Testimony of Patrick K. Nightingale, Esquire
before the Pennsylvania Senate Transportation Committee
September 21, 2021

I would like to thank Sen. Langerholc and Sen. Sabatina and all of the members of the Transportation Committee for giving me the opportunity to address what I believe is the most critical issue facing our 350,000 plus medical cannabis patient community here in the Commonwealth – Pennsylvania's "zero tolerance" DUI law for Schedule I controlled substances *and their metabolites.*

I want to make clear at the outset that driving impaired, whether by medical cannabis, prescription narcotics or legal alcohol, is and should remain a serious criminal offense with offenders prosecuted under the law. No one is suggesting that a medical cannabis patient should be entitled to operate a motor vehicle while under the psychoactive effects of tetrahydrocannabinol (THC).

Rather, the issue I am here to draw attention to is that under 75 Pa.C.S.A. §3802(d)(1) a registered medical cannabis patient can be arrested, prosecuted and convicted for a DUI with no proof of actual impairment being required. As we will discuss, the penalties for a DUI in Pennsylvania can escalate quicky and can result in a state prison sentence for someone who simply uses a few drops of tincture at the end of the day before bedtime to control pain.

Title 75, section 3802(d)(1) makes it illegal to operate a motor vehicle with any detectable amount of THC *or its metabolite*. It is a *per se* violation that relieves the investigating officer or the prosecutor from proving the motorist was actually impaired. Some in law enforcement, knowing this, will initiate a DUI investigation once he or she learns the motorist is a medical cannabis patient despite no other signs of impaired driving. Contrast this with 3802(d)(2) which requires proof of actual impairment for a prescription narcotic. Why should a medical cannabis patient be held to a different standard than a patient treating with prescription opioids or benzodiazepines?

Many have argued "well, if it's your first DUI you get a slap on the wrist so what's the big deal?" The "slap on the wrist" is Alternative Rehabilitative Disposition (ARD) and it's not as easy as that phrase may suggest. ARD participants face a 60 day license suspension, mandatory fines and court costs and probation supervision for up to two years. Some courts include community service as a condition.

It is only available once every ten years.

It is not available to a motorist with a minor under the age of 14 in the motor vehicle.

If one is not eligible for ARD the penalties escalate quickly:

First Offense – 72 hours – 6 months incarceration, $1000 fine, year license suspension, ignition interlock requirement

Second Offense – Misdemeanor of the First Degree. 90 days – 5 years' incarceration, $1500 fine, 18 month license suspension, ignition interlock

Third Offense – Felony of the Third Degree. 1 year – 7 years' incarceration, $2500 fine, 18 month license suspension, ignition interlock.

Child under 18 in car? First offense is a Misdemeanor of the First Degree and Second is a Felony.

When one considers that a medical cannabis patient who is using their medical cannabis on a daily or even weekly basis the risk of incarceration with the Department of Corrections is real. I do not believe it was the intention of the General Assembly to send medical cannabis patients to prison for lawful medical cannabis use merely for the presence of non-psychoactive metabolites.

Some will argue that law enforcement is helpless to detect cannabis impaired drivers without a roadside THC test. This argument is disingenuous. A law enforcement officer cannot request a chemical test without reason to suspect the motorist is impaired.

Law enforcement is very well trained and equipped to investigate drug impaired driving. Was the motorist driving erratically? Did the motorist admit recent drug use? Are there observable signs of impairment such as bloodshot eyes, dilated pupils, slurred speech, confusion? Every law enforcement officer in Pennsylvania is trained to perform "field sobriety tests" such as the walk and turn or one leg stand which are designed to test both balance and the motorist's ability to comprehend and follow instructions.

Additionally, the National Highway Traffic Safety Administration (NHSTA) provides Advanced Roadside Impairment Driving Enforcement (ARIDE) training to law enforcement. Officers who complete the training are deemed "Drug Recognition Experts". The DRE officers are regularly called to assist in making a drug impairment determination prior to an arrest and chemical test. ARIDE protocols include physical observation, checking pulse rate at specified intervals and interviewing the motorist.

The "real world" consequences for otherwise law abiding medical cannabis patients can be long lasting and wide spread. Many of you have constituents for whom reliable public transportation is simply not an option. Loss of operating privileges can result in loss of employment, inability to take children to school or day care and inability to care for care dependent family. A DUI arrest and prosecution results in time off of work, substantial court related costs including fines, costs of supervision, ignition interlock and attorney's fees. Some probation officers have threatened their supervisees with incarceration for violating terms of probation if the individual operates a motor vehicle while under probation supervision even when their operating privileges are restored if they continue to use medical cannabis.

The solution offered by SB 167 is simple and will place medical cannabis patients in the same position as their fellow patients who responsibly use their Schedule II and Schedule III

prescription narcotics – by removing medical cannabis from the Vehicle Code's definition of a Schedule I controlled substance and by requiring proof of actual impairment. Pennsylvania, with its "zero tolerance" DUI law is in the minority. Only 13 states are "zero tolerance" with another 5 embracing "per se" THC cutoffs. The majority require proof of actual impairment permitting THC levels as evidence thereof, but also allowing accused motorists the opportunity mount a defense. The Arizona Supreme Court ruled that non-psychoactive metabolites cannot be used in the prosecution of a medical cannabis patient. And here in Pennsylvania at least one Common Pleas Court has ruled that the Commonwealth must prove that the THC in the motorists' blood was not medical cannabis in order to obtain a conviction under §3802(d)(1). That case is pending before the Pennsylvania Superior Court.

In conclusion this, in my opinion as a criminal defense attorney, activist and medical cannabis patient is the most pressing issue facing our 350,000 plus medical cannabis patient population. Our program is 3.5 years old – perhaps not long enough to see patients coming in with their second or third "zero tolerance" no proof of impairment DUI convictions. I recall in 2015 and 2016 hearing our legislative allies say that we needed to strike while the iron was hot. "Pass it now, fix it later." We saw such industry friendly "fixes" sail through the General Assembly recently with the passage of HB1024. We must act with the same urgency to protect our patient population and pass SB 167.

Respectfully Submitted,

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