IN THE ARIZONA SUPREME COURT

TRAVIS LANCE DARRAH, Petitioner, v. HON. CRANE McCLENNEN, Judge of the Superior Court of Arizona in and for Maricopa County, Respondent Judge, CITY OF MESA PROSECUTOR'S OFFICE, Real Party In Interest.	)	S.Ct. No. CV-14-0303-PR Court of Appeals No. 1 CA-SA 14-0054 Maricopa County Superior Court LCA No. LC2013-000517-001 DT Mesa Municipal Court Docket No. 2011103211

BRIEF OF *AMICUS CURIAE* ARIZONA ATTORNEYS FOR CRIMINAL JUSTICE IN SUPPORT OF PETITIONER

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INTRODUCTION

For nearly a century this Court has discussed the menace of drunken driving on our roadways. Nearly fifty years ago, this Court "[took] judicial notice of the terrible toll taken, both in personal injuries and property damage, by drivers who mix alcohol and gasoline." *Noland v. Wootan*, 102 Ariz. 192, 193 (1967). The legislature later included drugged driving as prohibited, and this Court has held that impaired driving is properly prohibited.

This case and *Dobson v. McClennen*, 236 Ariz. 203 (App. 2014), decided two weeks apart by Division One of the Court of Appeals ("COA"), are not cases involving impaired driving. Instead, these are cases which, like *State ex rel. Montgomery v. Harris*, 234 Ariz. 343 (2014), take prosecution for drugged driving to an illogical and absurd extreme. Action by this Court was needed in *Harris* to roll back the COA's permissiveness toward prosecutions under A.R.S. §28-1381(A)(3) ("(A)(3)"), and it is needed again.

This case and *Dobson* raise questions about how far the government may go to undermine the clear intent of the voters who, through their constitutional power to make laws by initiative, have announced that marijuana is medicine and those who use it responsibly are immune from prosecution. In 2010, Arizona voters passed Proposition 203, the Arizona Medical Marijuana Act ("AMMA"), with its stated purpose being to protect patients from criminal prosecution based solely on their use

of marijuana. Anticipating prosecutions in cases such as this, AMMA drafters sought to immunize patients from being prosecuted under (A)(3) while leaving the ability to prosecute patients for driving while impaired under (A)(1) untouched.

The COA held that AMMA provides no such immunity. Both opinions misapplied *dictum* from *Harris* by taking out of context the statement that "[§28-1381(A)(3)] 'does not require the State to prove that the marijuana was illegally ingested[.]" *Darrah v. McClennen*, 236 Ariz. 185, 187 ¶7 (App. 2014) (quoting *Harris*, 234 Ariz. at 346-47 ¶16). Only Judge Cattani, concurring in part and dissenting in part, correctly understood that this statement was in the context of a driver who did not invoke the protections of AMMA, and thus Judge Cattani correctly recognized that "an authorized user cannot be convicted under §28-1381(A)(3) if he or she establishes that the amount of THC or marijuana metabolite in the blood was in insufficient concentration to cause impairment." *Id*. at 188 ¶12 (Cattani, J., specially concurring).

Amicus curiae Arizona Attorneys for Criminal Justice ("AACJ") asks this Court to grant review in this case as well as *Dobson*, No. CV-14-0313-PR (petition for review filed January 4, 2015), and hold that the voters' intent in passing AMMA may be accomplished only by recognizing that medical marijuana patients are immune from (A)(3) prosecutions.

INTERESTS OF *AMICUS CURIAE*

AACJ, the Arizona state affiliate of the National Association of Criminal Defense Lawyers, was founded in 1986 in order to give a voice to the rights of the criminally accused and to those attorneys who defend the accused. AACJ is a statewide not-for-profit membership organization of criminal defense lawyers, law students, and associated professionals dedicated to protecting the rights of the accused in the courts and in the legislature, promoting excellence in the practice of criminal law through education, training and mutual assistance, and fostering public awareness of citizens' rights, the criminal justice system, and the role of the defense lawyer.

AACJ offers this brief because the issue presented concerns the wrongful prosecution and conviction of citizens engaged in activity which the voters have decided is legal. The COA's opinions in this case and in *Dobson* subvert the will of the voters and effectively turns every medical marijuana patient with a driver's license into a criminal. The City of Mesa Prosecutor's Office ("Mesa") puts forth an argument no less absurd and unavailing than that presented and rejected in *Harris*, without noting the obvious flaw in its argument. Patients who drive while impaired may still be prosecuted under (A)(1) if they are actually impaired. Action from this Court is necessary so that AMMA's plain language is given a sensible interpretation.

ARGUMENTS

I. Arizona's public policy on medical marijuana was set by voter-passed Initiative; courts must liberally construe AMMA and the voters' intent in passing that Initiative.

"Public policy is that principle of the law which holds that no subject can lawfully do that which has a tendency to be injurious to the public, or against the public good, which may be termed, as it sometimes has been, the policy of the law, or public policy in relation to the administration of the law." *Wagenseller v. Scottsdale Mem'l Hosp*., 147 Ariz. 370, 379 (1985) (internal quotes omitted). In Arizona, "our state's constitution and statutes embody the public conscience of the people of this state." *Id*. at 378. The legislative authority resides equally in the Legislature and in the people through the initiative and referendum processes. Ariz. Const. art. IV, §1; A.R.S. §19-102. "The legislature and electorate share lawmaking power under Arizona's system of government." *Cave Creek Unified School Dist. v. Ducey*, 233 Ariz. 1, 4 ¶8 (2013) (internal quotes omitted).

In 1996, Arizona voters resoundingly passed Prop200,[1] permitting doctors to prescribe marijuana to treat patients if two licensed physicians agreed on the treatment and offered supporting research. The government moved quickly to suspend enactment of Prop200 until the FDA formally approved marijuana for

[1] http://www.azsos.gov/election/1996/General/Canvass1996GE.pdf (last visited February 6, 2015).

medical use.[2]

Angry over nullification of that election, and to stop Arizona's lawmakers and executive branch from overruling them so easily in the future, Arizona's voters passed Prop105, the "Voter Protection Act" ("VPA"), in 1998.[3] Former Secretary of State Richard Mahoney supported VPA: "There is a disturbing trend in Arizona in which citizens pass initiatives by overwhelming margins, only to watch the legislature turn around within months and gut what the voters passed. This has occurred on numerous issues, including drug policy reform, health care, and the environment." *Id.* Maricopa County Sheriff Joe Arpaio wrote: "The will of the people is the most important element of our government. Once an election takes place, votes can't be thrown away just because a few politicians don't like the results of an election." *Id.* Attorney General Grant Woods wrote:

> A number of citizen measures dealing with campaign reform, health care, and the environment have been under assault by the politicians. Recently, the legislature repealed Proposition 200 only a few months after it had been approved. The message is clear from the politicians: 'we know better than you.' Let's send a message back…Proposition 105 will prohibit the Legislature from repealing citizen measures approved by voters and prohibit the governor from vetoing ballot measures.

Id.

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[2] Tim Golden, "Medical Use of Marijuana To Stay Illegal in Arizona," New York Times, 4/17/97, p.A14.

[3] http://www.azsos.gov/election/1998/info/pubpamphlet/Prop105.html (last visited February 6, 2015).

VPA resulted from government's undermining public policy established by the voters, specifically legalizing medical marijuana. VPA's purpose is simple: control of the sovereignty of the State rests with the people, not with the government. Ariz. Const. art. II, §2. Our Constitution recognizes that government tend to promote its own interests rather than those of the people. For that reason, Arizona's declaration of rights, article II, §1, states: "a frequent recurrence to fundamental principles is essential to the security of individual rights and the perpetuity of free government."

Consistent with VPA, an initiative may be repealed only by another initiative or by legislative referral to the electorate. It matters not that the initiative at issue in this case is statutory rather than constitutional. *Cave Creek,* 233 Ariz. at 4 ¶18. Now that AMMA is law, the courts are tasked with upholding it in accordance with the public policy stated therein.

"The legislative power of the people is as great as that of the legislature." *Tilson v. Mofford*, 153 Ariz. 468, 470 (1987) (citing Ariz. Const. art. XXII, §14). Voter initiatives are "part and parcel of the legislative process," and therefore "receive the same judicial deference as proposals before the state legislature." *Winkle v. City of Tucson*, 190 Ariz. 413, 415 (1997). This Court "has characterized the right of initiative and referendum as 'vital,' and one so important to the authors of our constitution that they included sufficient machinery in the constitution to

make the right self-executing." *Van Riper v. Threadgill*, 183 Ariz. 580, 582 (1995); *see also Feldmeier v. Watson*, 211 Ariz. 444, 447 ¶11 (2005) (internal cites omitted).

The government therefore must liberally construe legislation passed by initiative and may not interfere with the people's right to initiate laws. *Pedersen v. Bennett*, 230 Ariz. 556, 558 ¶7 (2012) (quoting *Kromko v. Superior Court*, 168 Ariz. 51, 58 (1991)) (liberal interpretation of initiatives avoids "destroy[ing] the presumption of validity"). The judiciary's "primary objective in construing statutes adopted by initiative is to give effect to the intent of the electorate." *State v. Gomez*, 212 Ariz. 55, 57 ¶11 (2006).

In 2010, most Arizona law enforcement officials vocally opposed Prop203: "This proposition is extremely bad for public safety, for public health and is just plain bad public policy." Ariz. Sec'y of State, Ariz. Ballot Prop. Guide, Gen. Election – Nov. 7, 2010 ("2010 Voter Guide"), at 86. Prop203, §2(D) made clear its intent to stop state officials from persecuting patients who use marijuana medicinally. And §2(G) expressed the voters' intent to ***change Arizona's public policy***:

> State law should make a distinction between the medical and nonmedical uses of marijuana. Hence, the purpose of this act is to protect patients with debilitating medical conditions, as well as their physicians and providers, from arrest and prosecution, criminal and other penalties and property forfeiture if such patients engage in the medical use of marijuana.

Thus, it is plain that AMMA-compliant patients should not be prosecuted for criminal offenses.

II. The COA's construction of the statute directly contradicts the expressed will of the electorate that law-abiding patients not be prosecuted.

The COA summarized Petitioner's argument, *Darrah*, 236 Ariz. at 186 ¶5, but its brief analysis faltered in three ways. First, it erroneously concluded that because AMMA's language was not as specific as possible, it therefore was not specific enough. Second, it misinterpreted this Court's recent opinion in *Harris*. Third, it failed to address the clear intent of the voters.

As described by the Arizona Legislative Council's analysis, "the purpose of [AMMA] was to protect patients with debilitating medical conditions, as well as their physicians and providers, from arrest and prosecution, criminal and other penalties and property forfeiture if such patients engage in the medical use of marijuana." 2010 Voter Guide, at 73. AMMA allows patients with qualifying debilitating medical conditions to obtain registration identification cards that permits possessing and using marijuana. Thus, "Arizona voters decided that a qualified patient does not commit a criminal offense by possessing an allowable amount of marijuana." *State v. Okun*, 231 Ariz. 462, 465 ¶9 (App. 2013). The same is necessarily true for the use of allowable marijuana.

A.R.S. §36-2811(B) states that a patient or caregiver "is not subject to arrest, prosecution or penalty in any manner, or denial of any right or privilege, including any civil penalty or disciplinary action by a court or occupational or professional licensing board or bureau," so long as the patient or caregiver uses and possesses marijuana in compliance with AMMA. This provision "affords immunity." *State v. Fields*, 232 Ariz. 265, 269 ¶14 (App. 2013). Furthermore, "except as provided in section 36-2802, a qualifying patient … may assert the medical purpose for using marijuana as a defense to any prosecution of an offense involving marijuana intended for a qualifying patient's medical use…" §36-2812(A).

Many patients have driver's licenses. In order to protect patients who drive from prosecution merely because marijuana is in their bloodstream, AMMA included this language:

> This chapter does not authorize any person to engage in, and does not prevent the imposition of any civil, criminal or other penalties for engaging in, the following conduct:
> …
> D. Operating, navigating or being in actual physical control of any motor vehicle, aircraft or motorboat while under the influence of marijuana, ***except that a registered qualifying patient shall not be considered to be under the influence of marijuana solely because of the presence of metabolites or components of marijuana that appear in insufficient concentration to cause impairment***.

A.R.S. §36-2802(D) (emphasis added). This exception is built into the broad protection of AMMA in § 36-2811(B)(1), which prevents arrest or prosecution "for the registered qualifying patient's medical use of marijuana pursuant to this

chapter…"

The COA correctly pointed out that nothing in this language specifically points to §28-1381(A)(1)-(3). *Darrah*, 236 Ariz. at 186-87 ¶6. And it also correctly states that AMMA's drafters "could" have cited to the DUI statutes to be more specific. *Id*. But that does not resolve the issue of statutory interpretation; the availability of better language does not render the current language insufficient to establish this immunity. AMMA could have referred to no other statute but §28-1381(A)(1)-(3).

"If reasonably practical, a statute should be explained in conjunction with other statutes to the end that they may be harmonious and consistent." *State v. Sweet*, 143 Ariz. 266, 270-71 (1985). "Courts construe seemingly conflicting statutes in harmony when possible." *Baker v. Gardner*, 160 Ariz. 98, 101 (1988). "When two conflicting statutes cannot operate contemporaneously, the more recent, specific statute governs over an older, more general statute." *State v. Jones*, 235 Ariz. 501, 503 ¶8 (2014) (internal quotes omitted).

Combining these rules with those described above for giving a liberal construction to voter-approved initiatives, the only fair reading of §36-2802(D) is that AMMA, passed in 2010, modifies A.R.S. §28-1381(A)(3), enacted in 1990 "as part of Arizona's comprehensive law regulating drivers under the influence." *State v. Phillips*, 178 Ariz. 368, 371 (App. 1994); *see also Harris*, 234 Ariz. at 346 ¶¶18-

19. §36-2802(D) is both more recent and more specific, and it must control over the older and general (A)(3) prohibition on driving with a drug or metabolite in the bloodstream.

The proper construction of AMMA in the context of DUI is as follows. First, §36-2811(B)(1) preempts all attempts to prosecute anyone for any crime related to marijuana use. Within that broad immunity, §36-2802 carves out limited exceptions, including subsection (D)'s statement that operating a vehicle while impaired may still be prosecuted. Subsection (D) then clarifies that merely having marijuana or its components or metabolites in the bloodstream does not *per se* create impairment. Thus, in order to bring a DUI prosecution against a medical marijuana patient, the government must allege that the driver is actually impaired by marijuana and bring a charge under (A)(1), because an (A)(3) charge is specifically precluded. Though specific references to §28-1381(A)(1)-(3) certainly would have made the statute even clearer, the drafters were not required to do so in order for AMMA to amend the DUI statute. It is this final point that the COA altogether failed to recognize.

Moreover, the COA inexplicably found not only that its interpretation of §36-2802 was the correct interpretation, but also that it was the ***only reasonably possible*** interpretation. *Darrah*, 236 Ariz. at 187 ¶7. Thus, it did not consider the effect of competing reasonable alternative interpretations or this Court's standard for assessing those interpretations: "if the statute is ambiguous, we consider secondary

principles of statutory interpretation, such as 'the context of the statute, the language used, the subject matter, its historical background, its effects and consequences, and its spirit and purpose.'" *Ariz. Clean Elections Comm'n v. Brain*, 234 Ariz. 322, 325 ¶11 (2014) (internal quotes omitted). Furthermore, "[w]hen a statute is susceptible to more than one interpretation, the rule of lenity dictates that any doubt should be resolved in favor the defendant." *State v. Tarango*, 185 Ariz. 208, 210 (1996) (internal quotes omitted).

Where the COA made conclusory statements, Mesa's response to Darrah's petition attempts to flesh out that position—and thus demonstrates how that argument is meritless. Mesa essentially argues that any amount of marijuana in the bloodstream is impairing based on this Court's language in *Harris*. *Response* at 5-6. As Judge Cattani accurately stated, in *Harris* this Court was not addressing whether small amounts of tetrahydrocannabinol ("THC") in the bloodstream were impairing, rather, the issue was whether a nonimpairing metabolite was properly the basis for an (A)(3) prosecution. This Court's discussion of medical marijuana users was only for the purpose of showing the absurdity of the State's argument in that case.

Mesa argues that, in the absence of a scientific consensus as to a presumptive amount of THC in the bloodstream that impairs, the courts must interpret (A)(3) to prohibit ***any*** concentration of THC or metabolite hydroxy-THC. *Response* at 5-6. This same absurd logic was rejected in *Harris*, and it leads to a slippery slope.

According to Mesa, a patient driving with 5 ng/ml THC in the bloodstream is equally culpable as a driver with 0.5 ng/ml or even 0.0000000005 ng/ml. If next-generation laboratories could detect a single molecule of THC in a blood sample, then Mesa would prosecute under (A)(3). Mesa's slippery slope argument must be rejected.

Furthermore, Mesa's statements are no longer true. Other jurisdictions are developing a consensus as to an amount of THC in the bloodstream that creates a presumption or permissive inference of impairment. Montana and Colorado set that level at 5 ng/ml. Colo.Rev.Stat. 42-4-1301(6)(a)(IV); Mont.Code.Ann. 61-8-411(1) & 50-46-320(7)(a). Montana's medical marijuana act is very similar to Arizona's. *Reed-Kaliher v. Hoggatt*, 235 Ariz. 361, 364 ¶12 (App. 2014). As in Montana, AMMA would not bar amending (A)(3) in such a fashion.[4]

When this Court said in *Harris* that "unlike alcohol, there is no generally applicable concentration that can be identified as an indicator of impairment for illegal drugs," 234 Ariz. at 347 ¶22, this Court was not intending to limit the growth of scientific knowledge, as Mesa implies. The only question *Harris* sought to resolve was whether (A)(3) applied to drivers with nonimpairing metabolite carboxy-THC in the bloodstream. It is strange that the COA read into *Harris* the opposite of what

[4] In light of a recently-released study by the National Highway Traffic Safety Administration that found no connection between marijuana use and automobile accidents, however, such a law may not pass the rational basis test. David Shepardson, "U.S.: Pot use doesn't increase crash risk," *The Detroit News*, 2/7/15.

this Court seemed to be considering absurd—punishing medical marijuana patients who drive while sober.

The COA has previously held that an (A)(3) prosecution cannot be predicated on consumption of a lawful substance even if that substance metabolizes into an unlawful substance. In *State v. Boyd*, 201 Ariz. 27, 30 ¶¶15-16 (App. 2001), the COA recognized that persons of average intelligence and common experience would have no way of knowing that GBL purchased from a health-food store would metabolize into the proscribed GHB. There is no dispute that (A)(3) prosecutions may not be brought against lawful users of any other medication, even if that medication is a "drug defined in section 13-3401 or its metabolite." Marijuana is just as lawful as any other prescription drug, and AMMA's clear purpose was to erase the distinction between medical marijuana and other prescription drugs. For the COA to ignore that public policy decision by the voters is tantamount to judicially rejecting AMMA—something courts are powerless to do.

A sensible reading must be given to §36-2802. The language "sufficient to cause impairment" clearly does not mean "any amount"; otherwise, the drafters would have used that language. "Sufficient to cause impairment" means an amount sufficient to cause impairment in the average driver investigated by an officer in the field. In the absence of any *per se* limit written into (A)(3), AMMA permits DUI prosecutions of patients only for *actual* impairment. Prosecutions under (A)(1) may

proceed when users of lawful medication drive while impaired. *State v. George*, 233 Ariz. 400, 403 ¶12 (App. 2013). Thus, if Mesa wants to prosecute medical marijuana patients for being impaired while driving, it can bring that prosecution under (A)(1). It did so in this case; and Darrah was acquitted of that charge.

CONCLUSION

AMMA could have been written with greater clarity, but that is not the point. The voters' intent to protect medical marijuana patients from DUI prosecutions based solely on the presence of marijuana or metabolites in the bloodstream is very clear; and the COA disregarded that clear intent. Far from liberally construing the voter initiative's intent, the COA's rigid construction of AMMA violates VPA and is unacceptable under our Arizona Constitution. Action from this Court is needed to honor the will of the voters.

AACJ asks this Court to grant review of the petitions in this case and in *Dobson* so that Arizona courts recognize the full extent of the immunity from prosecution that was co clearly built into AMMA.

RESPECTFULLY SUBMITTED this 11th day of February, 2015.

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