Examining/Exploring Judicial Interpretations and Reactions to DUI Laws

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Independent Study

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On the surface, a driving under the influence offense (DUI) would seem to be one of the most routinely prosecuted crimes in the country. A hypothetical example goes as follows; the defendant is pulled over by an officer for a traffic violation, the officer notices a strong odor of an unknown alcoholic beverage emitting from the drivers breath, and the driver has slurred speech and bloodshot glassy eyes. At the scene, field sobriety tests are administered by the officer, and after determining the driver has failed the tests, the driver is taken to the local detention center and submits to a blood test. The results reveal a blood-alcohol-content ("BAC"), which falls slightly below the proscribed legal limit and marijuana metabolite in his system to boot. Although the BAC is not high enough for a per se violation of the local DUI statute the prosecutor charges the driver under a subsection of the DUI statute that prohibits one to drive while under the combined influence of substances and alcohol. With these facts one would tend to think that the prosecutor has one of life's very rare slam-dunk cases.

But, what if the term "substances" is vague and does not provide adequate notice of what substances are prohibited? Or, what would happen if the prohibited "substances" were specifically detailed within the statute but marijuana metabolite was absent? Does this force a judge to dismiss the case, overturn a past conviction, or will judges expand on the plain statutory language and try to find these acts punishable by determining that such "substances" were within the legislative intent?

What if our defendant admits to being under the influence, but states that he was unaware that he consumed any alcohol or marijuana. How does a person's mens rea of willfully becoming intoxicated affect a charge of DUI?

Lastly, does a defendant have a right to claim as an affirmative defense, involuntary intoxication, or is his intoxication while driving, alone irrespective of intent, make him guilty of a per se violation of DUI? This examination of American DUI law provides an in-depth look at DUI laws and their due process implications as well as the rational behind what some legal commentators consider the "toughest"(and most emotion filled) laws in the country.

I. HOW HAVE COURTS INTERPRETED PROHIBITED DRUGS AND/OR SUBSTANCES IN DUI STATUTES?

A. Lack of Required Notice of Prohibited Conduct: Void-for-Vagueness

Under the due process clause a statute is void if it is so vague that, "men of common intelligence must necessarily guess at its meaning and differ as to its application."[1] Due process requires fair notice of prohibited conduct, and that law enforcement's discretion be shielded from arbitrary and discriminatory enforcement and be proscribed by definitive legislative standards.[2]

The Supreme Court of Alaska was faced with a challenge of a state law by a driver convicted of DWI who argued that Alaska Statute §28.35.030(a)(3)(1982), which states, " a person commits the crime of driving while intoxicated if he is under the **combined influence** of intoxicating liquor and **another substance**," was void for vagueness.[3] At trial it was shown that appellant Williford, "consumed an alcoholic beverage, Septra DS, and possibly a Tylenol 3."[4] Williford contended that the words

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[1]. LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 1033 (2d ed. 1988) (quoting Connally v. General Construction Co., 269 U.S. 385, 391 (1926).

[2]. *Id.* at 1033

[3]. LAWRENCE TAYLOR, DRUNK DRIVING DEFENSE 53 (5th ed. 1999) (emphasis added), AS §28.35.030(a)(3)(1982),

[4]. Williford v. Alaska, 674 P.2d 1329, 1330 (1983)

"combined influence" and "another substance" failed to provide adequate notice of prohibited conduct.[5]

The Supreme Court of Alaska agreed with the court of appeals that the term "combined influence" provided requisite notice of the prohibited conduct.[6] The court explained their holding as follows, "If the statute prohibited driving while under the combined influence of alcohol and Tylenol 3, for example, it would mean that Tylenol 3 must be a contributing factor in causing intoxication."[7] The Court however disagreed with the Court of Appeals' holding that "another substance" is not unconstitutionally vague.[8] The Supreme Court of Alaska stated that the Court of Appeals' finding that "another substance" was not unconstitutionally vague was premised on that court's improper substitution of the word "drug" for "substance."[9]

Under the Alaska's driving while intoxicated laws "substance" is not defined.[10] The Supreme Court held that "substance" is a much broader term than "drug", stating that the term "substance", "encompass[es] all matter, not just medicinal substances."[11] The state argued that the term "drug" in many jurisdictions is any substance or combination of substances, which could affect the person's brain, muscles, or nervous system, which would impair his ability to drive.[12] But, unlike provisions in those jurisdictions, the Alaska DWI statute is not aimed at impairment; instead it lists what amounts of alcohol and/or certain types of intoxicants are prohibited.[13] "§28.35.030(a)(2) forbids driving

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5. *Id.*
6. *Id.*
7. *Id.*
8. *Id.* at 1331
9. *Williford*, 674 P.2d 1329, 1331 (1983)
10. *Id.*
11. *Id.*
12. *Id.*
13. *Id.*

'while under the influence of intoxicating liquor, or any controlled substance listed in 11.71.140-11.71.190.' "[14] The aforementioned provision provides notice of the specific substance which a driver is prohibited from being under the influence of while driving, yet the "vague designation of the 'combined influence of intoxicating liquor and another substance' in AS § 28.35.030(a)(3) **offers no such notice**."[15] The Court held that, "the attachment of criminal responsibility to [the conduct proscribed by AS § 28.35.030(a)(3)] is prohibited by the constitutional requirement of notice and the [subsection] must fail for indefiniteness."[16]

B. Strict Constructionism: Inhalants not a Drug?

A court must attempt to interpret a statute by making a determination of and implementing the intent of the legislature.[17] "The best evidence of the Legislature's intent is the text of the statute itself."[18] When construing a statute the courts will often pursue the progression of the legislation in that area in order to expound the, "intent of the Legislature".[19] This method is applicable in cases where the Legislature has continually refined the statute as the science and social climate has progressed in that area of law.[20]

A DWI case coming out of New York questioned what the Legislature intended by "intoxication" in New York's Vehicle and Traffic Law § 1192(3). The statute, in

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[14]. *Williford*, 674 P.2d 1329, 1331 (1983)
[15]. *Id.* at 1331-32 (emphasis added)
[16]. *Id* at. 1332
[17]. People of The State of New York v. Litto, 2007 WL 1826925, 3 (N.Y.) (2007)
[18]. Brief for Petitioner-Appellant , People of The State of New York v. Litto, 2005 WL 4910601, 13 (N.Y. App. Div.2 Oct. 17, 2005)
[19]. *Litto*, 2007 WL 1826925, 3
[20]. *Id.*

pertinent part, reads, "the evidence must show that the defendant operate[d] a motor vehicle while in an intoxicated condition."[21] The facts are as follows,

> The defendant was driving a car with three passengers when he allegedly inhaled a portion of the contents of a spray can of "Dust-Off," veered into oncoming traffic, and collided with an on coming car. He was indicted and charged with, inter alia, driving while intoxicated pursuant to Vehicle Traffic Law § 1192(3) and vehicular manslaughter in the second degree pursuant to Penal Law § 125.12.[22]

The Supreme Court of Kings County dismissed the charges of DWI and Vehicular Manslaughter, holding that, "the evidence was legally insufficient to establish the offense of [DWI] pursuant to [V.T.L. § 1192(3)]" because that offense is only applicable to a driver whose intoxication results from the consumption of alcohol.[23] Subsequent to this decision, the People appealed to the Appellate Division, Second Department of New York, arguing that the plain language of V.T.L. §1192(3), "applies where the driver's intoxication is caused by a substance other than alcohol."[24]

In affirming the Supreme Court of Kings County decision, the Court explained that the 1966 Legislature enacted V.T.L. § 1192(4), "making it a misdemeanor to operate a motor vehicle while impaired by the use of a drug," with the clear intention that §1192 (4) was to prohibit one from being under the influence of drugs while driving, and that, "by implication, the Legislature recognized that [V.T.L. §1192(3)] did not proscribe such conduct. For us to hold otherwise would render section 1192(4) superfluous, a result to be avoided in statutory construction."[25]

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[21]. *Litto*, 2005 WL 4910601, 32
[22]. People of The State of New York v. Litto, 33 A.D.3d 625 (N.Y. App. Div.2 2006)
[23]. *Litto*, 2005 WL 4910601, 3
[24]. *Id.* at 1
[25]. *Litto*, 33 A.D.3d 625, 626

This decision was appealed to the Court of Appeals of New York, which affirmed the lower courts' holdings.[26] In coming to this determination, the Court of Appeals was guided as well by the Legislature's 1966 enactment of [V.T.L. §1192(4)].[27]

The People argued that, "the goal of the Legislature may be advanced by including use of drugs in the definition of 'intoxication'."[28] The Court stated that the Legislature has frequently used well-defined, "mechanisms to prevent deathly accidents related to alcohol and drugs. Including driving while under the influence of limitless 'drugs' as a violation of [DWI] has not been part of that mechanism." [29] The term "drug" when used in N.Y. Vehicle and Traffic Law §114-a chapter includes any substance within Public Health Law §3306.[30] Neither of the active components within Dust Off, difluoroethane or hydrocarbon are within the Public Health Law's § 3306 exhaustive list of controlled substances. Therefore, Litto could not have been charged under §1192 (4) as well.[31] In recognizing the forthcoming legal impact of such holding, Chief Judge Judith S. Kaye concluded her opinion as follows,

> "If the defendant did what the prosecution charges, then his conduct was reprehensible-his voluntary inhalation of hydrocarbon while driving resulted in the death of a young woman and serious injuries to others. Perhaps gaps exit in the law and the prosecution should not have to rely on the 12 other counts charged. However, a determination by this Court that intoxication in the Vehicle and Traffic Law § 1192(3) includes the use of any substance would improperly override the legislative policy judgment. Accordingly, the order of the Appellate Division should be affirmed."[32]

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26. *Litto*, 2007 WL 1826925, 11
27. *Id.* at 2, N.Y. Veh. & Traf. Law. §1192(4), §1192(3)
28. *Id.* at 9
29. *Id.*
30. *Id* at 3, Pub. Health Law § 3306, N.Y. Veh. & Traf. Law § 114-a
31. *Litto*, 2007 WL 1826925, 3
32. *Id.* at 11

C. Retroactive Judicial Expansion: Marijuana Metabolite

A violation of the Due Process Clause of the Fourteenth Amendment occurs when a statute creates ambiguity as to its meaning and possible applications.[33] In discussing judicial expansion of statutory language, the United States Supreme Court in Rogers stated, "Deprivation of the right to fair warning…can result both from vague statutory language and from an unforeseeable and retroactive judicial expansion of statutory language that appears narrow and precise on its face."[34]

In Nevada, Jessica Williams ("Williams") was charged with, "six counts each of driving and/or being in actual physical control of a vehicle while under the influence of a controlled substance and/or prohibited substance (marijuana and marijuana metabolite) in the blood or urine."[35] Williams was tried on two alternative theories: being under the influence of either marijuana (tetrahdrocannabinol) or marijuana metabolite (carboxylic acid).[36] The jury returned a general verdict of guilty with no indication of the legal theory on which the verdicts were founded.[37]

Williams then filed a post-conviction writ of habeas corpus in the district court claiming that the conviction was unconstitutional because one of the theories on which the jury was presented, that being, "driving with marijuana metabolite in her blood… were improper because marijuana metabolite, carboxylic acid, is not a prohibited substance under NRS 484.1245."[38] The district court agreed and ordered her convictions be reversed, holding that carboxylic acid is not listed as a schedule I or II drug under the

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33. U.S. CONST. amend. XIV, §1, Bouie v. City of Columbia, 378 U.S., 347, 352 (1964)
34. Petition for a Writ of Certiorari, Nevada v. Williams, 2004 WL 1947195, 3 (Aug. 30, 2004), (quoting Rogers v. Tennessee, 532 U.S. 451 (2000)
35. Nevada v. Williams, 93 P.3d 1258, 1259 (2004)
36. *Williams*, 2004 WL 1947195, 1
37. *Id.* at 1-2
38. *Williams*, 93 P.3d 1258, 1259, Nev. Rev. Stat. §484.1245

Nevada guidelines and, "is not a prohibited substance under NRS 484.1245 or 484.379(3)".[39]

The State subsequently appealed the district court's decision and the Supreme Court of Nevada reversed the district court's order holding that marijuana metabolite is listed as a prohibited substance under NRS 484.379 and 484.1245.[40] However, Williams Writ of Certiorari, stated that under NRS 484.1245,

> " 'Prohibited Substance' means any of the following substances [which includes Marijuana or Marijuana Metabolite] **if** the person who uses the substance has not been issued a valid prescription to use the substance **and the substance is classified in schedule I or II pursuant to NRS 453.166 or 453.176 when it is used**."[41]

Williams contended that substances only become prohibited if, "the substance is classified in schedule I or II pursuant to 453.166 or 453.176… The plain reading of NRS 484.1245 holds that marijuana metabolite can be used as a theory of prosecution only if it is listed in the schedules."[42] The Supreme Court of Nevada looked back to the May 5th, 1999, Assembly Judiciary Committee meeting where the committee, "expressed the view that having a specific standard for measuring substances listed would be more defensible than simply looking for detectable amounts of each substance." Because there was a standard for detection of marijuana metabolite within the blood, the list of prohibited substances was amended to include such.[43] Although marijuana metabolite is not a schedule I or II drug, the Supreme Court of Nevada held that, "it is clear from the plain

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39. *Id.* 1260, Nev. Rev. Stat. §484.1245,Nev. Rev. Stat. § 484.379(3)
40. *Id.* at 1261, 1263, Nev. Rev. Stat. §484.1245, Nev. Rev. Stat. §484.379
41. *Williams*, 2004 WL 1947195, 5 (emphasis original), Nev. Rev. Stat. §484.1245, Nev. Rev. Stat. §453.166, Nev. Rev. Stat. §453.176
42. *Id.* at 6
43. *Williams*, 93 P.3d 1258, 1262, Hearing of S.B. 481 Before the Assembly Comm. on Judiciary, 70th Leg. (Nev., May 5, 1999), Hearing of S.B. 481 Before the Assembly Comm. on Judiciary, 70th Leg. (Nev., May 12, 1999)
46. *Id.* at 1262

language of both NRS 484.379 and 484.1245 that marijuana metabolite is a prohibited substance."[44] Williams responded to the courts' holding:, "[a]cting as a judicial legislature in violation of the United States Constitution, the Nevada Supreme Court "*rewrote*" NRS 484.1245 to deny Williams her constitutional right to a new trial."[45]

D. Analysis of the Courts' Rationales and Holdings

In the cases just detailed, the courts have been placed in the challenging position of making determinations that both comport to the rules of statutory interpretation and balance due process rights with the welfare of the public at large. Williford, overturned a driving while under the influence conviction, based upon the courts finding that the subsection of the DWI law in which the defendant was charged with was unconstitutionally vague.[46] The court held that "another substance" was too broad of a term and lacked the requisite notice in determining which "substances," when combined with the influence of alcohol, would subject one to criminal liability thereunder AS §28.35.030(a)(3)(1982).[47] Although enforcement of such law may provide the State with a very large net to catch anyone who might be a danger to the community (as to DWI), the due process rights of the defendant would have been offended if such a vague law were upheld.

Unlike Alaska, the Nevada Supreme Court did not give the defendant, Jessica Williams, her right to due process of the law. The tragic circumstances, surrounding the case only magnified the state of Nevada's interest and the substance of the holding. The Nevada Supreme Court was faced with plain statutory language under NRS 484.1245, which clearly stated that in order for a substance to be prohibited and one to be charged

4447. *Williams*, 2004 WL 1947195, 7 (emphasis original)
4548. *Williford*, 674 P.2d 1329
4649. *Id.*
47

for its use while driving the substance shall be listed in schedule I or II. [48] By admitting that marijuana metabolite was not within the required schedules, the court journeyed beyond the plain reading of the language of the statute and acted as "mini-legislature" in reaching its holding that marijuana metabolite was a "prohibited substance." [49]

In Litto, the Court of Appeals of New York affirmed the lower court's holding that Litto could not be convicted under V.T.L. §1192(3), because he was not intoxicated by alcohol.[50] Here, the People argued that the statute's use of the term "intoxication" was not limited to intoxication by alcohol.[51] The Court held that if the Peoples' contention were true, the Legislature would have had no reason to enact V.T.L. §1192(4), which prohibits driving while impaired by drugs.[52] The enactment of V.T.L. §1192(4) gave the public required notice of specifically what "drugs" were prohibited in the context of the statute.[53] Unfortunately, the compounds of Dust-Off were not listed within subsection (4), meaning Litto could not be convicted under either subsection.[54] To hold that "intoxication" is a term that encompasses a limitless array of substances or compounds would leave the public uniformed as to what exactly they can and cannot have within their system while driving. This inherent ambiguity would plainly go outside the bounds of the fundamental fairness of the justice system.

II. HOW HAVE COURTS REACTED TO AFFIRMATIVE DEFENSES, NAMELY INVOLUNTARY INTOXICATION?

48. *Williams*, 2004 WL 1947195, 5
49. *Williams*, 93 P.3d 1258, 1262
50. *Litto*, 2007 WL 1826925, 11
51. *Litto*, 2005 WL 4910601, 3
52. *Litto*, 2007 WL 1826925, 2
53. *Id.* at 3
54. *Id.*

A. The Burden of Proof Requirement: The Affirmative Defense Shift

The States are afforded the power to regulate procedures which carry out their laws, for example, the burden of production and the burden of persuasion.[55] Due Process does not require a State to disprove every fact constituting an affirmative defense which relates to the guilt of the accused.[56] In discussing the shifting of the burden of proof to the defendant as to an affirmative defense the Supreme Court of the United States stated,

> "[W]ithin limits of reason and fairness the burden of proof may be lifted from the state in criminal prosecutions and cast on a defendant…the state shall have proved enough to make it just for the defendant to be required to repel what has been proved with excuse or explanation, or at least that upon a balancing of convenience or of the opportunities for knowledge the shifting of the burden will be found to be an aid to the accuser without subjecting the accused to hardship or oppression."[57]

Under the due process clause, one cannot lose his liberty absent the Government carrying the burden of proving to the factfinder he is indeed guilty of the crime charged.[58] "The reasonable doubt standard is derived from the due process clause and is the historical barrier to arbitrary deprivation of freedom in the criminal justice system."[59] The reasonable doubt standard prohibits the burden of proof from, shifting to the accused as to any element of the offense.[60] In Winship, the Supreme Court of the United States discussed the importance of the reasonable doubt standard stating, "[A] society that values the good name and freedom of every individual should not condemn a man for commission of a crime when there is reasonable doubt about his guilt."[61]

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55. Patterson v. New York, 432 U.S. 197, 201-202 (1977)
56. *Id.* at 208-210
57. Morrison v. California, 291 U.S. 82, 88-89 (1934)
58. In re Winship, 397 U.S. 358, 364 (1970)
59. JOHN E. NOWAK & RONALD D. ROTUNDA, PRINCIPLES OF CONSTITUTIONAL LAW 322 (2d ed. 2005)
60. *Id.*
61. *Winship*, 397 U.S. 364

In Commonwealth v. Collins, the Superior Court of Pennsylvania dealt with the issue of whether shifting the burden of proof to the defendant as to, "an affirmative defense that does not negate an element of the crime charged is improper and contrary to the presumption of innocence and section 301 of the Pennsylvania Crimes Code"[62] The facts which lead to this case, involve inter alia, Collins attending a neighborhood party where she accepted a drink which, "tasted like fruit punch," and shortly thereafter she left the party, and was seen swerving into oncoming traffic, and eventually pulled off the road and was found by police slumped over her steering wheel unconscious.[63] Collins was taken to the hospital and a urine sample was taken which, "tested positive for phencyclidine [aka] PCP."[64] "Collins testified at trial that she never voluntarily ingested PCP and can only assume it was slipped into her drink without her knowledge."[65] The trial court instructed the jury that if they found that the Commonwealth met its burden of proof to all the elements of the offense, then they may consider any affirmative defenses, and in order for the jury to find the defendant not guilty, Collins must prove her affirmative defense of involuntary intoxication by a preponderance of the evidence.[66] The jury found Collins guilty of driving under the influence of a controlled substance.[67] The defense argued that the trial courts jury instruction on involuntary intoxication was improper because the burden of proof was improperly shifted to the defendant.[68] Collins stated,

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62. Brief for Petitioner-Appellant Commonwealth of Pennsylvania v. Collins 2002 WL 32352739, 3 (PA Super. Jul. 1, 2002), 18 Pa.Cons. Stat. § 301
63. 810 A.2d 698, 699 (2002 PA Super. 344)
64. *Id.*
65. *Collins,* 2002 WL 32352739, 3
66. 810 A.2d 701
67. *Id.* at 700
68. *Collins,* 2002 WL 32352739, 3

> "Section 301 of the Pennsylvania Crimes Code requires a voluntary act before criminal liability will attach… Although the Driving Under the Influence statute in Pennsylvania, 18 Pa.C.S. §3731, does contain express language setting forth the culpability requirement, it is fundamental to our notion of justice that some evidence of criminal intent is required to make an individual's actions subject to prosecution."[69]

The defense contended, that Collins acted without the required mens rea, and to shift the burden of proof upon her would unjustly require the defendant to prove her innocence.[70] The Superior Court of Pennsylvania responded, stating, "the statute does not make use of the terms 'intentionally', 'knowingly' or 'willfully'. Therefore, the Commonwealth was not required to prove that Collins's intoxication was intentional or voluntary."[71] Furthermore, the Court reiterates that 18 Pa.C.S. § 305 states that the voluntary act requirement within Section 301 only comports to offenses within Title 18, and that elements of DUI are stated within Title 75, therefore DUI is excluded from such voluntary requirement.[72] In order for the court to hold in favor of the arguments made by Collins, they would be placed in the position of acting as a quasi-legislature by adding the element of voluntariness to the Pennsylvania DUI statute.[73] In determining that Driving Under the Influence is a strict liability offense, the court held that the trial court's jury instruction on the shifting of the burden of proof upon the defendant for the affirmative defense of involuntary intoxication was proper, and therefore affirmed Collins guilty verdict.[74]

In several instances, courts have found that a trial judge refusing to give the jury an instruction on involuntary intoxication as an affirmative defense to DUI constituted

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69. *Id.*, 18 Pa.Cons. Stat. §3731
70. *Id.*
71. 810 A.2d 702, 75 Pa.Cons. Stat. § 3731(a)(2)
72. *Id.* at 703, 18 Pa.Cons. Stat. § 305, 18 Pa.Cons. Stat. § 301, 75 Pa.Cons. Stat. § 3731(a)(2)
73. *Id* at 702
74. *Id.* at 703

reversible error.[75] In Georgia, a defendant was found guilty of driving under the influence of alcohol and drugs and the evidence at trial showed that he had a BAC of 0.09 combined with Gamma Hydroxy Butyrate ("GHB") of 98 milligrams per liter of blood.[76] At trial, the judge instructed the jury that, "[t]he defense of involuntary intoxication is not available to excuse driving under the influence."[77] The Court of Appeals of Georgia held that involuntary intoxication is a recognized affirmative defense to DUI, and that the aforementioned jury instruction was clearly erroneous.[78] "Furthermore, the error was not harmless, as the defendant raised the issue of involuntary intoxication in his testimony when he claimed that someone put an unknown drug in his drink unbeknownst to him."[79] The Court reversed the conviction and remanded for a new trial.[80]

A similar result occurred in Florida where again a trial judge refused to read the jury an instruction on involuntary intoxication to the charge of DUI, and the resulting conviction was reversed and remanded.[81] In Carter, "[The] defendant requested a jury instruction on involuntary intoxication; however, the trial judge agreed with the state that there is no intent element in the offense of DUI, that the statute imposes strict liability, and refused to give the instruction."[82] On appeal, the District Court of Appeal of Florida, Fourth District, in addressing whether a DUI under Florida law was a strictly liable offense which afforded no opportunity of an affirmative defense, the Court responded by stating that the, "criminalization of conduct without fault is constitutionally limited to

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75. Carter v. Florida, 710 So.2d 110 (Fla. Dist. Ct. App 4th 1998), Colon v. State, 568 S.E.2d 811 (Ga. Ct. App. 2002)
76. *Colon*, 568 S.E.2d 813
77. *Id.* at 815
78. *Id.*
79. *Id.*
80. *Id.* at 816
81. *Carter*, 710 So.2d 111-13
82. *Id.*

minor infractions such as parking violations or other regulatory offenses."[83] In discussing the nature of strict liability offenses that do not offend due process the Supreme Court of the United States, stated in Morissette v. United States,

> "The accused, if he does not will the violation, usually is in position to prevent it with no more care than society might reasonably expect and no more exertion than it might reasonably exact from one who assumed his responsibilities. Also penalties commonly are small, and conviction does not grave damage to an offender's reputation."[84]

The Florida Court described *Morissette* as a, "landmark federal decision in this area."[85] Accordingly, the Florida Court recognized that the involuntary intoxication defense does not change what the state is required to prove in order to, "establish a prima facie case of DUI by [BAC] or other evidence."[86] The Court held that where there is evidence, "that the defendant unknowingly ingested a substance… and drove without the knowledge that he was or would become impaired… an instruction on involuntary intoxication should be given."[87] In considering the state's position that the failure to give an involuntary intoxication instruction was harmless due to the defendant's behavior during his arrest, the court held, "this error has constitutional due process implications… it is not harmless."[88]

B. Volition and Knowledge of Intoxication: Prescription Drugs

Where a defendant becomes involuntarily intoxicated to a point where he no longer has the mental capacity to appreciate the nature of his acts, many but not all courts

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83. *Id.*
84. 342 U.S. 246, 256 (1952)
85. *Carter*, 710 So.2d 113
86. *Id.*
87. *Id.*
88. *Id* (citing State v. DiGuilo, 491 So.2d 1129 (1986)

have held that such intoxication may excuse acts that otherwise would be deemed criminal.[89]

The Supreme Court of Nevada has held that a defendant may not defend a DUI charge on the notion that he was without knowledge that he became intoxicated.[90] This holding was reaffirmed in Whisler v. Nevada, when a defendant on appeal argued that his conviction of driving under the influence of a controlled substance under NRS 484.379 should be overturned because the trial court both refused to instruct the jury that the State must prove beyond a reasonable doubt that he was not involuntary intoxicated, and because of the trial court's erroneous instruction that involuntary intoxication was not a viable defense.[91] Evidence at trial showed that at the time of the Whisler's arrest he had, "5,000 nanograms per milliliter of carisoprodol (trade name Soma), 8,200 ng/mL of meprobamate, 390 ng/mL of diazepam (trade name Valium), 510 ng/mL of nordiazepam and 39 ng/mL of temazepam," in his system.[92] Whisler's defense at trial was that his intoxication unexpectedly resulted from the combination of medications that he had ingested.[93] As to Whisler's contention that the under NRS 484.379 the State must prove that he knowingly or willfully became intoxicated, the court stated that the term "willfully" describes driving, not, willfully becoming impaired, willful.[94] "To require the State to prove knowledge of intoxication or impairment would create too heavy a burden on the State and endanger the public."[95]

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89. 21 Am. Jur. 2d Criminal Law § 171
90. Slinkard v. State, 793 P.2d 1330, 1332 (1990)
91. 116 P.3d 59, 63-64(2005), Nev. Rev. Stat. §484.379
92. *Id.* at 61
93. *Id.*
94. *Id.* at 63-64
95. *Id.* at 64

On the opposite end of the spectrum, under Massachusetts law a defendant may not be convicted for driving while under the influence, "unless he knew or had reason to know of the possible effects of the [proscribed] drug on his driving abilities."[96] In Commonwealth v. Wallace, the trial court precluded the defendant from introducing evidence that he was unaware of the possible effects of his proscribed medication (chlordiazepoxide) and that he did not receive any warnings about the side effects of the medication.[97] Defendant was subsequently found guilty of driving under the influence of drugs under G.L. v. 90, § 24[1][a].[98] In reviewing the controversy, The Appeals Court of Massachusetts, Middlesex, stated,

> "Although the circumstances of a person who drives after taking a prescription drug unaware of its possible effects differ significantly from those of a person forced to drive after having a potion rammed down his throat or after being tricked, such circumstances also differ substantially from those of a person who drives voluntarily consuming alcohol or drugs whose effects are [known] or should be known. The law recognizes differences, and authorities have characterized as 'involuntary intoxication by medicine' the condition of a defendant who has taken prescribed drugs with severe unanticipated effects."[99]

The Commonwealth argues that G.L. v. 90, § 24[1][a] is a "public welfare" statute which imposes strict liability irrespective of intent.[100] Under common law some intent was required to find one criminally liable and due process requires a degree of notice, therefore courts generally will not infer an intent by the legislature to hold one strictly liable for an offense absent express language by the legislature.[101] In reversing the defendant's conviction and remanding the case for trial, the Court held, "it was error to

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96. Comm. v. Wallace, 439 N.E.2d 848, 853 (Mass. App. Ct. 1982)
97. *Id.* at 849
98. *Id.*, Mass. Gen. Laws ch. 90, § 24[1][a]
99. *Id.* at 850
100. *Id.*
101. 439 N.E.2d 848, 852 (citing 342 U.S. 246 250-51, Lambert v, California, 355 U.S. 225, 228 (1957), State v. Brown, 16 P. 259 (1888))

preclude the defendant from introducing evidence that he did not know of the possible effects of the medication on his driving ability, that he did not receive warnings as to its use, and that he had no reason to anticipate the effects."[102]

In Commonwealth v. Smith, the defendant was convicted of operating a motor vehicle while under the influence of alcohol to such a degree as to render her incapable of safe driving in violation of 75 Pa.C.S.A. § 3731(a)(1).[103] On appeal the defendant claimed that, "involuntary intoxication is a cognizable affirmative defense in a DUI prosecution… [and that] she was not criminally culpable for her conduct because she was unaware…[that] the prescribed duragesic patch she was wearing would heighten the effects of the alcohol she voluntarily ingested."[104] The Superior Court of Pennsylvania analogizes relieving one of criminal responsibility because the defendant's intoxication was involuntary with one being relieved of criminal responsibility because he was legally insane during the commission of the crime.[105] Involuntary intoxication has been recognized as a defense in limited circumstances:

> "(1) where the intoxication was caused by the fault of another (i.e. through force, duress, fraud, or contrivance); (2) where the intoxication was caused by an innocent mistake on the part of the defendant (i.e. the defendant took hallucinogenic pill in reasonable belief it was aspirin or lawful tranquilizer); (3) where a defendant knowingly suffers from a physiological or psychological condition that renders him abnormally susceptible to a legal intoxicant (sometimes referred to as pathological intoxication); and (4) where unexpected intoxication results from a medically prescribed drug."[106]

The defendant contends that her intoxication resulted from the unexpected effect of the patch mixed with alcohol, and that she clearly falls under number four of the

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102. 439 N.E.2d 852
103. 831 A.2d 636 (2003 PA Super. 301), 75 Pa.Cons. Stat. § 3731(a)(1)
104. *Id.* at 638- 39
105. *Id.* at 639
106. *Id.*

recognized involuntary intoxication defenses.[107] But, the defendant does not claim that the patch was the lone source of her intoxication, here she claims that the patch combined with alcohol (which she voluntarily consumed) created the unexpected intoxication.[108] Model Penal Code § 2.08 (5)(b) defines "self induced" intoxication as, "intoxication caused by substances that the actor knowingly introduces into his body, the tendency of which to cause intoxication he knows or ought to know…"[109] Pennsylvania's definition of "self-induced" intoxication is in line with the Model Penal Code and therefore, the Court held that the defendant's voluntary consumption of her prescribed medical patch and alcohol would not deem her resulting intoxication as "involuntary" regardless of her allegation that she was unaware of the synergistic effect.[110] The defendant's conviction was affirmed.[111]

C. Analysis of the Courts' Rationales and Holdings

The aforementioned cases have exemplified the uniqueness of DUI law within the United States. The constitutional requirement charges the State with the burden to prove every element of the criminal offense beyond a reasonable doubt has been complied with in DUI cases simply by statutory language. The aforementioned DUI statutes examined lacked any language stating that a person's intent to become intoxicated is an element of the crime. Therefore, under a generic DUI statute, if the State proves the defendant was driving and/or in actual physical control of a vehicle while under the influence of alcohol (with a proscribed BAC level) and/or under the influence of a drug or controlled

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107. 831 A.2d 640
108. *Id.*
109. Model Penal Code. § 2.08 (5)(b)
110. 831 A.2d 641
111. *Id.*

substance, every element to the crime charged is proven and the defendant has per se violated the statute irrespective of the defendant's intent to become intoxicated.

In Commonwealth v. Collins, the Superior Court of Pennsylvania held that if the Commonwealth proved all the elements to the offense of DUI (which lacked any mens rea as to becoming intoxicated), then a jury may consider an affirmative defense of involuntary intoxication which the defendant must prove by a preponderance of the evidence, and if he does so then the jury must acquit.[112] The courts rationale is consistent with the reasonable doubt standard where the state need only prove the elements of the crime beyond a reasonable doubt. The burden of proving that the defendant's intoxication was not voluntary would seem most fittingly placed upon the defendant since he is the one in the best position to bring any facts forth which tend to prove his contention. In order for the state to prove that every defendant that is charged with a DUI had the intent to become willfully intoxicated would place a significant burden upon the State and would bring the prosecution of DUI's to a screeching halt. The shifting of the burden of proof as to the involuntariness of ones intoxication in a charge for DUI affords the defendant a viable opportunity to excuse his seemingly criminal behavior without placing an impossible barrier for the State to the prosecute these cases.

The Georgia and Florida reached the conclusion that a trial judge's failure or refusal to read a jury an instruction on the affirmative defense of involuntary intoxication amounted to reversible error.[113] Holding one criminally responsible for conduct which he had no control over would be out of line with the supposed fundamental fairness of the criminal justice system. The courts here recognized that although willful intoxication is

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[112]. 810 A.2d 703

[113]. *Colon*, 568 S.E.2d 811, *Carter*, 710 So.2d 110

not an element of the crime charged, to find one liable for an offense with high criminal sanctions and probable social repercussions would be nonsensical when the one charged intoxication was a result of his own victimization.[114]

Unlike Georgia and Florida, Nevada does not allow for one to defend on the theory that their intoxication was not "willful" in nature.[115] In Whisler, the Nevada Supreme Court held that under NRS 484.379, the term "willfully" referred to one's driving and not willfully becoming intoxicated, and that the trial court was correct in its assertion that knowledge of ones intoxication is not a viable defense.[116] Here, like in Williams, the Nevada Supreme Court has tipped the scales in favor of what they seem to believe is the best interest of public welfare over that of an individuals right to only be punished for conduct for which he is responsible. By punishing drivers who are found to be under the influence without regard as to their culpability or lack thereof, for becoming intoxicated completely disregards the notion of mens rea as to criminal liability.

The Commonwealth of Massachusetts's holding in Wallace is closely aligned with the precedent that criminal liability generally cannot be found without some criminal intent of the party being charged.[117] This Court concluded that precluding the defendant from introducing that he did not know the possible effects of the medication prescribed was reversible error and that they would not interpret a statute to impose strict liability without regard to criminal intent unless expressly stated by the legislature.[118] Although intent may not be an element to an offense, the conclusion that intent is wholly irrelevant

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114. *Id.*
115. *Slinkard*, 793 P.2d 1330, 1332
116. 116 P.3d 59, 63-64
117. 439 N.E.2d 848, 852
118. *Id.* at 850

to the culpability of a defendant would unsuccessfully try to place "law" in terms of strictly "black and white", taking away the "gray" area where the law tends to reside.

Smith is an example of defendants trying to completely absolve themselves of any criminal responsibility simply because they failed to use their common sense. The defendant in Smith argued that she could not be held criminally responsible for the charge of DUI because she was unaware of the effects of her prescription medication combined with her voluntary consumption of alcohol.[119] Unlike a true example of involuntary intoxication, where a defendant consumed a drugged beverage and then drove unaware of the forthcoming intoxication, Smith either knew or should of known that mixing alcohol and her medication patch would cause intoxication. This begs the question: Was the defendant's behavior reasonable? If one were to conclude that it is reasonable to drive when you are unaware that you have been drugged then it would seem fair to relieve one of criminal responsibility. But, if one concludes that mixing medication and alcohol and then driving is unreasonable behavior, then a DUI conviction would be appropriate.

CONCLUSION

Court interpretations of what prohibited drugs and/or substances are within DUI statutes are anything but uniform across the United States. After a look at just some of the cases, it is clear that the Legislature's task in drafting statutes that are deemed to give notice of the prohibited conduct, as required by due process, is complicated to say the least. If a court reads the statute as too broadly prohibiting an area of unknown "substances" or "drugs," it would cast too large a net on unexpecting resulting in a high likelihood that the statute would be held void for vagueness and consequently struck

[119]. 831 A.2d 640

down by the court. But, if the Legislature drafts DUI statutes with extreme specificity to such a point were a defendant may be charged under a certain subsection of the DUI statute for being under the influence of a drug, instead of alcohol, if such drug is not stated within the statute as prohibited, the prosecution may not be able to charge on the theory of general "intoxication," because a court may hold that the "intoxication" subsection refers only to intoxication by alcohol, presuming that the Legislature would have no reason to add a drug subsection to a DUI statute if that was not the case. Furthermore, in an effort to protect the public welfare, courts like the one in Nevada have retroactively expanded the language of DUI statutes to find that a marijuana metabolite is a "prohibited substance" even though it does not satisfy the guidelines proscribed by the statute to be a "prohibited substance" and therefore held the defendant criminal liability without required notice of the prohibited conduct, in contravention of the defendant's due process rights.

Through legislative creativity, DUI statutes have eliminated a mens rea requirement of willfully becoming intoxicated. This leaves anyone who is found driving and/or in actual physical control of a vehicle while under the influence per se in violation of the statute. This crafting of DUI statutes has left the defendant in the position of having to prove their innocence by a preponderance of the evidence when circumstances surrounding their intoxication were no fault of their own. The affirmative defense of involuntary intoxication is vital to a defendant that was a victim of his or her circumstances. When a person is drugged or becomes intoxicated due to being uninformed of the possible effects of proscribed medication, (when it is deemed reasonable that the defendant was unaware of the effects of the medication), they cannot

be held liable for their actions while in their intoxicated condition. If intent to become intoxicated were an element to the offense of DUI, the State would be highly unsuccessful in prosecuting these crimes, an unbelievable amount of time and money would be necessary to prosecute these cases, and consequently the State would pursue these charges less and less which would inevitably lead to the public perception of the "de-criminalization" of DUI's and lead to a rise in alcohol and drug related deaths on the road.