup>

THC-COOH is not a psychoactive substance.<sup>94</sup> It is used for testing because it remains detectable in the body longer, and in more substantial quantities than THC or other active metabolites.<sup>95</sup> The synthetic version of THC, dronabinol, is chemically indistinguishable from the naturally occurring variety.<sup>96</sup> Thus, there is no way to determine with laboratory tests whether someone consumed THC legally or illegally.<sup>97</sup>

Drug testing for marijuana is unique among targeted illegal substances because the metabolite, THC-COOH, remains detectable in the body long after the marijuana use.<sup>98</sup> Many scientific studies report that subjects may test positively for marijuana three to ten days after use.<sup>99</sup> The length of time during which THC-COOH may be detected in an individual depends on how frequently they use marijuana.<sup>100</sup>

### C. Legal Products Containing THC

The seeds of the cannabis plant contain a good source of omega fatty acids.<sup>101</sup> These fatty acids are the same that are found in fish and nuts and are touted frequently in the media as an important part of a healthy diet.<sup>102</sup> For this reason, there are many commercially available hemp products for sale without

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<sup>92</sup> KASPER ET AL., *supra* note 77, at 2571; Huestis et al., *Blood Cannabinoids I*, *supra* note 87, at 276. "THC-COOH" will be used as the abbreviation for 11-nor-9-carboxy- $\Delta^9$ -tetrahydrocannabinol, it was also referred to as "the carboxylic acid" in *Williams II*. *State v. Williams*, 93 P.3d 1258 (Nev. 2004).

<sup>93</sup> See Huestis et al., *Blood Cannabinoids I*, *supra* note 87, at 276.

<sup>94</sup> Edward J. Cone & Marilyn A. Huestis, *Relating Blood Concentrations of Tetrahydrocannabinol and Metabolites to Pharmacologic Effects and Time of Marijuana Usage*, 15 THERAPEUTIC DRUG MONITORING 527 (1993).

<sup>95</sup> Huestis et al., *Blood Cannabinoids I*, *supra* note 87, at 276.

<sup>96</sup> Richard A. Gustafson et al., *Urinary Cannabinoids Detection Times after Controlled Oral Administration of  $\Delta^9$ -Tetrahydrocannabinol to Humans*, 49 CLINICAL CHEMISTRY 1114, 1122 (2003).

<sup>97</sup> *Id.*

<sup>98</sup> Cone & Huestis, *supra* note 94, at 530; Fraser et al., *supra* note 84, at 508; Gustafson et al., *supra* note 96, at 1115; Marilyn A. Huestis & Edward J. Cone, *Differentiating New Marijuana Use From Residual Drug Excretion in Occasional Marijuana Users*, 22 J. ANALYTICAL TOXICOLOGY 445, 453 (1998); Marilyn A. Huestis et al., *Blood Cannabinoids II: Models for Prediction of Time of Marijuana Exposure from Plasma Concentrations of  $\Delta^9$ -Tetrahydrocannabinol (THC) and 11-nor-9-carboxy- $\Delta^9$ -tetrahydrocannabinol (THCCOOH)*, 16 J. ANALYTICAL TOXICOLOGY 283, 287-89 (1992); Walsh et al., *Drugs and Driving*, *supra* note 4, at 246.

<sup>99</sup> Fraser et al., *supra* note 84, at 508; Gustafson et al., *supra* note 96, at 1115; Huestis & Cone, *Differentiating New Marijuana Use*, *supra* note 98, at 453; Walsh et al., *Drugs and Driving*, *supra* note 4, at 246. One study reported detection seventy-seven days after use at a cutoff level of 20ng/mL THCCOOH. Huestis et al., *Detection Times*, *supra* note 78, at 444.

<sup>100</sup> U.S. DEP'T OF TRANSP., *supra* note 91.

<sup>101</sup> Bony & Cole, *supra* note 79, at 562-63.

<sup>102</sup> See, e.g., American Heart Association, *Fish and Omega-3 Fatty Acids*, <http://www.americanheart.org/presenter.jhtml?identifier=4632> (last visited Feb. 25, 2007).

a prescription.<sup>103</sup> These products are made from the cannabis plant and contain detectable levels of THC.<sup>104</sup>

There are several studies demonstrating that using these legal products can yield a positive test for marijuana metabolites using the federal government's threshold values for detection.<sup>105</sup> From these studies, one may logically infer the possibility of a conviction in Nevada under the DUID statute for using legally purchased products. In fact, there have been at least two failed prosecutions in military courts for drug use where the defendants successfully claimed that their positive test results were from legal hemp products.<sup>106</sup>

#### D. Drug Testing and Standards

The majority of drug testing for the presence of marijuana is to determine whether individuals have used the drug at all. This appears to be done most often in the context of mandatory workplace drug testing. The federal government initiated drug testing for certain federal employees pursuant to an executive order in 1986.<sup>107</sup> The Department of Health and Human Services ("HHS") has adopted guidelines used to evaluate employee drug tests for the presence of marijuana.<sup>108</sup> It is germane that the purpose of these federal guidelines is to ascertain whether an individual has used marijuana at all – not whether the individual is impaired to any extent.<sup>109</sup> These guidelines provide specific amounts of marijuana metabolites that must be present in the sample to yield a positive test.<sup>110</sup> The same numerical values are used by the Department of Defense ("DOD") in its drug testing program.<sup>111</sup>

The Nevada legislature adopted the values HHS used when passing the per se DUID statute in 1999.<sup>112</sup> In the assembly committee hearing for the bill there was testimony indicating that there was a difficulty in successfully prosecuting drivers under the influence of drugs.<sup>113</sup> As the committee evaluated various options, a representative of the Nevada District Attorney's Association testified that drug testing needed to consist of blood or urine because "if hair was tested, usage could be detected from three or four weeks ago and would have no bearing on the current ability to drive."<sup>114</sup> The committee subsequently considered the need to prevent positive tests due to environmental

<sup>103</sup> Bosy & Cole, *supra* note 79, at 563.

<sup>104</sup> U.S. DEP'T OF TRANSP., *supra* note 91. The process of harvesting these oils is not efficient enough to exclude all THC. Bosy & Cole, *supra* note 79, at 563.

<sup>105</sup> Gustafson et al., *supra* note 96, at 1115; Bosy & Cole, *supra* note 79, at 563; U.S. DEP'T OF TRANSP., *supra* note 91.

<sup>106</sup> Bosy & Cole, *supra* note 79, at 563.

<sup>107</sup> Exec. Order No. 12564, 51 Fed. Reg. 32,889 (Sept. 17, 1986).

<sup>108</sup> Mandatory Guidelines for Federal Workplace Drug Testing Programs, 53 Fed. Reg. 11,970 (Apr. 11, 1988).

<sup>109</sup> *Id.*

<sup>110</sup> Mandatory Guidelines for Federal Workplace Drug Testing Programs, 69 Fed. Reg. 19,644, 19,659 (Apr. 13, 2004) (revised mandatory guidelines).

<sup>111</sup> HHS lowered its initial screening values in 1994, bringing them in line with DOD values established in 1992. Gustafson et al., *supra* note 96, at 1121.

<sup>112</sup> Hearing on S.B. 481 before the Assemb. Comm. on Judiciary, 1999 Leg., 70th Sess. 12-15 (Nev., May. 5, 1999) (hereinafter Assemb. Comm. Hearing).

<sup>113</sup> S. Comm. Hearing, *supra* note 10, at 3.

<sup>114</sup> Assemb. Comm. Hearing, *supra* note 112, at 12 (quoting Ben Graham).

exposure that manifest from hair testing or other causes.<sup>115</sup> A pathologist testified that the federal government had numerical standards for testing for the presence of illegal drugs and that by using said standards the legislature could avoid prosecuting individuals with environmental exposure.<sup>116</sup> The committee adopted the federal numerical values.<sup>117</sup> It appears from the legislative history that the bill was designed to detect the presence of illegal drugs in quantities significant enough to cause impairment.

However, the resulting statute does not achieve the goal of criminalizing ingestion of marijuana in amounts sufficient to cause impairment while driving. The very concerns that guided the committee in not using a hair test are not accounted for in the current statute.

Marijuana metabolism is unique when considering the schedule of illegal drugs. It has the capacity to remain with the user longer than most others and is thus detectable in laboratory testing longer than other illegal drugs.<sup>118</sup> The legislature made cursory attempts to protect Nevadans against testing positive for drug use through environmental exposure and thus, one may assume, on the basis of past drug use, but ultimately failed by wholesale adoption of the federal workplace guidelines for quantitation.<sup>119</sup>

#### IV. ANALYSIS

Per se DUID statutes like the one in Nevada are poised to cause unjust results over time. They are constructed in a way that requires a conviction based only on the presence of miniscule amounts of a drug or its metabolites.<sup>120</sup> They fail to take into account the relevant question in these inquiries: whether the driver was impaired. They fail to reflect any logical analysis of whether an individual is driving while impaired and instead only determine whether the individual has used drugs in the recent past.

The Nevada statute casts a blanket prohibition against using drugs without a prescription prior to driving for the period of up to a week or longer. When taking into account the scientific evidence, the statute is overinclusive because it punishes people for using drugs in the recent past without consideration of their actual impairment. It cannot be disputed that illegal drug use in this country is a problem that has proven intractable. However, employing a DWI statutory scheme like Nevada's goes beyond reasonable limits in attacking the problem because it punishes absent impairment.

The Nevada statute and those like it that provide irrefutable evidence of impaired driving based only on the presence of remnants of drugs in the body

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<sup>115</sup> *Id.*

<sup>116</sup> *Id.* (testimony of Fred Hillerby).

<sup>117</sup> See NEV. REV. STAT. ANN. § 484.379 (West 2007).

<sup>118</sup> Cone & Huestis, *supra* note 94, at 530; Fraser et al., *supra* note 84, at 508; Gustafson et al., *supra* note 96, at 1115; Huestis & Cone, *Differentiating New Marijuana Use*, *supra* note 98, at 453; Huestis et al., *Blood Cannabinoids II*, *supra* note 98, at 287-89; Walsh et al., *Drugs and Driving*, *supra* note 4, at 246.

<sup>119</sup> Assemb. Comm. Hearing, *supra* note 112; NEV. REV. STAT. ANN. § 484.379 (West 2007).

<sup>120</sup> See Marijuana Science, *supra* Section III; NEV. REV. STAT. ANN. § 484.379 (West 2007).

are unconstitutional. First, this analysis describes how the statute does not rest on a rational basis. Second, this analysis addresses the fact that there is no exception for legal users of medical marijuana. Third, this analysis will describe another case of DWI with a very different outcome under the same statutory scheme. Fourth, laws and strategies from other states that take marijuana metabolism into account are described. And finally, this analysis explains how using the evidence of prior drug use as the statute does is really nothing more than using a defendant's prior bad act of drug use to prove what may be factually false – driving while impaired.

#### A. Equal Protection

Both the United States and Nevada Constitutions deny the government the power to deprive any person of the equal protection of the laws.<sup>121</sup> The basic presumption is that the laws are constitutional and that they do not violate equal protection. However in the famous footnote from *United States v. Carolene Products Co.*, the United States Supreme Court held that certain constitutional claims warranted a more searching analysis.<sup>122</sup> The footnote explained that more exacting judicial scrutiny must apply where the law limits the exercise of a fundamental right or where the law has an impact on a class of individuals that is comprised of a discrete and insular minority, against whom there has been a history of discrimination and thus, who are unable to protect themselves through the normal political process.<sup>123</sup>

The *Carolene Products* footnote marked the beginning of the current equal protection framework that generally employs three tiers of scrutiny based on the degree of protection that should be afforded to a group exhibiting certain characteristics or the exercise of an important or fundamental right. The scrutiny least deferential to the government is strict scrutiny. This is applied only where the classification is based on a class strongly mirroring the factors in the *Carolene Products* footnote or the exercise of a right deemed fundamental. The level of scrutiny most deferential to the government is rational basis scrutiny. As the default level of scrutiny, rational basis is applied where the classification implicates no fundamental right nor does the group demonstrate any indicia of being suspect. The middle level of scrutiny is appropriately termed intermediate scrutiny. This level of scrutiny was applied initially for claims of gender discrimination but has been extended to include many claims not appropriately evaluated under either extreme level.<sup>124</sup>

The Nevada statutory scheme distinguishes people in three ways. First, the per se DUID statute distinguishes between legal drug users and non-legal drug users in allowing them the privilege of driving. Both groups of drug users are similarly situated with respect to whether they are actually impaired. The only difference lies in whether they consumed the drugs legally or illegally.

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<sup>121</sup> U.S. CONST. amend. XIV; NEV. CONST. art. IV, § 21.

<sup>122</sup> 304 U.S. 144, 152 n.4 (1938).

<sup>123</sup> *Id.*

<sup>124</sup> Intermediate scrutiny currently applies to the claims of non-marital children, undocumented alien children with regard to education, to the regulation of commercial speech, and to the regulation of speech in public forums. See, e.g., ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES § 6.5 (3d ed. 2006).

Second, the *per se* DUID statute distinguishes between people who legally use marijuana to treat their disease and those who legally use other drugs with psychoactive properties to treat their disease. These groups are similarly situated except regarding the therapy they legally use to treat their condition. Third, the statutory scheme regarding illegal drugs generally draws a distinction between illegal drug users and illegal drug users who drive in an unimpaired condition. All of the drug users in these third groups are similarly situated with respect to their drug use; the only difference is that the latter group has driven an automobile after the effects of the drugs have run their course.

None of these three classifications rest on the exercise of a fundamental right, nor are the groups comprised of members who are members of a protected class. Thus, statutes such as these are properly evaluated under rational basis scrutiny. The most logical classification for a law regulating traffic safety to make is one that distinguishes between individuals based on whether a driver is impaired or not. The Nevada *per se* DUID statute fails to do this in any rational way.

Rational basis scrutiny begins with the presumption that the law is constitutional. The burden is on the challenger to show that it is not rationally related to a legitimate governmental interest. Rational basis review will invalidate a law only where there are no "state of facts reasonably . . . conceived that would sustain it."<sup>125</sup> Further, the burden is on the challenger "to negative every conceivable basis which might support it."<sup>126</sup> However, "the classification must be reasonable, not arbitrary and must rest on some ground of difference having a fair and substantial relation to the object of the legislation."<sup>127</sup>

In *Williams's* case, the Supreme Court of Nevada determined that the state's interests in promoting highway safety and deterring illegal drug use are legitimate and that the statute is rationally related to these interests.<sup>128</sup> The court agreed that imposing harsher punishments against drivers who have used illegal drugs at some point in the near past is acceptable.<sup>129</sup> However, common sense dictates that the connection between the state's interest in highway safety and the *per se* DUID statute is illusory where the driver is not actually impaired. This disconnect is based on a failure to recognize that drivers who have the remnants of drugs in their systems may not be even remotely impaired. Scientific studies demonstrate that the remnants of marijuana may be present in an individual long after consuming the drug.

Rational basis scrutiny begins with an examination of the state's interest. Here, the state's interest in deterring illegal drug use seems to have been revealed for the first time in *Williams's* case. The legislative history reveals that the focus of the law is, as its title states, to address "Driving Under The Influence of Intoxicating Liquor or Controlled or Prohibited Substance[s]."<sup>130</sup>

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<sup>125</sup> *Lindsley v. Natural Carbonic Gas Co.*, 220 U.S. 61, 78-79 (1911).

<sup>126</sup> *Madden v. Commonwealth of Ky.*, 309 U.S. 83, 88 (1940).

<sup>127</sup> *Royster Guano Co. v. Commonwealth of Va.*, 253 U.S. 412, 415 (1920).

<sup>128</sup> *Williams I*, 50 P.3d at 1120.

<sup>129</sup> *Id.* at 1121.

<sup>130</sup> NEV. REV. STAT. ANN. § 484.389 (West 2007).

Regardless, under rational basis scrutiny any conceivable justification is adequate to sustain the law.

In the Nevada Constitution, however, Article 4, Section 17 states that "[e]ach law enacted by the legislature shall embrace but one subject, and matter, properly connected therewith, which subject shall be briefly expressed in the title . . . ." The

main test of the application of the clause to a particular statute is whether the title is of such a character as to mislead the public and the members of the legislature as to the subjects embraced in the act . . . [and] if the numerous provisions contained in an act have one general subject which is indicated by the title, and are logically germane to the subject expressed in the title, the act is not obnoxious to the constitutional requirement . . . .<sup>131</sup>

In *State v. Payne*, the Supreme Court of Nevada held a statute invalid that appeared to regulate the inspection of cattle hides.<sup>132</sup> Provisions of the act also regulated the sale of beef. The court held this duality violated the Nevada Constitution. It determined that the statute was calculated to mislead the public and members of the legislature.

The per se DUID statute is similarly misleading. The statute contains provisions that essentially punish the use of illegal drugs (or legal drugs in the case of medical marijuana) under the title of driving under the influence. The legislative history shows that the committee drafting the law was focused on providing assistance to law enforcement in fighting the problem of people driving under the influence of drugs. It was not the committee's focus to criminalize drug users who were driving after the effects of drug use have subsided. In light of the Nevada constitutional provision requiring a statute's provisions to have one general subject comprised by the title, the state's interest in deterring illegal drug use is not rationally related to the per se DUID statute.<sup>133</sup>

Legal burdens imposed by the criminal justice system should bear some relationship to the degree of wrongdoing or responsibility.<sup>134</sup> This concept should endure even under the deference afforded the government under the rational basis test. Simply having trace amounts of drugs or their metabolites in a person's system generally does not justify severe punishment;<sup>135</sup> driving in that condition, when not impaired, should not justify it either. Where the punishment can be twenty years in prison as in *Williams's* case,<sup>136</sup> there must be a closer relationship between the degree of wrongdoing and the punishment.<sup>137</sup> Per se DUID statutes provide that drivers innocent of DUID under a standard of actual impairment may be punished instead under the per se statute because they have committed the separate and distinct crime of using illegal drugs.

The Supreme Court of Nevada appears to have accepted this scheme solely for prosecutorial efficiency. Recognizing that the legislature had a problem writing laws that would effectively prosecute drivers actually impaired due

<sup>131</sup> *State v. Payne*, 295 P. 770, 771-72 (Nev. 1931).

<sup>132</sup> *Id.*

<sup>133</sup> *See Allegheny Pittsburgh Coal Co. v. County Comm'n*, 488 U.S. 336 (1989).

<sup>134</sup> *Plyler v. Doe*, 457 U.S. 202, 220 (1982).

<sup>135</sup> NEV. REV. STAT. ANN. § 453.411 (West 2007).

<sup>136</sup> NEV. REV. STAT. ANN. § 484.3795 (West 2007).

<sup>137</sup> *See Plyler v. Doe*, 457 U.S. 202, 220 (1982).

to drug use, the Supreme Court of Nevada sacrificed those individuals that many in society do not view favorably: illegal drug users.

### B. Medical Marijuana

In 2001, Nevada legalized the use of medical marijuana.<sup>138</sup> Future defendants prosecuted under the per se DUID statute for marijuana use will have the advantage of invoking with renewed vigor a case from the Georgia Supreme Court that was cited in *Williams I* but rejected. The Supreme Court of Georgia held that because medical marijuana use was legal and since the per se DUID statute excepted legal users, Georgia's per se DUID law with respect to marijuana violated Equal Protection.<sup>139</sup> They explained that there was no rational basis to criminalize illegal marijuana users with remnants of the drug in their body, for the exact same behavior that is legal by authorized users.<sup>140</sup> The Georgia Supreme Court seems to have realized that the tenuous basis on which per se DUID was rationalized was finally stretched to the breaking point where there also exists a law allowing medical marijuana use in the state.

The holding of the Georgia Supreme Court in *Love* has been subsequently distinguished, further bolstering the basic logic in its reasoning.<sup>141</sup> In *Ayers*, the Georgia Supreme Court had occasion to examine the relevance of marijuana metabolites in a driver charged with reckless driving.<sup>142</sup> The defendant in *Ayers* argued that the marijuana metabolites were not at all relevant to the inquiry into whether she was driving recklessly.<sup>143</sup> She argued under *Love* that they cannot be considered.

The Georgia Supreme Court correctly recognized that the behavior in question was reckless driving, not driving while impaired, and that evidence of actual impairment would be relevant if it came from illegal marijuana use or legal marijuana use.<sup>144</sup> It held:

*Love* does not apply to a charge of reckless driving or vehicular homicide based on reckless driving. Nothing in *Love* implied that reckless driving based on marijuana consumption could not be prosecuted. The violation of equal protection found in *Love* was grounded in the recognition that legal marijuana users pose the same threat as illegal users when controlling a moving vehicle, making disparate treatment without a rational basis.<sup>145</sup>

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<sup>138</sup> NEV. REV. STAT. ANN. § 453A.200 (West 2007).

<sup>139</sup> *Love v. State*, 517 S.E.2d 53, 57 (Ga. 1999). Jessica Williams made this argument to the Nevada Supreme Court and although at the time her case was heard, Nevada had already legalized medical marijuana, the court rejected her argument because at the time of her arrest, the statute was not yet enacted. *Williams I*, 50 P.3d at 1121. Additionally, in dicta, the court stated that it *would* see a legitimate state interest in deterring illegal drug use sufficient to form a rational basis *even in the presence* of a medical marijuana statute. *Id.*

<sup>140</sup> *Love v. State*, 517 S.E.2d 53, 57 (Ga. 1999).

<sup>141</sup> See, e.g., *Ayers v. State*, 534 S.E.2d 76 (Ga. 2000).

<sup>142</sup> *Id.*

<sup>143</sup> *Id.* at 76-78 (Ga. 2000). More specifically, the defendant argued that *Love* also rendered unconstitutional that portion of the statute that prohibits anyone from driving while under the influence of any drug to the extent that it is less safe to drive.

<sup>144</sup> *Id.* at 78.

<sup>145</sup> *Id.*



The Georgia Supreme Court has struck the proper balance in determining when evidence of marijuana use is relevant. This court allows such evidence to prove whether a driver was *actually impaired*, not as a substitute for convicting a driver of being impaired merely on the presence of drug metabolites. This further demonstrates how the science of marijuana metabolism is ill-suited to a definitive proscribed level in the body. There is no recommended prescription for medical marijuana, except to use it. It defies dose quantitation and remains in the user's system for days to weeks.<sup>146</sup> Now in Georgia, all marijuana users are equally protected in that they may drive so long as they are not impaired. They will be judged on a standard of actual impairment.

C. *Veronica Schmidt*

The inequity of the distinction between legal and illegal drug users is practically demonstrated by comparing Jessica Williams's case with that of another woman in southern Nevada who was later responsible for a deadly accident. On March 14, 2005, Veronica Schmidt was driving her sport utility vehicle in Las Vegas when she crashed into a bus shelter, killing four individuals, three of whom were children.<sup>147</sup>

It was discovered that Veronica Schmidt had been taking Xanax®, a central nervous system depressant, for which she had a legal prescription.<sup>148</sup> Schmidt, as did Williams, claims that she fell asleep.<sup>149</sup> Schmidt failed a field sobriety test immediately after the crash and fell asleep in the patrol car on the way to booking.<sup>150</sup> The police department criminologist determined that the level of drug in her system was appropriate for the prescription; however a forensic toxicologist for the Las Vegas City Attorney's office disagreed.<sup>151</sup> Additionally, the Director of Emergency Service at University Medical Center and Chairman of Nevada's Homeland Security Commission opined that the drug levels were "huge" and that "nobody would prescribe that much to take."<sup>152</sup> The toxicologist for the Las Vegas City Attorney's office stated that her blood levels indicated that she took more than twice the amount prescribed.<sup>153</sup>

The Clark County district attorney decided not to prosecute because of a perceived difficulty in convicting under the impairment standard.<sup>154</sup> Since Schmidt was taking the drug pursuant to a legal prescription, she was not sub-

<sup>146</sup> See Marijuana Science, *supra* Section III.

<sup>147</sup> Frank Curreri, *Horrific Scene: Four Die at Bus Stop*, LAS VEGAS REV. J., Mar. 15, 2005 at 1A; Frank Geary, *Driver Indicted in Crash That Killed Six-Year-Old Girl, Relatives*, LAS VEGAS REV. J., Apr. 2, 2005 at 7B.

<sup>148</sup> Frank Geary, *Driver Had Drug Xanax in System*, LAS VEGAS REV. J., Mar. 25, 2005 at 1B; PDR, *supra* note 80, at 2294.

<sup>149</sup> Brian Haynes, *Deadly Bus Stop Crash: Driver Had High Level of Xanax*, LAS VEGAS REV. J., Aug. 19, 2005 at 1A; Steve Sebelius, *Bad Idea Jeans*, LAS VEGAS REV. J., Mar. 9, 2004 at 9B.

<sup>150</sup> Brian Haynes, *Charges Filed in a Stop Crash*, LAS VEGAS REV. J., Sept. 8, 2005 at 1B.

<sup>151</sup> Glenn Puit and Brian Haynes, *Prosecutors Defend Decision*, LAS VEGAS REV. J., Aug. 20, 2005 at 1A.

<sup>152</sup> Haynes, *Deadly Crash*, *supra* note 149, at 1A.

<sup>153</sup> Haynes, *Charges Filed*, *supra* note 150, at 1B.

<sup>154</sup> Haynes, *Deadly Crash*, *supra* note 149, at 1A.

ject to the per se DUID statute, and the state would have to prove that she was actually impaired.<sup>155</sup> Responding to continued public pressure, citing the high drug levels and failed field sobriety test, the city attorney's office filed misdemeanor charges in Municipal Court.<sup>156</sup> If she were prosecuted on felony charges she could have faced two to eight years for each count; under the misdemeanor charges she faces only a maximum of six months.<sup>157</sup> On March 29, 2006, Schmidt agreed to a plea that imposed eight months of house arrest and one year of probation.<sup>158</sup>

Comparing Veronica Schmidt's case with Jessica Williams's case illustrates how an individual may actually drive while impaired with deadly results and yet be sanctioned far less severely than an individual who might not be actually impaired while driving. It appears that Veronica Schmidt was actually impaired based on a toxicologist's conclusion that she had taken more than twice the prescribed amount.<sup>159</sup> On the other hand, in light of the scientific evidence that demonstrates that the effects of marijuana are gone within two to four hours, it is far from certain that Jessica Williams was actually impaired. This example of disparate treatment should certainly be relevant when considering the legitimacy of Nevada's DUID law.

#### D. Other States' Laws

A majority of states with per se DUID statutes take an approach similar to Nevada's by setting the threshold for conviction at any detectable quantity or by using the federal drug testing standards.<sup>160</sup> A few states have statutes that appear to take into account the potential for convicting drivers who are not actually impaired.<sup>161</sup> Virginia's per se DUID statute only applies to users of methamphetamine, cocaine, or phencyclidine.<sup>162</sup> Ohio's per se DUID statute provides for different detection levels of marijuana depending on whether the

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<sup>155</sup> *Id.*

<sup>156</sup> Haynes, *Charges Filed*, *supra* note 150, at 1B.

<sup>157</sup> *Id.*; *Week in Review: Southern Nevadans Rush to Aid Hurricane Victims*, LAS VEGAS REV. J., Sept. 11, 2005 at 3B; Glenn Puit, *Driver Accepts Deal*, LAS VEGAS REV. J., Mar. 29, 2006, at 1A; NEV. REV. STAT. ANN. § 484.3795 (West 2007). Schmidt faced six counts in Municipal Court: reckless driving, DUI, speed too fast for conditions, failure to maintain a lane, obstructing an officer, and contempt. Criminal Complaint, Las Vegas v. Veronica Schmidt, Las Vegas Muni. Court, No. C629119, Aug. 23, 2005. The last two charges were for an unrelated incident. *Id.*

<sup>158</sup> Puit, *supra* note 157, at 1A.

<sup>159</sup> Haynes, *Charges Filed*, *supra* note 150, at 1B.

<sup>160</sup> ARIZ. REV. STAT. ANN. § 28-1381(A)(3) (2007); DEL. CODE ANN. tit. 21 § 4177(a)(6) (West 2007); GA. CODE ANN. § 40-6-391(a)(6) (West 2007); 625 ILL. COMP. STAT. ANN. 5/ § 11-501(a)(6) (West 2007); IND. CODE ANN. § 9-30-5-1(1)(c) (West 2007); IOWA CODE ANN. § 321J.2(1)(c) (West 2007); MICH. COMP. LAWS ANN. § 257.625(8) (West 2007); MINN. STAT. ANN. § 169A.20(1)(7) (West 2007); NEV. REV. STAT. ANN. § 484.379 (West 2007); N.C. GEN. STAT. ANN. § 20-138.1(a)(3) (West 2007); OHIO REV. CODE ANN. § 4511.19(A)(1)(j) (West 2007); 75 PA. CONS. STAT. ANN. § 3802(d) (West 2007); R.I. GEN. LAWS § 31-27-2(b)(2) (2007); UTAH CODE ANN. § 41-6a-517(2) (West 2007); VA. CODE ANN. § 18.2-266 (West 2007); WIS. STAT. ANN. § 346.63(1)(a) (West 2007).

<sup>161</sup> MINN. STAT. ANN. § 169A.20(1)(7) (West 2007); OHIO REV. CODE ANN. § 4511.19(A)(1)(j) (West 2007); VA. CODE ANN. § 18.2-266 (West 2007).

<sup>162</sup> VA. CODE ANN. § 18.2-266 (West 2007).

driver has only evidence of marijuana use or whether there is evidence that he consumed multiple illegal drugs or illegal drugs and alcohol.<sup>163</sup>

Minnesota's per se DUID statute exempts marijuana.<sup>164</sup> In considering a per se DUID statute, the legislature recognized that evidence of marijuana consumption might be present long after the use.<sup>165</sup> They were concerned that mandating per se impairment might criminalize too much behavior and instead funded more Drug Recognition Experts.<sup>166</sup> Drug Recognition Experts are able to determine more accurately whether drivers are impaired and by what substance and they are available anywhere statewide within two hours.<sup>167</sup> Their specialization and expertise have been essential in building strong evidence to convict drivers on a standard of actual impairment.<sup>168</sup> If Nevada had opted to go the route of funding Drug Recognition Experts instead of its current DWI statutory scheme, there likely would have been more consistency across cases like Jessica Williams and Veronica Schmidt.

### E. Character Evidence

Using evidence of prior drug use to convict a person of driving while intoxicated amounts to convicting someone for their prior bad act. The per se DUID statute uses evidence of prior drug use as irrefutable evidence that the person is driving while intoxicated. The rule against character evidence in Federal Rule of Evidence 404 and its counterpart in Nevada embody a concept expressed in common law dating back to the early 1800s.<sup>169</sup> This rule forbids introducing evidence against a criminal defendant that goes not to the issue at hand, but solely to the character of the defendant.<sup>170</sup> In this context, the term character means: as it illustrates reputation.<sup>171</sup>

In feudal times, trial by reputation was the rule.<sup>172</sup> People had great confidence in their ability to assess the character of an individual accurately.<sup>173</sup> As the world industrialized, urbanization radically increased population density, making it far more difficult to have accurate knowledge of those with whom one interacts in society.<sup>174</sup> The rule limiting character evidence exists for several reasons. First, evidence of bad character or past criminal acts would undoubtedly have great weight with juries.<sup>175</sup> As a jury weighs the evidence in

<sup>163</sup> OHIO REV. CODE ANN. § 4511.19(A)(1)(j) (West 2006).

<sup>164</sup> MINN. STAT. ANN. § 169A.20(1)(7) (West 2007).

<sup>165</sup> Telephone interview with attorney Jim Cleary, Legislative Analyst for the Minnesota House of Representatives Research Department for thirty years (Nov. 21, 2005).

<sup>166</sup> *Id.*

<sup>167</sup> *Id.*

<sup>168</sup> *Id.*

<sup>169</sup> THOMAS PEAKE, COMPENDIUM OF THE LAW OF EVIDENCE 6-7 (3d ed., London, Luke Hanford & Sons 1808); FED. R. EVID. 404; NEV. REV. STAT. ANN. 48.045 (West 2007); David P. Leonard, *In Defense of the Character Evidence Prohibition: Foundations of the Rule Against Trial by Character*, 73 IND. L.J. 1161, 1168 (1998).

<sup>170</sup> *Michelson v. United States*, 335 U.S. 469, 475 (1948); *see also State v. Pearce*, 15 Nev. 188, 190 (1880).

<sup>171</sup> *Michelson*, 335 U.S. at 477.

<sup>172</sup> Leonard, *supra* note 169, at 1194.

<sup>173</sup> *Id.*

<sup>174</sup> *Id.* at 1196.

<sup>175</sup> *People v. Zackowitz*, 172 N.E. 466, 468 (N.Y. 1930).

a proceeding, the fact that a defendant exhibited poor character at some point in the past might be treated as an irrefutable negative indicator that could distract the jury from its purpose of evaluating guilt or innocence in the issue at hand. One may rightly argue that this evidence has great probative value and that its inclusion could be essential in determining guilt.<sup>176</sup> To say that "A is quarrelsome, therefore he probably committed this assault" is a natural extension of common sense and, generally speaking, may be accurate.<sup>177</sup> However, introducing such character evidence at trial is problematic because the jury will likely not relegate it to its proper position in the determination of guilt in the specific case: "on the contrary, [it will] weigh too much with the jury and . . . overpersuade them as to prejudge one with a bad general record and deny him a fair opportunity to defend against a particular charge."<sup>178</sup>

Second, allowing evidence of bad character presents the risk that a jury will decide that the individual's prior acts are sufficient to warrant punishment in the current situation "even if he should happen to be innocent momentarily."<sup>179</sup> Permitting this evidence could give legal effect to juries' prejudices with regard to religion, politics, and morals, despite their best intentions.<sup>180</sup> Additionally, juries could decide to convict not based on guilt of the crime at issue, but based on a decision that in light of the poor character of the defendant, a judgment of guilt would prevent what they may determine to be a certain likelihood of future crimes.<sup>181</sup> It is under these circumstances that the ban against character evidence derives its greatest strength.

Further, the degree to which a defendant would be unfairly surprised and thus unduly burdened also militates against allowing character evidence.<sup>182</sup> A prime example is where a defense attorney is confronted with evidence of prior misconduct that was not revealed to him by the defendant.<sup>183</sup> The defense would thereafter be at great disadvantage in trying to lessen the impact of this evidence.<sup>184</sup> Finally, allowing character evidence of past acts could present an entirely new sub-issue as to their validity, which could in turn complicate the issue actually being tried.<sup>185</sup>

The principles embodied in the prohibition against character evidence relate to the issue of per se DUID statutes in that a prosecution for driving while impaired may be based primarily on a prior bad act: illegal drug use. The evidence of prior drug use is being used to characterize the defendant as a law breaker. The evidence is not being used to demonstrate with any degree of probativeness that the defendant is impaired or that the defendant's driving is affected in any way.

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<sup>176</sup> *Michelson*, 335 U.S. at 477.

<sup>177</sup> JOHN HENRY WIGMORE, 1 A TREATISE ON THE ANGLO-AMERICAN SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW § 57, at 272 (2d ed. 1923).

<sup>178</sup> *Michelson*, 335 U.S. at 476.

<sup>179</sup> *Old Chief v. United States*, 519 U.S. 172, 181 (1997).

<sup>180</sup> *People v. White*, 24 Wend. 520, 574 (N.Y. 1840).

<sup>181</sup> *Old Chief*, 519 U.S. at 181.

<sup>182</sup> Leonard, *supra* note 169, at 1185. Wigmore considered this the "chief reason" for the ban against character evidence. *Id.*

<sup>183</sup> *Id.*

<sup>184</sup> *Id.*

<sup>185</sup> *Michelson*, 335 U.S. at 476; Leonard, *supra* note 169, at 1185.

In certain cases a driver may in fact be impaired, based logically on the presence of drug metabolites in her body. However, at the levels of metabolites proscribed under the Nevada statute, there is no way to determine when their presence is probative and when their presence is not probative.

The use of propensity evidence is permitted in certain narrow circumstances and for specific policy reasons.<sup>186</sup> There have historically been common law exceptions to the prohibition of propensity evidence.<sup>187</sup> Currently there are several statutory exceptions enumerated in the rules of evidence.<sup>188</sup> Rule 404(b) itself describes when evidence of prior bad acts may be admitted into evidence where the purpose is not to demonstrate a propensity to engage in certain behavior, but to allow the jury to draw other inferences from the evidence.<sup>189</sup> Examples of this include the use of evidence to demonstrate proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake.<sup>190</sup> These exceptions recognize that there is often probative value attached to evidence of prior bad acts and that the party seeking to use them must be permitted so long as there is a valid, non-propensity based reason.<sup>191</sup>

The rules that allow evidence of prior sexual misconduct, enacted in 1994, also provide an exception to the prohibition against character evidence. The rules were from the outset, and continue to be, somewhat controversial.<sup>192</sup> They allow for propensity evidence to be admitted in contravention to the ages old principle for very specific reasons.<sup>193</sup> In cases of molestation or other sexual misconduct it is thought that there exists an exceptionally unique pattern that can be established.<sup>194</sup> A defendant who has in the past engaged in these acts is particularly disposed to repeat them.<sup>195</sup> Additionally there is often a difficulty in proffering evidence against the defendant because the analysis is reduced to a swearing match.<sup>196</sup> Lastly, Congress felt it singularly important to protect child victims of molestation from being the only source of evidence.<sup>197</sup> These rules allow evidence of the prior bad acts of the defendant to be used, thus bolstering the credibility of the accuser.<sup>198</sup> In prosecuting DWI cases, the state does not need additional credibility, and certainly not on par with that given to victims of sexual crimes.

These provisions that allow for an exception to the general rule targeted specific instances where admission of the evidence is both relevant and proba-

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<sup>186</sup> See FED. R. EVID. 404-15.

<sup>187</sup> See, e.g., *Lannan v. State*, 600 N.E.2d 1334, 1335 (Ind. 1992) (common law has recognized the "depraved sexual instinct" exception).

<sup>188</sup> See generally FED. R. EVID. 413-15.

<sup>189</sup> FED. R. EVID. 404(b).

<sup>190</sup> *Id.*

<sup>191</sup> See *id.*

<sup>192</sup> See, e.g., Katharine K. Baker, *Once a Rapist?* 110 HARV. L. REV. 563 (1997); David J. Karp, *Evidence of Propensity and Probability in Sex Offense Cases and Other Cases*, 70 CHI.-KENT L. REV. 15 (1995).

<sup>193</sup> 140 Cong. Rec. H8968, 8991-92 (daily ed. Aug. 21, 1994) (statement of Rep. Molinari).

<sup>194</sup> *Id.*

<sup>195</sup> *Id.*; but cf. Baker, *supra* note 192 (these conflicting sources further illuminate the continuing disagreement on the wisdom of the 1994 changes to the Federal Rules of Evidence).

<sup>196</sup> 140 Cong. Rec. H8968, 8991-92 (daily ed. Aug. 21, 1994) (statement of Rep. Molinari).

<sup>197</sup> *Id.*

<sup>198</sup> FED. R. EVID. 413-15.

tive of the elements to be proven.<sup>199</sup> The ban against character evidence was not enacted to prohibit irrelevant evidence, but to prevent over-reliance on it.<sup>200</sup> In using evidence of drug metabolites of any quantity, the Nevada statute seeks to introduce potentially irrelevant evidence. Such evidence cannot be said to have any tendency to make the existence of the possibility of driving while impaired more or less likely when that evidence may consist of only proof that the defendant has used drugs in the past.

The motive for the per se DUID statute appears to be congruent with those of the statutory exceptions to the character evidence rule embodied in rules 413 through 415. Both provisions may be used to help prevent crime by giving prosecutors more tools in their arsenal with which to gain convictions. The difference lies in their relevance. The statutory exceptions in the rules are meaningful because they are relevant despite their prejudicial value. Whereas the per se DUID statute, in cases of low levels of metabolites, simply permits evidence of prior drug use for no relevant reason whatever.

In Jessica Williams's case the jury was called upon to determine whether she was actually impaired and they declared she was not.<sup>201</sup> The statute then permitted conviction based completely on the fact that she had used illegal drugs in the recent past, thus evincing her criminal character.<sup>202</sup>

The statute permitted the court to accept this proof of bad character as reason enough to find her guilty of the far more serious offense of felony DWI simply because she was guilty of the lesser charge of illegal drug use. If the legislature determines that the use of illegal drugs warrants a more severe punishment than that which currently exists, it should so legislate. Such a decision would be within its police power. But to attempt to increase the success rate of DUID prosecutions by permitting conviction not based on impairment is to sanction societal prejudice and use it for expediency in obtaining a higher rate of DUID convictions.

## V. CONCLUSION

Jessica Williams was convicted for DWI based not on any evidence of impairment but based on a statutory presumption of guilt that attached to the presence of drug metabolites in her body. She was sentenced to eighteen to forty-eight years. Veronica Schmidt was subjected to no statutory presumption but was reportedly quite impaired by prescription medications. She was given a plea deal that only required her to serve eight months of house arrest and one year of probation. These inconsistent results are indicative of the ill-considered approach taken by states like Nevada in attempting to make the roadways safe from impaired drivers. Using evidence of prior drug use without any indication of impairment to conclude that a driver is impaired is nothing more than using a defendant's prior bad act to convict that driver of DWI.

The per se DUID statutes fail to make any reasonable link between drug use and impaired driving at the current cutoff levels. This violates the equal

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<sup>199</sup> *Id.*

<sup>200</sup> *Michelson*, 335 U.S. at 476.

<sup>201</sup> *Williams I*, 50 P.3d at 1119.

<sup>202</sup> NEV. REV. STAT. ANN. § 484.3795 (West 2007).

protection rights of unimpaired drivers who have proscribed drug metabolites in their bodies because the relationship is irrational. There is scientific evidence that demonstrates how drug metabolites can still be present in a person long after that person is no longer impaired. Furthermore, the Nevada statute makes no room for legal users of medical marijuana, thereby violating the equal protection rights of medical marijuana users.

A rational statutory scheme would exempt marijuana and any drug that demonstrably remains detectable in the body for a period of time that exceeds the period when a drug test can reliably show impairment. Minnesota's statutes and policies focusing on funding Drug Recognition Experts is a reasoned approach that accounts for the physiology of marijuana metabolism without sacrificing the important goal of traffic safety.