IN THE SUPREME COURT OF OHIO

STATE OF OHIO,	**:**	
		SUPREME COURT
APPELLEE	**:**	**CASE NO 2024-0669**
VS	**:**	**ON APPEAL FROM THE LORAIN COUNTY COURT**
EDWARD BALMERT,	**:**	**OF APPEALS, NINTH DISTRICT**
APPELLANT	**:**	**9TH DIST. CASE NO. 22CA011908**

MERIT BRIEF OF *AMICUS CURIAE* DUI DEFENSE LAWYERS ASSOCIATION

IN SUPPORT OF APPELLANT EDWARD BALMERT

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INTEREST OF AMICUS CURIAE DUIDLA

The DUI Defense Lawyers Association (DUIDLA) is a nonprofit national bar association comprised of more than six hundred lawyers throughout North America who endeavor to protect the constitutional rights of all citizens, with the understanding that DUI/DWI cases, by virtue of their frequency and the stigma attached thereto, are often at the front line for erosion of civil liberties.

DUIDLA's mission is to protect and ensure by rule of law those individual rights guaranteed by the state and federal constitutions in DUI-related cases, to resist the constant efforts that are made to curtail these rights, while also facilitating cooperation between the defense lawyers who are engaged in the furtherance of these objectives.

Amicus Curiae DUIDLA has filed amicus briefs in various state supreme courts as well as the United States Supreme Court in cases where it appeared that a court could be aided by the submission of a brief providing the perspective of a national organization composed of members with knowledge of the DUI laws, practices, and procedures in all fifty states and Canada.

Members of the DUIDLA have extensive knowledge of "per se" DUI laws as well as an understanding of how the active THC in a marijuana plant is metabolized by the human body into metabolites which are primarily inactive and non-impairing; it is scientifically accepted that these metabolites remain in a person's system for an extensive period of time. The difficulty is that these inactive metabolites will show up in blood or urine tests long after a person used marijuana, in circumstances when the person who was tested is completely sober and unimpaired. In addition, the metabolites produced by metabolization of totally legal "hemp" or CBD products will be inaccurately reported as "marijuana metabolites" when standard testing is conducted of a urine or blood sample.

In the instant case the trial court judge stated on the record his belief that if he found the Appellant guilty of the misdemeanor "per se marijuana metabolite" OVI offense he was required to automatically find the Appellant guilty of the much more serious felony offense of Aggravated Vehicular Assault, notwithstanding the fact that he found Appellant not guilty of the "impaired" OVI offense.

Amicus believes that such a result is both contrary to logic and contrary to science and appreciates the opportunity to set forth its reasoning below.

STATEMENT OF CASE AND FACTS

Amicus accepts the Statement of the Case and Facts as set forth in Appellant's Merit Brief.

LAW AND ARGUMENT

Upholding the Aggravated Vehicular Assault conviction of Appellant would not only work a tremendous injustice in the instant case, but it will also open the door to future convictions of large numbers of individuals for behavior that legislature did not intend to support a conviction for a serious felony carrying mandatory imprisonment.

Appellant's First Proposition of Law, when applied to the facts on the instant case, gets to the most salient question before the court – whether a person charged with Aggravated Vehicular Assault based upon an OVI violation can be convicted of that charge when the person was found Not Guilty of the OVI Impaired charge but found Guilty only of an OVI "per se" charge (where the per se charge consists of having a prohibited level of inactive, non-impairing "marijuana metabolite" in his blood or urine.)

For illustrative purposes, an intrinsically related question is thus: If a driver is involved in an accident where another person is injured, and the driver is shown to have "marijuana metabolites" in his or her blood or urine, is there any scientific or logical support for the contention

that the injury to the other person was the "proximate result" on the person having marijuana metabolites in their urine?

The answer to the second question is univocally "no," and therefore the answer to the first question must also be no.

Understanding the nature of the OVI Per Se charge contained in RC 4511.19(A)(1)(j)(viii)(II) aka the OVI "marijuana metabolite" per se charge.

RC 4511.19(A)(1)(j)(viii)(II) creates a "per se" offense that makes it an OVI offense to operate a vehicle when testing of his urine shows that, at the time the sample was collected, the urine contained 35 or more nanograms of a "marijuana metabolite." To be convicted of this "marijuana metabolite per se" charge, no evidence of impairment need be shown.

It is important to note that back in 2005 when this statute was created, any use of marijuana or any product derived from the marijuana plant, such as hemp or CBD oils, was completely illegal. Because all use of marijuana was illegal, testing for "marijuana metabolites" in urine was convenient to law enforcement, and in the big scheme of things the fact that totally sober marijuana users ran the risk being convicted of the "marihuana metabolite per se" OVI was not an unacceptable risk to the legislature at the time.[1] This per se offense has no relation to whether an operator was impaired in the slightest.

It is noteworthy that there is currently a bill pending in the Ohio legislature that would address this issue and similarly noteworthy that those providing testimony on that bill uniformly agree the "marijuana metabolite" that was found present in the Appellant's urine is inactive and not impairing.[2] Indeed, Amicus submits that there is no credible scientific source which would

[1] Of course, this prohibition was enacted amid the larger framework of still requiring the injury to be the proximate result of the OVI offense.
[2] Ohio Senate, *Judiciary Committee S. B. No. 26,* https://www.ohiosenate.gov/committees/judiciary/legislation/sb26 (Accessed Oct. 15, 2024)

support an argument that the 11-carboxy-THC metabolite is psychoactive, or its presence in the human body / blood causes any effect on the body.[3]

Delta 9 THC versus "Marijuana Metabolite"

It is important to understand the difference between THC, the psychoactive ingredient in marijuana, and the "marijuana metabolite" that was present in the Appellant's urine.

THC	Hydroxy-THC	Carboxy-THC
Δ^9 tetrahydrocannabinol	a.k.a. 11-OH-THC	a.k.a. THC-COOH
Main Isomer & principal psychoactive constituent	Main metabolite of THC Minor psychoactive potential	a.k.a. 11-*nor*-9-Carboxy-THC Inactive metabolite of THC

THC or more specifically Delta 9 THC (Delta-9-tetrahydrocannabinol) is the main isomer & principal psychoactive constituent in marijuana. As THC is broken down / metabolized in the human body it metabolizes first into Hydroxy-THC (11-OH-THC) and then into Carboxy THC (THC-COOH aka 11-nor-9-Carboxy-THC). While in the Hydroxy-THC metabolite stage there is some minor psychoactive potential, however once the THC is metabolized into Carboxy-THC the psychoactive properties are no longer present. *See State v. Thayer*, 2013-Ohio-1861, ¶5 (1st. Dist).

[3] Ohio Senate, *February 26, 2023 Testimony of the Ohio State Bar Association*, https://www.ohiosenate.gov/committees/judiciary/legislation/sb26 (Accessed Oct. 15, 2024)

For this reason, Delta 9 THC is represented above as a roaring flame which will burn you, Hydroxy-THC is represented as smoldering embers which still produce some heat, and Carboxy-THC is represented as the cold ashes that are sitting in the fireplace days and weeks after the last flame went out. Like those ashes, the inactive non-impairing Carboxy-THC metabolites remain in the human body days, weeks and even months after marijuana use.

In the instant case testing of the Appellant's urine showed only the presence of Carboxy-THC. See Ex. F-1 Thus the "per se marijuana metabolite OVI" charge upon which he was convicted was founded upon the presence on inactive marijuana metabolites.

A per se marijuana metabolite OVI based upon the presence of Carboxy-THC cannot logically provide the causal link necessary for a conviction of Aggravated Vehicular Assault under RC 2903.08(A)(1)(a) aka Aggravated Vehicular Assault with an OVI predicate

RC 2903.08(A)(1)(a) provides in pertinent part

> "(A) No person, while operating or participating in the operation of a motor vehicle, motorcycle, snowmobile, locomotive, watercraft, or aircraft, shall cause serious physical harm to another person or another's unborn in any of the following ways:
>
> > (1)(a) As the *proximate result* of committing a violation of division (A) of section 4511.19 of the Revised Code or of a substantially equivalent municipal ordinance …"

The injury to another simply cannot be the "proximate result of" of a per se marijuana metabolite OVI based upon the presence of Carboxy-THC. Carboxy-THC is non-impairing, its presence in the blood or urine of an individual has no effect on the individual's cognitive functions, nor his fine motor skills or any other normal abilities. In short, Carboxy-THC will not affect an individual's ability to drive and thus cannot cause an accident. Logically, any injury from such an accident cannot be said to have been the "proximate result of" the driver having a specified amount Carboxy-THC in his system.

Conclusion

For the reasons stated above, a motorist's conviction of an OVI due to marijuana metabolite is not a conviction relating to the motorists ability to drive in any fashion. As a result, this conviction cannot logically nor scientifically serve as the proximate cause of serious physical harm relating to aggravated vehicular assault.

Respectfully submitted,

DUIDLA, Amicus Curiae

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing BRIEF OF *AMICUS CURIAE* OACDL was served upon the following parties via EMAIL on 10/15/2024.

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