

SMOKE AND MIRRORS

The Disambiguation of Dubious Lab Testing in Cannabis DUI Prosecutions



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Anyone working in DUI practice long enough has come across the dreaded cannabis case. Your client blows a 0.00 on an alcohol test but the police *just know* your client is under the influence of *something*, so they collect a urine sample and send it off to the Florida Department of Law Enforcement (hereinafter “FDLE”) Crime Lab for analysis. In the meantime, your client is booked and charged for DUI (still with no scientific evidence of guilt), and you begin the arduous task of fighting an uphill battle. Then, after several months, the FDLE report comes back. Negative for amphetamines, barbiturates, benzodiazepines, cannabinoids, carisoprodol, cocaine, methadone, methamphetamine, opiates, and oxycodone. But your client tested positive for 11-Nor-9-carboxy-delta-

9-tetrahydrocannabinol (hereinafter “carboxy”). You feel your heart skip a beat, you sink into your seat just a little, and you realize you have to call your client to tell them the State has evidence of their impairment and it’s time to negotiate a plea.

Not anymore.

The science of cannabis has expanded at a much faster rate than the laws related to the substance. As a result, many of our clients are being prosecuted for 1) a crime the State cannot prove, or 2) a crime they did not commit. This paper will explain the science so you can educate the court and will discuss how to use the science to your clients’ benefit. The goal is dismissal through a motion under Rule 3.190(c)(4), Fla. R. Crim. P. The alternate plan is introducing the science to a jury.

Let’s begin with the science. First and foremost, carboxy is not a cannabinoid, or more simply put, carboxy is not a product of the cannabis plant.

Rather, carboxy is a secondary metabolite created by the human body after the body has broken down the psychoactive compounds found in cannabis. Importantly, carboxy is also present in the body as a secondary metabolite after one consumes any number of *legal cannabinoids* (as opposed to *cannabinoids*) and derivatives of the legal hemp plant.

The psychoactive (intoxicating) component of cannabis is delta-9-tetrahydrocannabinol (hereinafter “THC”). After ingesting cannabis, the THC enters the bloodstream and eventually comes to rest on cannabinoid receptors. As the THC continues to travel throughout the body, the body does its job by breaking the chemical down for disposal. This breakdown process is what we commonly know as metabolization. As the THC breaks down, the individual parts of the compound become “metabolites.” These metabolites are simply byproducts of the disposal process.¹

Carboxy — also referred to as “THCCOOH” — is “the most prevalent substance that remains after the body eliminates the active component

of the THC.” Scientists have determined some metabolites are “pharmacologically active” and thus, they affect the brain. Other metabolites are inactive and thus have no effect on a person. Carboxy is one of the metabolites which does not have any effect on a person whatsoever. Also of note is that carboxy remains in the body long after the psychoactive components of THC have been removed.²

This is significant because relevant scientific data indicates the very substance found in our clients’ collective urine *has no effect on the human brain*. Further, the urinalysis performed does not search for actual THC. It only searches for the presence of inactive metabolites like [carboxy]. But because carboxy is not active (but a mere metabolite), “urinalysis only reveals that the tested person has ingested cannabis at some point in the recent past; it does not give any information about one’s impairment level.”³ As such, when only carboxy is present, “scientists cannot determine whether a person is currently impaired by testing his urine.”⁴

In 2017, the National Highway Safety Administration (hereinafter “NHTSA”) published a report indicating urine tests showing the presence of carboxy (or any metabolite) cannot be used to determine impairment.⁵ That report concluded “[d]rugs and drug metabolites are detectable in urine for several days after the drug has been used (and sometimes for weeks). Urine test results cannot be used to prove that a driver was under the influence of the drug at the time of the arrest or testing.”⁶ “Detection of THC or other cannabinoids in urine does not necessarily reflect recent use.”⁷ Because the urine testing does not discriminate when it comes to *quantity*, persons who use legal hemp products will still test positive for carboxy. Further, according to the NHTSA, Florida is a jurisdiction which allows legal, non-psychoactive therapeutic cannabis use.⁸

Based on this science, it is abundantly clear that the presence of carboxy in urine does not demonstrate impairment; it merely indicates the test subject

may have ingested cannabis at a prior time, but that the psychoactive THC is no longer present in the system. It may also indicate the ingestion of a perfectly legal, non-intoxicating substance: hemp. As many of you are aware, hemp is now legal in all states, so long as the plant/product does not contain more than 0.3% THC.⁹

Think poppy seeds. It is common knowledge that consuming a poppy seed muffin may result in testing positive for opium derivatives. This has been a costly and ongoing issue with those who use *legal* parts of the poppy plants. In one instance, a woman had her newborn child stripped away from her by social services when she tested positive for heroin after consuming poppy seed products.¹⁰ “Similar results were reached in a study involving ingestion of cannabis seed oil.”¹¹ In that study, carboxy was found up to six days after ingesting cannabis products.¹²

That testing eventually led to the United States Air Force acquitting members in drug testing cases. It also led to the Air Force banning all hemp seed oil products because although the substances are legal and do not result in the person becoming intoxicated, the Air Force was concerned they could not tell the difference between a member who used an illicit substance and one who used a legal product.¹³ This is significant because the United States Air Force has recognized that the presence of carboxy means one of two things: either the person consumed an illegal drug some time ago (but was no longer intoxicated when the test was performed), or the person ingested a legal and innocent substance. Being that scientists cannot determine into which category to place a test subject, the Air Force has determined it is better to not allow *any* substance which may result

in the presence of carboxy. The civilian world is different: in these cases we are only concerned with whether the defendant was intoxicated *at the time of the arrest*, and the data adduced indicates there is a high probability they were not when only carboxy is discovered.

Although this issue is new in Florida, it has been addressed elsewhere. The Michigan Supreme Court heard a case and quoted the State’s own expert witness at the trial level as having testified that carboxy “itself has no pharmacological effect on the body



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and its level in the blood correlates poorly, if at all, to an individual’s level of THC-related impairment.”¹⁴ That case involved a blood specimen, which is even more accurate than urine. The most prevalent mention of carboxy in Florida case law was in *Estrich*, where the court held it was error for the trial court to not exclude evidence of the presence of carboxy in a DUI case because the substance was non-impairing and would only serve to confuse the jury.¹⁵ Essentially, case law shows us not only that evidence of carboxy must be excluded at trial, it also shows us that Florida (and

other) courts have agreed that carboxy is not evidence of any form of intoxication.

Now that you understand the science and you have seen the blueprint for your argument, what do you do next? First, let's discuss dismissal of a case in general terms. As you are aware, §316.193(1)(a), Fla. Stat., provides that an individual must be impaired beyond their normal faculties (which does not come into play here) or under the influence of intoxicating substances in order to be convicted for a DUI. However, criminal charges must be dismissed when the State cannot prove the evidence eliminates *all* reasonable hypotheses of innocence.¹⁶ Evidence must be, at a minimum, consistent with the defendant's guilt and inconsistent with his/her innocence.¹⁷ Under this model, if the undisputed facts do not create a *prima facie* showing of guilt (and as we will discuss below, they don't), or if defense counsel can raise a reasonable hypothesis of innocence (which we will also discuss below), the case is ripe for dismissal.

Here, we argue that the presence of carboxy is an undisputed fact and that fact does not in and of itself prove a *prima facie* case of guilt against the defendant. In the alternative, because there is a reasonable hypothesis of innocence (the poppy seed theory—defendant may have consumed a legal hemp product which would also result in the presence of carboxy), the case must be dismissed as a matter of law. Under these circumstances, the State's own evidence has created an insurmountable burden it cannot overcome.

Trial strategy is no different. There

are countless physicians willing to testify to the science behind our argument and when a jury sees 1) the only evidence is not really evidence, and 2) a shiny, well-dressed local doctor on the stand backing up the defense theory, the odds are stacked against the State.

Based on the prevailing winds of both science and case law, the State's old tried-and-true method is now questionable at best. Without the ability to prove guilt based on the *only* method for cannabis testing (assuming blood draw was not permissible under the law), cannabis-based DUI cases based on urinalysis are now up in smoke. 🏴‍☠️

¹ Darron J. Hubbard, "Narcotics on Illinois's Roadways: Drugged Driving's Ill Effects After *Martin*," 62 *DePaul L. Rev.* 591, 605-07.

² *Id.*

³ *Id.*

⁴ *Id.*; David Evans, "Marijuana Urine Test Results, Pharmacokinetics and Interpretation of Blood Concentrations," 1 *Drug Testing Law, Technology and Practice*, §1:18.50, Ch. 1(III)(B).

⁵ U.S. Dept. of Transportation, NHTSA, DOT HS 812 440: *Marijuana-Impaired Driving: A Report to Congress* (2017).

⁶ *Id.* at 10.

⁷ *Id.*

⁸ NHTSA Report at 17-18.

⁹ The Agriculture Improvements Act of 2018 (commonly known as the 2018 Farm Bill).

¹⁰ Kevin B. Zeese, "Unreliability of Urine Screens—Causes of Urine Test Inaccuracy—Cross Reactions," 1 Zeese, *Drug Testing Legal Manual* §3:9 (2d Ed.), Ch. 3: "Technological Problems with Testing."

¹¹ *Id.*

¹² *Id.*

¹³ *Id.*

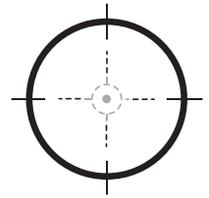
¹⁴ *People v. Feezel*, 486 Mich. 184 (2010).

¹⁵ *Estrich v. State*, 995 So.2d 613 (Fla. 4 DCA 2008).

¹⁶ *Davis v. State*, 90 So.2d 69 (Fla. 1956); *State v. Hayes*, 333 So.2d 51 (Fla. 4th DCA 1976).

¹⁷ *Taylor v. State*, 319 So.2d 114 (Fla. 2d DCA 1975); *Harvey v. State*, 390 Si.2d 484, 485 (Fla. 4th DCA 1980).

well crafted outcome by an experienced defense attorney to secure the constitutional rights of the accused long after the case has been closed.



We can view Florida's application of Withheld Adjudication similarly to a "Bad Conduct Discharge" under the Uniform Code of Military Justice—where it is preferable for the accused to have a BCD versus a "Dishonorable Discharge" which is equivalent to a felony conviction that would create a loss of rights and firearm prohibition under federal and state laws.

In conclusion, Withheld Adjudication has the ability to preserve the rights of the accused by not making them adjudicated convicted of a crime punishable by one year or more in prison.

Although not an optimal outcome, it can be the best outcome given the circumstances. 🏴‍☠️

¹ ABA Rule 1.1L Competence; A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation. www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_1_1_competence/.

² *United States v. Clarke*, 780 F.3d 1131 (11th Cir. 2015).

³ *Clarke v. United States*, 184 So. 3d 1107 (Fla. 2016).

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