

South Dakota Law Review

Volume 63 | Issue 1

2018

What's in a Name Anyway: Reevaluating South Dakota's Cannabis Statutory Scheme

Eric Schlimgen

Follow this and additional works at: <https://red.library.usd.edu/sdlrev>

Recommended Citation

Eric Schlimgen, *What's in a Name Anyway: Reevaluating South Dakota's Cannabis Statutory Scheme*, 63 S.D. L. REV. 44 (2018).

Available at: <https://red.library.usd.edu/sdlrev/vol63/iss1/7>

This Article is brought to you for free and open access by USD RED. It has been accepted for inclusion in South Dakota Law Review by an authorized editor of USD RED. For more information, please contact dloftus@usd.edu.

“WHAT’S IN A NAME ANYWAY?”: REEVALUATING SOUTH DAKOTA’S CANNABIS STATUTORY SCHEME

ERIC SCHLIMGEN[†]

With the recent increase of cannabis activity in neighboring states, as well as the United States as a whole, South Dakota has seen an increase in cannabis cases. In response, the South Dakota Legislature has enacted laws in an effort to regulate cannabis. However, the laws in place are outdated in comparison to the advances in the cannabis industry. Additionally, South Dakota case law is void of guidance on interpreting the existing cannabis statutory scheme. Currently, several of South Dakota’s statutes are conflicting and vague. Due to the language of the existing laws, legislative intent and the practical effect are juxtaposed; for example, individuals with high level tetrahydrocannabinol (“THC”) in “flowering” or natural form cannabis are charged with a misdemeanor, while individuals with low level THC in an extract are charged with a felony. Essentially, the law no longer effectuates the purpose of protecting against high levels of THC, resulting in arduous consequences for the judicial system. This comment argues for the repeal of current South Dakota cannabis statutes and adoption of new legislation with inclusive terms that comports with cannabis advances to effectuate the goals of public safety and logical enforcement.

I. INTRODUCTION

The marijuana and edibles consumed now are not the same products of the 1970s and neither are the gummy bears.¹ South Dakota’s legislature has not attempted to remain contemporary with the developments of the cannabis industry; the current statutory language makes interpretation, prosecution, and defense of cannabis cases arduous.²

Copyright © 2018. All rights reserved by Eric Schlimgen and the *South Dakota Law Review*.

[†] J.D., 2016, University of South Dakota School of Law; M.P.A., 2016, University of South Dakota; B.A. in Political Science and Criminal Justice, 2013, University of South Dakota. I would like to thank the *South Dakota Law Review*, my friends who gave meaningful feedback when I was lost in the haze of this Comment, and a special thanks to my devoted editor and friend: Cameron Cook. I would also like to thank the Judges of the Fourth Circuit, but especially the recently appointed Circuit Court Judge, Eric Strawn. Judge Strawn, thank you for sharing your zeal for justice and compassion with me during the tenure of my clerkship.

1. Zlatko Mehmedic et al., *Potency Trends of Δ9-THC and Other Cannabinoids in Confiscated Cannabis Preparations from 1993 to 2008*, 55 J. FORENSIC SCI. 1209, 1216 (2010); Cheri Sicard, *10 Extremely Potent Cannabis Edibles*, HIGH TIMES (July 22, 2016), <http://hightimes.com/edibles/foods/10-extremely-potent-cannabis-edibles>. See also *Marijuana far more potent than it used to be, tests find*, CBS NEWS (Mar. 23, 2015), <http://www.cbsnews.com/news/marijuana-far-more-potent-than-it-used-to-be-tests-find> [hereinafter *Marijuana far more potent than it used to be*] (stating that “[t]oday’s marijuana is more potent by far than the weed sold a generation ago, according to new data being presented Monday at the national meeting of the American Chemical Society”).

2. Stewart Huntington, *Legal definitions of new marijuana products—like wax—cause problems*, KOTA TV (Mar. 6, 2017), <http://www.kotatv.com/content/news/Legal-definitions-of-new-marijuana>

The overall trend for the past several decades has been to breed marijuana with increasing amounts of THC.³ In the 1970s, marijuana purchased “on the street” typically contained less than 1% THC; marijuana containing over 20% THC in medical dispensaries is now commonplace.⁴ Additionally, the amount of THC in cannabis wax varies greatly; it has been estimated to contain as much as 90% THC.⁵ Essentially, the “goods” (marijuana and THC derivatives) have changed, but the laws—at least in South Dakota—have not.⁶

The recent South Dakota Supreme Court case *State v. Schrempp*⁷ illuminates the ongoing difficulty defendants, prosecutors, and the judiciary face in classifying THC under the current statutory scheme.⁸ In *Schrempp*, the defendant was indicted for eight drug-related offenses.⁹ The day before trial, during a pretrial motions hearing, the State noted that it had corresponded with defense counsel about an amendment to the indictment.¹⁰ The State, after obtaining test results from a chemist, wanted to amend counts three and seven to reference “Delta-9-Tetrahydrocannabinol” in place of “hashish.”¹¹ The parties consented to the

products—like-wax—cause-problems—415523103.html. Rena Hymans, a local defense attorney, stated,

I don't think the law in South Dakota is meeting the purpose I think that it was intended to meet and that was to keep high potency high concentration levels of THC (the active ingredient in pot) out of its citizens hands At this time it's not linked to concentration levels. It's linked to other things such as plant material. It's just unclear and I don't think it accomplishes the goal the legislature intended.

Id.

3. *Marijuana far more potent than it used to be*, *supra* note 1.

4. See Caleb Hellerman, *Is super weed, super bad?*, CNN (Aug. 9, 2013), <http://www.cnn.com/2013/08/09/health/weed-potency-levels/index.html> (“[T]he average THC content of marijuana has soared from less than 1% to 3 to 4% in the 1990s, to nearly 13% today.”); *Colorado Marijuana Study Finds Legal Weed Contains Potent THC Levels*, NBC NEWS (Mar. 23, 2015), <https://www.nbcnews.com/storyline/legal-pot/legal-weed-surprisingly-strong-dirty-tests-find-n327811> (describing that levels of THC in marijuana have grown from 10% to over 30% in Colorado, with some samples showing a THC level of 20%). See also Ana Cabrera, *Colorado marijuana's potency getting 'higher'*, CNN (Oct. 21, 2016), <http://www.cnn.com/2016/10/21/health/colorado-marijuana-potency-above-national-average> (noting there are currently no regulations in Colorado limiting THC levels).

5. Mallory Loflin & Mitch Earleywine, *A New Method of Cannabis Ingestion: The Dangers of Dabs?*, 39 ADDICTIVE BEHAV. 1430, 1430 (2014).

6. Huntington, *supra* note 2.

7. 2016 SD 79, 887 N.W.2d 744.

8. See *State v. Schrempp*, 2016 SD 79, ¶¶ 5-9, 887 N.W.2d 744, 747 (appealing jury's conviction of defendant for various marijuana-related offenses).

9. See *id.* ¶ 5, 887 N.W.2d at 746. The offenses included possession of one-half pound but under one pound of marijuana (South Dakota Codified Law section 22-42-6); possession with intent to distribute or dispense more than one-half pound but less than one pound of marijuana (South Dakota Codified Law section 22-42-7); possession of a controlled substance, hashish (South Dakota Codified Law section 22-42-5); possession of a controlled substance, cocaine (South Dakota Codified Law section 22-42-5); maintaining a place where drugs are kept, sold, or used (South Dakota Codified Law section 22-42-10); possession with intent to distribute or dispense more than one-half pound but less than one pound of marijuana (South Dakota Codified Law section 22-42-7) in a drug-free zone (South Dakota Codified Law section 22-42-19); possession with intent to manufacture controlled substance, hashish (South Dakota Codified Law section 22-42-2); and possession or use of drug paraphernalia, digital scales (South Dakota Codified Law section 22-42A-3). *Id.*

10. *Id.* ¶ 6, 887 N.W.2d at 746.

11. *Id.*

change, and the indictment was amended to replace “hashish” with “Delta-9-Tetrahydrocannabinol AKA Hashish.”¹²

The South Dakota Supreme Court relied on the testimony from the chemist and found that hashish or Delta-9-Tetrahydrocannabinol “are at least related substances.”¹³ Exercising prudence, the court was not concerned with the technicalities of “whether the drug in question is technically known as hashish or by its chemical compound Delta-9-Tetrahydrocannabinol,” because “the name is not an essential element of the offenses as both are controlled Schedule I substances.”¹⁴ The cloudiness of classifying the substance, as noted in *Schrempp*, is only the most recent acknowledgement of the lack of clarity in South Dakota’s disheveled cannabis statutory scheme. This lack of clarity in the statutes bolsters the underlying point, paraphrasing from *Schrempp*; the name of the substance is not essential.¹⁵

Additionally, South Dakota circuit courts have applied the doctrine of *in pari materia* in recent cannabis cases, electing to view the South Dakota cannabis statutes collectively.¹⁶ The shared holding of these circuit court decisions indicates that within the statutory scheme there are two marijuana statutes—one for “flowering” marijuana and one for marijuana outside the plant.¹⁷ Within the

12. *Id.*

13. *Id.* ¶ 17, 887 N.W.2d at 749. The court wrote,

Erin McCaffrey, a forensic analyst, testified that hashish is made by extracting the Delta-9-Tetrahydrocannabinol either chemically or physically by heating the marijuana. When asked by the prosecutor how she tested for “hashish or Delta-9-Tetrahydrocannabinol,” McCaffrey stated, “I usually physically observe it, look to see under a microscope to see if I see any green plant material in it.” McCaffrey’s usage of the singular pronoun in this context indicates that she would test for hashish or Delta-9-Tetrahydrocannabinol in the same way, which would indicate that they are at least related substances.

Id.

14. *See id.* ¶ 18, 887 N.W.2d at 749 (citing *State v. Fisher*, 2013 SD 23, ¶ 28, 828 N.W.2d 795, 803 n.7) (articulating that “an indictment may be amended when it does not change the elements of the offense”).

15. *Id.* ¶ 17, 887 N.W.2d at 749. *See also* *State v. Petruzello*, 250 N.W.2d 682, 683 n.1 (S.D. 1977) (stating in a footnote, “[t]etrahydrocannabinol other than that which occurs in marijuana in its natural and unaltered state.” As amended, subsection (12) is apparently intended to include only the synthetic form of THC); *State v. Lorenz*, 2001 SD 17, ¶¶ 11-12, 622 N.W.2d 243, 244 (arguing that South Dakota Codified Law section 22-42-1(7) should be interpreted to differentiate marijuana and “ditch weed”).

16. Memorandum Decision at 9, *State v. Harrison*, 46CRI16-213 (Fourth Circuit South Dakota, Feb. 10, 2017) [hereinafter Memorandum Decision, *State v. Harrison*]; Findings of Fact and Conclusion of Law at 7, *State v. Gonzales*, 40CRI16-830 (Fourth Circuit South Dakota, Feb. 22, 2017) [hereinafter Findings of Fact, *State v. Gonzales*]; Memorandum Decision at 7, *State v. O’Connor*, 09CRI16-000195 (Fourth Circuit South Dakota, Feb. 17, 2017) [hereinafter Memorandum Decision, *State v. O’Connor*]. *See also* *Erlenbaugh v. United States*, 409 U.S. 239, 243-44 (1972) (noting statutes relating to the same subject matter, statutes *in pari materia*, should be construed together); *Goetz v. State*, 2001 SD 138, ¶ 26, 636 N.W.2d 675, 683 (quoting 2B SUTHERLAND, STATUTORY CONSTRUCTION § 51:3 (6th ed. 2000)) (The rule of *in pari materia* applies when statutes “relate to the same . . . thing, to the same class of . . . things, or have the same purpose or object ‘Characterization of the object or purpose is more important than characterization of the subject matter in determining whether different statutes are closely related enough to justify interpreting one in light of another.’”).

17. Memorandum Decision, *State v. Harrison*, *supra* note 16, at 11-15; Findings of Fact, *State v. Gonzales*, *supra* note 16, at 4-13; Memorandum Decision, *State v. O’Connor*, *supra* note 16, at 9-14. *See also* S.D.C.L. § 34-20B-1(12) (2011 & Supp. 2017) (defining marijuana as “all parts of any plant of the genus cannabis, whether growing or not; the seeds thereof”); S.D.C.L. § 22-42-1(7) (2006 & Supp.

definition of the marijuana statute for marijuana outside the plant, there is an exemption that has been held by the circuit court decisions to mean the THC outside the marijuana plant remains housed under the marijuana statute, as opposed to the tetrahydrocannabinol statute.¹⁸ The consequence of housing THC in the marijuana statute, instead of under the tetrahydrocannabinol statute, is the difference between a misdemeanor or felony.¹⁹

South Dakota Governor Dennis Daugaard has also approved a bill that removed cannabidiol ("CBD") from the definition of marijuana, making CBD oil a Schedule IV controlled substance.²⁰ Senate Bill 95 is significant as it notes a distinction of compounds within the cannabis plant.²¹ Additionally, with the progress from pro-marijuana groups advocating for medical or recreational marijuana germinating in South Dakota, the time for legislative clarity in South Dakota's cannabis statutes is even more urgent.²² The adoption of new cannabis statutes will "nip" the disparities of penalties under the current scheme and potential wave of increased cannabis complications from a ballot initiative—absent definitions—"in the bud."²³

This comment will first examine the emergence of new trends in the cannabis industry.²⁴ Next, this comment will provide an overview of the history of federal and South Dakota classification and regulation of cannabis generally.²⁵ It will then analyze South Dakota's statutes regulating cannabis (collectively, marijuana, tetrahydrocannabinol, and hashish).²⁶ Next, this comment assesses South Dakota Supreme Court and circuit court decisions involving cannabis.²⁷ Finally, this

2017) (defining marijuana as "all parts of any plant of the genus cannabis, whether growing or not, in its natural and unaltered state . . .").

18. See, e.g., Memorandum Decision, *State v. Harrison*, *supra* note 16, at 8 (referencing South Dakota Codified Law section 34-20B-14(20) which lists tetrahydrocannabinol as a hallucinogenic substance, apart from that which is naturally found in marijuana in an unaltered state).

19. See S.D.C.L. § 22-42-6 (2006 & Supp. 2017) (listing penalties for possession of marijuana according to amount held); S.D.C.L. § 22-42-5 (2006 & Supp. 2017) (stating knowing possession of a controlled substance or drug is a class four felony).

20. *South Dakota allows controlled access to cannabidiol*, MARIJUANA POLICY PROJECT (Oct. 13, 2017), <https://www.mpp.org/states/south-dakota>.

21. S.B. 95, 2017 Leg., 92nd Sess. (S.D. 2017).

22. See Chris Huber, *Group Pushing for Vote on Recreational Pot in SD*, RAPID CITY J. (Jan. 8, 2017), http://rapidcityjournal.com/news/local/group-pushing-for-vote-on-recreational-pot-in-sd/article_44487fa7-90cb-56fb-a28e-58058ccacd49.html (stating that "New Approach South Dakota will submit the proposal for an initiated measure to go to a statewide vote on the 2018 ballot. The group . . . plans to begin gathering signatures after [the attorney general] explanation is released. A separate measure reviving the medical marijuana issue has also been submitted for the statewide ballot process"); Pat Powers, *Attorney General Ballot Explanations Released for Two Initiated Measures on Legalizing Marijuana*, DAKOTA WAR COLLEGE (Mar. 28, 2017), <http://dakotawarcollege.com/attorney-general-ballot-explanations-released-for-two-initiated-measures-on-legalizing-marijuana/> (stating the "Attorney General Explanations for two proposed initiated measures have been filed with the Secretary of State").

23. See *Marijuana Overview*, NAT'L CONFERENCE OF STATE LEGISLATURES (Apr. 3, 2017), <http://www.ncsl.org/research/civil-and-criminal-justice/marijuana-overview.aspx> [hereinafter *Marijuana Overview*] (noting multiple states have proposed and enacted legislation with distinctions in cannabis regulation by THC percentage and for other purposes such as medical, low THC/high CBD, and hemp).

24. See *infra* Part II.A.1-4 (detailing various forms of cannabis products).

25. See *infra* Part II.B-C (describing federal and state cannabis laws).

26. See *infra* Part II.C (describing state cannabis laws).

27. See *infra* Part II.C.1-3 (noting important state and circuit court decisions).

comment provides an overview of regulatory schemes implemented by other states.²⁸ This comment concludes by urging South Dakota to retire its current cannabis statutes and offers a suggestion for an update to the statutory framework governing cannabis.²⁹

II. BACKGROUND

Marijuana goes by many names, for a non-exhaustive example: pot, weed, ganja, Mary Jane, reefer, and devil's lettuce.³⁰ Whichever name given to marijuana is largely irrelevant—outside the statutory component of definitions.³¹ What is important, however, is how cannabis has evolved in “flowering,” edible, wax, and synthetic forms. To gain some sense of the scope of the industry of cannabis, it is noteworthy that “North American marijuana sales grew by an unprecedented 30% in 2016 to \$6.7 billion as the legal market expand[ed] in the [United States] and Canada.”³² By 2021, sales in North America are predicted to reach \$20.2 billion at a compound growth rate of 25%.³³ The marijuana industry has grown faster and larger “than even the dot-com era.”³⁴

A. THE MANY FACES OF CANNABIS

1. High Potency Marijuana

The cannabis plant contains over seventy “phytocannabinoids.”³⁵ The two most common psychoactive elements are Delta-9-Tetrahydrocannabinol (“THC”) and cannabidiol (“CBD”).³⁶ THC and CBD work against each other: THC produces the “high” associated with marijuana, and CBD counteracts the

28. See *infra* Part II.D.1-6 (stating regulations other states have implemented).

29. See *infra* Part III (giving a recommendation for an updated statutory scheme).

30. See *Street Names Marijuana*, DRUG FREE WORLD, <http://www.drugfreeworld.org/drugfacts/marijuana/edibles.html#streetnames> (last visited Dec. 14, 2017) (listing twenty-four names for marijuana); *What is Marijuana or Hashish and how is it used?*, DRUGS (Nov. 13, 2016), <https://www.drugs.com/illicit/hashish.html> (noting “[t]here are over 200 street names for marijuana including pot, herb, dope, reefer, grass, weed, ganja, Mary Jane, boom, gangster and chronic”); Josh Terry, *Euphemisms for marijuana, ranked*, CHICAGO TRIBUNE (Apr. 20, 2016) <http://www.chicagotribune.com/redeye/redeye-marijuana-euphemisms-slang-ranked-20160420-story.html> (ranking twenty-four name for marijuana).

31. See, e.g., *State v. Schrempp*, 2016 SD 79, ¶ 18, 887 N.W.2d 744, 747 (standing for the proposition the name is not of the most importance, but the schedule of the drug is crucial).

32. Debra Borchardt, *Marijuana Sales Totaled \$6.7 Billion In 2016*, FORBES (Jan. 3, 2017), <https://www.forbes.com/sites/debraborchardt/2017/01/03/marijuana-sales-totaled-6-7-billion-in-2016/#7da13ac975e3>.

33. *Id.*

34. *Id.*

35. Joe Pierre, *Skunk, Wax, and Edibles: What Marijuana Is Your Child Using?*, PSYCHOLOGY TODAY (Jan. 18, 2017), <https://www.psychologytoday.com/blog/psych-unseen/201701/skunk-wax-and-edibles-what-marijuana-is-your-child-using>.

36. *Id.*

high.³⁷ CBD also has other medicinal and neuroprotective properties.³⁸ The emerging trend is to cultivate marijuana with higher amounts of THC and lower amounts of CBD.³⁹ Whereas in the 1970s, marijuana contained less than 1% THC, by 2012, the THC level had risen to more than 12%.⁴⁰ THC levels are even as high as 20% in states that have legalized marijuana.⁴¹ The level of THC depends on the species of plant, its anatomy, and strain.⁴²

2. "Edibles"

Smoking or chewing is no longer the only method of ingesting cannabis.⁴³ Cannabis can be mixed into a variety of foods and drinks, including tinctures, chocolates, cereals, cooking oils, desserts, drinks, snack foods, spreads, candies, pills, and chewing gum.⁴⁴ There are three categories that edibles fall into:

- (1) Edibles absorbed by the body through gastrointestinal uptake (digested through the stomach);
- (2) Edibles absorbed through saliva or oral uptake; and
- (3) Edibles that fit into a hybrid category and are absorbed both gastrointestinally and orally.⁴⁵

Because THC is absorbed through the stomach instead of the lungs, the "high" produced by eating edibles is different from the one produced by smoking marijuana.⁴⁶ The "high" is generally slower to arrive, lasts longer, and is often more intense because people will overeat marijuana edibles while waiting for the high to take effect.⁴⁷ On the other hand, people who smoke marijuana get high

37. *Id.*

38. *Id.* See also 1 DAVID EVANS, DRUG TESTING LAW, TECHNOLOGY & PRACTICE § 1:19 (West 2017) (noting "[m]arijuana contains 500 chemicals including over 100 compounds called cannabinoids, including cannabitol, cannabidiol, cannabitolidic acids, cannabigerol, cannabichromene, and several isomers of tetrahydrocannabinol (THC)").

39. Pierre, *supra* note 35.

40. *Id.*

41. *Id.* See also Cabrera, *supra* note 4 (noting there are currently no regulations in Colorado limiting THC levels); Sarah Maslin Nir, *Chasing Bigger High, Marijuana Users Turn to 'Dabbing'*, NY TIMES (May 12, 2016), https://www.nytimes.com/2016/05/13/nyregion/chasing-bigger-high-marijuana-users-turn-to-dabbing.html?_r=2.

42. Pierre, *supra* note 35. For example, "Cannabis indica tends to have a higher THC to CBD ratio than Cannabis sativa." *Id.*

43. *Infused Edibles*, MED. JANE, <https://www.medicaljane.com/category/cannabis-classroom/consuming-cannabis/edibles/> (last visited Nov. 8, 2017).

44. Christina Cole, *Chew on This: Learning from Colorado's Edible Marijuana Market*, 11 J. FOOD L. & POL'Y 203, 209 (2015); *Drug Facts: Marijuana*, NAT'L INST. DRUG ABUSE (last updated Aug. 2017), <http://www.drugabuse.gov/publications/drugfacts/marijuana>; John Hudak, *Colorado's Rollout of Legal Marijuana Is Succeeding: A Report on the State's Implementation of Legalization*, 65 CASE W. RES. L. REV. 649, 667 (2015).

45. Cole, *supra* note 44, at 209.

46. Narc News, *Marijuana "Edibles" Cause Concerns in Colorado*, 41 NARCOTICS L. BULL. (2014).

47. *Id.* See also 1 DAVID EVANS, DRUG TESTING LAW, TECHNOLOGY & PRACTICE § 1:18 (West 2017) (stating that "[e]dibles take longer to digest and produce a high. Therefore, people may consume more to feel the effects faster, leading to dangerous results").

quicker; which allows them to better regulate their high.⁴⁸ Inconsistent THC potency in edibles is also a serious problem.⁴⁹ Potency errors in edibles make even responsible consumption challenging.⁵⁰ When there is substantially more THC in an edible than is labeled, overconsumption can occur even when the consumer follows directions carefully.⁵¹

3. Cannabis “Wax”

One method of extracting THC is referred to as “solvent extraction.”⁵² This process uses butane to produce a cannabis wax that is sticky, hard, and hyper-concentrated.⁵³ Cannabis wax is used when a small “dab” of it is heated and the vapors inhaled, giving this method the name “dabbing.”⁵⁴

Amounts of THC in cannabis wax vary, but reports have revealed that THC levels can reach as high as 90% THC.⁵⁵ Even more conservative findings on THC concentrations in cannabis wax put the percentage at 20 to 25% THC.⁵⁶ Aside from burn injuries related to its production, use of cannabis wax is associated with a more intense high, as well as less common effects; such as passing out, rapid

48. Narc News, *supra* note 46.

49. Josiah M. Hesse, *Dazed & Infused: Five Legit Reasons Why Your Edibles High is Unpredictable*, THE CANNABIST (Jun. 5, 2015), <http://www.thecannabist.co/2015/06/05/marijuana-edibles-pot-effects-highs-unpredictable/33489/>. Brooke Wise, owner of The Growing Kitchen, stated “the scientific data showing exactly how the type of food in an edible interacts with the cannabis is ‘probably 10 or 15 years’ into the future but adds that ‘cannabis acts as a catalyst with other herbs, making (the infused foods) significantly more powerful than any of those things by themselves,’ she says. ‘It’s like how if you consume olive oil with tomatoes it helps your body absorb the nutrients, as opposed to if you were to consume those two things separately. When you mix omega oils and agave nectar and cannabis, the end result is incredibly different.’” *Id.*

50. *Id.*; Ricardo Baca, *Tests Show THC Content in Marijuana Edibles is Inconsistent*, DENVER POST (Mar. 8, 2014), <http://www.denverpost.com/2014/03/08/tests-show-thc-content-in-marijuana-edibles-is-inconsistent/> (reporting that edibles labeled as containing 100 milligrams of THC contained less than half of one milligram of THC; in others, 100 milligram packages had nearly 1.5 times the stated amount of THC).

51. Baca, *supra* note 50. See also Robert T. Hoban & Raushanah A. Patterson, *Sprung from Night into the Sun: An Examination of Colorado’s Marijuana Regulatory Framework Since Legalization*, 8 KY. J. EQUINE, AGRIC. & NAT. RESOURCES L. 225, 259-60 (2015) (describing how the Marijuana Policy Project has started an awareness campaign called “Consume Responsibly” that advises adults to “start low and go slow” when eating marijuana edibles in order to avoid overdosing); Ryan Vandrey et al., *Cannabinoid Dose and Label Accuracy in Edible Medical Cannabis Products*, 313 JAMA 2491, 2491-93 (2015) (detailing results of investigation into label accuracy of marijuana edibles).

52. Pierre, *supra* note 35.

53. *Id.*

54. *Id.* See also Tiffany John, *Dabbing: What You Need to Know About the Latest Marijuana Craze*, NAT’L CTR. ADDICTION & SUBSTANCE ABUSE (Mar. 24, 2015), <http://www.centeronaddiction.org/the-buzz-blog/dabbing-what-you-need-know-about-latest-marijuana-craze>.

Dabbing allows the user to ingest a high concentration of [THC], the psychoactive ingredient in marijuana. Butane Hash Oil (BHO), an oil or wax-like substance extracted from the marijuana plant, is placed on a “nail” attached to a specialized glass bong called a “rig.” A blow torch is used to heat the wax, which produces a vapor that can then be inhaled. This ingestion method means the effects of dabbing can be felt instantaneously.

Id.

55. Pierre, *supra* note 35; Loflin & Earleywine, *supra* note 5, at 1430.

56. Loflin & Earleywine, *supra* note 5, at 1430.

heartbeat, confusion, and psychosis.⁵⁷ Some have reported that cannabis wax may be associated with greater tolerance and withdrawal (two aspects of physiologic addiction) compared to smoking "regular" marijuana.⁵⁸

4. Synthetics

Synthetic drugs are made-man chemical substances that are produced in laboratories and are designed to have the same molecular structure and effect of naturally occurring drugs, such as opium and cocaine.⁵⁹ Methamphetamine and ecstasy were among the first synthetic drugs made and were imported into the United States through black markets.⁶⁰ Synthetic drugs have been marketed as the "legal" alternative to illegal drugs, like cocaine, marijuana, and heroin, causing law enforcement to encounter new issues in the war on drugs.⁶¹

Two categories of substances comprise the new breed of synthetic drugs: "(1) synthetic cannabinoids (commonly referred to as 'synthetic marijuana,' 'Spice,' or 'K2'); and (2) synthetic cathinones (commonly referred to as 'bath salts')." ⁶² This new era of synthetic drugs also includes substances such as "phenethylamines (e.g. the 2C compound series), piperazines, tryptamines, and arylcyclohexamines."⁶³ There is, however, an almost infinite amount of various chemical compositions that drugs could be made into.⁶⁴ New compositions of drugs can appear on the market quickly, making it hard for state governments to keep rapidly-changing products under control.⁶⁵ One researcher referred to the effort to prevent new substances from emerging, banning them, and immediately facing another substance as a "whack-a-mole" game.⁶⁶

57. Patricia A. Cavazos-Rehg et al., *A Content Analysis of Tweets About High-Potency Marijuana*, 166 DRUG & ALCOHOL DEPENDENCE 100, 100 (2016); Joseph M. Pierre et al., *Cannabis-Induced Psychosis Associated with High Potency "Wax Dabs"*, 172 SCHIZOPHRENIA RES. 211, 212 (2016); Corey J. Keller et al., *A Case of Butane Hash Oil (Marijuana Wax)-Induced Psychosis*, 37 SUBSTANCE ABUSE 384, 384-86 (2016).

58. Cavazos-Rehg, *supra* note 57, at 100.

59. Joseph A. Cohen, *The Highs of Tomorrow: Why New Laws and Policies Are Needed to Meet the Unique Challenges of Synthetic Drugs*, 27 J.L. & HEALTH 164, 164 (2014).

60. *Id.* at 164-65.

61. *Id.* at 165.

62. *Id.*

63. *Id.*

64. *Id.*

65. *Id.*

66. *Id.* (citing Olga Khazan, *Synthetic Drugs Are Multiplying Too Fast for Regulators to Outlaw Them*, ATLANTIC (Jun. 27, 2013), <http://www.theatlantic.com/international/archive/2013/06/synthetic-drugs-are-multiplying-too-fast-for-regulators-to-outlaw-them/277321/>).

B. THE HISTORY OF NATIONAL MARIJUANA LAWS

To start with, cannabis is illegal under federal law, regardless of whether it is used for medical or recreational purposes.⁶⁷ The first act the federal government took to regulate marijuana was in 1937 with the passage of the Marijuana Tax Act.⁶⁸ Similar to the Harrison Narcotic Act of 1914, the act taxed and regulated drugs, instead of prohibiting them.⁶⁹ As a result, the act was less susceptible to legal challenges and was characterized as a revenue measure.⁷⁰ Despite this characterization, both the Harrison and Marijuana Acts had the effect of outlawing sale or possession of heroin, marijuana, and other drugs.⁷¹ Soon after, mandatory sentences began to be imposed on drug offenders after passage of the Boggs Act of 1952.⁷²

Marijuana use gradually became more restricted, coming to a head in the Controlled Substances Act (“CSA”), which classified marijuana as Schedule I substance and made it illegal in any form.⁷³ In 1970, Congress passed the Comprehensive Drug Abuse Control Act (“CDACA”), which “was designed to regulate and control the manufacture, importation, distribution, possession, and proper use of controlled substances within the United States.”⁷⁴ The CSA, Title II of the CDACA, classifies substances into five schedules.⁷⁵

67. Scott C. Martin, *A Brief History of Marijuana Law in America*, TIME (Apr. 20, 2016) <http://time.com/4298038/marijuana-history-in-america/>.

68. *Id.* See also Richard J. Bonnie, *The Surprising Collapse of Marijuana Prohibition: What Now?*, 50 U.C. DAVIS L. REV. 573, 577 (2016) (noting “[t]his period of local suppression and exaggeration led to federal enactment of the Marihuana Tax Act in 1937 and was followed by an escalation of penalties for the so-called ‘narcotic’ drugs in the 1950s, characterized by the new claim that marijuana use is a ‘steppingstone’ to use of heroin”).

69. Martin, *supra* note 67.

70. *Id.*

71. *Id.*

72. *Id.* See also Elena Quattrone, *The “Catch-22” of Marijuana [Il] Legalization*, 22 B.U. J. SCI. & TECH. L. 299, 307 (2016) (describing that both the Boggs Act of 1952 and the Narcotics Control Act of 1956 both set mandatory sentences for marijuana offenders).

73. 21 U.S.C.A. § 812 (West 2017); William Vertes & Sarah Barbantini, *Caught in the Crossfire: The Dilemma of Marijuana “Medicalization” for Healthcare Providers*, 58 WAYNE L. REV. 103, 105 (2012); U.S. DEP’T. JUST., Controlled Substance Schedules, <http://www.justice.gov/dea/pubs/scheduling.html> (last visited Dec. 9, 2017).

74. Vertes & Barbantini, *supra* note 73, at 107; 21 U.S.C.A. § 801(1) (West 2017).

75. Comprehensive Drug Abuse Prevention and Control Act of 1970, Pub. L. No. 91-515, 84 Stat. 1236 (codified as amended in scattered sections of 21 in the United States Code).

The five schedules are identified as Schedules I,⁷⁶ II,⁷⁷ III,⁷⁸ IV,⁷⁹ and V.⁸⁰ Schedule I is the most restrictive category and Schedule V is the least restrictive.⁸¹ Currently, Schedule I drugs or substances include some opiates and opiate derivatives, as well as hallucinogenic substances, including any drug or substance containing THC, like marijuana.⁸² The findings required to place a controlled substance on Schedule I are that: "(A) [t]he drug or other substance has a high potential for abuse[;] (B) [t]he drug or other substance has no currently accepted medical use and treatment in the United States[;] [and] (C) [t]here is a lack of accepted safety for use of the drug or other substance under medical supervision."⁸³

Since new synthetic substances were not scheduled, the Analogue Act was put in place to become the enforcement authority of federal law.⁸⁴ The number of people charged under the Analogue Act is significant.⁸⁵ Despite the increase in convictions, prosecution of manufacturers and sellers of new synthetic drugs under the Analogue Act is challenging.⁸⁶

Convictions are largely determined on a subjective expert's testimony as to whether compounds are similar or dissimilar—a "battle of the experts"—and is especially difficult due to the burden of convincing lay jury members that a substance is an illicit drug beyond a reasonable doubt.⁸⁷ Even if the jury is convinced in one case that a drug is analogous to another, that does not mean that a similar result is reached in other cases involving the same drug.⁸⁸

76. 21 U.S.C.A. § 812(b)(1)(A-C) (West 2017) (stating Schedule I drugs have three characteristics: "a high potential for abuse," "no currently accepted medical use in treatment in the United States," and "a lack of accepted safety for use of the drug or other substance under medical supervision").

77. 21 U.S.C.A. § 812(b)(2)(A-C) (West 2017) (noting Schedule II drugs also have three characteristics: "a high potential for abuse," "a currently accepted medical use in treatment in the United States or a currently accepted medical use with severe restrictions," and "[a]buse of the drug or other substances may lead to severe psychological or physical dependence").

78. 21 U.S.C.A. § 812(b)(3)(A-C) (West 2017) (describing the three characteristics of Schedule III drugs: "a potential for abuse less than the drugs or other substances in Schedule I or II," "a currently accepted medicinal use in the United States," and abuse "may lead to limited physical dependence or psychological dependence").

79. 21 U.S.C.A. § 812(b)(4)(A-C) (West 2017) (noting Schedule IV drugs or substances have "a low potential for abuse" compared to Schedule III drugs or substances, have an "accepted medical use in treatment the United States," and could have a limited potential for physical or psychological dependence when compared to Schedule III drugs or substances").

80. 21 U.S.C.A. § 812(b)(5)(A-C) (West 2017) (explaining Schedule V drugs present the least amount of risk for abuse, have "a currently accepted use in medicinal treatment in the United States," and have an even more limited likelihood of leading to physical or psychological dependence compared to Schedule IV drugs and substances").

81. 21 U.S.C.A. § 812.

82. *Id.*

83. 21 U.S.C.A. § 812(b)(1)(A-C).

84. Cohen, *supra* note 59, at 175.

85. *Id.* at 176.

86. *Id.*

87. *Id.*

88. *Id.* at 176-77.

Congress enacted the Synthetic Drug Abuse Prevention Act of 2012 (“SDAPA”) in an attempt to fill in holes left by the CSA.⁸⁹ The act bans twenty-six substances, but there are hundreds more drugs that could also be included.⁹⁰ In fact, the Drug Enforcement Administration (“DEA”) estimates there are up to 250 other synthetic drugs on the market.⁹¹

C. SOUTH DAKOTA’S CANNABIS LAWS

The following South Dakota Statutes define Hashish, Tetrahydrocannabinol, Manufacture of Marijuana, Marijuana, Synthetic Cannabinoids, and Possession: South Dakota Codified Law sections 34-20B-14(10), (20), 34-20B-1(9), (11), (12), (46), 22-42-1(6), (7), 22-42-5 and 22-42-6.⁹²

1. Principles of Statutory Interpretation

No legislature functions without some amount of error, and some statutes and cases create ambiguities when compared to one another.⁹³ Courts are, therefore, required to resolve uncertainties in the law through the process of statutory interpretation.⁹⁴ Statutory interpretation has been used by judiciaries as far back as 1786.⁹⁵ This process enables the judiciary to analyze laws to determine legislative intent.⁹⁶ The judiciary must, however, protect society from overreaching judicial legislation by observing rules and boundaries.⁹⁷ The court must always keep in mind that dispensing justice is the fundamental purposes of the legal system.⁹⁸

89. *Id.* at 177; Synthetic Drug Abuse Prevention Act of 2012, S. 3190, 112 Cong., 2d Sess. (2012) (enacted), codified at 21 U.S.C.A. § 812(d)(1-2) (West 2017).

90. Cohen, *supra* note 59, at 177; 21 U.S.C.A. § 812(d)(2)(A-B) (West 2017).

91. Cohen, *supra* note 59, at 177.

92. See *infra* Part V (reprinting relevant parts of South Dakota Codified Laws section 34-20B-1, South Dakota Codified Laws section 34-20B-14, South Dakota Codified Laws section 22-42-1, South Dakota Codified Laws section 22-42-5, and South Dakota Codified Laws section 22-46-6).

93. Brad J. Lee, *Faircloth v. Raven Industries: A Departure From South Dakota Case Law Precedent and Public Policy*, 47 S.D. L. REV. 612, 612 (2002). See also *In re Jetter*, 1997 SD 125, ¶ 20, 570 N.W.2d 26, 30-31 (quoting *In re Olson*, 332 N.W.2d 711, 713 (S.D. 1983)) (stating “language is ambiguous when it is reasonably capable of being understood in more than one sense”).

94. Lee, *supra* note 93, at 612. See also *In re Famous Brands, Inc.*, 347 N.W.2d 882, 885 (S.D. 1984) (stating that “[t]hus it has been said that whatever its opinion may be as to the wisdom of a statute or the necessity for further legislation, the duty of a court is to apply the law objectively as found, and not to revise it”).

95. Lee, *supra* note 93, at 612. See also *Kerlin’s Lessee v. Bull*, 1 Dall. 175, 178 (1786) (explaining that the court should favor a resolution in favor of equity when there is confusion concerning which rule of law should apply).

96. Lee, *supra* note 93, at 612. See also *In re Famous Brands*, 347 N.W.2d at 884 (“The purpose of rules regarding the construction of statutes is to discover the true intention of the law . . .”).

97. Lee, *supra* note 93, at 612. See also *Delano v. Petteys*, 520 N.W.2d 606, 607 (S.D. 1994) (quoting *In re Famous Brands*, 347 N.W.2d at 884) (stating “[t]he purpose of rules regarding the construction of statutes is to discover the true intention of the law, and said intention is to be ascertained by the court primarily from the language expressed in the statute”).

98. See, e.g., S.D.C.L. § 15-6-8(f) (2015) (“[a]ll pleadings shall be so construed as to do substantial justice”); *Morgan v. Baldwin*, 450 N.W.2d 783, 786 (S.D. 1990) (stating the court is “required to construe

In South Dakota, the adjudicatory process for cannabis cases relies on the canons of statutory interpretation to determine the statute's meaning and apply the statutory language to the facts of the case.⁹⁹ Judicial resolution depends upon a careful examination of the statute and its language.¹⁰⁰ As stated in *M.B. v. Konenkamp*,¹⁰¹ "[t]he intent of the statute must be determined from what the legislature said, rather than what this court thinks the legislature should have said, and this determination must be confined to the plain, ordinary meaning of the language used by the legislature."¹⁰² Thus, the canons of statutory construction and interpretation are paramount to determine whether a person is in violation of South Dakota's cannabis laws. Accordingly, "[t]he correct rule of interpretation of a statute is that if divers statutes relate to the same thing, they ought all to be taken into consideration in construing any one of them."¹⁰³ Lastly, "[w]hen called upon to construe ambiguous statutes, courts may look to 'the legislative history, title, and the total content of the legislation.'"¹⁰⁴

2. The Limited South Dakota Supreme Court Case Law

The limited relevant South Dakota Supreme Court precedent includes *State v. Petruzello*¹⁰⁵ and *State v. Schrempp*, which address the intricacies of distinguishing marijuana and Delta-9-Tetrahydrocannabinol.¹⁰⁶ In *State v. Lorenz*,¹⁰⁷ the court addressed the definition of marijuana and refrained from adopting a THC percentage approach.¹⁰⁸ Although not examined in detail, *State v. Toben*,¹⁰⁹ addresses the struggle in defining synthetics in the ever-evolving synthetics industry.¹¹⁰

pleadings liberally for the purpose of determining its effect with a view of doing substantial justice between the parties").

99. See NORMAN J. SINGER & SHAMBIE SINGER, SUTHERLAND STATUTES AND STATUTORY CONSTRUCTION §§ 20:1, 45:03, 45:04 (7th ed. 2017) (explaining the canons of statutory construction and interpretation).

100. *Id.* § 45:04. See also *Doe v. Quiring*, 2004 SD 101, ¶ 18, 686 N.W.2d 918, 923 (noting the court would not interpret a statute to reach an absurd result).

101. 523 N.W.2d 94 (S.D. 1994).

102. *Id.* at 97.

103. *Pucket v. Hot Springs School Dist.*, 526 F.3d 1151, 1158 (quoting *United States v. Freeman*, 44 U.S. 556, 564 (1845)). See also *Food & Drug Admin. v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000) (quoting *Davis v. Mich. Dep't of Treasury*, 489 U.S. 803, 809 (1989)) (noting the United States Supreme Court has repeatedly stated that "[i]t is a 'fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme'").

104. *In re Oliver*, 2012 SD 9, ¶ 15, 810 N.W.2d 350, 354 (quoting *Zoss v. Schaefers*, 1999 SD 105, ¶ 6, 598 N.W.2d 550, 552).

105. 250 N.W.2d 682 (S.D. 1977).

106. *State v. Petruzello*, 250 N.W.2d 682, 682 (S.D. 1977); *State v. Schrempp*, 2016 SD 79, ¶ 11, 887 N.W.2d 744, 747 n.1.

107. 2001 SD 17, 622 N.W.2d 243.

108. *Id.* ¶¶ 11-13, 622 N.W.2d at 245-46 (interpreting South Dakota Codified Law section 22-42-1(7) as including both marijuana and "ditch weed").

109. 2014 SD 3, 842 N.W.2d 647.

110. See *id.* ¶ 1, 842 N.W.2d at 647 ("Toben was convicted of possessing and distributing synthetic marijuana. He had been selling these products when they were legal, but they became illegal after

In *Petruzello*, the jury found the defendant guilty on two counts of distributing a controlled substance, namely, tetrahydrocannabinol.¹¹¹ The original charges that had been brought against him were charges for distributing marijuana.¹¹² However, the morning of trial, “the state was given permission to file an amended information charging defendant with having distributed [THC].”¹¹³ The South Dakota Supreme Court concluded there was no err in allowing the amended information to be filed since no new offense was charged.¹¹⁴

The *Petruzello* court concluded “marijuana and tetrahydrocannabinol are both hallucinogenic substances, the distribution of which, with narrowly drawn statutory exceptions, is unlawful.”¹¹⁵ Evidence had been presented at trial by an expert witness who stated all marijuana contained THC.¹¹⁶ The court noted “apparently there is a synthetic form of THC, we do not understand defendant to contend that the state charged him with the distribution of such form of THC or that he was misled to believe that he was being so charged.”¹¹⁷ Following the sentence immediately quoted, the *Petruzello* court offered guidance on statutory interpretation regarding a new cannabis law soon to take effect in footnote one, which reads:

Ch. 158, s 42-12, Laws of 1976, effective April 1, 1977, would amend SDCL 39-17-57(12) to read: ‘Tetrahydrocannabinol other than that which occurs in marijuana in its natural and unaltered state’. As amended, subsection (12) is apparently intended to include only the synthetic form of THC.¹¹⁸

In *State v. Lorenz*, the defendant “was convicted of possession of over ten pounds of marijuana in violation of [South Dakota Codified Law section] 22-42-6.”¹¹⁹ On appeal, the defendant raised the issue of “whether the evidence was sufficient to convict [him] of possession of more than ten pounds of marijuana.”¹²⁰ The defendant argued that the weight of the marijuana, when the “ditch” weed was excluded, actually weighed 4 pounds, 5.76 ounces.¹²¹ Lorenz argued that an ambiguity existed in the statutory definition marijuana.¹²² He asserted that *Hill v.*

emergency legislation took effect [South Dakota Codified Law section 34-20B-14(46)]. His defense at trial was that he mistakenly believed that the products had no illicit substances in them based on the package labeling and the representations from the commercial distributors.”).

111. *Petruzello*, 250 N.W.2d at 682.

112. *Id.*

113. *Id.*

114. *Id.* at 683.

115. *Id.*

116. *Id.* See also *State v. Murphy*, 234 N.W.2d 54, 57 (S.D. 1975) (commenting on the lack of specificity in the definition of marijuana).

117. *Petruzello*, 250 N.W.2d at 683.

118. *Id.* at 683 n.1.

119. *State v. Lorenz*, 2001 SD 17, ¶ 3, 622 N.W.2d 243, 244.

120. *Id.*

121. *Id.* ¶ 11, 622 N.W.2d at 245.

122. *Id.* ¶ 12, 622 N.W.2d at 245.

*Commonwealth*¹²³ should be used to help interpret South Dakota's definition of marijuana.¹²⁴ In a footnote, the *Lorenz* court stated:

Lorenz's reliance on the *Hill* case is misplaced because the *Hill* court was interpreting Virginia's statutory definition of marijuana, [section] 54.1-340, where marijuana is defined as: "any part of a plant of the genus *Cannabis* whether growing or not, its seeds or resin; and every compound, manufacture, salt, derivative, mixture, or preparation of such plant, its seeds, or its resin. Marijuana shall not include any oily extract containing one or more cannabinoids unless such extract contains less than [12%] of tetrahydrocannabinol by weight, nor shall marijuana include the mature stalks of such plant, fiber produced from such stalk, oil or cake made from the seeds of such plant, unless such stalks, fiber, oil or cake is combined with other parts of plants of the genus *Cannabis*." Even a cursory reading of our statute and that of Virginia's clearly show that the two statutes are incomparable.¹²⁵

The court found that in light of the language in South Dakota Codified Law section 22-42-1(7) it "does not have to look to outside authority to give meaning to this statute."¹²⁶ Hence, the court did not find the Virginia decision as argued by the defense to be of assistance in interpreting what constitutes marijuana in South Dakota.¹²⁷ Additionally, the court found South Dakota Codified Law section 22-42-1(7) did "not differentiate between cultivated marijuana and what is loosely termed as 'ditch weed'" because "both are considered genus *cannabis*."¹²⁸

3. South Dakota Circuit Court Decisions

Three recent circuit court decisions, *State v. Gonzales*, *State v. O'Connor*, and *State v. Harrison*, examine South Dakota's cannabis statutory scheme.¹²⁹ In each decision, the defendant was charged with unauthorized possession of a controlled drug or substance, namely, Tetrahydrocannabinol, as defined by South Dakota Codified Law section 34-20B-14(20) in violation of South Dakota

123. 438 S.E.2d 296 (Va. 1993).

124. *Lorenz*, 2001 SD 17, ¶ 12, 622 N.W.2d at 245. *Hill* has since been superseded by statute as stated in *Brown v. Virginia*, 690 S.E.2d 301, 303 (Va. Ct. App. 2010) (holding that "in amending the statutory definition of marijuana, the General Assembly effectively overruled *Hill*. Accordingly, [] where the stalks are combined with the other parts of the marijuana plant, the Commonwealth no longer has to separate the stalks from the other parts of the marijuana plant to prove that the accused possessed the proscribed weight of marijuana").

125. *Id.* ¶ 12, 622 N.W.2d at 246 n.2.

126. *Id.* ¶ 12, 622 N.W.2d at 246.

127. *Id.*

128. *Id.* ¶ 13, 622 N.W.2d at 246.

129. Memorandum Decision, *State v. Harrison*, *supra* note 16; Findings of Fact, *State v. Gonzales*, *supra* note 16; Memorandum Decision, *State v. O'Connor*, *supra* note 16.

Codified Law section 22-42-5.¹³⁰ Each court in the above-named decisions applied the doctrine of *in pari materia*, viewing the cannabis statutory scheme collectively.¹³¹

In each decision, the court found that South Dakota has two statutes (South Dakota Codified Law sections 34-20B-1(12) and 22-42-1(7)) which define marijuana; however, the court in each decision found South Dakota Codified Law section 34-20B-1(12), by its more inclusive terms, defined marijuana outside of the “flowering” plant form, which is covered by South Dakota Codified Law section 22-42-1(7).¹³² In each decision, the court applied South Dakota Codified Law section 34-20B-1(12), which provides the definition of marijuana.¹³³ Next, the court in each decision found that within South Dakota Codified Law section 34-20B-1(12), an included word in the definition, “manufacture,” provided an exception to a prohibited word “extraction.”¹³⁴ The word “manufacture,” as defined by both South Dakota Codified Law sections 34-20B-1(11) and 22-42-1(6), permits “extraction.”¹³⁵ Essentially, South Dakota Codified Law sections 34-20B-1(11) and 22-42-1(6), conflict with South Dakota Codified Law section 34-20B-1(12).¹³⁶

The court in each decision concluded that South Dakota Codified Law sections 34-20B-1(11) and 22-42-1(6) provide that natural THC, not in the physical plant, still falls under the definition of South Dakota Codified Law section 34-20B-1(12) when the THC extracted is not from the marijuana plant resin.¹³⁷ The analysis in each decision reasoned that when THC is extracted from the resin of the marijuana plant, the exemption to South Dakota Codified Law

130. Memorandum Decision, *State v. Harrison*, *supra* note 16, at 4, 7; Findings of Fact, *State v. Gonzales*, *supra* note 16, at 1; Memorandum Decision, *State v. O'Connor*, *supra* note 16, at 3.

131. Memorandum Decision, *State v. Harrison*, *supra* note 16, at 9; Findings of Fact, *State v. Gonzales*, *supra* note 16, at 7; Memorandum Decision, *State v. O'Connor*, *supra* note 16, at 7. In these cases, South Dakota Codified Law sections 22-42-1(6), (7), 34-20B-1(12), 34-20B-14(10), and (20), were read *in pari materia* because South Dakota Codified Law sections 34-20B-1(9), (11), (12), and 34-20B-14(10), and (20) are in the same chapter, and all relate to the same thing (THC/marijuana). These statutes also have the same purpose or object.

132. Memorandum Decision, *State v. Harrison*, *supra* note 16, at 11-12; Findings of Fact, *State v. Gonzales*, *supra* note 16, at 8-13; Memorandum Decision, *State v. O'Connor*, *supra* note 16, at 9-11.

133. Memorandum Decision, *State v. Harrison*, *supra* note 16, at 9; Findings of Fact, *State v. Gonzales*, *supra* note 16, at 5; Memorandum Decision, *State v. O'Connor*, *supra* note 16, at 6.

134. Memorandum Decision, *State v. Harrison*, *supra* note 16, at 12-13; Findings of Fact, *State v. Gonzales*, *supra* note 16, at 8-9; Memorandum Decision, *State v. O'Connor*, *supra* note 16, at 10-11. See also S.D.C.L. § 34-20B-1(12) (2011 & Supp. 2017) (defining marijuana as “all parts of any the genus cannabis, whether growing or not; the seeds thereof; and every compound, *manufacture* . . . of such plant or its seeds. The term does not include . . . the resin when *extracted* from any part of such plant”) (emphasis added).

135. Memorandum Decision, *State v. Harrison*, *supra* note 16, at 12-13; Findings of Fact, *State v. Gonzales*, *supra* note 16, at 8-9; Memorandum Decision, *State v. O'Connor*, *supra* note 16, at 10-11. See also S.D.C.L. § 34-20B-1(11) (2011 & Supp. 2017) (defining manufacture as “the production, preparation, propagation, compounding, or processing of a controlled drug or substance, either directly or indirectly by extraction from a substance of natural origin, or independently by means of chemical synthesis or by a combination of extraction and chemical synthesis”); S.D.C.L. § 22-42-1(6) (2006 & Supp. 2017) (same).

136. Memorandum Decision, *State v. Harrison*, *supra* note 16, at 12-13; Findings of Fact, *State v. Gonzales*, *supra* note 16, at 8-9; Memorandum Decision, *State v. O'Connor*, *supra* note 16, at 10-11.

137. Memorandum Decision, *State v. Harrison*, *supra* note 16, at 15; Findings of Fact, *State v. Gonzales*, *supra* note 16, at 9-10; Memorandum Decision, *State v. O'Connor*, *supra* note 16, at 11.

section 34-20B-1(12)—the “manufacture” term—does not apply.¹³⁸ Therefore, the substance is not marijuana but hashish as defined by South Dakota Codified Law section 34-20B-1(9).¹³⁹ Furthermore, the court in each decision did not find that the language in South Dakota Codified Law section 34-20B-14(20), which states “[THC], other than that which occurs in marijuana in its natural and unaltered state, including any compound . . .” removes THC from South Dakota Codified Law section 34-20B-1(12) definition of marijuana, when read in light of the exemption created by South Dakota Codified Law sections 34-20B-1(11) and 22-42-1(6).¹⁴⁰

The decisions each noted the absence of guidance on the legislative intent and precedent on the meaning of “natural and unaltered state,” leaving the circuit courts void of direction.¹⁴¹ The *O’Connor* and *Harrison* decisions declined to follow the *Petruzello* footnote, while the *Gonzales* decision noted it in passing.¹⁴² In these decisions, even absent the “flowering” form of marijuana, the court relied on testimony from experts in each case that testified the THC found in the edibles was essentially the same THC which would be found in raw marijuana.¹⁴³ The Gas-Chromatography Mass-Spectrometer (“GC/MS”) test returned a result of THC, and therefore whether the THC was “natural or unaltered” was unable to be proven beyond a reasonable doubt.¹⁴⁴

138. Memorandum Decision, *State v. Harrison*, *supra* note 16, at 15; Findings of Fact, *State v. Gonzales*, *supra* note 16, at 9-10; Memorandum Decision, *State v. O’Connor*, *supra* note 16, at 11.

139. Findings of Fact, *State v. Gonzales*, *supra* note 16, at 9-10; Memorandum Decision, *State v. O’Connor*, *supra* note 16, at 11. *See also* S.D.C.L. § 34-20B-1(9) (2011 & Supp. 2017) (defining hashish as “the resin extracted from any part of any plant of the genus *cannabis*, commonly known as the marijuana plant”).

140. Memorandum Decision, *State v. Harrison*, *supra* note 16, at 13-15; Findings of Fact, *State v. Gonzales*, *supra* note 16, at 10; Memorandum Decision, *State v. O’Connor*, *supra* note 16, at 11.

141. Memorandum Decision, *State v. Harrison*, *supra* note 16, at 13-14; *State v. O’Connor*, *supra* note 16, at 13-14. *See also* Findings of Fact, *State v. Gonzales*, *supra* note 16, at 9 (noting that only one South Dakota Supreme Court case, *Petruzello*, has indicated South Dakota Codified Law section 34-20B-14(20) “was intended for the prohibition of synthesized THC, or THC not made from marijuana”).

142. Memorandum Decision, *State v. Harrison*, *supra* note 16, at 6; Memorandum Decision, *State v. O’Connor*, *supra* note 16, at 13 n.5. In *Gonzales*, the court stated: “The State argues *Petruzello* relied on an outdated definition of marijuana, which forty years ago, included the resin of the marijuana plant. Today, the definition of marijuana specifically excludes resin extracted from marijuana and has defined such as “hashish” under [South Dakota Codified Law section] 34-20B-1(9). In 1977, marijuana and hashish had no difference by statute and thus there was no difference as to how the defendant in *Petruzello* was charged. However, *Petruzello* is not offered to interpret [South Dakota Codified Law section] 34-20B-1(12); the case is offered because the footnote offers a limitation of the application of [South Dakota Codified Law section] 34-20B-14(20) to only synthetic THC.” Findings of Fact, *State v. Gonzales*, *supra* note 16, at 9-10.

143. Memorandum Decision, *State v. Harrison*, *supra* note 16, at 2-4; Findings of Fact, *State v. Gonzales*, *supra* note 16, at 2-3; Memorandum Decision, *State v. O’Connor*, *supra* note 16, at 2-3.

144. Memorandum Decision, *State v. Harrison*, *supra* note 16, at 2; Memorandum Decision, *State v. O’Connor*, *supra* note 16, at 2-3. The court in *Harrison* stated, “In Dr. Heglund’s testimony, he opined that delta-9 is plant material, since it is contained in the marijuana plant Sieverding agreed, delta-9 comes out of the marijuana plant, and there is no chemical alteration required to have delta-9 Dr. Heglund testified that the results from Exhibit (4) will not determine if [the THC is] in its natural and unaltered state.” *Id.* at 3. *See also* Findings of Fact, *State v. Gonzales*, *supra* note 16, at 2-3 (discussing that Wold, the chemist detected THC within the gummies, but only “naturally-derived THC, not synthetic THC” and “testified there was no way to determine how the THC within the gummies was extracted from marijuana”); Ian Bull, *Gas Chromatography Mass Spectrometry (GC/MS)*, UNIVERSITY OF BRISTOL (Jan.

The above-mentioned decisions exemplify the circuit courts' interpretations on juxtaposed statutes, absent guidance from the South Dakota Supreme Court or legislative clarification. Essentially, each defendant possessed a substance which, at minimum, was charged by indictment as a violation of South Dakota Codified Law section 22-42-5, yet the conflicting language amounting to multiple definitions of the same item—marijuana or THC—burdened the prosecution, defense, and judiciary. Under the current South Dakota testing procedures, which utilize GC-MS testing, the origin of the THC as well as percentage of the THC remain unverifiable, as noted in all of the three aforementioned circuit court decisions.¹⁴⁵

D. WHAT OTHER STATES HAVE DONE

Especially in the past four years, multiple states have been active in their approaches toward regulation or deregulation of marijuana.¹⁴⁶ After examining the approaches taken by other states, South Dakota should adopt regulations to capture the successes of different regulatory schemes, ideally without the detrimental effects. This section is intended to exemplify, at a cursory level, the ability to narrowly define cannabis as well as the THC derivatives in a way that maximizes the alignment of the regulation with the intentions and perhaps more importantly, the effects of the legislature.

1. Legalization

States that have legalized marijuana—more specifically cannabis—provide an outline of the differing regulatory schemes. These schemes regulate all aspects of the substance, including its cultivation, manufacture, storage, sale, use, and distribution.¹⁴⁷

14. 2008), <http://www.bris.ac.uk/nerclsmsf/techniques/gcms.html> (noting “[g]as chromatography mass spectrometry (GC/MS) is an instrumental technique, comprising a gas chromatograph (GC) coupled to a mass spectrometer (MS), by which complex mixtures of chemicals may be separated, identified and quantified. This makes it ideal for the analysis of the hundreds of relatively low molecular weight compounds found in environmental materials. In order for a compound to be analyzed by GC/MS it must be sufficiently volatile and thermally stable. In addition, functionalized compounds may require chemical modification (derivatization), prior to analysis, to eliminate undesirable adsorption effects that would otherwise affect the quality of the data obtained. Samples are usually analyzed as organic solutions consequently materials of interest (e.g. soils, sediments, tissues etc.) need to be solvent extracted and the extract subjected to various ‘wet chemical’ techniques before GC/MS analysis is possible”).

145. Memorandum Decision, *State v. Harrison*, *supra* note 16, at 2-4; Findings of Fact, *State v. Gonzales*, *supra* note 16, at 2-3; Memorandum Decision, *State v. O'Connor*, *supra* note 16, at 2-3.

146. *Marijuana Overview*, *supra* note 23.

147. See, e.g., ALASKA STAT. ANN. § 17.38.900 (West 2016) (giving definitions of terms relating to marijuana regulation); COLO. CONST. art. XVIII, § 16 (stating that marijuana usage is legal); D.C. CODE ANN. § 48-901.02 (West 2015) (giving definitions of terms relating to marijuana regulation); ME. REV. STAT. tit. 7, § 2452 (West 2017) (allowing personal use of marijuana); MASS. GEN. LAWS ANN. ch. 94G, § 9 (West 2017) (describing requirements that marijuana establishments must follow); NEV. REV. STAT. ANN. § 453A.360 (West 2017) (regulating edible and marijuana-infused products on the basis of the concentration of THC in the products and not by weight); OR. REV. STAT. ANN. § 475B.015 (West 2017)

According to the National Conference of State Legislatures, "[e]ight states and the District of Columbia have legalized small amounts of marijuana for adult recreational use."¹⁴⁸ California, Maine, Massachusetts, and Nevada, all approved adult-use recreational marijuana in the fall of 2016.¹⁴⁹ Colorado and Washington enacted marijuana use statutes in 2012, and Alaska, Oregon, and the District of Columbia enacted their statutes in 2014.¹⁵⁰

The impact of legalization varies depending on the language approved by the state to regulate recreational marijuana. For instance, Colorado's constitution mandates that the user be twenty-one years of age or older but does not include language addressing THC percentages.¹⁵¹ In Washington, there is regulation on "marijuana-infused products" which are limited to a THC concentration no greater than 10%.¹⁵² Additionally, to be considered "marijuana" Washington requires a THC concentration greater than 0.3% on a dry weight basis.¹⁵³ Oregon distinguishes "marijuana" from "industrial hemp" and "cannabinoid product[s]" but does not mention THC percentages.¹⁵⁴ Maine regulates the amount by weight that an individual may purchase.¹⁵⁵

2. Decriminalization

The National Conference of State Legislatures has found that "[t]wenty-two states and the District of Columbia have decriminalized small amounts of marijuana."¹⁵⁶ Decriminalization "generally means certain small, personal-consumption amounts are a civil or local infraction, not a state crime (or are a lowest misdemeanor with no possibility of jail time)."¹⁵⁷ Activists for marijuana reform "have approached decriminalization in four ways: (1) substitution, (2) de facto decriminalization, (3) pure decriminalization, and (4) reclassification."¹⁵⁸ The impact of decriminalization can reduce incarceration rates and reduce judicial

(giving definitions of terms relating to marijuana regulation); WASH. REV. CODE ANN. § 69.50.101 (West 2017) (giving definition of terms relating to controlled substances regulation).

148. *Marijuana Overview*, *supra* note 23.

149. *Id.*

150. *Id.*

151. COLO. CONST. art. XVIII, § 16 (West 2017).

152. WASH. REV. CODE ANN. § 69.50.101(dd) (West 2017).

153. WASH. REV. CODE ANN. § 69.50.101(w) (West 2017).

154. OR. REV. STAT. ANN. § 475B.015 (West 2017).

155. ME. REV. STAT. ANN. tit. 7, § 2452 (West 2017).

156. *Marijuana Overview*, *supra* note 23. The states that have decriminalized marijuana are Alaska, California, Colorado, Connecticut, Delaware, Illinois, Maine, Maryland, Massachusetts, Minnesota, Mississippi, Missouri, Nebraska, Nevada, New York, North Carolina, Ohio, Oregon, Rhode Island, Vermont, and Washington, as well as the District of Columbia. *Id.* Five of those states—Minnesota, Missouri, Nevada, North Carolina, and Ohio—have marijuana usage "as a low-level misdemeanor, with no possibility of jail for qualifying offenses." *Id.* As of 2017, decriminalization bills are pending in eleven states: Alabama, Arizona, Hawaii, Iowa, Montana, New Hampshire, New Jersey, Tennessee, Texas, Virginia, and Wyoming. *Id.*

157. *Id.*

158. Jordan Blair Woods, *Decriminalization, Police Authority, and Routine Traffic Stops*, 62 U.C.L.A. L. REV. 672, 683 (2015).

expenses but also increase fines on indigent populations and remove legal assistance.¹⁵⁹

3. Medical Marijuana/Cannabis Program Laws

Twenty-nine states have laws in place allowing for medical marijuana, although the parameters of the programs vary.¹⁶⁰ Among the states that have permitted medical marijuana, there is no general consensus on regulations regarding possession, caregiver requirements, illnesses, use, or cultivation.¹⁶¹ For example, in Maine, (a state that has legalized medical marijuana) medical possession is limited to 2.5 ounces, while in New Jersey (where marijuana is not legalized or decriminalized) possession is limited to two ounces per thirty-day period.¹⁶²

4. Limited Access Marijuana Laws (Low THC/High CBD)

Nineteen states have legislation that limits the amount of THC while requiring a certain percentage of CBD for restricted medical purposes.¹⁶³ These laws allow the use of marijuana to treat neurological disorders.¹⁶⁴ Again, there is no shared concept among the states that have laws permitting low THC/high CBD.¹⁶⁵ This is an example of narrowly tailored state legislative action designed to specifically permit marijuana usage.

159. See, e.g., DAVID E. AARONSON, C. THOMAS DIENES & MICHAEL C. MUSHENO, PUBLIC POLICY AND POLICE DISCRETION: PROCESSES OF DECRIMINALIZATION 153 (1984) (decriminalization serves the end of “removing criminal sanctions attached to a particular behavior”); Darryl K. Brown, *Democracy and Decriminalization*, 86 TEX. L. REV. 223, 225 (2007) (describing legislative decriminalization broadly as including “repealing or narrowing criminal statutes, reducing offense severity, and converting low-level crimes to civil infractions”); see generally Alexandra Natapoff, *Misdemeanor Decriminalization*, 68 VAND. L. REV. 1055 (2015) (arguing against decriminalization).

160. *State Medical Marijuana Laws*, NAT’L CONFERENCE OF STATE LEGISLATURES (Sept. 14, 2017), <http://www.ncsl.org/research/health/state-medical-marijuana-laws.aspx> [hereinafter *State Medical Marijuana Laws*]. The twenty-nine states are Alaska, Arizona, Arkansas, California, Colorado, Connecticut, Delaware, Florida, Hawaii, Illinois, Maine, Maryland, Massachusetts, Michigan, Minnesota, Montana, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Dakota, Ohio, Oregon, Pennsylvania, Rhode Island, Vermont, Washington, and West Virginia. *Id.* The District of Columbia, Guam, and Puerto Rico have also enacted similar laws. *Id.*

161. See generally Therese A. Clarke Arado & Annie Mentkowski, *Medical Marijuana: An Overview of Select Resources*, 35 N. ILL. U. L. REV. 461 (2015) (providing a bibliography of state medical marijuana laws).

162. ME. REV. STAT. ANN. tit. 22, § 2423-A (West 2017); N.J. STAT. ANN. § 24:6I-10 (West 2017).

163. *State Medical Marijuana Laws*, *supra* note 160. The nineteen states are Alabama, Florida, Georgia, Iowa, Idaho, Indiana, Kentucky, Louisiana, Mississippi, Missouri, North Carolina, Oklahoma, South Carolina, Tennessee, Texas, Utah, Virginia, Wisconsin, and Wyoming.

164. Janel Greiman & Joshua Ramirez, *Update on Serving the Pot Culture*, 25 J. MULTISTATE TAX’N & INCENTIVES 14, 18 (2015).

165. See *id.* (describing the medical marijuana laws of sixteen states).

5. Hemp

Thirty-two states now have some form of legislation specifically aimed at the regulation of use and consumption of hemp.¹⁶⁶ Industrial hemp (often simply referred to as hemp) and marijuana are both part of the plant species *cannabis sativa*.¹⁶⁷ Though derived from the same species, hemp and marijuana do not contain the same amount of THC.¹⁶⁸ Hemp does not contain enough THC to produce the “high” that is often associated with marijuana usage.¹⁶⁹ Hemp is more commonly grown as a food product or as a manufacturing material, as opposed to marijuana, which is more often used as a drug for recreational or medical use.¹⁷⁰

The Controlled Substances Act does not outlaw hemp cultivation, but does require prospective growers to obtain approval of the Drug Enforcement Administration to do so.¹⁷¹ Federal law allows for institutions of higher education to grow industrial hemp.¹⁷² The statute defines “industrial hemp” as “the plant

166. *State Industrial Hemp Statutes*, NAT'L CONFERENCE OF STATE LEGISLATURES (Aug. 19, 2016), <http://www.ncsl.org/research/agriculture-and-rural-development/state-industrial-hemp-statutes.aspx#nd> [hereinafter *State Industrial Hemp Statutes*]. The website notes that “states are taking independent action to regulate industrial hemp seeds.” *Id.* At least eleven states have seed certification programs and/or require that growers use certified hemp seeds or acquire their seeds from a certified seed source. *Id.* “Certified seeds are usually defined as seeds that contain less than 0.3[%] THC or produce hemp plants that contain less than 0.3[%] THC.” *Id.* ALA. CODE §§ 2-8-380 to -3, 20-2-2 (2017); ARK. CODE ANN. §§ 2-15-401 to -12 (West 2017); CAL. FOOD & AGRIC. CODE ANN. §§ 81000 to -10 (West 2017); COLO. REV. STAT. ANN. §§ 35-61-101 to -9 (West 2017); DEL. CODE ANN. tit. 3 §§ 2800 to -2 (West 2017); FLA. STAT. ANN. § 1004.4473 (West 2017); HAW. REV. STAT. ANN. §§ 141-31 to -40, 712-1260 (West 2016); 720 ILL. COMP. STAT. ANN. 550/15.2 (West 2017); IND. CODE ANN. §§ 15-15-13-1 to -17 (West 2017); KY. REV. STAT. ANN. §§ 260.850 to -69 (West 2017); ME. REV. STAT. ANN. tit. 7 § 2231 (2017); MD. CODE ANN., AGRIC. § 14-101 (West 2017) (statute tentatively effective in October 2020 contingent on passage of other acts); MASS. GEN. LAWS ANN. ch. 128, §§ 116 to -18 (West 2017); MICH. COMP. LAWS ANN. §§ 286.841 to -4 (West 2017); MINN. STAT. ANN. §§ 18K.01 to -9 (West 2017); MONT. CODE ANN. §§ 80-18-101 to -11 (West 2017); NEB. REV. STAT. ANN. § 2-5701 (West 2017); NEV. REV. STAT. ANN. §§ 557.010 to -80 (West 2017); N.H. REV. STAT. ANN. §§ 433-C:1 to -C:3 (2017); N.Y. AGRIC. & MKTS. LAW §§ 505 to -14 (McKinney 2017); N.C. GEN. STAT. ANN. §§ 106-568.50 to -47 (West 2017); OR. REV. STAT. ANN. §§ 571.300, -05, -15 (West 2017); 3 PA. STAT. AND CONS. STAT. ANN. §§ 701 to -10 (West 2017); 2 R.I. GEN. LAWS §§ 2-26-1 to -9 (West 2017); S.C. CODE ANN. §§ 46-55-10 to -60 (West 2017); TENN. CODE ANN. § 43-26-103 (West 2017); UTAH CODE ANN. §§ 4-41-101 to -3 (West 2017); VT. STAT. ANN. tit. 6, §§ 561 to -6 (West 2017); VA. CODE ANN. §§ 3.2-4112 to -20 (West 2017); WASH. REV. CODE ANN. §§ 15.120.005 to -60 (West 2017); W. VA. CODE ANN. §§ 19-12E-1 to -9 (West 2017); WYO. STAT. ANN. §§ 35-7-2101 to -09 (West 2017).

167. Michael D. Moberly, *Old MacDonald Hid a Farm: Examining Arizona's Prospects for Legalizing Industrial Hemp*, 20 DRAKE J. AGRIC. L. 361, 362 (2015).

168. *Id.*

169. *Id.* at 362-63. See also *Hemp Indus. Ass'n v. Drug Enf't Admin.*, 357 F.3d 1012, 1013 n.2 (9th Cir. 2004) (“[I]ndustrial hemp plants . . . contain only a trace amount of the THC contained in marijuana varieties grown for psychoactive use.”); *Cockrel v. Shelby Cty. Sch. Dist.*, 270 F.3d 1036, 1042 (6th Cir. 2001) (“Unlike marijuana, the industrial hemp plant is only comprised of between 0.1 and 0.4[%] THC, an insufficient amount to have any narcotic effect.”).

170. Moberly, *supra* note 167, at 363. See also Justin M. Holler et al., *Δ9-Tetrahydrocannabinol Content of Commercially Available Hemp Products*, 32 J. ANALYTICAL TOXICOLOGY 428, 430 (2008) (“[h]emp products have expanded from mainly oil to many different products since the mid-1990s. The range of products includes several different beverages, nutritional bars, snacks, and candies”); *Raich v. Gonzales*, 500 F.3d 850, 864-65 (9th Cir. 2007) (“It is beyond dispute that marijuana has a long history of use—medically and otherwise—in this country.”).

171. Dwight L. Pringle, *Advising Clients Who Want to Grow Hemp*, 43 COLO. LAW. 71, 75 (2014).

172. 7 U.S.C.A. § 5940(a) (2017 West).

Cannabis sativa L. and any part of such plant, whether growing or not, with a [THC] concentration of not more than 0.03[%] on a dry weight basis.”¹⁷³

The Committee on State Affairs introduced House Bill 1204 in the 2017 South Dakota legislative session.¹⁷⁴ Under the language of the bill, any person with a license could “plant, grow, harvest, possess, process, sell, and buy industrial hemp.”¹⁷⁵ The bill allowed for regular testing of growers hemp plants to ensure that the hemp plants had no more than 0.3% THC—which is a common regulation amongst states with hemp laws.¹⁷⁶ The South Dakota Senate Agriculture and Natural Resources Committee killed the bill.¹⁷⁷

6. States with No Permissible Cannabis Legislation

Two states, Idaho and Kansas, have not—although their status may change by the time this comment is published—joined the rest of the country with any form of marijuana legalization.¹⁷⁸ South Dakota Governor Dennis Daugaard, on March 17, 2017, signed Senate Bill 95 and joined South Dakota with the rest of the states having marijuana legislation.¹⁷⁹ The bill removed CBD oil from the definition of marijuana, making CBD oil a Schedule IV controlled substance.¹⁸⁰ Critics of the bill believe that the requirement that CBD oil be approved by the Food and Drug Administration will “practicality indefinitely curtail [] access to CBD oil in South Dakota.”¹⁸¹ It should be noted that South Dakota has two marijuana ballot initiatives for the 2018 ballot including medical cannabis and recreational cannabis.¹⁸² The grassroots group cultivating these initiatives, New Approach South Dakota, does not define marijuana by THC in either the recreational or legal ballot initiative.¹⁸³ The passage of either initiative would

173. 7 U.S.C.A. § 5940(b)(2) (2017 West).

174. H.B. 1204, 2017 Leg., 92nd Sess. (S.D. 2017).

175. *Id.*

176. *Id.* See also *State Industrial Hemp Statutes*, *supra* note 166 (stating “[s]tate statutes, with the exception of West Virginia, define industrial hemp as a variety of cannabis with a THC concentration of not more than 0.3[%]”).

177. H.B. 1204, 2017 Leg., 92nd Sess. (S.D. 2017). See also TENTH AMENDMENT CTR., *South Dakota Republicans Kill Bill to Legalize Industrial Hemp, Reject Unconstitutional Federal Ban* (Mar. 23, 2017), <http://blog.tenthamentendmentcenter.com/2017/03/south-dakota-republicans-kill-bill-to-legalize-industrial-hemp-reject-unconstitutional-federal-ban/>.

178. GOVERNING, *State Marijuana Laws in 2017 Map* (Mar. 23, 2017), <http://www.governing.com/gov-data/state-marijuana-laws-map-medical-recreational.html>; *State Industrial Hemp Statutes*, *supra* note 166.

179. S.B. 95, 2017 Leg., 92nd Sess. (S.D. 2017); MARIJUANA POLICY PROJECT, *Governor signs Senate’s CBD bill into law* (Oct. 13, 2017), <https://www.mpp.org/states/south-dakota/> [hereinafter MARIJUANA POLICY PROJECT].

180. S.B. 95, 2017 Leg., 92nd Sess. (S.D. 2017).

181. MARIJUANA POLICY PROJECT, *supra* note 179.

182. Associated Press, *Let’s talk 2018: Marijuana among issues on South Dakota list*, THE DAILY REPUBLIC (Mar. 30, 2017), <http://www.mitchellrepublic.com/news/4243010-lets-talk-2018-marijuana-among-issues-south-dakota-list>; Huber, *supra* note 22; Powers, *supra* note 22.

183. NEW APPROACH SOUTH DAKOTA, *21+ Recreational Cannabis*, <https://newapproachsd.com/21-recreational-cannabis> (last visited Dec. 10, 2017); NEW APPROACH SOUTH DAKOTA, *Medical Cannabis*, <https://newapproachsd.com/medical-marijuana> (last visited Dec. 10, 2017).

permit the use of cannabis—including wax with a high THC percentage—which is now a felony.¹⁸⁴

III. RECOMMENDATIONS

Although numerous states have legalized, decriminalized, provided medical exceptions, and hemp exceptions, many states still retain similar definitions of marijuana, hashish and THC as South Dakota.¹⁸⁵ To effectively govern cannabis, South Dakota should split its regulatory scheme into three classification options: (1) Cannabis; (2) Cannabis Concentrates; and (3) Synthetics.

1. Cannabis

South Dakota currently has two marijuana statutes, South Dakota Codified Law sections 34-20B-1(12) and 22-42-1(7).¹⁸⁶ The legislature should omit both prior statutes and adopt the following "Cannabis" statute:

"Cannabis" means any part of a plant of the genus *Cannabis* whether growing or not, its seeds, or its resin; and every compound, manufacture, salt, derivative, mixture, or preparation of such plant, its seeds, or its resin. Marijuana shall include any extract containing one or more cannabinoids when such extract contains 20% or less of tetrahydrocannabinol by weight. It does not include: The weight of any other ingredient combined with marijuana to prepare topical or oral administrations, food, drink, or other products.

- (1) "Cannabinoid" means any of the chemical compounds that are the active constituents of marijuana.
- (2) "Cannabinoid concentrate" means a substance obtained by separating cannabinoids from marijuana.
- (3) "Cannabinoid edible" means food or potable liquid into which a cannabinoid concentrate, cannabinoid extract or dried marijuana leaves or flowers have been incorporated.
- (4) "Cannabinoid extract" means a substance obtained by separating cannabinoids from marijuana.

184. *Id.*; S.D.C.L. § 22-42-6 (2006 & Supp. 2017).

185. *See supra* notes 147 (listing eight states that have legalized marijuana), 156 (listing twenty-two states that have decriminalized marijuana), 160 (listing the twenty-nine states that have legalized marijuana for medical purposes), 163 (listing nineteen states that limit amounts of THC), 166 (listing twenty-eight states that regulate hemp use and consumption).

186. S.D.C.L. §§ 34-20B-1(12) (2011 & Supp. 2017), 22-42-1(7) (2006 & Supp. 2017). South Dakota Codified Law section 34-20B-1(12) has recently been amended to include the following language: "Marijuana," all parts of any plant of the genus *cannabis*, whether growing or not; the seeds thereof; and every compound, manufacture, salt, derivative, mixture, or preparation of such plant or its seeds. The term does not include fiber produced from the mature stalks of the plant, or oil or cake made from the seeds of the plant, or the resin when extracted from any part of the plant or cannabidiol, a drug product approved by the United States Food and Drug Administration. S.B. 95, 2017 Leg., 92nd Sess. (S.D. 2017).

(5) “Cannabis-infused products” means products that contain marijuana or marijuana extracts, are intended for human use, are derived from marijuana as defined in this section, and have a THC concentration no greater than 20%. The term “cannabis-infused products” does not include either useable marijuana or marijuana concentrates.¹⁸⁷

Any person in possession of “Cannabis” as defined above would be prosecuted for possession by weight under South Dakota Codified Law sections 22-42-6 and distribution under 22-42-7.¹⁸⁸ Cannabis possession, as defined above, would not be prosecuted under South Dakota Codified Law section 22-42-5.¹⁸⁹ Essentially, cannabis in the “raw, flower version,” or extracted when it contained 20% or less THC by weight, would be a misdemeanor, not a felony. The method of extraction would become irrelevant as long as the substance extracted is as defined in subsection (4) obtained by separating cannabinoids from marijuana.

187. The language is modeled from the following statutes: CAL. HEALTH & SAFETY CODE § 11018(b) (West 2017); OR. REV. STAT. ANN. § 475B.015 (West 2017); VA. CODE ANN. §§ 54.1-3401, 54.1-3408.02, & 54.1-3410 (West 2017).

188. S.D.C.L. § 22-42-6 (2006 & Supp. 2017) (“No person may knowingly possess marijuana. It is a Class 1 misdemeanor to possess two ounces of marijuana or less. It is a Class 6 felony to possess more than two ounces of marijuana but less than one-half pound of marijuana. It is a Class 5 felony to possess one-half pound but less than one pound of marijuana. It is a Class 4 felony to possess one to ten pounds of marijuana. It is a Class 3 felony to possess more than ten pounds of marijuana. A civil penalty may be imposed, in addition to any criminal penalty, upon a conviction of a violation of this section not to exceed ten thousand dollars”); S.D.C.L. § 22-42-7 (2006 & Supp. 2017) (“The distribution, or possession with intent to distribute, of less than one-half ounce of marijuana without consideration is a Class 1 misdemeanor; otherwise, the distribution, or possession with intent to distribute, of one ounce or less of marijuana is a Class 6 felony. The distribution, or possession with intent to distribute, of more than one ounce but less than one-half pound of marijuana is a Class 5 felony. The distribution, or possession with intent to distribute, of one-half pound but less than one pound of marijuana is a Class 4 felony. The distribution, or possession with intent to distribute, of one pound or more of marijuana is a Class 3 felony. The distribution, or possession with intent to distribute, of less than one-half ounce of marijuana to a minor without consideration is a Class 6 felony; otherwise, the distribution, or possession with intent to distribute, of one ounce or less of marijuana to a minor is a Class 5 felony. The distribution, or possession with intent to distribute, of more than one ounce but less than one-half pound of marijuana to a minor is a Class 4 felony. The distribution, or possession with intent to distribute, of one-half pound but less than one pound of marijuana to a minor is a Class 3 felony. The distribution, or possession with intent to distribute, of one pound or more of marijuana to a minor is a Class 2 felony. A first conviction of a felony under this section shall be punished by a mandatory sentence in the state penitentiary or county jail of at least thirty days, which sentence may not be suspended. A second or subsequent conviction of a felony under this section shall be punished by a mandatory sentence of at least one year. Conviction of a Class 1 misdemeanor under this section shall be punished by a mandatory sentence in county jail of not less than fifteen days, which sentence may not be suspended. A civil penalty, not to exceed ten thousand dollars, may be imposed, in addition to any criminal penalty, upon a conviction of a felony violation of this section.”).

189. S.D.C.L. § 22-42-5 (2006 & Supp. 2017) (“No person may knowingly possess a controlled drug or substance unless the substance was obtained directly or pursuant to a valid prescription or order from a practitioner, while acting in the course of the practitioner’s professional practice or except as otherwise authorized by chapter 34-20B. A charge for unauthorized possession of controlled substance when absorbed into the human body as set forth in subdivision 22-42-1(1) shall only be charged under the provisions of South Dakota Codified Law section 22-42-5.1. A violation of this section for a substance in Schedules I or II is a Class 5 felony. A violation of this section for a substance in Schedule III and IV is a Class 6 felony.”).

2. Cannabis Concentrates

The grouping of cannabis concentrates "Hashish," "Hashish and hash oil," and "Tetrahydrocannabinol" is currently defined by South Dakota Codified Law sections 34-20B-14(9), (10), and 34-20B-1(20), respectively.¹⁹⁰ These statutes should be replaced by one statute, "Cannabis Concentrates," with the following language:

"Cannabis Concentrates" means hashish, tetrahydrocannabinols, or any alkaloid, salt, derivative, preparation, compound, or mixture, of a cannabinoid extract containing 21% or greater of tetrahydrocannabinol by weight. It does not include: The weight of any other ingredient combined with marijuana to prepare topical or oral administrations, food, drink, or other products nor marijuana in the flower form.

- (1) "Cannabinoid extract" means a substance obtained by separating cannabinoids from marijuana.
- (2) "Cannabinoid" means any of the chemical compounds that are the active constituents of marijuana.
- (3) "Cannabinoid concentrate" means a substance obtained by separating cannabinoids from marijuana.
- (4) "Hashish" includes the resin extracted from any part of the plant genus *Cannabis*, and every compound, manufacture, salt, derivative, mixture, or preparation from such resin.
- (5) "Cannabis-infused products" means products that contain marijuana or marijuana extracts, are intended for human use, are derived from marijuana as defined in this section, and have a THC concentration greater than 21%. The term "cannabis-infused products" does not include either useable marijuana or marijuana concentrates.¹⁹¹

"Cannabis Concentrates" as defined above would be a violation of South Dakota Codified Law section 22-42-5.¹⁹² As noted in *Schrempp*, the distinction between hashish and THC is irrelevant.¹⁹³ This proposed statute limits evaluation of the percentage of THC from cannabinoid concentrate obtained by separating cannabinoids from marijuana.¹⁹⁴ The "battle of the experts" as to how the

190. S.D.C.L. § 34-20B-14(9), (10) (2011 & Supp. 2017); S.D.C.L. § 34-20B-1(20) (2011 & Supp. 2017).

191. The language is derived from the following statutes: COLO. REV. STAT. ANN. § 27-80-203(16) (West 2017); D.C. CODE ANN. § 48-901.02(3) (West 2017); CAL. HEALTH & SAFETY CODE § 11018(b) (West 2017).

192. See *supra* note 189 (stating the language of South Dakota Codified Law section 22-42-5).

193. See *State v. Schrempp*, 2016 SD 79, ¶ 17, 887 N.W.2d 744, 749 (indicating that hashish and THC are "at least related substances").

194. See, e.g., VA. CODE ANN. § 18.2-247(D) (West 2017) (defining "[t]he term 'marijuana' [as] . . . any part of a plant of the genus *Cannabis*, whether growing or not, its seeds or resin; and every compound, manufacture, salt, derivative, mixture, or preparation of such plant, its seeds, or its resin. Marijuana shall

extraction process occurred would be moot under this proposed statute.¹⁹⁵ The only evaluation necessary would be (1) is it marijuana in the raw form as defined by “Cannabis?” If no, (2) is it a cannabinoid concentrate from marijuana? If yes, (3) is the percentage of THC above 21% by weight? If yes, (4) then there is a violation of South Dakota Codified Law section 22-42-5. If no, (5) then there is a violation of South Dakota Codified Law section 22-42-6.

Many state statutes governing cannabis distinguish THC percentages in marijuana products.¹⁹⁶ The effect is that low-level THC concentrates—similar to that level consistent with “flowering” marijuana—will not automatically be a felony merely due to the extraction process. Although not suggested at this time, this graduated delineation of THC percentages within the marijuana plant assuages potential statutory modifications involving hemp or medical marijuana to be defined by the legislature.¹⁹⁷

3. Synthetics

Synthetics are defined by South Dakota Codified Law sections 34-20B-14(20)—if the *Petruzello* footnote is followed—and explicitly in 34-20B-14(46).¹⁹⁸ This category ought to be explicitly limited to substances that are void of cannabinoid extract, i.e., any of the chemical compounds that are the active constituents of marijuana obtained by separating cannabinoids from marijuana.¹⁹⁹ South Dakota should adopt the following language:

Synthetics:

(1)(a) “Synthetic cannabinoid” means any chemical compound that is chemically synthesized and either:

(I) Has been demonstrated to have binding activity at one or more cannabinoid receptors; or

(II) Is a chemical analog or isomer of a compound that has been demonstrated to have binding activity at one or more cannabinoid receptors.

not include any oily extract containing one or more cannabinoids unless such extract contains less than 12[%] of tetrahydrocannabinol by weight, or the mature stalks of such plant, fiber produced from such stalk, oil or cake made from the seed of such plant, unless such stalks, fiber, oil or cake is combined with other parts of plants of the genus Cannabis”).

195. See Memorandum Decision, *State v. Harrison*, *supra* note 16, at 3-4 (observing neither expert for either the State or defense was able to identify the origin of the THC). See also *Washington v. Crowder*, 385 P.3d 275, 280-81 (Wash. 2016) (reversing defendant’s conviction for delivery of marijuana because no expert testified as to the amount of THC in the marijuana).

196. See *supra* Part II.D.4 (discussing states which have adopted marijuana exceptions based on THC percentages).

197. See *supra* Part II.D.4-5 (observing states which have graduated THC levels and hemp or low-level THC exemptions).

198. Findings of Fact, *State v. Gonzales*, *supra* note 16, at 9 (noting “[a]lthough *Petruzello* states the phrase ‘tetrahydrocannabinol other than that which occurs in marijuana in its natural and unaltered state . . . is apparently intended to include only the synthetic form of THC,’ the case does not formally interpret [South Dakota Codified Law section 34-20B-14(20)”; S.D.C.L. § 34-20B-14(46) (2011 & Supp. 2017) (defining synthetic cannabinoids).

199. See *supra* Part II.A.4. (discussing synthetic drugs in detail).

(b) "Synthetic cannabinoid" includes but is not limited to the following substances:

(I) HU-210: (6aR, 10aR)-9-(hydroxymethyl)-6, 6-dimethyl-3-(2-methyloctan-2-yl)-6a, 7,10,10a-tetrahydrobenzo[c]chromen-1-ol;

(II) HU-211: dexanabinol, (6aS, 10aS)-9-(hydroxymethyl)-6, 6-dimethyl-3-(2-methyloctan-2-yl)-6a, 7, 10, 10a-tetrahydrobenzo[c]chromen-1-ol;

(III) JWH-018: 1-pentyl-3-(1-naphthoyl)indole;

(IV) JWH-073: 1-butyl-3-(1-naphthoyl)indole;

(V) JWH-081: 1-pentyl-3-(4-methoxy-1-naphthoyl)indole, also known as 4-methoxynaphthalen-1-yl-(1-pentylindol-3-yl)methanone;

(VI) JWH-200: 1-[2-(4-morpholinyl)ethyl]-3-(1-naphthoyl)indole;

(VII) JWH-250: 1-pentyl-3-(2-methoxyphenylacetyl)indole, also known as 2-(2-methoxyphenyl)-1-(1-pentylindol-3-yl)ethanone; and

(VIII) CP 47, 497, and homologues: 2-[(1R, 3S)-3-hydroxycyclohexyl]-5-(2-methyloctan-2-yl)phenol.

(c) "Synthetic cannabinoid" does not mean:

(I) Any tetrahydrocannabinols, as defined in subsection (35) of this section; or

(II) Nabilone.

(d) As used in this subsection (34.5), "analog" means any chemical that is substantially similar in chemical structure to a chemical compound that has been determined to have binding activity at one or more cannabinoid receptors.

(2)(a) "Tetrahydrocannabinols" means synthetic equivalents of the substances contained in the plant, or in the resinous extractives of, cannabis, sp., or synthetic substances, derivatives, and their isomers with similar chemical structure and pharmacological activity, such as the following:

(I) Cis or trans tetrahydrocannabinol, and their optical isomers;

(II) Cis or trans tetrahydrocannabinol, and their optical isomers;

(III) Cis or trans tetrahydrocannabinol, and their optical isomers.

(b) Since the nomenclature of the substances listed in paragraph (a) of this subsection (2) is not internationally standardized,

compounds of these structures, regardless of the numerical designation of atomic positions, are included in this definition.²⁰⁰

4. Implementation Suggestions

States that have statutes that include THC percentages within the definition of marijuana or THC also have developed testing protocols.²⁰¹ States such as Washington, Colorado, and Oregon have struggled with ensuring accurate testing procedures, but through that struggle, they have developed robust testing standards.²⁰² The Washington State Liquor and Cannabis Board (“WSLCB”) provides a checklist for laboratory certification.²⁰³ The Oregon Environmental Laboratory Accreditation Program (“ORELAP”) has developed similar regulations to ensure accurate testing of both “flowering” and THC concentrates.²⁰⁴

By contrast, South Dakota is currently using a GC-MS test; the GC-MS test results are limited to what the item tested is (for example THC or meth), not the percentages of chemical components, or where the tested item is chemically derived from.²⁰⁵ Washington allows for GC and High Pressure Liquid Chromatography (“HPLC”) testing which displays the percentages of the substance tested.²⁰⁶ South Dakota does not need to re-invent the wheel, or rather

200. This proposed language is modeled after COLO. REV. STAT. ANN. § 27-80-203 (West 2017).

201. WASHINGTON STATE LIQUOR AND CANNABIS BOARD, *Certification Good Laboratory Practice (GLP) Checklist – Version 2.0*, <http://lcb.wa.gov/publications/Marijuana/1-502/GLP-Checklist-v2.pdf> (last visited Dec. 14, 2017); OREGON HEALTH AUTHORITY, *Cannabis Testing Laboratories*, <http://www.oregon.gov/oha/PH/DISEASES/CONDITIONS/CHRONICDISEASE/MEDICALMARIJUANA/PROGRAM/Pages/laboratories.aspx> (last visited Dec. 14, 2017); VIRGINIA DEPARTMENT OF FORENSIC SCIENCE, *Controlled Substances*, <http://www.dfs.virginia.gov/laboratory-forensic-services/controlled-substances/> (last visited Dec. 14, 2017).

202. Tobias Coughlin-Bogue, *To Combat Inconsistency, Washington Testing Labs Turn to Self-Policing*, LEAFLY (Mar. 11, 2016), <https://www.leafly.com/news/politics/to-combat-claims-of-inconsistency-washington-testing-labs-turn-to>.

203. WASHINGTON STATE LIQUOR AND CANNABIS BOARD, *Certification Good Laboratory Practice (GLP) Checklist – Version 2.0*, <http://lcb.wa.gov/publications/Marijuana/1-502/GLP-Checklist-v2.pdf> (last visited Dec. 14, 2017).

204. See OREGON HEALTH AUTHORITY, *ORELAP Cannabis Sampling Protocols*, <https://public.health.oregon.gov/LaboratoryServices/EnvironmentalLaboratoryAccreditation/Pages/Sampling.aspx> (last visited Dec. 14, 2017) (providing testing guidelines for samples of marijuana as well as protocol for collecting samples of cannabinoid concentrates, extracts, and products).

205. See Findings of Fact, *State v. Gonzales*, *supra* note 16, at 3 (noting the State’s Chemist, Richard Wold, “testified that THC, as a chemical compound, naturally occurs in and from the marijuana plant. Wold testified that scientific analytical techniques are available to determine the chemical properties of marijuana, such as the chlorophyll and a family of naturally occurring phytols of marijuana. Yet, by the standards he follows, as set forth in the SWGDRUG testing standards, he is only to identify ‘marijuana’ if visible plant matter can be detected”).

206. See ANALYTICAL 360, *Potency Testing*, <http://analytical360.com/cannabis-analysis-laboratory/potency-testing> (last visited Dec. 14, 2017) (“Analytical 360 employs High Pressure Liquid Chromatography (HPLC) technology to directly quantify the total cannabinoid content of medical cannabis. Beginning with dry-weight determination, we analyze the percentage of water contained in each sample to ensure proper preparation during the curing process. Our Quantification process then identifies and measures the amount of total Cannabidiol (CBDA + CBD), Tetrahydrocannabinol (Δ 9THCA + Δ 9THC + Δ 8THC), Cannabinol (CBN), Cannabichromene (CBC) and Cannabigerol (CBGA + CBG). We

the lab; the procedures used by both the state labs that currently test marijuana and concentrates as well as the commercial testing facilities should be adopted in South Dakota in order to apply the statutes recommended above.

IV. CONCLUSION

For decades, the United States legal system has attempted to regulate the cannabis plant. However, the cannabis plant that spawned original regulations has blossomed into an industrial-strength organism that dwarfs the intoxicant potential of the original plant. Aside from the plant's bolstered THC levels, the methods of THC extraction have created products with THC potency levels that exceed the wildest dreams of 1970s era "stoners." While the potency and extraction process has progressed rapidly, the laws designed to regulate THC have not progressed at the same pace.

South Dakota's collective cannabis statutes severely haze the judicial process, hinder prosecution, and make a plain reading of the statutes a headache-inducing endeavor. The South Dakota Supreme Court in *Schrempp* correctly noted that the name of the substance—hashish or tetrahydrocannabinol—is irrelevant; what matters is the schedule of the substance. The circuit courts that thus far have been tasked with deciphering the current statutory scheme have correctly applied the doctrine of *in pari materia*. Without an inclusive reading of the statutes, which essentially all have the same goal or objective, the intent of the legislation is lost in the multitude of definitions which presently contradict each other in application.

States have verified that there are multiple avenues to legislate cannabis in accordance with the values of that state. States have either elected to embrace the new industry and enact laws in accordance with that position, or, like South Dakota, stand steadfast in opposition while also retaining outdated, ineffective cannabis legislation compared to the advances of the cannabis industry. In light of these trends, South Dakota can and should heed the ability shown by other states to specifically tailor legislation in a manner allowing the legislation to be optimally effective for its purpose—enforcing cannabis laws with the prescribed punishment to uphold public safety in the most effective manner possible. The current legislation provides numerous definitions of the same substance—marijuana—and overlaps in what is THC or how the THC resulted in its form outside the plant, all of which can be simplified. The testing mechanisms utilized in other states that have laws differentiating cannabis based on THC percentages is no longer out of reach; it is established scientific testing and fosters effective enforcement of cannabis laws.

While South Dakota necessarily does not need to change its stance on cannabis, it does need to change its statutory scheme governing cannabis. South Dakota by way of Senate Bill 95 established an understanding that cannabis is not

also measure the Terpene content (Linalool, Myrcene, Limonene, Terpinolene, α -Pinene, β -Pinene, Humulene, Caryophyllene, and Caryophyllene oxide).”).

all the same, in the sense that certain cannabinoids can and should be differentiated. Along that line of differentiation, the statutes suggested above distinguish cannabis in a way that effectively delineates between misdemeanor and felony level offenses. As the *Schrempp* court intuitively noted and as the South Dakota Legislature should heed: the name is not important, what is important is the substance.

V. APPENDIX

SOUTH DAKOTA CODIFIED LAWS

Title 34. Public Health and Safety Chapter 34-20B Drugs and Substances Control

34-20B-1. Definitions.

(9) “Hashish,” the resin extracted from any part of any plant of the genus cannabis, commonly known as the marijuana plant

...

(11) “Manufacture,” the production, preparation, propagation, compounding, or processing of a controlled drug or substance, either directly or indirectly by extraction from substances of natural origin, or independently by means of chemical synthesis or by a combination of extraction and chemical synthesis

(12) “Marijuana,” all parts of any plant of the genus cannabis, whether growing or not; the seeds thereof; and every compound, manufacture, salt, derivative, mixture, or preparation of such plant or its seeds; but does not include fiber produced from the mature stalks of such plant, or oil or cake made from the seeds of such plant, or the resin when extracted from any part of such plant²⁰⁷

34-20B-14. Hallucinogenic substances specifically included in Schedule I.

Any material, compound, mixture, or preparation which contains any quantity of the following hallucinogenic substances, their salts, isomers, and salts of isomers, is included in Schedule I, unless specifically excepted, whenever the existence of such salts, isomers, and salts of isomers is possible within the specific chemical designation:

(10) Hashish and hash oil

...

(20) Tetrahydrocannabinol, other than that which occurs in marijuana in its natural and unaltered state, including any compound, except nabilone or compounds listed under a different schedule, structurally derived from 6,6’ dimethyl-benzo[c]chromene by substitution at the 3-position with either alkyl (C3

²⁰⁷ S.D.C.L. § 34-20B-1(9), (11)-(12) (2011 & Supp. 2017).

to C8), methyl cycloalkyl, or adamantyl groups, whether or not the compound is further modified in any of the following ways

. . .

(46) Synthetic cannabinoids. Any material, compound, mixture, or preparation that is not listed as a controlled substance in another schedule, is not an FDA-approved drug, and contains any quantity of the following substances, their salts, isomers (whether optical, positional, or geometric), homologues, modifications of the indole ring by nitrogen heterocyclic analog substitution or nitrogen heterocyclic analog substitution of the phenyl, benzyl, naphthyl, adamantly, cyclopropyl, cumyl, or propionaldehyde structure, and salts of isomers, homologues, and modifications, unless specifically excepted, whenever the existence of these salts, isomers, homologues, modifications, and salts of isomers, homologues, and modifications is possible within the specific chemical designation²⁰⁸

Title 22. Crimes

Chapter 42

Controlled Substances and Marijuana

22-42-1. Definition of Terms

(6) "Manufacture," the production, preparation, propagation, compounding, or processing of a controlled drug or substance, either directly or indirectly by extraction from substances of natural origin, or independently by means of chemical synthesis or by a combination of extraction and chemical synthesis

(7) "Marijuana," all parts of any plant of the genus *cannabis*, whether growing or not, in its natural and unaltered state, except for drying or curing and crushing or crumbling. The term includes an altered state of marijuana absorbed into the human body. The term does not include fiber produced from the mature stalks of such plant, or oil or cake made from the seeds of such plant²⁰⁹

22-42-5. Unauthorized possession of controlled drug or substance as felony

No person may knowingly possess a controlled drug or substance unless the substance was obtained directly or pursuant to a valid prescription or order from a practitioner, while acting in the course of the practitioner's professional practice or except as otherwise authorized by chapter 34-20B. A charge for unauthorized possession of controlled substance when absorbed into the human body as set forth in subdivision 22-42-1(1) shall only be charged under the provisions of § 22-42-5.1. A violation of this section for a substance in Schedules I or II is a Class 5 felony. A violation of this section for a substance in Schedule III and IV is a Class 6 felony.²¹⁰

²⁰⁸ S.D.C.L. § 34-20B-14(10), (20), (46) (2011 & Supp. 2017).

²⁰⁹ S.D.C.L. § 22-42-1(6)-(7) (2017).

²¹⁰ S.D.C.L. § 22-42-5 (2017).

22-42-6. Possession of marijuana prohibited—Degrees according to amount

No person may knowingly possess marijuana. It is a Class 1 misdemeanor to possess two ounces of marijuana or less. It is a Class 6 felony to possess more than two ounces of marijuana but less than one-half pound of marijuana. It is a Class 5 felony to possess one-half pound but less than one pound of marijuana. It is a Class 4 felony to possess one to ten pounds of marijuana. It is a Class 3 felony to possess more than ten pounds of marijuana. A civil penalty may be imposed, in addition to any criminal penalty, upon a conviction of a violation of this section not to exceed ten thousand dollars.²¹¹

²¹¹ S.D.C.L. § 22-42-6 (2017).