

# The GREEN LIGHT NEWS

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## The Changing Face of the Impaired Driver

By: Honorable Neil Edward Axel (retired)

National Highway Traffic Safety Administration's Region 3 Judicial Outreach Liaison.

Earlier this year, the National Highway Traffic Safety Administration (NHTSA) released the latest two studies on impaired driving providing increasing evidence that fewer Americans are driving impaired by alcohol, but that an increasing number are driving under the influence of marijuana and other drugs.

The 2013-2014 National Roadside Survey of Alcohol and Drug Use by Drivers<sup>1</sup> is the fifth iteration of surveys of night time weekend drivers conducted voluntarily and anonymously. This latest study surveyed a nationally representative sample of approximately 10,000 drivers in 300 locations around the country. What is significant about this survey is that when compared to earlier studies, trends in the use of alcohol and drugs by drivers become

clear. By way of example, the use of alcohol by drivers continues to decline, decreasing by 30% since the 2007 survey, and by 80% since the 1973 survey. Specifically, alcohol use was evident in the following percentages of those surveyed:

<b>1973 survey:</b>	<b>35.9%</b>
<b>2007 survey:</b>	<b>12.4%</b>
<b>2013/2014 survey:</b>	<b>8.3%</b>

**Based upon this most recent survey, illegal drug use is up more than 20% since the 2007 survey, and the use of marijuana is up by 47% since the 2007 survey.**

Over the same periods of time, when looking only at breath alcohol concentrations of 0.08 or higher, we can see the same general downward trend:

<b>1973 survey:</b>	<b>7.5%</b>
<b>2007 survey:</b>	<b>2.2%</b>
<b>2013/2014 survey:</b>	<b>1.5%</b>

Although there are still approximately 10,000 alcohol-impaired fatalities annually, it appears that the broad range of impaired driving policies and programs implemented by all branches of government and numerous other non-governmental organizations are working. Drug use, however, is increasing. Based upon this most recent survey, illegal drug use is up more than 20% since the 2007 survey, and

the use of marijuana is up by 47% since the 2007 survey. In the 2013/2014 survey 22.5% of all weekend nighttime drivers were found to have drugs (marijuana, illicit, prescription and over the counter drugs) in their system. The increase in marijuana use is seen when comparing the 2007 and 2013/2014 surveys which found

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**Editor's Note:** The article originally appeared in "Highway to Justice", a publication of the American Bar Association and the National Highway Traffic Safety Administration. The Michigan Traffic Safety Resource Program has permission to reprint Judge Axel's article from the last issue of "Highway to Justice."



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1. For more information, see generally, NHTSA Press Release Feb. 6, 2015 and links to Research Notes, Fact Sheets, and Executive Summaries found at: <http://www.nhtsa.gov/About+NHTSA/Press+Releases/2015/nhtsa-releases-2-impaired-driving-studies-02-2015>

# Important United States Supreme Court Decision Regarding Police Stops

By: Kenneth Stecker and Kinga Gorzelewski

In *Rodriguez v. United States*, No. 13-9972, decided April 21, 2015, a police officer pulled over defendant's vehicle for a traffic violation. After obtaining information from defendant and his passenger, the officer wrote defendant a warning ticket and gave them back their documents.

The officer then asked defendant for permission to walk his dog around the vehicle and the defendant declined. The officer instructed defendant to wait for a second officer to arrive to the scene. When the second officer arrived approximately seven minutes later, the dog was walked around the car and alerted for drugs.

Defendant was subsequently indicted for possession with intent to distribute 50 grams or more of methamphetamine. He moved to suppress the evidence arguing that the officer had prolonged the traffic stop without reasonable suspicion.

The United States Supreme Court agreed with the defendant. The Court held as follows:

We hold that a police stop exceeding the time needed to handle the matter for which the stop was made violates the Constitution's shield against unreasonable seizures. A seizure justified only by a police-observed traffic violation, therefore, "become[s] unlawful if it is prolonged beyond the time reasonably required to complete th[e] mission" of issuing a ticket for the violation. (p. 1 of the opinion).

The case was remanded back to the 8th Circuit Court of Appeals to decide the issue of whether reasonable suspicion existed to validate the prolonged detention.

This case is important because of what the Court noted in its decision.

First, the Court stated that in *Illinois v. Cabellas*, 543 U.S. 405 (2005), the United States Supreme Court held that a dog sniff conducted during a lawful traffic stop

does not violate the Fourth Amendment. Certain unrelated investigations such as speaking with a passenger or having a K-9 walk around the vehicle, while an officer is writing the ticket is legal under the Fourth Amendment. "The seizure remains lawful only so long as [unrelated] inquiries do not measurably extend the duration of the stop." (p. 5 of the opinion).



Second, the Court noted that a dog sniff is not an "ordinary incident of a traffic stop." (p. 7 of the opinion). The majority emphasize that the question for Fourth Amendment purposes "is not whether the dog sniff occurs before or after the officer issues a ticket, but whether conducting the sniff prolongs –i.e., adds time to the stop." (p. 8 of the opinion). Therefore, it seems permissible for a K-9 officer to conduct a dog sniff while another officer attends to the purpose of the motor vehicle stop, as long as the dog sniff does not lengthen the duration of the stop.

There are several points worth noting from the Rodriguez decision that officers should know.

First, the decision did not call into question the well-established principles of traffic stops and other seizures. Second, there is no absolute time as to the duration of a traffic stop. See, *United States v. Harrison*, 606 F.3d 42 (2010) (The 2nd Circuit Court of Appeals held that there is no requirement to terminate "at the earliest possible moment").

In *United States v. DeHernandez*, 473 U.S. 531 (1985), the United States Supreme Court mentioned that "Common

sense and ordinary human experience must govern over rigid time criteria."

A traffic stop may very well end up being a simple stop or it may result in a felony arrest. The officer never knows until he or she has contact with the driver and/or the passengers. It is suggested that the officer not be in a hurry with the stop and to always be observant.

If the officer is only focused on giving the driver a traffic citation, he or she may miss out on other criminal activity that is occurring right before their eyes.

The officer never knows who is in the vehicle and what their intentions may be. Additionally, the officer does not know whether there are weapons and/or contraband in the vehicle. Officers should never forget that a traffic stop is an investigation.

Therefore, it is imperative that the officer always breaks down the traffic stop into segments and deals with things one step at a time. The stop has a beginning, middle, and an end. By breaking it down into segments, the officer is prepared and thorough in every traffic stop.

The bottom line to take from the Rodriguez ruling is that any action, which prolongs a stop beyond the reason that justified the stop in the first place, will invalidate the additional enforcement action unless there is reasonable suspicion to do so.

*For more information on this article and PAAM training programs, contact Kinga Gorzelewski or Kenneth Stecker, Traffic Safety Resource Prosecutors at (517) 334-6060 or e-mail at [steckerk@michigan.gov](mailto:steckerk@michigan.gov) or [gorzelewskik@michigan.gov](mailto:gorzelewskik@michigan.gov). Please consult your prosecutor before adopting practices suggested by reports in this article. Discuss your practices that relate to this article with your commanding officers, police legal advisors, and the prosecuting attorney before changing your practice.*

**Editor's Note:** Kinga Gorzelewski and Kenneth Stecker are the Michigan Traffic Safety Resource Prosecutors.

# Word Choice Matters: Crash vs. Accident

By: Brandon Hughes

As prosecutors, we must recognize that when we deliver an opening statement, closing argument or when we stand before a judge at sentencing - Word Choice Matters. Words have impact. Words evoke images and even stir emotions. Take for instance the words "Crash" and "Accident". These two words are often used to describe the same event, but in reality each word conjures up a very different image. Any event involving a vehicle and a collision, whether another vehicle is involved or not, is frequently referred to as a traffic accident, one of life's little mishaps.

Let's consider this scenario. A car runs a red light and collides with another vehicle in the intersection. Just another traffic accident, right? Now, consider that the driver who ran the red light is driving 70 mph in a 45 mph zone. Still an accident? Suppose that same driver also had a blood alcohol content of 0.14. Would your answer be the same?



An accident is something that cannot be reasonably foreseen or predicted and cannot be avoided. It just happens. A crash, on the other hand, is the result of choices made and risks disregarded. When I hear the word "crash", I picture a pile-up on the back stretch at Talladega. It's a word that

evokes a violent image and shouts blame.

After all, crashes don't just happen, do they? Somebody is always at fault in a crash. But what about accidents? Nobody's fault? Just an unfortunate event? Simply in the wrong place at the wrong time? Does it really matter?

Jurors see the pictures and hear testimony. During the course of a trial, they know victims are dead or injured because of the actions of the defendant. They know it is not *really* an accident. Don't they? This is an

**Part of the job of a prosecutor is to not only paint an accurate picture to the jury but to also inject emotion into the case. Remember, Word Choice Matters and proper word choice can help paint the correct picture.**

important question that I suggest you don't leave unanswered. When you present your case and talk about the "accident scene" and the "accident report" or the "accident investigation", expect that the defense attorney will do the same. Now, he probably won't be blatant about it and ask the investigator "Isn't this simply just an accident?" However, rest assured he will use the term accident as much as he can and most certainly will point out your use of the word to the jury.

"Ladies and gentleman, this is not murder. This was a horrible, terrible accident. You heard the prosecutor refer to this case as an accident yourselves numerous times."

A really alert defense attorney may even keep count of the number of times you use the term accident and tell the jury. That term could come up several dozen times during a two or three day trial. It is these very arguments that cause a juror during deliberations to try and convince the other 11 that it really was *just* an

accident or cause a judge to give a light sentence because, poor guy, it was *just* an accident.

Part of the job of a prosecutor is to not only paint an accurate picture to the jury but to also inject emotion into the case. Remember, Word Choice Matters and proper word choice can help paint the correct picture. Your words, your arguments should give meaning to the two dimensional photographs that show the twisted metal and shattered glass. Let the jury know this was in fact a crash, a wreck, a collision, or even an explosion. Make sure they understand that it is not an accident. The defendant did not merely run in to the other car. He was drunk and smashed in to it. Choosing words that have impact help you to get the jury to understand and feel the pain and loss the victims felt.

The term "accident" has become somewhat generic. Consider the little boy killed in a crash because the defendant was high on Meth and blew through a stop sign while running from the police. Do you stand before the court and refer to that event as an accident or a crash? How about the retired couple who are now dead because the defendant was operating his pickup truck at more than 100 mph in a rainstorm causing the defendant to cross the double yellow line and hit their Winnebago head on. Crash or accident? Word Choice Matters.

Now, fast forward to the next time you are standing before a jury asking them to convict some defendant for murder after killing all of the occupants in a car he or she hit. How many times will the defense attorney use the term "accident"? How many times will you?

**Editor's Note:** Brandon Hughes is the Alabama Traffic Safety Resource Prosecutor.

# The Significance of a DRE Prosecutor in the Courtroom

By: Kenneth Stecker

In 2009, an effort began in Michigan to address the serious issue of driving "under the influence" of a controlled substance and/or intoxicating substance and/or intoxicating liquor on Michigan roadways.

Through the dedicated efforts of many highway safety professionals, Michigan was approved for the Drug Evaluation Classification (DEC) Program and joined the ranks of DRE states in the country in 2010.

One of the things about Michigan's DRE Program was that unlike



some other DRE states, Michigan DRE officials invited prosecutors to attend, participate, and complete the nine (9) day DRE classroom training and field certification training. The experience and knowledge that the prosecutors received during the extensive training was extremely beneficial.

One of the most important benefits was that the DRE instructors taught and helped give the DRE prosecutors a more realistic and accurate perspective on police procedures. More specifically, the instructors taught the prosecutors on a number of topics including the standardized field sobriety tests (SFSTs), drug recognition expert evidence, and the effects of alcohol and drugs.

On the other hand, the prosecutors who attended the class gave their

thoughts and suggestions to law enforcement about traffic safety laws, legal standards, case preparation, and testimony.

**One of the most important benefits was that the DRE instructors taught and helped give the DRE prosecutors a more realistic and accurate perspective on police procedures.**

The joint effort has yielded impressive results. In the past year, a DRE prosecutor successfully convicted a defendant of killing two young men while driving under the influence of prescription pills. The defendant was sentenced to up to 50 years in prison. Witnesses had testified to seven prior incidents where the defendant had police contact due to alleged drugged driving.

In another case a DRE prosecutor and officer successfully convicted a defendant of Operating While Intoxicated-3rd Offense (felony), Driving While License Suspended-2nd Offense, and Failing to stop at a crash. The trial is the first felony case in the State of Michigan to include testimony of, and be based on the investigation of, a Drug Recognition Expert.

In order to make sure the DRE prosecutors and officers were prepared for court to make sure a defendant is successfully convicted for an offense committed on the highway, the Michigan Office of Highway Safety Planning implemented the DRE Mock Court Class.

Within 6 months of graduation from the DRE School, the officers are brought back for expert witness training. The agenda for the class included classroom instruction on

expert courtroom testimony and a mock trial scenario. The Michigan Judicial Liaison Officer (JOL) served as the judge. Prosecutors that attended the previous DRE School played the role of prosecutor and defense attorney.

The prosecutors and defense had prepared a list of DRE questions to use, however, they were encouraged to utilize their own skills and experience when the opportunity presented itself. Each DRE officer was on the stand approximately 10 minutes; afterward the DRE instructors, prosecutors, and the judge gave a critique of the testimony.

Although mock trials often put stress on the officers, from the evaluations received the majority of the students indicated they enjoyed the experience.

Next, the Michigan Traffic Safety Resource Prosecutor (TSRP), who graduated from the first Michigan DRE Class, had the opportunity earlier this year to go to the Maricopa County Jail in Phoenix, Arizona to gain a better understanding and first-hand knowledge of drug impairment.

Arizona's Maricopa County Sheriff's Office jail is the premier sites nationally and internationally for conducting DRE field certification training. Law enforcement personnel come from a number of states and several countries, including Canada to learn the steps to identify drug impairment and conduct DRE evaluations.

By participating at the jail, the Michigan TSRP understood the

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# Michigan Traffic Deaths Fall 8 Percent in 2014

For the first time since 2011, Michigan traffic deaths fell below 900 for the year, from 951 in 2013 to 876 in 2014, according to information from the Michigan State Police Criminal Justice Information Center. In addition to the decline in traffic deaths, alcohol-involved crash fatalities dropped 17 percent, from 284 in 2013 to 236 in 2014. Drug-involved traffic deaths were down 9 percent, from 165 in 2013 to 150 in 2014.

“While overall crashes increased 3 percent, there is some very good news in the 2014 crash data for Michigan,” said Michael L. Prince, director of the Michigan Office of Highway Safety Planning. “The next step is further review and analysis by the University of Michigan Transportation Research Institute to better understand these changes.”

Large declines were also noted in motorcyclist and bicyclist fatalities. Motorcyclist fatalities were down 16

## Total Injuries

Percent from 128 in 2013 to 107 in 2014. Bicyclist fatalities were down 22 percent, from 27 in 2013 to 21 in 2014. Despite declines in many areas,

commercial motor vehicle-involved fatalities increased for the third year in a row, up 12 percent, from 94 in 2013 to 105 in 2014.

In other areas:

- Overall traffic crashes increased 3 percent, from 289,061 in 2013 to 298,699 in 2014.
- Traffic injuries remained nearly unchanged, at 71,031 in 2013 to 71,378 in 2014.
- Serious injuries fell 7 percent, from 5,283 in 2013 to 4,909 in 2014.
- Cell phone-involved crashes decreased 3 percent, from 689 in 2013 to 666 in 2014. Cell phone-involved fatal crashes decreased from 4 in 2013 to 2 in 2014.
- Pedestrian fatalities were nearly unchanged, at 149 in 2013 and 148 in 2014.
- Deer-involved crashes fell 7 percent, from 49,205 in 2013 to 45,690 in 2014.

## Roll call videos focus on motorcyclist and bicyclist safety

The Michigan Office of Highway Safety Planning (OHSP) is providing additional tools to remind law enforcement officers of the

crucial role they play in ensuring the safety of both motorcycle riders and bicyclists.

A new Michigan specific motorcycle roll call DVD explains how the enforcement community can reduce motorcyclist deaths and injuries by taking enforcement action for unendorsed riders, knowing the signs of a potentially impaired rider, and understanding the danger of excessive speed. OHSP has also produced motorcycle law reference cards for road officers.

To address bicyclist safety, OHSP is providing a roll call DVD explaining the importance of safe bicycling produced by the National Highway Traffic Safety Administration. OHSP also has new bicycle law reference cards available for road officers.

For questions or additional information about OHSP's motorcycle and bicycle safety programs, contact Chad Teachout, motorcycle safety coordinator, at (517) 241-2579 or [teachoutc@michigan.gov](mailto:teachoutc@michigan.gov). To order DVDs or reference cards, contact Cindy Stoneham at (517) 636-5347.

## For Your Information

### NHTSA Releases Two New Studies on Impaired Driving on U.S. Roads

#### Results of the 2013-2014 National Roadside Survey of Alcohol and Drug Use by Drivers

The survey was conducted during 2013 and 2014 at a representative sample of 300 locations across the country. More than 9,000 drivers participated in the voluntary and anonymous survey. This was the fifth such survey on driver alcohol use conducted since 1973. This is the second such survey

on the use of drugs that could affect driving, including both illegal and legal drugs.

[Executive Summary](#)  
[Fact Sheet](#)  
[Research Note](#)

#### Drug and Alcohol Crash Risk

A new study by NHTSA, the largest and most carefully controlled of its

kind to date, examines the crash risk associated with alcohol and drug use by drivers. The study used a case-control methodology, a research method commonly used in medicine and social science for studying risk factors for disease or other negative outcomes.

[Executive Summary](#)  
[Fact Sheet](#)  
[Research Note](#)

## The Changing Face of the Impaired Driver (continued from page 1)

THC present in those surveyed in the following percentages:

**2007 marijuana use (THC): 8.6%**  
**2013/2014 marijuana use (THC): 12.6%**

These results suggest that marijuana is now the most popular intoxicant used by drivers on our highways. However, it should be noted that the surveys only measure the presence of drugs and not whether there is impairment.

The second study released, *Drug and Alcohol Crash Risk*, was designed to estimate the risk associated with alcohol- and drug-positive driving. Over a 20-month period of time in 2010-2011 in Virginia Beach, Virginia data was collected from more than 3,000 crash-involved drivers and 6,000 control drivers (not involved in crashes). This study confirmed earlier studies of the relative risk of crash involvement associated with alcohol use. Specifically, with a 0.08 BAC, there was 4 times the risk or probability of a crash, and with a 0.15 BAC, there was 12 times the risk or probability of a crash compared to alcohol-free drivers. Drivers testing positive for THC were overrepresented in the crash-involved (case) population. However, when demographic factors (age and gender) and alcohol use were controlled, the study did not find an increase in population-based crash risk associated with THC use.

Clearly prior studies have shown that drugs (including marijuana) may impair psychomotor tasks, reaction times, divided attention tasks, as well as cognitive and executive functions, all of which impact one's ability to safely operate a motor vehicle. However, the role that drugs play in contributing to crashes is less clear.<sup>2</sup> "Understanding the effects of other drugs on driving is considerably more complicated than is the case for alcohol impairment. This stems from the fact that there are many potentially impairing drugs and the



relationship between dosage levels and driving impairment is complex and uncertain in many cases."<sup>3</sup>

Although a number of states have enacted *per se* laws that set statutory limits for the presence of drugs in one's system, one challenge that lies ahead is for researchers to be able

to definitively assess the relationship between drug concentrations in the body and specific degrees of driver impairment. Currently more research is needed in that "while the impairing effects of alcohol are well-understood, there is limited research and data on the crash risk of specific drugs, impairment, and how drugs affect driving-related skills. Current knowledge about the effects of drugs other than alcohol on driving performance is insufficient to make judgments about connections between drug use, driving performance, and crash risk."<sup>4</sup>

With the changing face of the impaired driver, the way in which these cases impact our courts may be significant. Reliance upon drug testing as part of the prosecution case may lead to longer trials, increased demands for drug recognition experts and State chemists. Further, the trial judge will inevitably continue to face evidentiary challenges based on search and seizure, chain of custody, confrontation and related issues.

One can reasonably expect that in the years ahead, research will address improved and more efficient forms of testing for drugs, the relationship between drug levels and impairment, and even standardized field sobriety tests specific to drugged driving cases.

In the meantime, these new studies help us see what may lie ahead.

2. *Drug and Alcohol Crash Risk*, NHTSA Traffic Safety Facts Research Note, DOT HS 812 117 (February 2015) (citations omitted).

3. *Drug and Alcohol Crash Risk*, NHTSA Traffic Safety Facts Research Note, DOT HS 812 117 (February 2015).

4. Berning & Smither, *Understanding the Limitations of Drug Test Information, Reporting, and Testing Practices in Fatal Crashes*, NHTSA Traffic Safety Facts, Research Note, DOT HS 812 072 (November 2014).

## The Significance of a DRE Prosecutor in the Courtroom (continued from page 4)

significance of learning about observations by DRE officers who are encountering these people. The knowledge acquired enabled the TSRP to pull critical information and observations out of non-DRE trained officers when those officers may have not seen the relevance of the information. As a result, the TSRP gained further knowledge on how to more effectively prosecute impaired driving cases, especially those involving other than alcohol.

The knowledge the TSRP gained at the DRE field certification training has been put to use on a nearly a daily basis to prosecutors and law enforcement in Michigan through trainings and other resources such as The Green Light News.

The experience at the Maricopa County Jail also provided the

opportunity to meet numerous highly dedicated DRE instructors and DREs from other states and jurisdictions, including Chuck Hayes, the Regional DRE Operations Coordinator for the International Association of Chiefs of Police (IACP). One of Chuck's roles with the IACP DEC Program is in making sure the DRE Program is successful nationwide.

The networking provided me with the opportunity to gain even more knowledge from Mr. Hayes about the scope of DRE and the IACP DEC Program and how it has expanded greatly since its inception in the 1970s and has become the premier drugged driving detection program in the world.

Numerous improvements and major advancements of the DEC Program are directly attributed to

the many professionals involved in the program, including the National Highway Traffic Safety Administration (NHTSA), the IACP and individual state highway safety offices. Because of this dedication and support, the DEC Program has quickly become a valuable resource for public safety and the communities they serve.

Since the program's inception with the Los Angeles Police Department, police officers and prosecutors trained as DREs have shown that they can effectively work together to successfully detect, arrest and prosecute drives impaired by drugs and alcohol on our nation's roadways.

**Editor's Note:** Kenneth Stecker is the Michigan Traffic Safety Resource Prosecutor.

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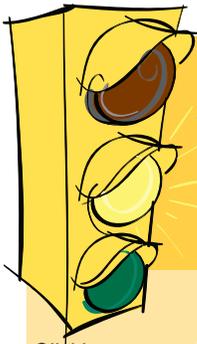
### Prosecuting Attorneys Association of Michigan

116 West Ottawa  
Suite 200  
Lansing, Michigan 48913

Phone: (517) 334-6060  
Fax: (517) 334-6787  
Email: [steckerk@michigan.gov](mailto:steckerk@michigan.gov)



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# The YELLOW LIGHT LEGAL UPDATE

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Clicking on case names (highlighted in blue text) will take you directly to the PDF version of the opinions online.

## Published Cases

### United States Supreme Court

McFadden was arrested and charged with distributing controlled substance analogues in violation of the federal Controlled Substance Analogue Enforcement Act of 1986 (Analogue Act), which identifies a category of substances substantially similar to those listed on the federal controlled substances schedules, 21 U. S. C. §802(32)(A), and instructs courts to treat those analogues as schedule I controlled substances if they are intended for human consumption, §813.

Arguing that he did not know the “bath salts” he was distributing were regulated as controlled substance analogues, McFadden sought an instruction that would have prevented the jury from finding him guilty unless it found that he knew the substances he distributed had chemical structures and effects on the central nervous system substantially similar to those of controlled substances.

The United States Supreme Court held that “When a controlled substance is an analogue, §841(a)(1) requires the Government to establish that the

defendant knew he was dealing with a substance regulated under the Controlled Substances Act or Analogue Act.”

**The Court noted “It follows that the Government must prove that a defendant knew that the substance he was distributing was “a controlled substance,” even in prosecutions dealing with analogues.”**

The Court noted “It follows that the Government must prove that a defendant knew that the substance he was distributing was “a controlled substance,” even in prosecutions dealing with analogues.”

According to the Court, “That knowledge requirement can be established in two ways: by evidence that a defendant knew that the substance he was distributing is controlled under the CSA or Analogue Act, regardless of whether he knew the substance’s identity; or by evidence that the defendant knew the specific analogue he was distributing, even if he did not know its legal status as a controlled substance analogue.”

The Court concluded “A defendant with knowledge of the features defining a substance as a controlled substance analogue, §802(32)(A), knows all of the facts that make his conduct illegal.”

***McFadden v. United States***, case no. 14-378, decided June 18, 2015.

Officer Struble, a K-9 officer, stopped petitioner Rodriguez for driving on a highway shoulder, a violation of Nebraska law. After Struble attended to everything relating to the stop, including, checking the driver’s licenses of Rodriguez and his passenger and issuing a warning for the traffic offense, he asked Rodriguez

for permission to walk his dog around the vehicle.

When Rodriguez refused, Struble detained him until a second officer arrived. Struble then retrieved his dog, who alerted to the presence of drugs in the vehicle. The ensuing search revealed methamphetamine. Seven or eight minutes elapsed from the time Struble issued the written warning until the dog alerted.

Rodriguez was indicted on federal drug charges. He moved to suppress the evidence seized from the vehicle on the grounds that Struble had prolonged the traffic stop without reasonable suspicion in order to conduct the dog sniff.

The United States Supreme Court held that “Absent reasonable suspicion, police extension of a traffic stop in order to conduct a dog sniff violates the Constitution’s shield against unreasonable seizures.”

The Court reasoned “A routine traffic stop is more like a brief stop under *Terry v. Ohio*, 392 U. S. 1, than an arrest. Its tolerable duration is determined by the seizure’s ‘mission,’ which is to address the traffic violation that warranted the stop, *Illinois v. Caballes*, 543 U. S. 405, 407 and attend to related safety concerns.”

The Court further reasoned “Authority for the seizure ends when tasks tied to the traffic infraction are—or reasonably should have been— completed. The Fourth Amendment may tolerate certain unrelated investigations that do not lengthen the roadside detention, but a traffic stop ‘become[s] unlawful if it is prolonged beyond the time reasonably required to complete th[e] mission’ of issuing a warning ticket.”



**The Yellow Light Legal Update is an addition to The Green Light News. With this insert, you can keep a notebook for just the traffic safety cases.**

Vacated and remanded.

*Rodriguez v. United States*, case no. 13-9972, decided April 21, 2015.

### Michigan Supreme Court

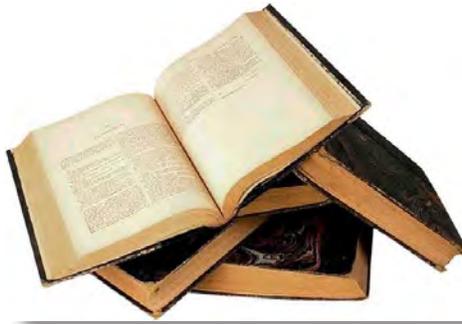
Defendant Cynthia Mazur was the wife of David Mazur, a registered qualifying patient and a registered primary caregiver for two medical marijuana patients. David grew marijuana in their marital home. Officers of the Holly Police Department, acting on a tip, searched the residence for marijuana. Marijuana plants, dried marijuana, and pipes with marijuana residue were found. In executing the search, an officer questioned defendant, who used the first-person plural pronoun “we” when describing the marijuana operation. Although the use of this pronoun led the officers to conclude that defendant was a participant in her husband’s marijuana operation, the defendant maintained that her involvement was limited to writing the date of harvest for marijuana plants on several sticky notes.

The defendant was charged with possession with intent to deliver less than 5 kilograms or fewer than 20 plants of marijuana, and with manufacturing less than 5 kilograms or fewer than 20 plants of marijuana.

The defendant moved to dismiss the charges against her citing the immunity provision of the MMMA.

The Supreme Court held that: “Marihuana paraphernalia,” as that phrase is used in MCL 333.26424(g), includes items that are both specifically designed or actually employed for the medical use of marijuana. Under section 4(g) of the MMMA, an individual may claim immunity ‘for providing a registered qualifying patient or a registered primary caregiver with marihuana paraphernalia for purposes of a qualifying patient’s medical use of marihuana.’”

The Court ruled that: “In this case, defendant provided her husband with sticky notes for the purpose of detailing the harvest dates of his plants. This activity constituted the provision of ‘marihuana paraphernalia’ because the objects were actually used in



the cultivation or manufacture of marijuana and fell within the scope of section 4(g).”

Reversed and remanded to the circuit court.

*People v. Mazur*, case no. 149920, decided June 11, 2015.

### Michigan Court of Appeals

On June 5, 2013, as the victim walked across a street along a pedestrian crosswalk, defendant made a left-hand turn and struck the victim with his vehicle in the process. As a result of the collision, the victim suffered head trauma that left him permanently disabled. Defendant was charged with moving violation causing serious impairment of a body function pursuant to MCL 257.601d(2).

**“The prosecution is not required to also prove that defendant operated his vehicle in a negligent manner, and the trial court erred in so concluding.”**

Prior to trial, defendant moved the district court for a jury instruction requiring the prosecution to prove, as an element of the charged offense, that defendant was negligent in the operation of his vehicle. The prosecution argued, in contrast, that the applicable jury instruction, M Crim JI 15.19, provides that to prove the charge of committing a moving violation causing serious impairment of a body function, the prosecution is required to prove only (1) that the defendant committed a moving violation; and (2) that the defendant’s operation of the vehicle caused a serious impairment of a body function to the victim.

The district court granted defendant’s motion. The prosecution subsequently filed an application for leave to appeal the district court’s order in the Washtenaw

Circuit Court, which denied the application. The Court of Appeals granted the prosecution’s application for leave to appeal the Washtenaw Circuit Court’s denial of its application.

On appeal, the prosecution contended that MCL 257.601d encompasses a pre-existing negligence component such that the district court’s requirement of proof of negligence as a separate, distinct element was superfluous and contrary to legislative intent. Alternatively, the prosecution contended that the statute is a constitutional, strict liability offense.

The Court of Appeals agreed.

MCL 257.601d(4) states:

As used in this section, “moving violation” means an act or omission prohibited under this act or a local ordinance substantially corresponding to this act that involves the operation of a motor vehicle, and for which a fine may be assessed.

The Court held “It may be inferred from the Legislature’s use of the term ‘moving violation,’ without any reference to a mens rea requirement, that it intended to dispense with the criminal intent element and make committing a moving violation causing serious impairment of a body function a strict liability offense.”

The Court concluded “Because the Legislature impliedly intended to make MCL 257.601d a strict liability offense, the prosecution is required to prove solely (1) the commission of a moving violation; (2) another person suffered a serious impairment of a body function; and (3) a causal link between the bodily injury and the moving violation, i.e., factual and proximate causation. The prosecution is not required to also prove that defendant operated his vehicle in a negligent manner, and the trial court erred in so concluding.”

Reversed and remanded.

*People v. Pace*, case no. 322808, decided June 4, 2015.

Defendant was disabled and used a slow-moving, electric four-wheeled scooter to get around (please see attached photo). Traverse City police officers observed

defendant travelling along the paved portion of the “curb lane” along Garfield Avenue on his scooter. He was weaving into the traffic lane, causing a backup. When the officers effectuated a traffic stop, defendant was holding an open can of beer. He failed field sobriety tests and admitted that he was intoxicated. Defendant did not challenge that he was intoxicated and in possession of an open container of alcohol. Nor did defendant contest that he was travelling “upon the highway.” Rather, defendant argued that his scooter did not qualify as a “vehicle” under the MVC.

**The Court of Appeals held that the circuit court erred in characterizing defendant’s scooter under this definition and that the scooter at issue was a four-wheel device.**

MCL 257.33 of the MVC defines a “motor vehicle” as: “every vehicle that is self-propelled . . . . Motor vehicle does not include an electric patrol vehicle being operated in compliance with the electric patrol vehicle act. Motor vehicle does not include an electric personal assistive mobility device. Motor vehicle does not include an electric carriage.” A “vehicle” in turn is defined as: “every device in, upon, or by which any person or property is or may be transported or drawn upon a highway, except devices exclusively moved by human power or used exclusively upon stationary rails or tracks . . . [MCL 257.79.]

The circuit court found that defendant’s scooter was “an electric personal assistive mobility device” as exempted from the definition of “motor vehicle.” MCL 257.13c defines an “electric personal assistive mobility device” as “a self-balancing nontandem 2-wheeled device, designed to transport only 1 person at a time. . . .”

The Court of Appeals held that the circuit court erred in characterizing defendant’s scooter under this definition and that the scooter at issue was a four-wheel device. It agreed with the prosecutor’s argument that electronic personal assistive mobility devices are generally called Segways. The Court of Appeals also held that even if defendant’s scooter qualified as an electric personal assistive mobility device, his conduct would not be exempt from

prosecution. It stated that defendant’s scooter was a device upon which a person was transported upon a highway and therefore he was subject to all the duties applicable to a driver of a vehicle under the MVC.

Reversed and remanded.

*People v. Lyon*, case no. 319242, decided May 19, 2015.

On July 13, 2013, defendant Green was arrested for operating his motorcycle while intoxicated after he struck and seriously injured a pedestrian. He consented to a blood draw and two vials were taken. An MSP analyst ran two tests on one of the vials with results of .092 grams of alcohol per 100 milliliters of blood.

Defendant moved to have the original sample of blood retested by the same MSP analyst, arguing there was no foundation to establish that the blood draw was the product of reliable principles and methods. Defendant also argued that he would have to pay for an independent test of the second vial of blood and that a test of the second vial would not be a similar sample.

The prosecution appealed the trial court’s order granting defendant’s motion to retest the sample. It argued that the order did not comply with the terms of MCL 257.625a(6), which grants a defendant a reasonable opportunity to have a person of his or her own choosing administer a chemical test of his or her blood sample.

The Court of Appeals agreed, holding that a trial court lacks the authority to compel a state agency such as the MSP Lab to perform services it does not offer, i.e. chemical testing services for private individuals. Furthermore, the COA acknowledged that even though MCL 257.625a(6) grants a defendant a right to obtain an independent chemical test, “[R]equiring the ‘same lab analyst at the same lab’ to retest the ‘same vial’ of blood is not independent from the first test.”

Reversed and remanded.

*People v. Green*, case no. 321823, decided April 14, 2015.

## Unpublished Cases

*(An unpublished opinion is not binding as precedent but may have persuasive value in court.)*

Following a jury trial in district court, defendant was convicted of operating a commercial motor vehicle with a blood alcohol level (BAL) of 0.04 or more but less than 0.08. MCL 257.625m(1). The district court subsequently granted a directed verdict of acquittal. On plaintiff’s appeal of right, the circuit court reversed the district court’s grant of a directed verdict of acquittal and reinstated the jury’s guilty verdict. The defendant appealed by leave granted.



The Court of Appeals noted “The constitutional protections against double jeopardy preclude “retrial following a court-decreed acquittal, even if the acquittal is ‘based upon an egregiously erroneous foundation.’ ” *Evans v Michigan*, \_\_ US \_\_; 133 S Ct 1069, 1074; 185 L Ed 2d 124 (2013), quoting *Fong Foo v United States*, 369 US 141, 143; 82 S Ct 671; 7 L Ed 2d 629 (1962). However, “[i]f a court grants a motion to acquit after the jury has convicted, there is no double jeopardy barrier to an appeal by the government from the court’s acquittal, because reversal would result in reinstatement of the jury verdict of guilt, not a new trial.” *Evans*, 133 S Ct at 1081 n 9. See also *People v Anderson*, 409 Mich 474, 483-484; 295 NW2d 482 (1980).

Therefore, the Double Jeopardy Clauses of the United States and Michigan Constitutions did not bar the prosecution’s appeal. *Evans*, 133 S Ct at 1081 n 9; *Anderson*, 409 Mich at 483-484.”

The Court of Appeals agreed with the circuit court that a reasonable inference can be made from the evidence that defendant was operating the vehicle with a BAL between .04 and .08.

Affirmed.

*People v. Sandoval*, case no. 321150, decided June 11, 2015.

In October 2012, veteran Troy police officer pulled defendant's car over for a traffic violation. There is no dispute that the officer had the legal authority to make the stop. Defendant was the lone occupant of the vehicle. The police officer smelled an overpowering odor of unburned marijuana emanating from defendant's car.

The officer also noticed a backpack on the front passenger seat and asked defendant how much marijuana he possessed in the car. Defendant informed the police officer that he had medical marijuana cards. He presented the officer with three cards showing defendant's designation as a medical marijuana primary caregiver for three individuals, one of those cards being expired. Defendant also gave the police officer his own medical marijuana card, showing him to be a qualifying patient.

The officer and defendant proceeded to discuss the amount of marijuana that defendant could legally possess under the law (7.5 ounces based on the three valid cards). Defendant told the officer that he indeed possessed marijuana in the car that he had purchased for \$2,000 and that, while he did not know the total weight of the marijuana, it was more than he was permitted to possess under the law.

The officer conducted a search of defendant's car and found marijuana in the backpack, packaged in various-sized plastic baggies. The quantity of marijuana totaled 1.6 pounds or about 25 ounces—more than three times the amount defendant was legally entitled to possess.

At the preliminary examination, the district court declined to bind defendant over on the charge of possession with intent to deliver less than 5 kilograms of marijuana. The basis for the district court's ruling was that the search of defendant's vehicle was unconstitutional, in that there was an underlying Miranda violation and the police officer lacked probable cause to conduct the search.

The Court of Appeals disagreed.

It held that, because there was no claim or evidence that defendant's statement about possessing too much marijuana was involuntary or coerced, there was no constitutional violation and the sole remedy for the Miranda violation is exclusion of the statement at trial. The statement is not otherwise to be discarded in relation to providing probable cause to search defendant's car, and the ultimate physical fruits of the statement, i.e., the marijuana and other potentially incriminating evidence, are admissible in court.

Reversed and remanded for reinstatement

*People v. Ali Zaid*, case no. 320197, decided May 26, 2015.

## NEW LAWS

### Masking of motor vehicle offenses

Effective, July 8, 2015, Public Act 11 amends MCL 257.732(21) by eliminating the term "commercial" so that the statute would apply to all offenses under the motor vehicle code, not just commercial vehicles or holders of commercial driver's licenses. MCL 257.732(21) reads as follows:

(21) Notwithstanding any other law of this state, a court shall not take under advisement an offense committed by a person while operating a motor vehicle for which this act requires a conviction or civil infraction determination to be reported to the secretary of state. A conviction or civil infraction determination that is the subject of this subsection shall not be masked, delayed,

diverted, suspended, or suppressed by a court. Upon a conviction or civil infraction determination, the conviction or civil infraction determination shall immediately be reported to the secretary of state in accordance with this section.

In essence, the language in amended MCL 257.732(21) specifically prohibits a conviction or civil infraction determination from being "masked, delayed, diverted, suspended, or suppressed by a court" to all offenses under the Michigan Motor Vehicle Code (MVC).

Although the term "masked" has not been defined in the MVC, the term "masked" comes from 49 Code of Federal Regulation 384.226. This regulation prohibits the state from resolving a CDL violation so as to "mask, defer imposition of judgment, or allow an individual to enter into a diversion program" if doing so would "prevent a CDL driver's conviction" from appearing on his driving record.

### Consult Your Prosecutor Before Adopting Practices Suggested by Reports in this Article.

The statutes and court decisions in this publication are reported to help you keep up with trends in the law. Discuss your practices that relate to these statutes and cases with your commanding officers, police legal advisors, and the prosecuting attorney before changing your practices in reliance on a reported court decision or legislative change.



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