

To: House Transportation Committee
From: Matt Valerio, Defender General, Office of the Defender General
Date: March 30, 2016
Re: Opposition to H.228 Saliva Testing Bill

Mere Presence vs. Impairment, Page 4, Lines 10 – 12.

Presence of marijuana in the saliva does not mean that someone is impaired. Marijuana's main psychoactive ingredient, THC, can linger in the body long after the initial high and long after the effects have worn off.¹ There are many complexities in defining exactly what level of THC concentration constitutes an impairment for drivers and there is no consensus as to what THC levels are consistently correlated with behavioral impairment.² The National Highway Traffic Administration states:

“It is difficult to establish a relationship between a person's THC blood or plasma concentration and performance impairing effects. Concentrations of parent drug and metabolite are very dependent on pattern of use as well as dose...
It is inadvisable to try and predict effects based on blood THC concentrations alone, and currently impossible to predict specific effects based on THC-COOH concentrations. It is possible for a person to be affected by marijuana use with concentrations of THC in their blood below the limit of detection of the method.”³

Medical marijuana patients may always have some level of nanograms in their blood at almost all times, yet experience no impairment whatsoever. Without being able to measure intoxication to the point of impairment in regards to driving while using cannabis, these saliva tests are useless. The most reliable test for THC is the blood test.⁴

Again, current saliva testing can only show the presence of cannabis which doesn't equate to a person being impaired (due to the amount of time cannabis can remain in a person's system).⁵ Police should not and cannot substitute this new technology for an arbitrary legal limit for their own judgement.

This chemistry problem should not, however, present a problem. What we are all hoping to do is to prevent unsafe, impaired drivers off the road. That is best accomplished by identifying drivers who are operating erratically, rather than imposing artificial limits on THC measured by

¹ *Is a breath test for marijuana nothing but a pipe dream?* Nick Lavars, July 15, 2015.
<http://www.gizmag.com/breath-test-marijuana/38456/>

² <http://www.businessinsider.com/why-dui-limits-for-pot-are-bad-2013-12>

³ <http://www.nhtsa.gov/people/injury/research/job185drugs/cannabis.htm>

⁴ *No Easy Answers for DUI Concerns as Marijuana Gains Support*, February 24, 2014. NPR Staff.
<http://www.npr.org/2014/02/23/280310526/with-support-for-marijuana-concern-over-driving-high-grows>

⁵ <https://www.drugfoundation.org.nz/viewpoints/roadside-test-for-cannabis>

equipment that has less than adequate scientific certainty. For those cases where erratic driving and observed clinical impairment leads law enforcement to believe that someone is operating contrary to the statute under the influence of drugs, a blood test remains the available and appropriate scientific tool to use to assist in building a case.

Test case: Australia

- In West Australia, roadside saliva testing (using the Draeger Drug Test) was introduced in legislation in 2006.
- It has recently come to light from police that these machines have “quite a few issues” including: failing to return adequate readings, machines not working sufficiently (the indicators fails even though there is plenty of saliva), and failing to pick up on positive readings despite admission from driver they had smoked in the last 24 hours.⁶
- Saliva testing was recently criticized by a NSW judge who acquitted a man who was charged with drug-driving nine days after he had smoked.⁷
- In that case, roadside saliva test detected presence of THC in his blood, although clearly he was not impaired since he had smoke nine days earlier.⁸

Implied Consent: Constitutional? Page 3 – 4.

It is not clear, under the Fourth Amendment, whether implied consent laws are constitutional. This issue is currently being litigated in Vermont and a cert petition was granted by the Supreme Court on this issue. The issue will be argued in April.

- ***Kentucky Supreme Court recently ruled:*** The Kansas Court recently overturned criminal penalties for drivers who refuse alcohol testing, holding that it is unconstitutional to punish people for withdrawing “implied consent.”

Once a suspect withdraws consent...a search based on that consent cannot proceed,” says the 6-to-1 ruling in State v. Ryce. “By criminally punishing a driver’s withdrawal of consent, [the statute] infringes on fundamental rights arising under the Fourth Amendment.

- ***Birchfield v. North Dakota***, U.S. Supreme Court, Docket No. 14-1468. Oral argument set for April 20, 2016
Issue: Whether, in the absence of a warrant, a state may make it a crime for a person to refuse to take a chemical test to detect the presence of alcohol in the person’s blood.

⁶ <https://au.news.yahoo.com/a/31046715/police-drug-test-accuracy-in-doubt/>

⁷ <http://www.smh.com.au/nsw/roadside-drug-driving-tests-mysterious-and-uncertain-magistrate-says-20160202-gmjus2.html>

⁸ <http://www.abc.net.au/news/2016-02-02/man-caught-drug-driving-days-after-smoking-cannabis-acquitted/7133628>

Effective Date

If this is something the committee decides it wants to go forward with, we propose the effective date be changed to line up with Legalization as proposed in S.241, or 2018. The technology of these roadside testing devices is evolving and cannot detect impairment, only mere presence. It would be a waste of state resources to invest in these devices now.