The Effects of Current Cannabis Control Policies and Testing Ability in Florida in the Short Term: How is Law Enforcement in Florida Operating in the Current Cannabis Environment and How Can the Law Enforcement Community Best Use Resources in the Near Future

Janine Nixon

Abstract

This article discusses the current environment for cannabis prosecution in Florida. The author reviews current academic literature regarding the ills of cannabis consumption and the difficulties prosecuting both misdemeanor and felony cannabis charges in the existing statutory scheme. The article points out that the laboratory capabilities are not consistent with the statutory requirements and therefore certain statutory definitions of cannabis are incapable of proof in court. Additionally, the author discusses the practical inability of most forensic labs to test misdemeanor quantities of cannabis at all (or to scale). The author collects data from prosecutors and forensic labs in Florida to compare the strategies used to overcome the barriers to prosecution. The article discusses the different strategies and makes recommendations for the short-term efficient use of resources towards prosecution of cannabis in Florida.

Introduction

Law enforcement agencies in Florida find themselves in a legal no man's land. Individually and as a group they have sworn to uphold the laws of Florida and of these United States. The Florida legislature has legalized medical cannabis, with regulations and exceptions which are virtually unenforceable. The Florida Legislature has further defined illegal cannabis as having a certain percentage of tetrahydrocannabinol (THC) and certain kinds of cannabis are automatically felonies. Yet there is currently no practical means for prosecutors to obtain an admissible test result for percentage of THC or to ascertain the precise nature and content of a substance. Courts are burdened with the backlog of cases from the COVID pandemic. Jail officials are attempting to manage and keep healthy the population of inmates awaiting trial. The Florida Supreme Court suspended speedy trial rights. Courts are re-opening in fits and starts. All the while, a majority of members of the community, including some Judges and jurors, believe cannabis should be legal. And for those jurors who are agnostic as to the legality of cannabis itself, they certainly don't wish to take a day from their normal responsibilities to sit in a windowless courtroom with at least twelve strangers to consider the fate of a twenty-year-old, otherwise law abiding, cannabis user.

As mentioned, each law enforcement officer has sworn to uphold the law. However, in the United States of America, enforcement decisions, within reason and if applied without discrimination, are discretionary and left to local jurisdictions. Why is cannabis illegal? What are the harms of ingesting cannabis? Who are the most

vulnerable? Under what circumstances is cannabis the most damaging? What is our current ability to prove a substance is illegal cannabis? How practical is it to administer these tests? These are the questions that will most assist today's law enforcement official in determining how to proceed with cannabis prosecutions.

Law enforcement officials must make decisions on each case and create legal, logical, practical policies in the above referenced environment. Arguably the legal landscape will get more complicated rather than less. The United States federal government stance on cannabis could change in the near future. There are potentially several regulatory frameworks in Florida's future, including cannabis de-criminalization, legalization for personal use, cannabis production and cannabis commercialization.

The current legal condition is an opportunity. One of the beauties of the American model of government is that each community can consider what is best for it and its citizens. It is the intent of the author to explore the factors a law enforcement agency should consider while shaping policy as well as individual law enforcement officials in making decisions about individual cases.

Literature Review

The effect of cannabis legalization on several public health and safety issues are important for law enforcement officials. The legalization of cannabis has the potential to effect: driving offenses, the use of other substances (either negatively or positively) including alcohol, accidental ingestions (including by children), increased or decreased crime, increase or decrease in black market for cannabis, and increased use by juveniles. Many studies have attempted to consider the effects of legalization of cannabis on the above in several countries and U.S. states. Comparison of the literature on the subject of cannabis legalization should be considered carefully, because there are major differences between legalization for medical purposes, recreational purposes and legalization for commercial manufacture and sale of cannabis.

Cannabis is a schedule one drug pursuant to the Federal Comprehensive Drug Abuse Prevention and Control Act of 1970, 21 U.S.C. § 802(6) and § 802 (16)(B)(i) and 21 C.F.R. § 1308.11(d)(23). The act defines schedule one drugs as those with no accepted medical use and a high potential for abuse. 21 U.S.C. § 802. Even so, cannabis is legal to produce in several U.S. states, legal for recreational personal use in several U.S. states and legal for medical use in many U.S. states, including Florida. Medical marijuana use is regulated in Florida under Florida Statute § 381.986 (2021). (Hartman, 2021).

Florida Statute § 581.217 legalizes the production and possession of substances defined as having lower than .03 % THC (tetrahydrocannabinol), commonly known as hemp or CBD (cannabidiol). The Department of Agriculture, in cooperation with local law enforcement, regulate this statute. F.S. § 581.217 (2020).

Florida also permits and regulates medical marijuana under Florida statute § 381.986 (2021). In summary the statute sets forth packaging, quantities and registry requirements of smokable and other types of medical marijuana.

Florida statute § 893.13 and § 893.03 in combination prohibit the possession, sale, delivery or possession with intent to sell or deliver substances defined as cannabis

(893.03(1)(a)190.). Florida statutes § 893.13 or § 893.03, in combination, additionally make the possession of any quantity of synthetic THC (tetrahydrocannabinol) a felony as opposed to "naturally occurring" THC which is a misdemeanor unless the quantity possessed is more than 20 grams. Florida statutes § 893.03 and § 893.13 only apply when medical marijuana (F.S. 381.986) and hemp (F.S. § 581.217) don't apply. F.S. § 893.03 (2021), § 893.13 (2019) and F.S. § 381.986 (2021).

A Florida appellate court has interpreted F.S. § 893.13(6)(c)(the THC statute) to mean that in order to prove that a substance is a THC concentrate (oil, wax, liquid) the State must prove that the substance is "synthetic" Meaning, an expert must testify that the substance is synthetically derived. *State v. Stevenson*, 307 So.3d 784 (4th DCA 2020).

A theme of the literature of the effects of the legalization of cannabis is that the studies are incomplete, limited and flawed. Most studies recognize the limitations of studying a drug the potency of which is extremely varied. (Heidt & Wheldon 2020). Some studies relied on survey data and any survey data is limited by the participant's willingness to answer the questions accurately. (Pigeon 2010, Zuckermann et al. 2019). Additionally, crime related data is incomplete or incomparable because of collection differences across jurisdictions. (Compton 2017, Connealy 2019, Chu 2015, Hall & Lane 2019, Lu et al. 2021, Stohr et al. 2020). There are near infinite variable factors in comparing populations (i.e., comparisons between countries, comparisons between different regulatory structures, comparisons between cities, comparisons between different populations of people, comparison between different types of cannabis, comparison over time). (Chabrol 2020, Connealy 2019, Chu 2015, Dobbs et al. 2019, Hall & Lane 2019, Hall & Lynskey 2020, Jorgensen & Harper 2020, Smart & Pacula 2019, Stohr et al. 2020). Some studies have pointed out the limitations of certain data and the researchers attempts to ameliorate the effect of the data on their research. (Chu 2015).

Regardless of these difficulties studying the substances' effect upon humans, the general public is not waiting for the verdict. As of August 2021, the National Conference of State Legislatures (NCSL) reports that 36 states and 4 territories allow and regulate medical marijuana sales and possession and 18 states, 2 territories and the District of Columbia allow but regulate recreational marijuana use. (NCSL, 2021). A Pew Research Center survey from April 2021 found that 91% of U.S. adults say that marijuana should be legal for medical use. Sixty (60%) of U.S. adults said that marijuana should be legal for medical and recreational use. (Van Green 2021).

While social scientists attempt to explore the dangers of cannabis (if any), the debate over the meaning of the social science studies is heated. The authors of *Data, damn lies, and cannabis policy: reefer madness and the methodological crimes of the new prohibitionist* argue that the opponents of legalized marijuana use flawed analysis to conclude that marijuana is more dangerous than it is. Heidt and Wheeldon argue that the initial prohibition of cannabis in the 1930's was based partially upon discrimination against Mexican immigrants and other minorities. The authors point out that the current opposition to cannabis legalization may be rooted in fear as well. Many researchers cite the increased potency of cannabis as a danger. Heidt and Wheeldon blame a book by journalist Alex Berenson, *Tell your children the truth about marijuana, mental illness, and violence*, and Malcom Gladwell's article in the New Yorker: *Is marijuana as safe as we think?* for popularizing the potency arguments and magnifying mis-interpreted research.

Heidt and Wheeldon argue that the increase in potency is overstated. The authors question the long-held belief that marijuana is a "gateway drug." Lastly, the article questions whether cannabis causes mental illness and increases in violence and crime. The article claims that not only are methodological flaws in the studies that have linked marijuana with negative outcomes, but the research fails to consider the benefits of legalizing cannabis. (Heidt & Wheeldon 2020).

Several studies attempted to discern if legalization increases the use of cannabis by adolescents. The evidence is mixed and not terribly compelling. Some studies found no association. (Schinke et al. 2017). Others cite to evidence that in some states there was increased prevalence and in some there was not, ultimately concluding that adolescents use of cannabis was not responsive to legalization laws. (Smart & Pacula 2019). Canadian youth were found to gradually increase cannabis use prior to legalization. This study found that certain (vulnerable or minority) populations were at risk for increased use over their lifetime. (Zuckerman et al. 2019).

Whether teens increase use or not, cannabis use, particularly heavy use, by young people appears to be harmful. Pigeon in her doctoral thesis cites several studies that set forth the physiological, neuropsychological and psychosocial negative outcomes for teenagers that use cannabis. Teens who use marijuana are more likely to become dependent upon cannabis (and other substances), experience depression and attempt suicide. Pigeon acknowledges however that there is little evidence that legalization increases the use my teens (Pigeon 2020). Some studies have shown that increases, if any, are among female teens, gay and lesbian and native populations. (Pigeon 2020 and Zuckermann et al. 2019). Social scientists have also reviewed the association between cannabis use and the use of other drugs, both as a "gateway drug" and as a complement or substitute for other harder drugs. Chu studied the idea that if marijuana is a complement to harder drugs then an increase in medical marijuana would increase the usage of hard drugs. Interestingly, Chu discussed the gateway hypothesis – he attributed the popularity of that hypothesis to Denise Kandel's 1975 paper published in Science, *Stages in adolescent involvement in drug use*. Chu reviews several studies on the gateway drug idea. Some showed evidence of the effect and others found no such effect. Chu cites Kandel in a later paper as concluding that that existing evidence of the gateway effect is, at best, mixed. Chu reviewed arrest data and drug treatment data from states with medical marijuana laws. Chu found a 10-15 percent increase in marijuana use after passage of medical marijuana laws. From arrest data Chu did not find a significant association between marijuana and cocaine or heroin. From the treatment data the study found a 10-20 percent decrease in heroin-related treatment admissions but no significant change in cocaine-related treatment admissions. Chu concluded that the results show that marijuana is a substitute for heroin. (Chu 2020).

In an article published in 2015 that argues to inform the Canadian government about how to implement legalized cannabis, the authors claim that policies that prohibit cannabis cause harm, that cannabis prohibition has no effect on rates of use and that at higher doses cannabis has a well-established risk for motor vehicle crashes. (Spithoff 2015). Interestingly, these claims are at direct odds with claims from other studies or articles, possibly because Spithoff published her article in 2015 and this area of study changes rapidly as additional states pass cannabis liberalization laws and as the effects of the older liberalization laws become apparent.

Cannabis use has also generally been understood to be associated with serious mental health disorders, such as depression, suicidal ideation and psychosis in young adults and adults. Several studies have attempted to discern the relationship between cannabis use (or cannabis use disorder – i.e., use of cannabis to the point of dysfunction) and mental health disorders. Chabrol et al. attempted to discern the relationship between cannabis use disorder and suicidal ideation, depressive and anxiety symptoms and borderline personality traits. The study found certain shared risk factors reduced the significance of the association between cannabis use and non-use in French college aged students. (Chabrol et al. 2020).

One unintended consequence of liberalization of medical and recreational use of marijuana is on accidental poisoning, possibly associated with the increase in availability of edibles and other forms of THC products. Yuyan Shi and Di Liang studied the association between recreational commercialization and poisoning reports. The study differentiated the regulatory schemes of recreational cannabis legalization (RCL) and recreational cannabis commercialization (RCC). The study defined RCL as the removal of penalties for adults' possession of cannabis in small amounts for recreational use and RCC as providing a legal supply of cannabis to adults through licensed dispensaries. The study suggested a substantial increase in cannabis exposures following RCC in the United States. (Shi & Liang 2020)

Another consideration in the application of local marijuana laws is the effect of local law on legal immigrants. Because cannabis is illegal at the Federal level, the consequences of a minor local violation (or worse, a legally murky pseudo violation) can be devastating. Legal residents of the United States can be lulled into a false sense of security or not given advice at all about the consequences of a local arrest or conviction for cannabis. (Kain 2021).

Studies have mixed results as to whether driving deaths have increased from legalization of cannabis or not. The literature is consistent however that it is difficult to prove impairment from THC (the active chemical in cannabis) as well as impractical to measure the quantity of active chemical in the blood. (Compton 2017).

In its 2017 report to Congress the National Highway Traffic Safety Administration advised that there is an increased use of marijuana by drivers in the United States. Although the report stated that driving skills are likely impaired by marijuana, there is no scientific evidence correlating THC concentrations and impairment and there is little to no evidence that marijuana use increases the risk of a crash. (Compton 2017).

Page Dobbs, however, cites, Chihuri et al. when stating that "marijuana use, as well as combined alcohol/marijuana use, can increase the odds of receiving a speeding/driving ticket, having a motor vehicle crash and having a fatal motor vehicle crash." Additionally, Dobb's letter claims that marijuana use decreases both occasional and heavy users' driving performance (Dobbs et al. 2019, citing Bosker et al. (2012)). The letter describes a survey conducted by the authors that focused on young people's attitudes toward driving under the influence of cannabis. The survey results suggest that college age students believe that marijuana users build a tolerance for driving under the influence and that, in general, driving under the influence of cannabis was not dangerous. The results cause concern that with increased legalization of cannabis, the attitude of driving under the influence of cannabis could exacerbate the potential dangers of the practice. (Dobbs et al. 2019).

Another study argues against *per se* criminal penalties for driving with a defined THC concentration in a driver's blood both because of the low risk of driving under the influence of cannabis and the inability to empirically measure impairment with current tests. (Kleinman et al. 2018). The authors caution that while stoned driving alone is no more dangerous than talking on a hands-free device while driving, the synergistic effects of driving while under the influence of cannabis and alcohol is dangerous, possibly made more so by the attitudes surrounding cannabis use. Kleinman et al. echo the idea that cannabis users believe that driving under the influence of cannabis is not dangerous and that some users believe they driver better while under the influence. Consumption of cannabis and these attitudes are concentrated in populations that are predisposed to risky driving (young and male drivers). (Kleinman et al. 2018).

Wayne Hall and Tyler Lane caution those interpreting studies (including their own) associating driving risk with cannabis because of several factors including but not exclusive of: differences in enforcement of cannabis laws, the studies usually measure deaths rather than injuries (injuries may be represented at a higher rate due to the nature of cannabis related crashes occurring at lower speeds), and the inability to measure the effects of federal law change and lift the prohibition on large scale commercialization of cannabis. (Hall & Lane 2020).

Wayne Hall and Michael Lynskey review the US research on the public health impacts of legalizing recreational cannabis use and find that legalization has caused a whole host of negative public health effects. The authors recognize that as cannabis is produced legally, the price will fall, and potency will increase. The review found that daily cannabis use is associated with an increased risk of psychotic mental health symptoms. That these risks are compounded by frequent users and people who begin to use in adolescence. The risks are also associated with higher potency. Hospitalizations have increased in Colorado for cannabis abuse and dependence, as well as motor vehicle accidents and injuries related to cannabis use. In Boulder Colorado there was in an increase in childhood poisonings, psychological distress in adults and other sickness, mental health distress and injury. Evidence of the relationship between legalization and traffic accidents has been mixed. Additionally, there is a suggestion of a "reverse gateway effect" in that an increase in cannabis smoking among young adults increases tobacco smoking. (Hall & Lynskey 2020).

In a report from a meta-analysis study of the association of drugs and criminal behavior authors Bennett, Holloway and Farrington conclude that the odds of criminal offending are increased by drug use. However, the greatest odds were associated with crack cocaine, heroin and cocaine. The odds of offending were about 1.5 times higher for marijuana users than for non-users, however the association was weaker than for the harder drugs. (Bennett et al. 2008).

The criminal justice study of the relationship between the existence of dispensaries and crime has developed as a result of legalization of cannabis. These studies borrow hypotheses from the relationship between retail alcohol establishments and related crime. Connealy et al. (2020) evaluated the effect in Denver and found that the effect on crime depended on the type of dispensary. The authors of this study sought to further consider a previous study that found that cannabis dispensaries led to disorder and crime increases in the neighborhood of the dispensary. Connealy at al. found that If the establishment dispensed *medical* marijuana there is little observable effect on crime. If

the establishment dispensed *recreational* marijuana, there was an observable increase in crime. Furthermore, the study demonstrated an increase in property crime locally and disorder and drug crimes immediately adjacent to recreational dispensaries. (Connealy et al. 2020).

Cody Jorgensen and Alexis J. Harper followed upon previous studies involving police clearance rates after the legalization of cannabis, testing the hypothesis that if officers do not have to focus on lower-level cannabis crimes they will have additional time and energy to solve more serious crime. The result of the study was that the legalization of cannabis had no meaningful effect on clearance rates for either violent crime or property crime. The authors point out that although the legalization of cannabis does not necessarily free up police resources, it does not appear to be detrimental to clearance rates. Furthermore, there may be other benefits to the criminal justice system, such as fewer arrests, reduction of jail population, and reduction in perceived discrimination. (Jorgensen & Harper 2020)

Lu et al. conclude that the legalization of cannabis in Colorado and Washington State had little effect on crime rate. The study results demonstrated a short-term increase in property crime at the time of legalization and a drop in burglaries (in Washington State) at the point that retail sales began. The authors point out that the study included only serious crime and that crimes rates are not the sole measure of public safety. (Lu et al. 2021).

In *Effects of Marijuana Legislation on law enforcement and crime: Final Report*, Mary Stohr et al. seeks to answer the following questions: How are law enforcement handling crime and offenders, particularly involving marijuana, before and after legalization? And what are the effects of marijuana legalization on crime, crime clearance, and other policing activities statewide, as well as in urban, rural, tribal, and border areas? Some interesting results were found by the study. First, arrest rates for cannabis reduced but at different rates for the black population as for the white population. Also, even though possession by persons under 21 remained illegal, arrest rates for all ages fell. Law enforcement officers reported that cannabis consumption by youth became less of a priority after legalization. Second, driving under the influence of cannabis investigations and other cannabis related offenses took up an inordinate amount of officer time and energy. Officers reported that testing for THC levels was time consuming and laws related to cannabis regulation were vague and confusing. The study found anecdotal evidence of an increase in organized crime, black market and illegal cross-state transport and a decrease in investigatory power. The study further found no association between legalization or the beginning of retail sales and increased calls for service. (Stohr et al 2020).

All of the above factors coupled with the current state of forensic testing of cannabis causes law enforcement to ask important questions about the prosecution of cannabis, in the present and near future. The tests used to determine the percentage of THC in a substance and the testing to determine whether the THC is naturally occurring, or synthetic are expensive and not yet ubiquitous in the public sector. Consequently, prosecutors are unable to reliably prosecute cannabis cases of all types.

Methods

The purpose of this paper is to determine the best strategy to deal with the uncertainty in the prosecution of cannabis cases, both misdemeanor and felony, in the near-term future.

Data was collected from State Attorney's Offices across Florida regarding their current handling of cannabis cases. The data was collected through telephone interviews with supervising assistant state attorneys from a representative sample of large and small, urban and rural state attorney's offices. The questions were designed to learn whether the prosecutors had access to reliable analysis of suspected cannabis substances and if not, how they dealt with the lack of reliability. Additionally, the interview questions asked whether the state attorney's offices had formal guidelines for how to prosecute cannabis. The data was collected and interpreted in order to discern how the State's Attorneys were handling the uncertainty at present and whether they were handling it differently from each other.

Data was also collected from forensic labs across Florida regarding whether they have the ability to analyze suspected cannabis to establish the information required by statute to scale. In other words, whether the lab had the ability to provide reliable meaningful results to prosecutors on all requested samples. Finally, data was collected from those forensic labs as to the predicted timeline for the use of reliable chemical test to support cannabis prosecution to scale. The data was collected and interpreted to best determine what the near future holds for the State's ability to support prosecution by forensic testing.

Additionally, data was collected in the form of an interview with a Judge in order to collect information on the prosecution of cannabis cases from a judicial perspective.

Limitations upon the data are that State Attorney's Offices and labs may be hesitant to disclose whether and how practical it is to produce forensic test results for strategic reasons. An additional limitation is that it may be unclear whether the lack of prosecution of cannabis may be tied more to State Attorney political motivations rather than statutory uncertainty. Lastly, the interviews will be done by supervising employees. The rank-and-file assistant state attorneys and lab technicians may perceive the current legal environment differently than a supervisor who does not deal with Judges, defense attorneys and law enforcement officers daily.

Results

There are twenty (20) judicial circuits in Florida with a State Attorney in each judicial circuit. An interview was requested for eighteen (18) supervising assistant state attorneys of the twenty (20) circuits. Of those requested, seven (7) provided interviews. The rate of return was thirty-eight-point eight (38.8) percent. The seven (7) circuits that provided interviews represent a variation in circuit size and urbanization, several of the most rural circuits did not respond to the request for an interview.

Regarding forensic labs, Florida Department of Law Enforcement (FDLE) lab services is the largest. FDLE has several chemistry labs that serve different jurisdictions. Five local law enforcement forensic labs, one university lab and one private lab were identified. Interviews were requested from all eight (8) of the above. One interview was

granted. The rate of return was twelve-point five (12.5) percent. The interview conducted was with Florida Department of Law Enforcement in Ft. Myers. Additional data about forensic lab capabilities was collected through previously published or communicated material. Lastly, the local law enforcement forensic lab capabilities are evident in the responses from the State Attorney's Offices.

Interview questions for the forensic labs were focused on whether the labs can provide test results for green leafy suspected cannabis (misdemeanor or felony quantities), oils, waxes, and other material, and whether the lab can provide an opinion on whether the controlled substance is naturally or synthetically derived.

As previously mentioned only one forensic lab responded to the request for interview. The interviewed lab was FDLE. The supervising lab analyst said that the chemistry section had recently changed their submission threshold to 20 grams of suspected green leafy cannabis. Meaning, FDLE will accept submissions of 20 grams of cannabis and test those to determine whether the substance contains cannabis/THC and will conduct a point determination (report whether the percentage of THC is greater than or less than 1%). Therefore, the submission threshold is now (or will be in the near future) consistent with the misdemeanor/felony quantities. FDLE will test misdemeanor quantities of green leafy cannabis but will not provide a point determination (whether the substance contains greater or less than 1% THC). FDLE will test felony quantities of suspected green leafy cannabis and provide a point determination. FDLE can test waxes and oils suspected of containing THC and provide a point determination. The FDLE representative interviewed stated that he knows of no available test to determine if cannabis (or THC) is naturally or synthetically derived. Additionally, FDLE cannot test edibles suspected of containing THC.

The Orlando FDLE chemistry lab has published its submission requirements. They are subject to change, however at the time of the writing of this paper they were as provided in Appendix C. Essentially the Orlando FDLE lab had at the time of the publication of these submission requirements a matrix of weights and sample size thresholds for plant material and derivatives that were suspected of containing THC.

No other forensic labs responded to requests for interviews, however, in interviewing the prosecutors in several jurisdictions data was collected about local law enforcement forensic labs. One local law enforcement lab can and will test any quantity of green leafy suspected cannabis as well as oils and waxes and provide a point determination. That lab does not report on the question of natural versus synthetically derived THC.

Another local law enforcement forensic lab tests green leafy material at a threshold of twenty-eight (28) grams and the requirement of aggravating circumstances (material intended for sale or found with other drugs). The lab will also test oils and waxes under selective circumstances. These guidelines were collectively agreed upon by all stakeholders.

The data reported that local law enforcement forensic labs routinely tested suspected substances only when the matter was set for trial, likely due to the geographic proximity between the evidence and the lab and the relative number of items to be tested.

Through previously published advertisements (attached as Appendix B), a private lab provided the following data. For fees ranging from sixty-eight dollars ($68) to ninety-six dollar ($96) the lab could test green leafy substances, oils waxes and edibles. The

threshold quantities are very low, meaning the lab will test very low quantities. The lab can provide potency results on all three kinds of substances, i.e., the percentage of THC in the substance on plant material, oils, waxes, other derivatives and edibles.

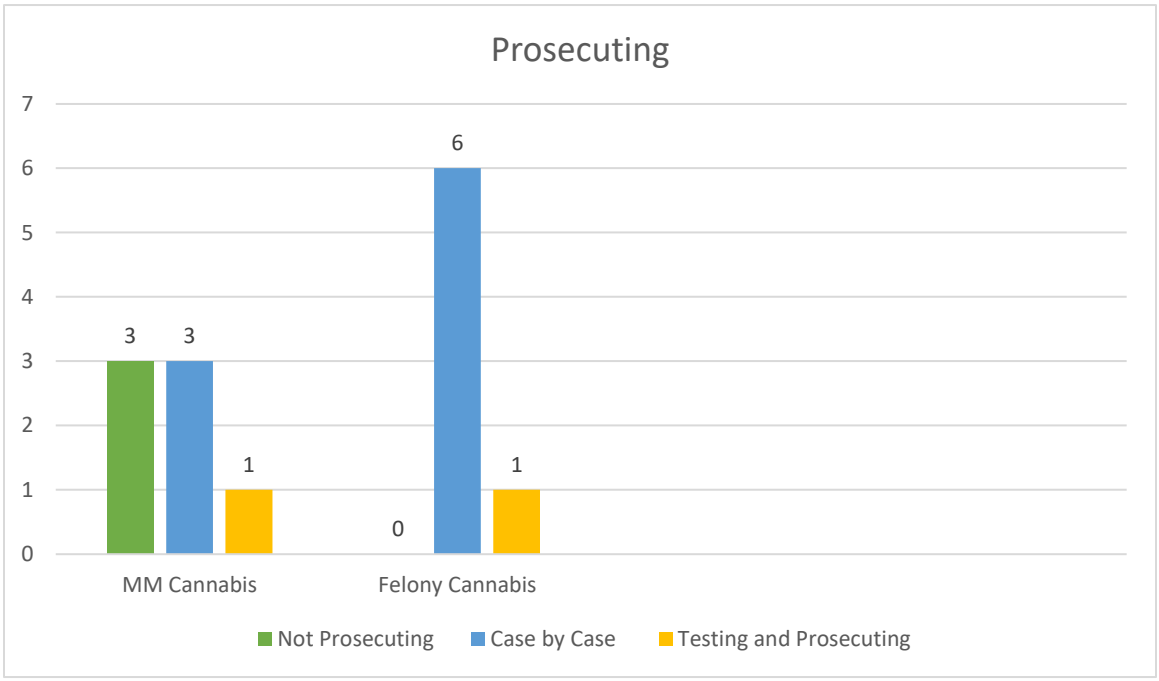
In previous communications, a university-based lab provided information that it could provide all of the required factual data upon a sample and could also provide an opinion about whether a substance was naturally or synthetically derived. The fees are in the thousands of dollars (not including testimony) for each sample. See Appendix D.

The interview questions for the prosecutors were essentially, whether the assistant state attorneys had the forensic support to prosecute both misdemeanor and felony cannabis cases. In other words, whether the prosecutors could obtain admissible forensic testing results on suspected cannabis to either prove to a jury or convince a defendant to agree to a plea offer.

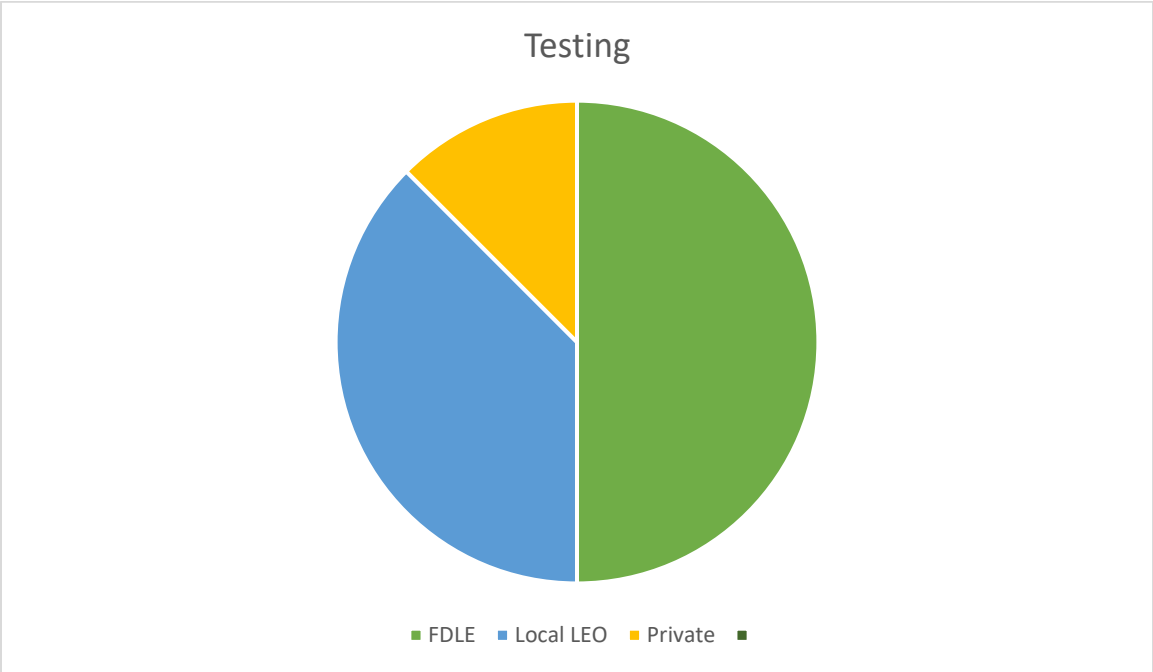
In the case of green leafy cannabis, three of the interviewed prosecutors stated that they have a policy against prosecuting misdemeanor cannabis (or a sole count of misdemeanor cannabis). Those jurisdictions refrain from sending any misdemeanor quantity of cannabis for testing. Three prosecutors interviewed stated they make this decision on a case-by-case basis and one prosecution office routinely send misdemeanor and felony quantities of green leafy cannabis for testing. It should be noted that only one of the prosecutors' offices has access to a lab that will routinely test misdemeanor quantities of green leafy suspected cannabis.

The vast majority of the prosecutors are evaluating oils and waxes on a case-by-case basis in order to determine whether they will send the substance to a lab. Only one jurisdiction routinely sends those to the lab for testing.

*See chart for visual depiction of the respondent's prosecution of cannabis cases.



Of the eight (8) interviews, four (4) use FDLE labs and three (3) use their local law enforcement forensic lab. One reported having used a private lab on a regular basis but discontinued the relationship because the lab did not consistently provide the appropriate testimonial support. See pie chart for a visual depiction of labs used for drug identification.



None of the law enforcement-based labs can provide testing for edible products. Private labs can provide testing for those. Most jurisdictions are prosecuting those cases only on an extremely selective basis.

Lastly, only one lab in the data set claims to be able to respond to the question posed in the *Stevenson* case, that is, whether a substance is synthetically or naturally derived. And that test would be very expensive. Not all representative prosecutors were aware of how their offices were handling this legal ruling. Most, it seems are treating oils and waxes as if they are green leafy substance and reverting to the threshold felony quantity of 20 grams or more (F.S. § 893.03(1)(c)7. In other words, the law enforcement and prosecutors are ignoring Florida Statute 893.03(1)(c)190 and prosecuting under 893.03(1)(c)7[1]. One jurisdiction is essentially ignoring the opinion, reading it as an anomaly based upon the incorrect interpretation of the statute and application of the statute to the factual circumstances. This jurisdiction continues to charge under the definition of Tetrahydrocannabinol Florida Stature § 893.03(1)(c)190., where any quantity of tetrahydrocannabinol in any quantity is a felony.

[1] That strategy comes with a complicated argument about the definition of resin. See F.S. 893.03(1)(c)7.

One Judge was interviewed about the difficulties in prosecuting cannabis cases from a judicial perspective. The judge said the following
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> Initially, I tend to agree with the overall sentiment that marijuana is not as addictive as other substances. Alcohol is proved to be much more addictive. I never really bought the argument from Defendants that they were "addicted" to marijuana. However, people with substance abuse disorders still have a heavy reliance on mind and/or mood-altering substances … which would include marijuana. The benefit of legalized marijuana use is that it cuts down on people buying drugs illegally from drug dealers. Dealers have been known to spike marijuana with other substances (i.e.: fentanyl) which will cause the user to get "hooked," or possibly even overdose on what they believed to be an ordinary joint. With the taxes and costs associated with legal marijuana sales, dealers are always going to be able to underbid the legal sellers. People with more income will buy from legitimate sellers, and those who don't will continue to buy from illegal dealers.
>
> Marijuana use also brings another group of impaired drivers on our roads. I read a report a few years ago outlining how the number of DUI cases increased in states that legalized recreational marijuana use. Also, in speaking with a local doctor about this, he told me legalized marijuana use contributes more to the "dumbing down" of America. As he said it, "Young people will have their alcohol. When you also give them marijuana, they won't use it to replace the alcohol … they will just use both."
>
> Regarding criminal prosecutions of marijuana cases, I differentiate between users and dealers. Users should be afforded the opportunity for diversion or other lesser sanctions. Dealers are part of the problem and should be punished accordingly.

Discussion

There was a variety of different approaches even among the seven prosecutors' offices that were interviewed. Only two decline to prosecute misdemeanor cannabis on a regular basis. All other offices utilize whatever forensic lab is available to them to support prosecution.

The ability of all forensic labs to test green leafy material and oils and waxes continues to improve. The local law enforcement forensic labs are nimbler. Local labs can obtain custody of evidence and test substances on an expedited basis.

Many of the prosecution offices interviewed are either avoiding the *Stevenson* issue by filing under a different statute number or ignoring the issue entirely[2].

One of the limitations of the data collection may bear discussion here. Prosecutors are required to consider many factors when making prosecution decisions. Most of those factors are factual, for example: objective credibility of witnesses, subjective credibility of witnesses, quantity of direct evidence versus circumstantial evidence, the strength of circumstantial evidence, consistencies and inconsistencies among and between testimonial and physical evidence. However, some are legal. For instance, a search and seizure issue or if a defendant's entry into a dwelling to live for a few days is a burglary or a trespass. A line level prosecutor's day to day decision making is complicated when those legal analyses are numerous and complex. The prosecutors most likely to be dealing with these questions of cannabis prosecution are less experienced. Supervising prosecutors can implement guidelines and policies but the guidelines and policies are often such that their application is cumbersome. Rank and file prosecutors, if interviewed, might respond that policy application is inconsistent, or they tend to avoid the prosecution of cannabis altogether. The work of a prosecutor is rendered less efficient when he or she has to consider the factual determinations, plus the legal circumstances, plus the lab capabilities, plus the local jurisdiction's guidelines or policies.

Similarly, law enforcement officers are given abundant, but constantly changing, information (the thresholds for labs have changed between the time this paper was begun to when it was completed). Law enforcement officers are expected to apply in the field, consistently, reasonably, and equitably. This creates inefficiencies for law enforcement work as well.

The sentiment of the interviewed Judge was rationally supportive of the enforcement of cannabis laws. In the world where it seems the establishment is ceding the dispute over legalizing cannabis; the Judge makes the argument for the protection of the public at large.

Based upon the evidence collected, cannabis is prosecuted as much as possible considering aggravating and mitigating factors as well as available resources, similar to the prosecution of all other types of cases.

[2] There is an argument that the *Stevenson* case was decided incorrectly and if given the opportunity the State would argue that the Court should overturn that decision.

Recommendations

Based upon the findings, the author recommends the following:

- Law enforcement departments should consider adopting a liberal but consistently applied discretionary scheme reference misdemeanor quantities of cannabis and/or tetrahydrocannabinol
- State attorneys' offices should consider adopting liberal but consistently applied discretionary schemes reference misdemeanor quantities of cannabis and/or tetrahydrocannabinol
- Law enforcement should explore all manner of pre-arrest and pre-trial intervention programs for lesser quantities of cannabis
- Any of the above discretionary schemes should not apply to juvenile possession of cannabis or tetrahydrocannabinol
- Any of the above discretionary schemes should consider the combination of driving and the use of cannabis (especially when suspected of being used in combination with other drugs or alcohol) as an aggravating factor
- Law enforcement should use any and all resources available to it in order to detect and investigate drugged driving
- Law enforcement and prosecutors should beware of cannabis, including tetrahydrocannabinol, being laced with more serious drugs
- Law enforcement should research and seek to use the most sophisticated field tests available (or use those tests on a discretionary but consistently applied basis)
- Law enforcement and Assistant State Attorneys continue to communicate within their jurisdictions in order to maintain or increase efficiency of prosecution
- Prosecutors should coordinate intra-jurisdictionally to find test cases to clarify the *Stevenson* issue
- Prosecutors should resort to using private labs in only extraordinary cases (law enforcement officers and supervisors should understand the same and proceed accordingly)
- Law enforcement and prosecutors should communicate to treat most other cases of oils and waxes as cannabis under F. S. 893.03(1)(c)7. using the 20 grams or more threshold, unless and until F.S. 893.03(1)(c)190. is clarified by the legislature or case law
- Forensic labs and prosecutors' offices should frequently communicate to find effective strategies to use limited resources optimally (develop times lines, prioritize trial cases, etc.)
- Law enforcement should lobby the legislature for clarification of F.S. 893.03(1)(c)190. vis a vis the *Stevenson* case, passing laws authorizing alternative methods of punishing minor quantities of cannabis by adults, and a robust budget to support forensic chemistry labs

Janine Nixon has been an attorney for 27 years, most of those years as a prosecutor. She attended the University of Florida for her undergraduate degree and University of Miami for her law degree. Janine has practiced several types of law including commercial, personal injury, dependency, criminal defense and criminal prosecution. Janine has prosecuted in two different Judicial Circuits and many types of cases including misdemeanors, sex crimes and child abuse, gun violence, DUI manslaughters, specialized prosecution, drug trafficking and capital murders. Janine is currently the Division Supervisor for the Marion County division of the State Attorney's Office of the Fifth Judicial Circuit.

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The Federal Comprehensive Drug Abuse Prevention and Control Act of 1970, United States Code 21 U.S.C. § 802(6) and § 802 (16)(B)(i) (2018)

Code of Federal Regulation, 21 C.F.R. § 1308.11(d)(23) (2021)

Florida Statute § 381.986 (2021)

Florida Statute § 581.217 (2020)

Florida Statute § 893.03 (2021)

Florida Statute § 893.13 (2019)

State v. Stevenson, 307 So.3d 784 (4th DCA 2020).

Appendix A

Interview Questions for State Attorney's Offices

My name is Janine Nixon. I am an Assistant State Attorney in Marion County (the Fifth Judicial Circuit). I am participating in Class 24 of the Florida Department of Law Enforcement Senior Leadership Program. As part of the class, we are required to write a research paper that includes personally collected data. My research paper's working title is, ***The Effects of Current Cannabis Control Policies and Testing Ability in Florida in the Short Term: How is Law Enforcement in Florida Operating in the Current Cannabis Environment and How Can the Law Enforcement Community Best Use Resources in the Near Future***.

I am collecting information from State Attorney's Offices and forensic labs across Florida in order to understand the current practical ability to prosecute cannabis offenses and how prosecutors are handling the current situation. I would like to ask you approximately seven (7) questions about how your office is handling cannabis prosecutions.

All answers are ***unofficial and anonymous***. Although the paper will be published, the data will NOT associate the answers on the interview/survey questions with the agency answering.

SAO

Do you routinely request that leafy green suspected controlled substance be tested at an accredited or otherwise accepted lab for chemical analysis?
If yes, what lab?

- FDLE
- Local accredited or legally accepted lab
- Private lab
- Other

If no, are you requesting that the substance be sent on a case-by-case basis?

Are you routinely sending oils, wax, etc. suspected to contain THC or cannabis to an accredited or otherwise legally accepted lab for chemical analysis? Yes……. No…….
If yes, what lab?

- FDLE
- Local accredited or legally accepted lab
- Private lab
- Other

If no, are you requesting that the substance be sent on a case-by-case basis?

Do you have a formal policy or guideline regarding the prosecution of misdemeanor cannabis (separate from the policy you have regarding prosecution in general)? Yes No

Do you have a formal policy or guideline regarding the prosecution of felony cannabis (separate from your policy regarding prosecution in general)? Yes No

Have you communicated that policy to your law enforcement partners? Yes No
If yes, how was it communicated?
How well is your policy working? Very well Fairly well No opinion Not well

Interview Questions for Forensic Labs

My name is Janine Nixon. I am an Assistant State Attorney in Marion County (the Fifth Judicial Circuit). I am participating in Class 24 of the Florida Department of Law Enforcement Senior Leadership Program. As part of the class, we are required to write a research paper that includes personally collected data. My research paper's working title is, *The Effects of Current Cannabis Control Policies and Testing Ability in Florida in the Short Term: How is Law Enforcement in Florida Operating in the Current Cannabis Environment and How Can the Law Enforcement Community Best Use Resources in the Near Future.*

I am collecting information from State Attorney's Offices and forensic labs across Florida in order to understand the current practical ability to prosecute cannabis and how the prosecutors are handling the current situation. I would like to ask you approximately five (5) questions about your lab's capability to test and report on the identification of cannabis (THC) and clarify related current legal issues.

All answers are unofficial, but not completely anonymous. I will label the answers as being from a "law enforcement forensic lab" or a "private lab" in any published material.

Labs/Supervisors in Chemistry Section or Equivalent

Can your lab test for percentage of THC in a substance? To what percentage?

Can your lab perform this test to scale (meaning on every sample requested)?
What is your predicted time line for the availability of such testing to scale (the ability to perform the analysis on every sample requested)?

Can your lab determine if the THC is naturally derived or synthetic (answering the question in *Stevenson* case)? Or is it your scientific opinion that this is a meaningless distinction?

Can your lab perform this analysis to scale (meaning on every sample requested)?
What is your predicted time line for the availability of such testing to scale (the ability to perform the analysis on every sample requested)?

Interview Questions for Judge

From the perspective of a criminal court judge, what have you seen as the practical problems associated with prosecution of cannabis cases?
What do you see as the future of the prosecution of cannabis?

Appendix B

ACS LABORATORY | CANNABIS & HEMP BEYOND COMPLIANCE

CANNABIS Law Enforcement Panels

DOH Certified | CLIA Certified | ISO Certified | Medical Quality Testing | AHCA Certified | PJLA Accredited

Turnaround Times

Standard: 3-5 days | **Edibles:** 7 days | **Additional Testing:** 1-3 days (additional)

• Testimony services available. Contact us for more information. •

Flowers & Plants $96.00

Potency + Moisture

Minimum Requirement: 2.00g

Moisture testing is required by the State for all cannabis products. The test is performed to equalize the moisture in the product so all testing is consistent. Flower that is very moist or very dry will have the same result based on the moisture calculation.

Derivative Products $68.00

Potency

Minimum Requirement: 0.50g

Edibles $68.00

Potency

Minimum Requirement: 5.00g

ACS Laboratory • Ph: 866-762-8379 • W: acslabcannabis.com PSL20201029A4CV20

Appendix C

Seized Drugs Evidence Submission Guidelines for:

% THC Threshold Testing (CH-MD testing) – This new testing method has the ability to distinguish Cannabis from Hemp, Industrial Hemp and Low-THC Cannabis & Other Types of THC evidence from Hemp and Low-THC Cannabis and has recently become available in the FDLE Orlando Laboratory, Seized Drugs Section in February of 2021 for suspected Cannabis plant material and March of 2021 for other types of suspected THC evidence. This is a reference guide and includes scenarios to demonstrate the types of evidence eligible for the % THC Threshold Testing – also known as (CH-MD testing) and typical reporting formats for different evidence types.

I. PLANT MATERIAL

a. PLANT MATERIAL – **% THC Threshold Testing Performed**: Analysis differentiating Cannabis as defined by F.S. 893.02 from Low-THC Cannabis, Hemp, and Industrial Hemp, is restricted to plant material having a minimum net weight of 50 grams or more. ALL samples contributing to this weight must belong to the same subject and each sample must have a NET weight between 4 and 5 g to qualify for this testing. The following is a *typical* reporting format depending on the testing criteria met:

- **Cannabis *(weight with measurement uncertainty)* and the following remark → This substance meets the definition of Cannabis in F.S. 893.02.)**

b. PLANT MATERIAL – % THC Threshold Testing **NOT** Performed: For various reasons, these items may only qualify for regular testing known as CH-ID testing or Chemical Identification testing. When CH-ID testing is performed on plant material, the following is a *typical* reporting format depending on the testing criteria met:

- **Cannabis *(weight with measurement uncertainty)* and the following remark→ The results of the microscopic examination and Duquenois Levine Color test are consistent with the genus Cannabis. The THC threshold analysis was not performed and cannot exclude "Low-THC Cannabis" as defined in F.S. 381.986, "Hemp" as defined in F.S. 581.217, and "Industrial Hemp" as defined in F.S. 1004.4473.)**

II. SUSPECTED THC OILS, LIQUIDS, RESINOUS or WAXY EXTRACTS, & CARTRIDGES

a. THC OILS, LIQUIDS, RESINOUS/WAXY EXTRACTS, & CARTRIDGES – **% THC Threshold Testing Performed**: Analysis differentiating THC as defined by F.S.

893.03 from Low-THC Cannabis or Hemp is restricted to oils, liquids, waxy/resinous extracts with a net weight of 10 grams or more or a count of 10 vape cartridges or more. The following is a *typical* reporting format depending on the testing criteria met:

- **Tetrahydrocannabinols(s) *(weight with measurement uncertainty)* and the following remark→ (This meets the definition of Tetrahydrocannabinols in F.S. 893.03(1)(c)190. a.)**

b. THC OILS, LIQUIDS, RESINOUS/WAXY EXTRACTS, & CARTRIDGES – **%** THC Threshold Testing **NOT** Performed: For various reasons, these items may only qualify for regular testing known as CH-ID testing or Chemical Identification testing. When CH-ID testing is performed on these types of substances, the following is a *typical* reporting format depending on the testing criteria met:

- **Tetrahydrocannabinols(s) *(weight with measurement uncertainty)* and the following remark → The THC threshold analysis was not performed and cannot exclude "Low -THC Cannabis" as defined in F.S. 381.986 and "Hemp" as defined in F.S. 581.217.**

III. CANNABIS EDIBLES (CANDY, BROWNIES, COOKIES, GUMMIES, ETC.), BEVERAGES, TEAS, JUICES, & LOTIONS/BUTTER – These items **don't qualify** for THC Threshold Determination

a. CANNABIS EDIBLES (CANDY, BROWNIES, COOKIES, GUMMIES, ETC.), BEVARAGES, TEAS, JUICES, & LOTIONS/BUTTER – % THC Threshold Testing **CANNOT BE** Performed: For these items, we are unable to perform the CH-MD testing since a method for % THC Threshold Testing for this type of evidence does not exist. These items only qualify for regular testing known as CH-ID testing or Chemical Identification testing. When CH-ID testing is performed on these types of substances, the following is a *typical* reporting format depending on the testing criteria met:

- **Tetrahydrocannabinols(s) *(weight with measurement uncertainty)* and the following remark→ The THC threshold analysis was not performed and cannot exclude "Low -THC Cannabis" as defined in F.S. 381.986 and "Hemp" as defined in F.S. 581.217.**

b. At this time, we recommend holding off on submitting suspected Cannabis Edibles, etc. and instead submitting suspected Cannabis plant material or Suspected THC Oils, Liquids, Resinous/Waxy Extracts & Vape Cartridges. Our testing methods will not be able to exclude Low-THC Cannabis or Hemp from THC for Cannabis Edibles evidence.

IV. EXCEPTIONS & SPECIAL CIRCUMSTANCES FOR ALL % THC Threshold Testing (CH-MD)

a. **EXCEPTIONS**: Exceptions to the above guidelines can be made in **writing** to the Seized Drugs Supervisor, Deborah Hahn. Please email deborahhahn@fdle.state.fl.us The submitting agency must bring a copy of the written approval with the evidence.

b. Plant material items that weigh a minimum of 50 grams are automatically tested using % THC Threshold Testing (CH-MD) as long as all items belong to the same subject and each item has a net weight of 4-5 grams.

c. The minimum weight or count that will be considered for Suspected THC Oils, Liquids, Resinous/Waxy Extracts is 1 gram or 1 Vape Cartridge to qualify for CH-MD testing.

d. Residues will not be approved for CH-MD testing.

e. CH-MD testing is more time consuming and uses more resources and therefore will be limited on each case. Analysts will test enough qualified or approved items to meet a felony weight or trafficking threshold.

f. All plant material evidence is required to have a minimum net weight of 4-5 grams that contributes to the 20 grams or more of plant material (*if approved*). This weight will be determined by the analyst performing the testing and if this requirement is not met, the analysis will revert back to CH-ID testing.

g. Weights will be determined by the analyst performing the testing and if the approved weights are not met, then the analysis will revert back to CH-ID testing rather than CH-MD testing.

h. ANALYSIS on accepted evidence will proceed on highest penalty item per subject. At times this may not be the items with CH-MD testing but rather CH-ID testing (i.e. 3rd tier trafficking in heroin).

i. Reports dated from 3/31/21 and forward will also include the specific isomer of THC if THC is identified such as delta 9 THC, etc.

V. PLANT MATERIAL SCENARIOS – 50 grams or more or (*Evidence has written approval for 20 grams or more of plant material)

- *One bag is submitted as Q1: The bag contains 25 grams of plant material = **QUALIFIES**
- 65 bags each containing 2 grams of plant material = **DOES NOT** *(The combined total is over 50 grams, but each bag contains less than 4-gram minimum sample size.)*
- *One bag is submitted as Q1: The bag contains 15 grams of plant material = **DOES NOT**
- *Two bags are submitted as Q1: Each bag contains 10 grams of plant material=**QUALIFIES** *(The combined total is 20 grams, both items belong to the*

same subject, and each item is over the 4-gram minimum.)

- *Two bags are submitted as Q1: One bag contains 17 grams of plant material and the second bag contains 3 grams of plant material = **DOES NOT** *(The combined total is 20 grams, but the 3-gram sample does not meet the minimum sample size of 4 grams; the item does not qualify for the CH-MD testing.)*
- *Ten bags are submitted as Q1: Each bag contains 2 grams of plant material= **DOES NOT**

  (The combined total is 20 grams, but each 2-gram sample does not meet the minimum sample size of 4 grams each; the item does not qualify for the CH-MD testing.)

- *Two items are submitted as Q1 and Q2 belonging to the same subject: Each item contains 12 grams of plant material = **QUALIFIES** *(The combined total is over 20 grams, each bag contains over 4 grams, and both items belong to the same subject.)*
- Two items are submitted as Q1 and Q2 belonging to different subjects: Each item contains 12 grams of plant material = **DOES NOT** *(The combined total is over 20 grams, each bag contains over 4 grams, but each item belongs to a different subject and therefore in reality is less than the 20 grams required per subject.)*
- Two items are submitted as Q1 and *Q2 belonging to different subjects: Q1 contains 10 grams and Q2 contains 25 grams = **Q1=DOES NOT**; **Q2=QUALIFIES** *(For Q1, the minimum weight of 20 grams is not met; Q2 only 1 bag and it is over 20 grams and meets the minimum sample size of 4 grams.)*

VI. SUSPECTED THC OILS, LIQUIDS, RESINOUS OR WAXY EXTRACTS, & CARTRIDGES SCENARIOS – 10 grams or more or 10 Cartridges or more (*Evidence has written approval for less than 10 grams or less than 10 cartridges)

- Two items are submitted as Q1 and Q2 belonging to the same subject: Each item contains 5 cartridges of THC oil = **QUALIFIES**
- Two items are submitted as Q1 and Q2 belonging to different subjects: Each item contains 5 cartridges of THC oil = **DOES NOT** (unless prior, written approval is obtained)
- THC Residue = **DOES NOT**
- THC Oils, Liquids, Resinous or Waxy Extracts weighing less than 1 gram = **DOES NOT**
- *Eight Vape Cartridges = **QUALIFIES**

Please reach out to the Seized Drug Supervisor, Debbie Hahn at deborahhahn@fdle.state.fl.us with any questions you have about your specific evidence scenarios.

Please note that % THC Threshold testing is the same as CH-MD Testing.

Appendix D

Type of Analysis	Sample	Charge	Cumulative $
HPLC/(+)ESI-MS	Solvent	$180	
	Sample	$180	
	Std Mix	$180	
Data processing		$105	$645
HPLC/(-)ESI-MS/MS for Acid forms	Solvent	$180	
	Sample	$180	
	Std Mix	$180	
Data processing		$105	$1,290
GC/Ei-MS	Solvent	$90	
	Sample	$90	
	Std Mix	$90	
Data processing		$105	$1,665

Data processing; 1 hr per sample/analysis

University based lab quotation to answer the *Stevenson* question