

The Changing Face of Impaired Driving

Where Are We and Where Are We Going?

Tennessee Judicial Conference

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The Road Ahead



Shifting Paradigms

The Changing
Face of the
Impaired Driver

Increased
fatalities

Current
research on
recidivism

Public policy
against
incarceration

Major Issues & Trends in 2022

- Multi-substance impaired driving
- Legalization of Marijuana
- 4th Amendment Issues
 - automobile searches
 - warrantless blood draws
- Evidence-based sentencing

Learning Objectives

After this session you will be able to:

- Discuss current issues that arise in impaired driving cases
- Identify the different challenges presented in impaired driving cases
- Discuss the role and importance *per se* statutes play in the trial of an impaired driving case

Hypothetical

- Tom is operating a vehicle at 8:30 p.m. on a 2-lane road with his 5-year-old son as passenger
- Driving erratically, he loses control of the vehicle and hits another vehicle causing significant property damage but fortunately no serious injuries
- Tom has an odor of alcohol on him, admits drinking, has a small baggie of marijuana in his pocket along with a prescription slip for benzodiazepine

Polling Question #1

Assuming that Tom is under the influence, what substance is he under the influence of?

- a) alcohol
- b) marijuana
- c) cocaine
- d) benzodiazepine
- e) we don't know

The Changing Face of the Impaired Driver

➤ Alcohol Use

1973: 35.9%

2007: 12.4%

2013/2014: 8.3%

➤ Marijuana Use

2007 marijuana use (THC): 8.6%

2013/2014 marijuana use (THC): 12.6%

➤ Overall Drug Use (all categories): 22.5%



Source: *Results of the 2013-2014 National Roadside Survey of Alcohol and Drug Use by Drivers*, NHTSA Research Note (DOT HS 812 118) (February 2015)

Fatality Analysis Reporting System (FARS 2016)

Of deceased drivers with known test results:

- 38% tested positive for alcohol (any BAC)
- 43% tested positive for drugs
 - 41% *marijuana*
 - **51% of the drug-positive drivers were positive for two or more drugs**
 - *40.7% were positive for alcohol*

Source: GHSA Drug Impaired Driving: A Guide for States (April 2017)

Massachusetts Motor Vehicle Fatalities (2013-2017)

- “Marijuana was the most prevalent drug found in drivers involved in fatal crashes.”
- “11% of drivers involved in fatal crashes were found with both alcohol and drugs in their system.”

Massachusetts Executive Office of Public Safety and Security Press Release
(8/14/19)

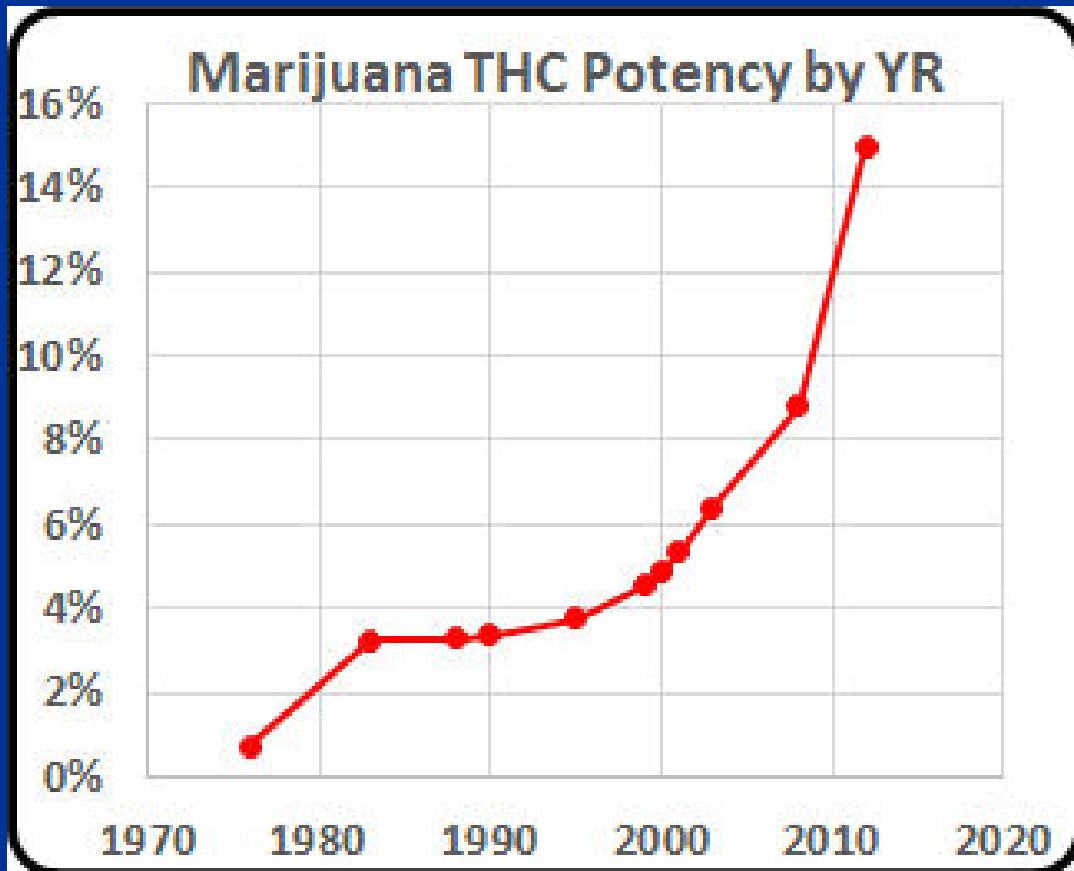
Impact of Legalization of Marijuana in Colorado (2013-2017)

Since legalization in 2012:

- Marijuana-related traffic deaths up 151% vs. 35% for all traffic deaths
- Percentage of marijuana-related traffic deaths increased from 11.4% to 21.3% in 2017
- Annual rate of marijuana-related ER visits up 52%
- Annual rate of marijuana-related hospitalizations up 148%

THC Potency

(You're not in Woodstock anymore)



Nora Volkow

National Institute of Drug Abuse

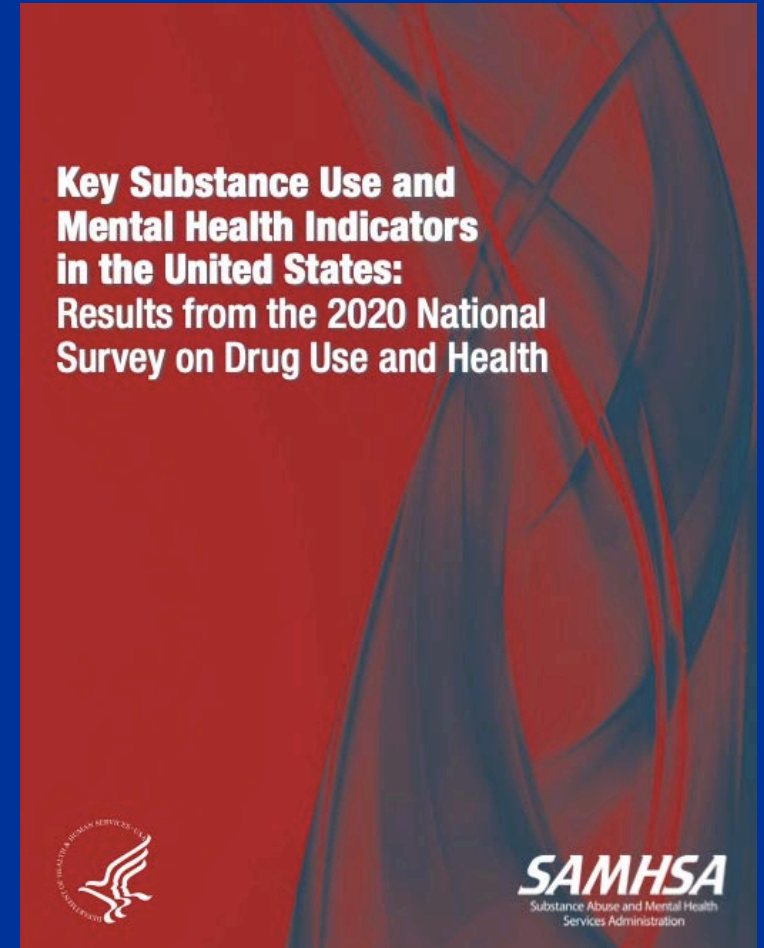
The higher the THC concentrations:

- The stronger the effect on the brain
- The more likely to have toxic reaction like psychosis
- Leads to increased ER visits



2020 National Survey on Drug Use and Health

- Alcohol – 138.5 million 12+ years old used in past month
 - 61.6 million “binge” drinkers
 - 17.7 million “heavy” drinkers
- Marijuana
 - 49.6 million 12+ years old in past year
 - 14.2 million had CUD under DSM-5

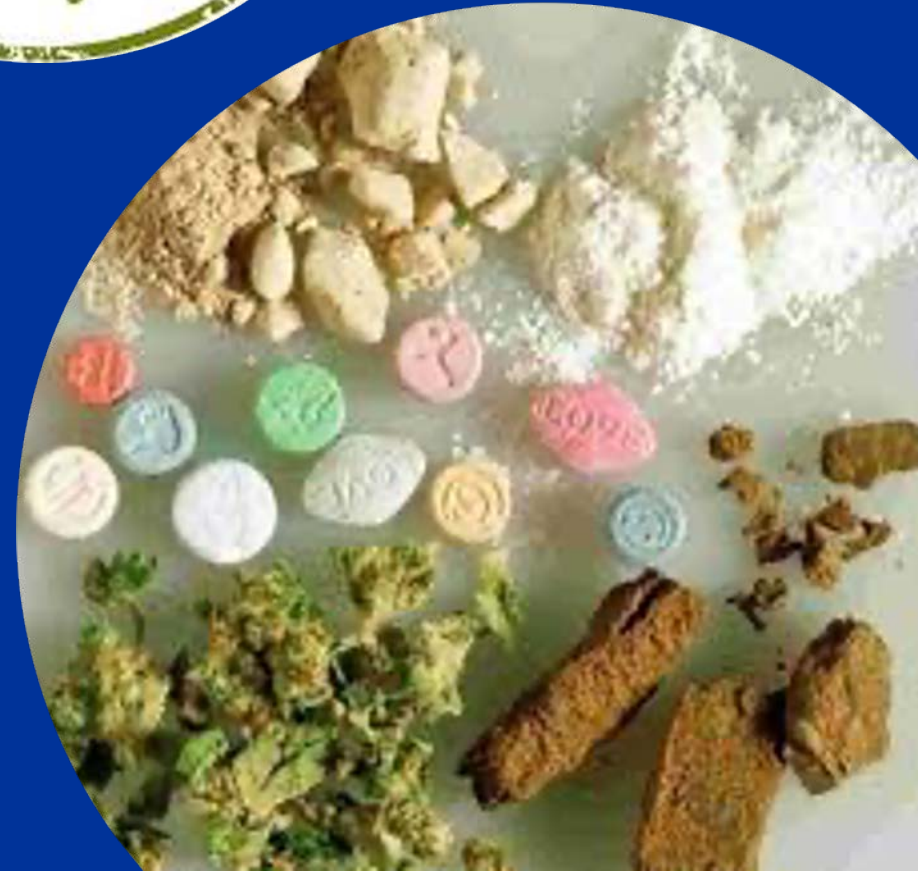


Dangerous Trends

- ↑ Marijuana use
- ↑ Public acceptance of use
- ↓ Penalties for possession
- ↓ Public perception of harmfulness

More Trends

- Legalized Medical Marijuana
(37 States & D.C.)
- Legalized/Decriminalization of Marijuana
(32 States & D.C.)
- Increased use and abuse of Rx
- Continued use of illegal & designer drugs
- Aging population



Polling Question #2

Why have more and more States moved to legalizing & decriminalizing the use or possession of marijuana?

- a) It is a safe drug?
- b) Offense is not worthy of prosecution?
- c) Prosecutions have led to unnecessary incarceration?
- d) Tax revenues?
- e) All of the above?

Impact of Marijuana Generally



NIH Marijuana Research Report (July 2020)

- “Because marijuana impairs short-term memory and judgment and distorts perception, it can impair performance in school or at work and make it dangerous to drive.”
- “It also affects brain systems that are still maturing . . . so regular use by teens may have negative and long-lasting effects on their cognitive development, putting them at a competitive disadvantage.

Cannabis Use & Risk of Depression

Meta-analysis of 11 studies & 23,000+ individuals:

“adolescent cannabis consumption was associated with increased risk of developing depression and suicidal behavior later in life.”

Source: JAMA Psychiatry, Feb. 13, 2019

Impact on Cognitive Development

- Executive function
- Processing speed
- Memory
- Attention span & concentration
- Significant decline in IQ

Source: Kenneth L. Davis, President, Mount Sinai Health System (N.Y. Times, 6/16/19)

Adverse Health Effects of Marijuana Use

Nora Volkow, New England Journal of Medicine (2014)

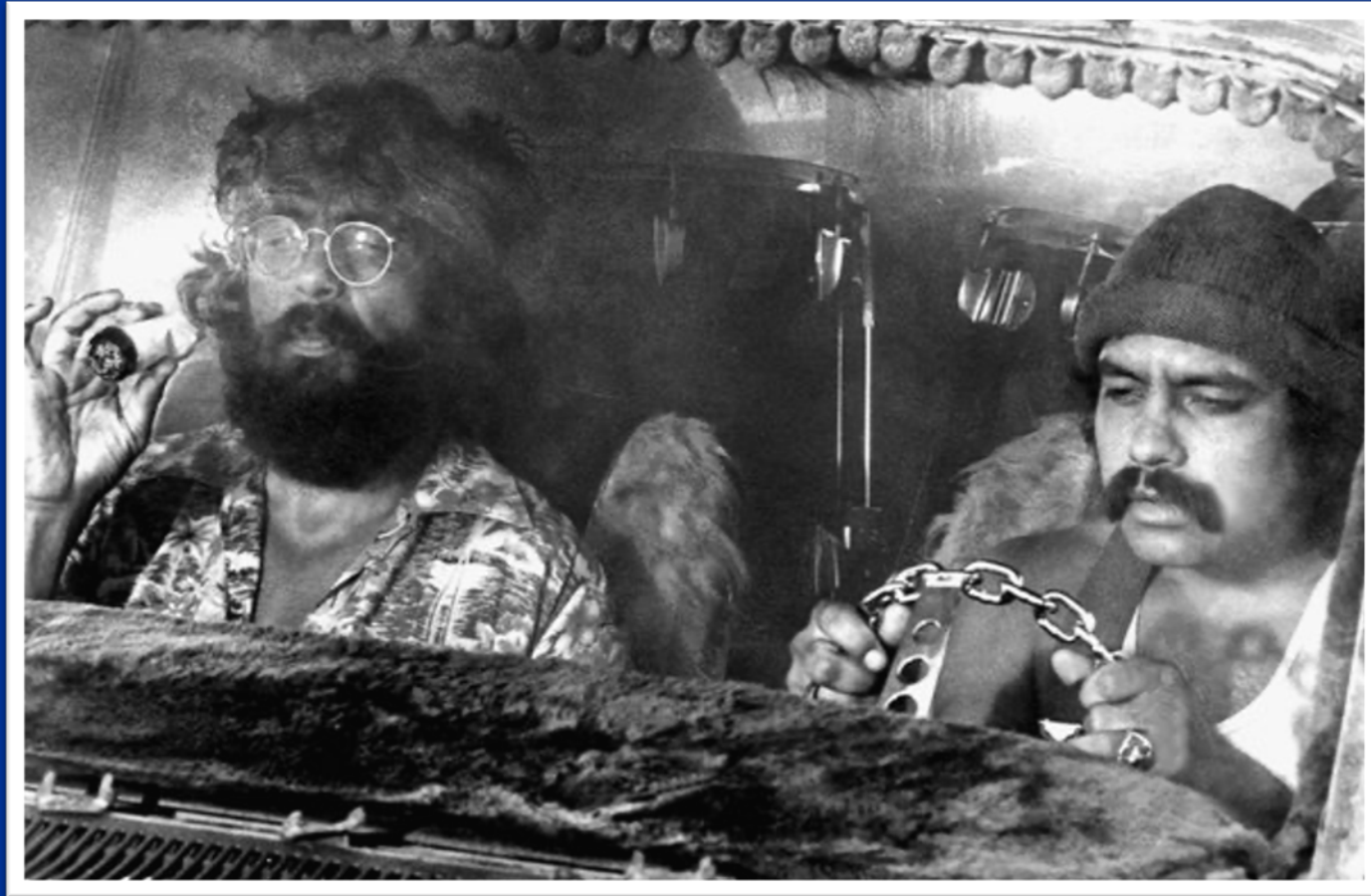
➤ Short-term use

- Impaired memory
- Impaired motor coordination
- Altered judgment
- Paranoia & psychosis in high doses

➤ Long-term/heavy use

- Altered brain development
- Cognitive impairment
- Increased risk of chronic psychosis
- Chronic bronchitis
- Diminished lifetime achievement

How Does Marijuana Affect Driving?



Impact of Marijuana on Driving

State v. Hadley, 55 Kan.App.2d 141 (2017)

“the primary psychoactive substance in marijuana, . . . is known to have an impact on several functions of the brain that are relevant to driving ability, including the capacity to divide one's attention and focus on several things at the same time, balance, and the speed of processing information. While not all researchers agree, a significant amount of research has shown that consumption of marijuana can impair the ability to drive.”

See also Commonwealth v. Gerhardt, 477 Mass. 775 (2017)

Effects of Marijuana on Driving Related Skills

Studies have shown that marijuana can impair critical abilities necessary for safe driving:

- Slow reaction time
- Road tracking – lane position variability
- Decreased divided attention
- Impaired cognitive performance
- Impaired sensory-perception functions
- Impaired executive functions – decision making, risk taking

Source: *Marijuana-Impaired Driving: A Report to Congress* (NHTSA July 2017) and citations contained therein

1 + 1 ≠ 2

Marijuana & Alcohol Combined

- Research shows that impairment increases significantly when marijuana use is combined with alcohol
- Studies have found that many drivers who test positive for alcohol also test positive for THC

Source: "Drugged driving," NIDA Infofacts,
(2010)



Polling Question #3

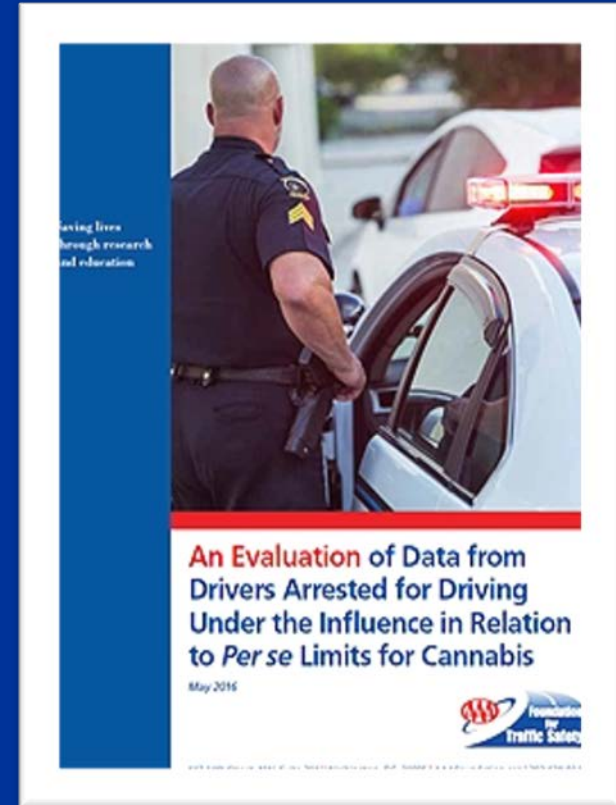
The higher the level of THC in the body,
the greater the impairment.

- a) True
- b) False

Per Se Limits for Cannabis

AAA Foundation for Traffic Safety (May 2016)

- “There is no evidence . . . that any objective threshold exists that established impairment, based on THC concentrations”
- “A quantitative threshold for *per se* laws for THC following cannabis use cannot be scientifically supported”



DUIM's Major Challenge

“It is difficult to establish a relationship between a person’s THC blood or plasma concentration and performance impairing effects.”

Source: *Drugs and Human Performance Fact Sheets, Cannabis / Marijuana* NHTSA
(April 2014)

Medical Marijuana



Marijuana as Medicine

Nora D. Volkow, M.D.

“Whether smoking or otherwise consuming marijuana has therapeutic benefits that outweigh its health risks is still an open question that science has not resolved.”



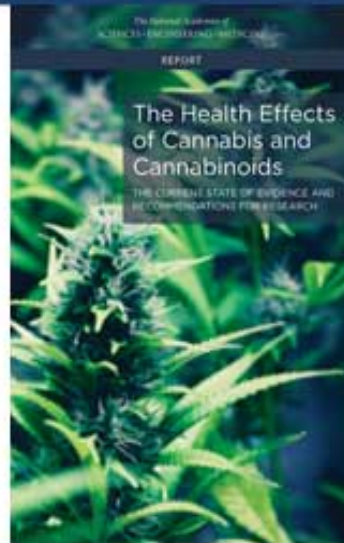
Marijuana as Medicine: Cart Before the Horse?

- Components of cannabis plant **may** be therapeutic & **may** meet unmet clinical needs
- Need research is needed:
 - About mechanics of actions
 - To back up benefits
 - To determine adverse events & toxicity
 - So it can be reproducible lot-to-lot

Dr. Marilyn Huestis, *What Do I Need to Know About Marijuana* (National Families in Action Podcast, 8/13/19)

Health Benefits of Marijuana (2017)

The National Academies of
SCIENCES • ENGINEERING • MEDICINE



**The Health Effects of Cannabis and
Cannabinoids:
The Current State of Evidence and
Recommendations for Research**

To be found at: [Nationalacademies.org/cannabishealtheffects](https://www.nationalacademies.org/cannabishealtheffects)

Report Findings

- Cannabis use may be beneficial for certain conditions
- “Substantial evidence” that cannabis use prior to driving increases crash risk
- “Moderate evidence” that cannabis use may lead to alcohol, drug or tobacco dependence
- **But more research is needed**

Process to Legally Obtain Medical Cannabis In General

1. Register as a patient
 - 18+ years of age; or a minor with parental consent
2. Obtain written certification from registered/certified provider
 - Must have bona fide provider-patient relationship
 - Provider must approve medical cannabis as treatment option for “qualifying medical condition”
3. Visit licensed dispensary

Qualifying Medical Conditions (PA)

- ALS
- Anxiety disorders
- Autism
- Cancer
- Crohn's disease
- Damage to the nervous tissue of the central nervous system
- Neuropathies
- Dyskinetic & spastic movement disorders
- Epilepsy
- Glaucoma
- HIV/AIDS
- Huntington's disease
- Inflammatory bowel disease
- Intractable seizures
- Multiple sclerosis
- Neurodegenerative diseases
- Opioid use disorder
- Parkinson's disease
- Post-traumatic stress disorder
- Severe chronic or intractable pain
- Sickle cell anemia
- Terminal illness
- Tourette syndrome

Qualifying Health Conditions

Table 3. Arizona Medical Marijuana Active Qualifying Patients by Qualifying Health Condition

Qualifying Health Condition	Patient Count	% of Total Cardholders*
Alzheimer's	152	0.05%
Cachexia	615	0.20%
Cancer	6,622	2.20%
Chronic Pain	282,341	94.11%
Crohn's Disease	1,046	0.34%
Glaucoma	1,635	0.54%
Hepatitis C	1,137	0.37%
HIV/AIDS	1,233	0.41%
Muscle Spasms	4,414	1.47%
Nausea	4,775	1.59%
PTSD	5,769	1.92%
Sclerosis	84	0.02%
Seizures	2,178	0.72%

*% of Cardholders will not add up to 100% due to individual cardholders being represented across more than one Qualified Health Condition.

Sales of Medical Marijuana - Arizona

Table 11. Arizona Medical Marijuana **September 2021** Transaction Summary in Ounces and Pounds

Marijuana Ounces	Edible Ounces	Other Ounces	Total Ounces
149,076.22	2,434.61	18,655.88	170,166.71
Marijuana Pounds	Edible Pounds	Other Pounds	Total Pounds
9,317.25	152.18	1,166.03	10,635.43

Table 12. Arizona Medical Marijuana **YTD 2021** Transaction Summary in Ounces and Pounds


Marijuana Ounces	Edible Ounces	Other Ounces	Total Ounces
1,659,936.86	31,634.77	204,738.72	1,896,310.43
Marijuana Pounds	Edible Pounds	Other Pounds	Total Pounds
103,746.09	1,977.28	12,796.35	118,519.51

Medical Marijuana Cards

License No. 000000 Prescriber's Name, Degree DEA No. 0000000
Your Practice/Clinic Name Here
Your Street Address • City, State, Zip Code
E-mail/Web Site Address
Phone: 000-000-0000 • Fax: 000-000-0000

Client Name/ID _____
Address _____
Patient/Pet Name/ID _____ Age _____
Date _____

Rx



Label
Rx# - NPL - 1 - 2 - 3 - 4 - PPN
Dr. _____

KEEP OUT OF CHILDREN'S REACH • FOR VETERINARY USE ONLY





“Remind me, is this medicinal or recreational weed?”

Arizona Cardholder Protections

May not be subject to “arrest, prosecution or penalty in any manner or denial of any right or privilege . . . for . . . medical use of marijuana

- pursuant to AMMA
 - in compliance with statutory limits on quantity and location of use
- Rebuttable presumption that cardholder in possession of 2.5 ounces (of MMJ) is engaged in medical use

Hypotheticals



Food for Thought

May a probationer be prohibited from using medical marijuana as a lawful condition of probation?



May Probation Prohibit Use of MMJ?

Yes

- California: *People v. Leal*, 210 Cal.App.4th 829 (2012).
- Federal District (Maine): *U.S. v. Friel*, 699 F.Supp.2d 328 (D.Me. 2010).

No

- Montana: *State v. Nelson*, 195 P.3d 826, 833 (MT. 2008).
- Pennsylvania: *Gass v. 52nd Judicial District, Lebanon County*, 232 A.3d 706 (PA 2020).
- Arizona: *Reed-Kaliher v. Hoggatt*, 347 P.3d 136, 139 (AZ. 2015).
- Oregon: *State v. Miller*, 299 Or.App. 515 (2019)

People v. Thue, ___ N.W.2d ___ (Mich.Ct.App. Feb. 11, 2021)

- “a qualifying patient . . . is not subject to arrest, prosecution, or penalty . . . or denied any right or privilege . . . for the medical use of marijuana in accordance with this act.”
- HELD:
 - Probation condition that prohibits **compliant** use of MMJ is impermissible
 - Revocation of probation based on **compliant** use of medical marijuana is a “penalty” and is impermissible
 - BUT inapplicable to recreational use of MJ

Hybrid Approach

Walton v. People, 451 P.3d 1212 (CO. 2019)

- As condition of probation for DUI, prohibited from using medical marijuana
- HELD: should not have been barred from using MMJ without finding that this was necessary and appropriate to promote statutory sentencing goals



“Evidence Based Practices”

It’s a Whole New World



Evidence-Based Practice (EBP)

- EBP is a body of research done through meta-analysis (a study of studies) that has provided tools and techniques that have been proven to be effective at reducing recidivism
- These tools and techniques allow decision makers to determine risk and criminogenic characteristics of offenders and place them in appropriate supervision levels and treatment programs

Consistency vs. Individualized Sentencing

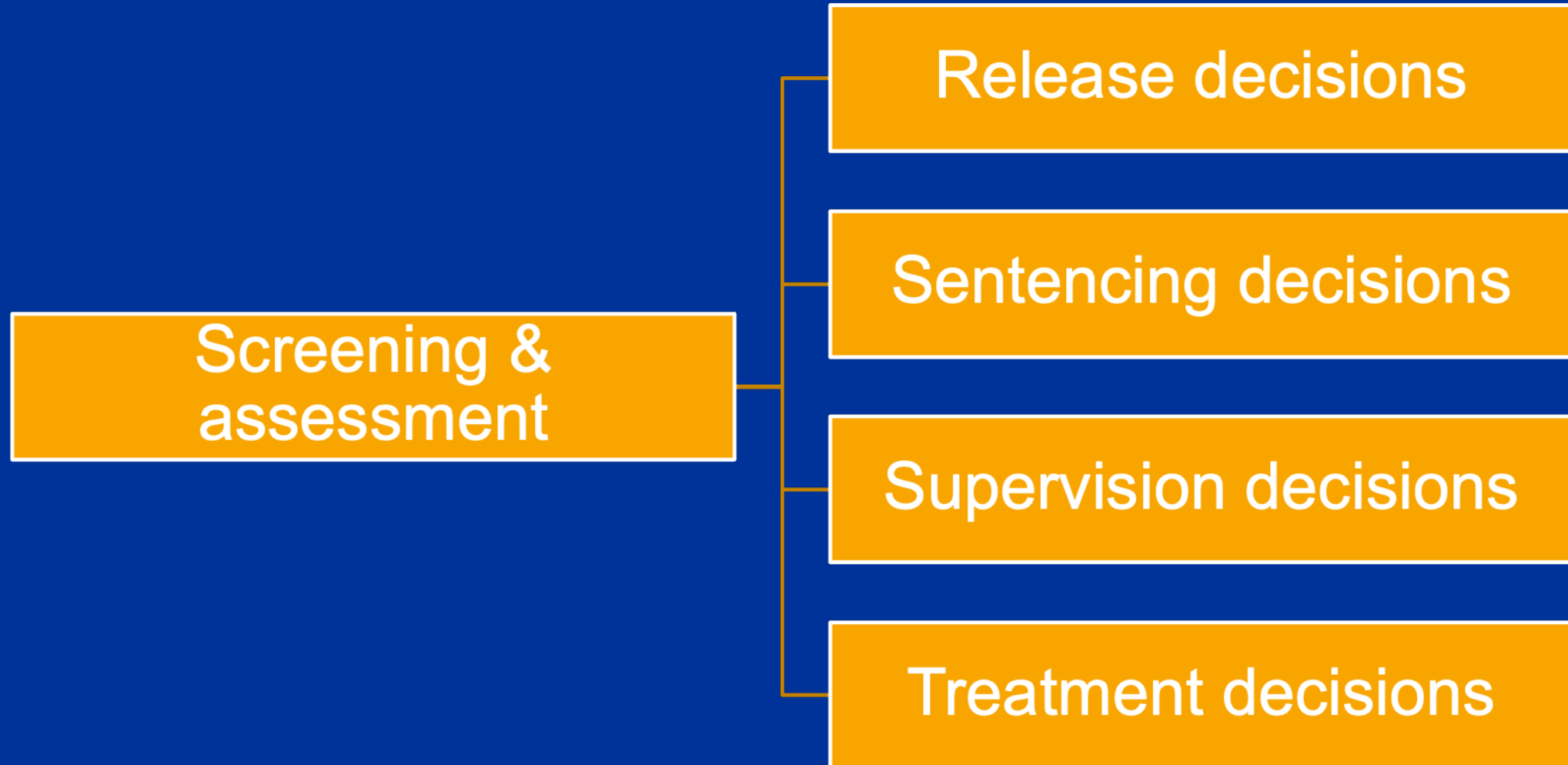


The Goals of Utilizing Evidence-Based Practices

1. Reducing recidivism
2. Improving public safety by:
implementing practices based on empirical research to transform probation into a more efficient, effective, and meaningful arm of the court



Assessments & Decision-Making



What Lies Ahead?

- Legalization/decriminalization of mj + other drugs
- Roadside drug testing
- Oral fluid drug testing
- New field sobriety tests
- Research on marijuana
- *Per se* drug-impaired driving laws



Questions or Comments?



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