2023 • Issue 4

from the desk of the SJOL

JUDGE JOHN W. GRINSTEINER (RETIRED)

Welcome to the JOL Newsletter for North Dakota 2023, Volume 4:

Pot, weed, dope, grass, and herb are some old-school basic terms. Chances are, the first time you heard marijuana slang it was one of these five words, but all five refer to the same thing – cannabis. Cannabis is a plant that has been used for its intoxicating effects for at least a century in the United States and even longer in other cultures. More than 100 different cannabinoids have been identified in cannabis. The primary intoxicating cannabinoid in cannabis is delta-9-tetrahydrocannabinol (THC). Cannabis continues to be one of the major themes in the media, our courtrooms, treatment courts, and in impaired driving over the past year and shows no signs of burning out.

In this issue, I plan to give you the current status (legalization, derivatives, and cannabis use disorder) and follow that up in 2024 with an issue in the next quarter on what to do about issues such as impairment detection, roadside testing, treatment, and sentencing. There is a lot of information, and I will do my best to synthesize it down to something you can use and/or to increase your understanding. I have included resources and links for you to take a deeper dive if your interest has been piqued and when time allows. Finally, the upcoming Trainings/Events/Webinars and case law sections have returned to the Newsletter after being cut for space in the last issue.

As the State's JOL, John brings you access to current and evidence-based practices that will assist you in your work and help promote more effective outcomes in impaired driving and other traffic related cases. With the help of the ABA's Judicial Division and its partnerships with various organizations (NHTSA, National Judicial College, NCSC, NADCP), John works to provide education, training, and technical assistance to judges and court staff throughout ND.

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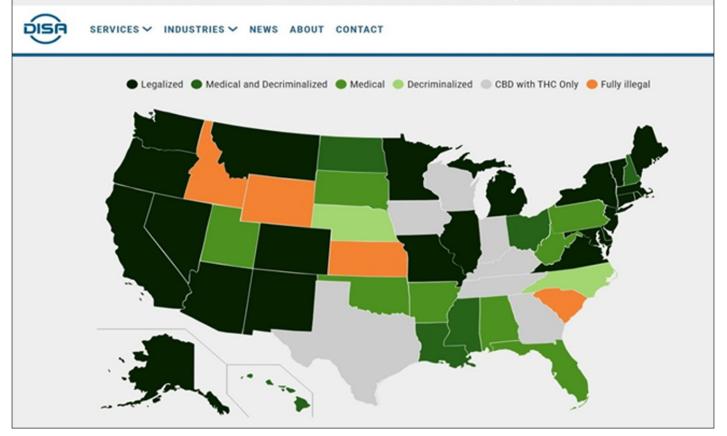
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Legalization: An Update

Judge John Grinsteiner (retired), SJOL for North Dakota

Last Updated: October 30, 2023

- State status reflects current laws at the time of update, not pending legislation or future dates upon which marijuana becomes available medicinally or
 recreationally. States with legislation that has passed but has a future enactment date will be marked with an asterisk *.
- CBD oil can be made with or without THC. This chart is specifically referring to CBD Oil with THC as an ingredient. CBD oil with THC is illegal in states marked as
 "Fully Illegal".
- All "statuses" are subject to state limits. E.g., CBD Oil may only be legal to 0.5% THC or marijuana may only be legal to one ounce. Please consult state laws.



The above map was last updated October 30, 2023. A fuller size and interactive version can be found at <u>MARIJUANA LEGALITY BY STATE - Updated Oct</u> <u>30, 2023</u> | DISA. On November 7, 2023, Ohio voters approved Issue 2, legalizing cannabis for adults. More than half of Americans now live in a legal cannabis state! In Missouri, it is a constitutional right to use and possess cannabis. Although the last two ballot initiatives have been defeated in North Dakota, with medicinal and decriminalization already in place, legalization seems just on the horizon. Closer to home, on May 30, 2023, Minnesota became the 23rd legalization state when Gov. Tim Walz (D) signed HF 100 into law. Legal possession and cultivation took effect on August 1, 2023. Adults 21 and older can now:

- Possess up to two ounces of cannabis, eight grams of concentrate, and edibles with up to 800 milligrams of THC
- Give away the above amounts of cannabis to other adults 21+
- Possess up to two pounds of cannabis at home
- Cultivate up to eight plants (four of which may be flowering) at their primary residence or in the curtilage, as long as it is out of public view and in an enclosed, locked space
- Use cannabis at a private residence or on private property unless the owner prohibits doing so.

Smoking and vaping are prohibited in multifamily housing, such as apartments, and there is an "open package" law that carries possible jail time. The new law includes automatic expungement for low-level cannabis offenses. It creates a Cannabis Expungement Board to determine if certain cannabis felonies should be vacated, charges should be dismissed, and records should be expunged, or if the person should be resentenced to a lesser offense.

Legal sales are expected in early 2025. The new law will include a variety of license types, including retailers, cultivators, transporters, events, microbusinesses, mezzo businesses, and delivery services. Regulators will decide how many licenses to issue and will reserve at least 20% of points for those with social equity status. The law imposes a 10% retail tax, plus the standard 6.5% sales tax and local taxes. Medical cannabis is tax-exempt. HF 100 establishes grant funds, which include funding to help applicants with start-up and training and for substance abuse disorder treatment and prevention.

With Regard to Impaired Driving

The laws regarding cannabis continue to evolve. In addition to legalizing and decriminalizing cannabis, states are enacting and modifying statutes addressing impaired driving for drugs (DUID), including operating a vehicle with cannabis in a driver's system. One of the persistent problems in DUID enforcement is that the presence of drugs does not necessarily mean the person is impaired. In addition, there are limitations to drug testing and technology, as well as difficulty in determining impairment from a drug test result.

While there is a blood alcohol content (BAC) for alcohol, there is no BAC for THC. Research has not yet established what impairment, if any, results from various levels of other drugs such as cannabis. To convict a driver of a DUID, a majority of states require the prosecution to prove the driver is actually impaired. However, 12 states have a zero-tolerance law, meaning operating a vehicle with any amount of THC in the system is unlawful. Also, five states have specific per se limits at which a driver is considered impaired. The new law also keeps hemp-derived THC products legal, while imposing taxes and regulations. It allows the two existing medical cannabis businesses to continue operating and to sell limited amounts of cannabis for adult use. The State Office of Cannabis Management has already launched a website Minnesota Office of Cannabis Management | State of Minnesota – Office of Cannabis Management with more information about the law and implementation.

Conversation about the harms and potential benefits of cannabis use, as well as the most appropriate legal status and regulatory structure to govern its use, has intensified nationwide. There is much to be learned from the other states that have already passed laws, and I hope our lawmakers are paying attention. I think most of us would agree that should North Dakota continue to move toward legalization, we do so within a strong public health-based regulatory framework that minimizes the already known harms related to legalization. •



For an up-to-date status of state laws, see the National Center of State Legislatures website at: <u>https://www.ncsl.org</u>. Under the general heading of transportation, there is a great deal of information about pending and enacted state legislation and an overview of marijuana-impaired driving laws in various states: <u>https://www.ncsl.org/transportation/drugged-</u> <u>driving-marijuana-impaired-driving</u>.

*adapted from an article that previously ran in Directions: The Newsletter of the Judicial Resource Center on Drug-Impaired Driving. Authored by my friend and colleague Earl G. Penrod, Senior Judge, Indiana Judicial Outreach Liaison, and Judge in Residence, National Judicial College.



Statistics; Canabis Use Disorder; and Conclusions

Judge John Grinsteiner (retired), SJOL for North Dakota

Cannabis use disorder is defined by the DSM-5 as:

A problematic pattern of cannabis use leading to clinically significant impairment or distress, as manifested by at least two of the following, occurring within a 12-month period:

- 1. Cannabis is often taken in larger amounts or over a longer period than was intended.
- 2. There is a persistent desire or unsuccessful efforts to cut down or control cannabis use.
- 3. A great deal of time is spent in activities necessary to obtain cannabis, use cannabis, or recover from its effects.
- 4. Craving, or a strong desire or urge to use cannabis.
- 5. Recurrent cannabis use resulting in a failure to fulfill major role obligations at work, school, or home.
- 6. Continued cannabis use despite having persistent or recurrent social or interpersonal problems caused or exacerbated by the effects of cannabis.
- 7. Important social, occupational, or recreational activities are given up or reduced because of cannabis use.
- 8. Recurrent cannabis use in situations in which it is physically hazardous.

- 9. Cannabis use is continued despite knowledge of having a persistent or recurrent physical or psychological problem that is likely to have been caused or exacerbated by cannabis.
- 10. Tolerance, as defined by either of the following:
 - a. A need for markedly increased amounts of cannabis to achieve intoxication or desired effect.
 - b. A markedly diminished effect with continued use of the same amount of cannabis.
- 11. Withdrawal, as manifested by either of the following:
 - a. The characteristic withdrawal syndrome for cannabis (refer to DSM-5 for further details).
 - b. Cannabis (or a closely related substance) is taken to relieve or avoid withdrawal symptoms.

A *mild* cannabis use disorder is defined as the presence of 2–3 of the above symptoms.

A *moderate* cannabis use disorder is defined as the presence of 4-5 of the above symptoms.

A *severe* cannabis use disorder is defined as the presence of 6 or more of the above symptoms.

Potency and consumption levels are driving cannabis use disorder to the forefront. The average potency of marijuana flower increased from 3.75% THC in 1995 to 15.80% in 2018 (ElSohly M.A., 2019). Independent studies in "legal" states have also found the percentage to be even higher, such as an average THC percentage of 18.7% in plant material in Colorado (Colorado Department of Public Health & Environment, 2020). This is not your average "Woodstock weed."

Potency levels on some of the concentrated products such as hash oil, dabs, and edibles can reach into the 90% THC range. The change in the typical marijuana user today versus 20 years ago, according to Carnegie Mellon professor Jonathan Caulkins, is akin to thinking about a typical caffeine drinker consuming one 20-ounce cola worth of caffeine versus about thirty 16-ounce cappuccinos today.

In 1992, 17.5 million Americans used marijuana, and that number increased to 52.5 million by 2021 (SAMHSA National Survey on Drug Use and Health 2021). Use is increasing across the board but especially in young adults aged 19-30. In 2021, 29% reported past-month use, up from 17% in 2011; 11% reported daily use, up from 8% in 2011 (Monitoring the Future, 2021).

While the use and potency of marijuana is steadily increasing, the perception of harm from using marijuana is unfortunately decreasing, especially among high schoolers. This is especially troubling for our line of work. It may come as no surprise that, according to the National Institute on Drug Abuse (NIDA), 30% of marijuana users have some form of cannabis use disorder, whether abuse or dependence. Use before the age of 18 increases the likelihood of cannabis use disorder seven-fold (NIDA 2019a). Most cannabis use disorder cases were characterized as mild, which means patients experience just two or three of 11 benchmark symptoms, such as increased tolerance, intense cravings, or repeated attempts to stop marijuana use. An estimated 26% of cases are considered moderate, while 16% are severe, according to SAMHSA's National Survey on Drug Use and Health. SAMHSA estimates at least 16.3 million people in the United States had a cannabis-use disorder in 2021, putting it behind only alcohol.

"It's the second-most common addiction Americans are struggling with, but nobody hears about it," said James H. Berry, a psychiatrist and addiction expert at West Virginia University.

More than 20,000 peer-reviewed research articles have linked marijuana use to adverse mental health outcomes, ranging from depression to psychosis, as well as consequences for physical health and even negative outcomes for neonates exposed in utero. Although there is potential for the medical use of certain components found within the marijuana plant, these components should be researched through well-designed clinical studies. A recent study found that, despite evidence that lower THC dosage is more appropriate for medical purposes, the medical marijuana products advertised in retail stores contained around the same amount of THC as recreational marijuana products, which generally contain upwards of 15% THC (Cash et al., 2020). And a 2022 study suggests that the risk of developing a cannabis use disorder increases as marijuana's THC level increases (Petrilli et al., 2022). Like opioids and other similar "prescribed" drugs, the risk of abuse and addiction are significant, and all too often realized.

For a more robust listing of the effects of cannabis legalization, see the 2023 report from Smart Approaches to Marijuana (SAM) <u>2023-Report.pdf</u> (<u>learnaboutsam.org</u>) "Lessons Learned from State Marijuana Legalization." You'll also find the citation support for this article in the references section.



The Tip of the Iceberg, Cannabis Strains and Derivatives: What are they?

Strains, derivatives, and synthetics, oh my! Ever changing and ever growing, the world of cannabis continues to garner the attention of society. You can find it in the conversations of not just users and dealers, but in the conversations of lab technicians, law enforcement, courts, treatment providers, and increasingly in the conversations of growers, businesspeople, and even our legislatures. The following is meant to give you an idea of where cannabis comes from and where it's going.

Cannabis refers to a genus of flowering plants that are members of the family cannabaceae, which includes about 170 plant species. The genus is often divided into three species: cannabis sativa, cannabis indica, and cannabis ruderalis. Cannabis contains both hemp plants and marijuana plants. The word "marijuana" is used to distinguish between cannabis that is hemp and cannabis that isn't based on the percentage of THC each plant contains (0.03).



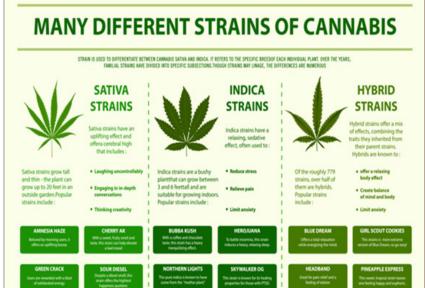
Judge Scott Pearson, RJOL for Region 8 ABA-JOL Program

Three species of the genus affect a user differently and in the following ways. Cannabis sativa – the sativa species tends to provide an energizing and euphoric psychoactive effect. Cannabis indica – tends to be high in THC. As a result, consumption often leads to a feeling of deep body relaxation. Cannabis ruderalis – the ruderalis species is naturally high in CBD and low in THC levels. Some cannabis plants contain very little THC and are often considered "industrial hemp" rather than marijuana. BUT (and that's a big but on purpose), hemp can be used to create higher level THC products.

Let's go a little deeper into the science. Cannabinoids are a group of substances found in the cannabis plant. The main cannabinoids are THC and cannabidiol (CBD), but there are many more. Besides THC and CBD, there are at least 144 known cannabinoids. An example is delta 8 THC, which exists naturally in the cannabis plant in only small quantities and

is estimated to be about 50% to 75% as psychoactive as delta-9 THC. This is sometimes known as "diet weed." The conversion of CBD to delta-8-THC involves refluxing CBD in an organic solvent, such as toluene or heptane, with p-toluenesulfonic acid or another acid that serves as a catalyst. Delta-10 THC is also processed from hemp-derived CBD.

THC-a, the acidic form of THC, is a precursor to other variations. When a plant matures or is heated it changes into analogs of traditional THC. THCP-THCP (Trans- Δ 9-tetrahydrocannabiphorol) is the new powerhouse cannabinoid on the block. It is 33 times more active at the cannabinoid 1 (CB1) receptors in the human brain than THC, causing an



intense and intoxicating euphoric high. The search for the next higher high seems to be the only thing that remains the same.

THCV is your "diet weed." It is also called "weederall" for its purported appetite-curbing and energyboosting properties. THC-O, not naturally occurring in the hemp plant, is a synthetic cannabis compound derived from hemp. Research has found that it's roughly three times stronger than conventional THC. It has been called "the psychedelic cannabinoid" for its borderline hallucinatory effects. A seemingly never ending quest for the next perfect strain and/or derivative.

Adding synthetics to the picture further blurs the lines and pushes the envelope. Spice, Yucatan Fire, Sence, Chill X, Smoke, Genie, Algerian Blend, K2, JWH, skunk, black mamba, Bombay blue, genie, zohai, moon rocks or herbal blends are just some of the products on the market. These are often found in head shops, smoke shops, and even at the local gas station or truck stop. Synthetics work as the cannabinoid receptor agonists mimic the effects of THC and anandamide by interacting with the CB1 receptor in the brain. Although often referred to simply as synthetic cannabinoids, many of the substances are not structurally related to the so-called "classical" cannabinoids, i.e., compounds like THC. They can produce dramatically bigger reactions in the body; for example, a synthetic substance like HU-210 binds over 100 times more tightly to the CB1 receptor in our brain than THC.

While we struggle to simply keep up with the number of new strains and derivates coming out, the full effects are yet to be known and will be studied for years to come. The amount of money and research that pours into the industry is staggering. What is becoming clearer, however, is the long list of challenges facing society.

North Dakota 2023 Fatal Crash Statistics as of 11/13/2023

Fatalities: 96

Crashes: 86 Operators Tested Positive BAC: 16 Operators Tested Negative BAC: 31 Operators Not Tested: 14 Crashes with impending investigation: 27 Fatalities from Alcohol Crashes: 17 No Seat belt (for seat belt eligible vehicles) 36



Speed-related fatalities: 20 Pedestrian fatalities: 10 Fatal Crash Involved Lane Departure: 43 Fatal Crash Involved a Younger Driver(s) 14-20 years old: 9 Fatal Crash Involved an Older Driver(s) 65+ years old: 24 Fatal Crash Involved a Train: 3 Fatal Crash Involved a Commercial Motor Vehicle(s): 18 Holiday Fatalities: 12

For a full look at the Fatal Crash Stat Board and how the numbers compare to 2022 and 2021, visit: <u>2023</u> <u>Fatality Spreadsheet.xlsx (nd.gov)</u>. You can also find a link to the 2022 North Dakota Crash Summary here: <u>NDDOT 2022 Crash Summary.indd</u>.

Recent Court Opinions of Note ("A little late-night reading") – Alexander J. Bott, UND School of Law

The court opinions are a special contribution of my friend and colleague Earl G. Penrod, Senior Judge, Indiana Judicial Outreach Liaison, and Judge in Residence, National Judicial College

Smell of Unlawful Marijuana vs Lawful Hemp

The Indiana Court of Appeals upheld the denial of a motion to suppress in which the defendant argued that because there is no legitimate way to distinguish between the odor of unlawful marijuana and some lawful forms of cannabis such as hemp, there was insufficient basis to search the vehicle following a traffic stop. The Court of Appeals reviewed several federal cases and found that the odor in this case as part of the totality of circumstances provided a "fair probability" that the vehicle contained contraband. The Court of Appeals also rejected the defendant's challenge under the Indiana Constitution by noting that, "Although the legal landscape for cannabisderived substances is ever-changing, one thing remains true: some types of marijuana possession remain illegal in Indiana. It follows then that the odor of marijuana reasonably may indicate criminal activity."

Moore v. State, 2023 Ind. App. LEXIS 159, *16, 2023 WL 3668721.

Reasonable Suspicion for Expanding Traffic Stop

In a 3-2 decision, the New Hampshire Supreme Court found that the officer did NOT have sufficient reasonable suspicion to justify expanding the traffic stop based on the odor of marijuana. Upon smelling marijuana, the officer had asked for consent to search the vehicle, and in New Hampshire, because asking for consent extends the stop beyond the original purpose, the officer's action must be justified by a reasonable, articulable suspicion of criminal activity. The dissent felt that there was sufficient reasonable suspicion because the officer immediately smelled freshly burned marijuana, and in spite of the driver's denial of the presence of marijuana, the strength and nature of the odor provided sufficient reasonable suspicion.

State v. O'Brien, 2023 N.H. LEXIS 62 (April 26, 2023)

Useful Resources and Links

1. International Academy on the Science and Impact of Cannabis (IASIC)

Doctors educating on marijuana. IASIC is an organization of international experts on cannabis who are guided by medicine and science to provide accurate and honest information that guides decision-making. They recognize that the use of cannabis is potentially harmful, and that policies or practices which enhance or increase the use of cannabis risk serious medical and social consequences.

Click here for access: IASIC – Doctors Educating on Marijuana (iasic1.org)

2. International Council on Alcohol, Drugs & Traffic Safety (ICADTS)

ICADTS is an independent not-for-profit body whose only goal is to reduce mortality and morbidity brought about by misuse of alcohol and drugs by operators of vehicles in all modes of transport. They have put together a fact sheet on cannabis and driving.

Click here for access to the fact sheet: ICADTS - Fact Sheets (icadtsinternational.com)

3. Marijuana-Impaired Driving: A NHTSA Report to Congress

In 2017, this report was prepared in accordance with Section 4008 (Marijuana-Impaired Driving) of the Fixing America's Surface Transportation Act (FAST Act), Pub. L. 114-94. The report summarizes what is known about marijuana use and driving.

Click here for the report: Marijuana-Impaired Driving (nhtsa.gov)

4. ABA Publication Highway to Justice

Highway to Justice is produced through a joint project with the American Bar Association Judicial Division and the National Highway Traffic Safety Administration. This complimentary publication is designed to be a source for updates on national traffic safety news.

Click here for all issues: Highway to Justice (americanbar.org)

5. ABA Judicial Outreach Cannabis Working Group

The ABA-JOL Cohort is sharing the Fall 2023 Update, a collection of articles from around the county that can be found here: Fall 2023 JOL Cannabis Update

Upcoming Trainings/Events/Webinars

*This is not an exhaustive list and is geared toward impaired driving

April 7-9, 2024

Lifesavers Conference on Roadway Safety, to be held at the Colorado Convention Center in Denver, CO. Registration is now open: <u>Registration - Lifesavers Conference on Roadway Safety</u>

More information on topics and training to come.

May 22-25, 2024 | RISE Annual Conference – All Rise

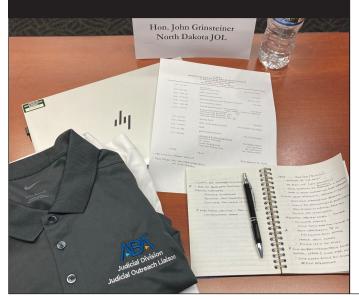
RISE returns to Anaheim California. Join us for four electric days of education, fellowship, and inspiration. Stay tuned for more information in the coming weeks!

The world's premier conference on addiction, mental health, and justice reform. Since 1995, All Rise has convened the only national conference for treatment court professionals. Expanding alongside our field, RISE attendance has grown to include a wide array of public health and public safety leaders working to expand treatment for people impacted by substance use and mental health disorders. What remains constant is the unparalleled education, networking, and fellowship enjoyed by every attendee. Whether you're a regular or first-timer, new to treatment courts or a seasoned pro, we invite you to attend this landmark event and join us as we march toward our mission of ensuring every individual in the justice system has access to evidence-based treatment and recovery.

The National Judicial College (NJC) Recorded Webinars and Programs on impaired driving issues going back to 2018 can be found here: <u>Webinars & Programs | Traffic Resources</u>

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STAY TUNED!



While this quarter's issue discussed the current status of cannabis, the next quarter will address what to do about it. I stand as a resource for each of you, so don't hesitate to reach out. If you have an issue that is somehow connected to impaired driving, I'll do my best to help. If it's not, I'm still happy to listen and help if I can. I know how isolating the position can be at times, so you have a friend in me. I hope to bring you value and some informative articles in my upcoming issues of the newsletter. Until next time, peace on your heart and strength for your fight, no matter how big or small!

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