EFFECTS OF MEASURE 110 ON INVESTIGATION AND PROSECUTION OF DRUG OFFENSES

Appellate and Criminal Justice Divisions, Oregon DOJ

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The recent enactment of Ballot Measure 110 means that possession of controlled substances, whether under ORS 475.752 or the substance-specific statutes later in Chapter 475, will now generally be a violation, not a crime. Drug possession will only be a crime when it involves a certain quantity of a drug covered by the substance-specific offenses listed below, or a commercial drug offense (CDO) that involves a Schedule I or II drug or a drug listed in the substance-specific offenses. These changes impact the scope of an officer's ability to investigate drug offenses.

Measure 110 takes effect February 1, 2021. The changes to the legal classifications of conduct will apply only prospectively—*i.e.*, only to conduct *committed* on or after that date. The changes do not apply to conduct committed before February 1, 2021, even if the defendant is not charged or tried until after that date. *See* ORS 161.035(4) (even after statute is amended or repealed, the law in effect at the time of the person's conduct controls the prosecution). [1]

[1] Although the legislature has the power to make a statute apply retroactively to conduct committed before its enactment, ORS 161.035(4) states a general policy judgment that conduct is prosecuted and punished based on the law at the time of the offense. Compare *State v. Isom*, 313 Or 391, 395 (1992) (later amendments redefining crime of escape did not affect the classification of the defendant's conduct, which constituted escape under the law in effect at the time), with *State v. McDonnell*, 329 Or 375, 384-85 (1999) (where legislature expressly provided that amended sentencing statute applies to "any defendant sentenced to death after [its effective date]," ORS 161.035(4) did not override legislative stated intent that it apply to conduct committed before effective date). As a result, because Measure 110 states only that its amendments "become operative" on February 1, 2021, and does not purport to change the classification of prior conduct, ORS 161.035(4) provides that the prior statutes remain effective for conduct committed before its operative date.

Below, DOJ addresses the most significant effects of the new law on current drug enforcement practices. The reclassification of "mere possession" as a violation will limit officers' authority to make initial stops based on suspicion of drug possession, to investigate suspected drug possession even during a lawful stop made for another offense, and to make arrests and—at least to some degree—to search pursuant to the automobile exception based on probable cause for possession of drugs.

A. THE INITIAL STOP: WHAT JUSTIFICATION IS NEEDED TO STOP FOR SUSPECTED DRUG POSSESSION?

1. A stop for a *violation*-level offense requires probable cause.

An initial question under the new law is what authority an officer has to make a stop for suspected possession of drugs, now that it has been reclassified as a violation. Although DOJ previously has attempted to convince the appellate courts that reasonable suspicion should be sufficient, the Oregon Court of Appeals has held that the state constitution requires probable cause to stop a person for a traffic violation. *See, e.g.*, *State v. Aguilar*, 307 Or App 457, 466-67 (2020) ("[U]nder Article I, section 9, of the Oregon Constitution, an officer must develop probable cause—rather than merely reasonable suspicion—to stop a citizen for a traffic violation.") (citing *State v. Gordon*, 273 Or App 495, 500 (2015), *rev den*, 358 Or 529 (2016)). And if probable cause is required to stop for a *traffic* violation, it seems likely that test will be the same for a *non-traffic* violation.[2]

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[2] ORS 153.039(2), which governs non-criminal violation stops, sets a lower standard than probable cause—allowing a stop based on "*reasonable grounds*" that the person has committed a violation—but that does not affect the constitutional analysis. Moreover, the meaning of "reasonable grounds" is nebulous at best. In a different context, the Oregon Supreme Court has held only that "reasonable grounds" means something *more* than reasonable suspicion, but *less* than probable cause. *State v. Gulley*, 324 Or 57 (1996). And, although the state has attempted to argue that "reasonable grounds" means reasonable suspicion, the Court of Appeals—at least at this time—has declined to address the issue. In sum, even if ORS 153.039 is relevant to the constitutional question, that standard currently requires *more* than reasonable suspicion to stop for a violation.

Thus, in a close case as to probable cause, it may be worth making a backup argument that reasonable suspicion, or "reasonable grounds," can justify a stop for a non-traffic violation—to preserve the issue for appellate review. The Oregon Supreme Court has not directly decided the issue—*see, e.g.*, *State v. Watson*, 353 Or 768, 774 n 7 (2013)—and, in *dictum* in one case, has strongly suggested that reasonable suspicion may be constitutionally sufficient for a violation stop. *See, e.g.*, *State v. Suppah*, 358 Or 565, 568 n 2 (2016). But the Court of Appeals cases requiring probable cause for a traffic stop are binding unless the Supreme Court holds otherwise, and it is unlikely that it would set a lower standard for non-traffic violations.

2. A stop for a *crime* requires reasonable suspicion.

Of course, the reasonable suspicion standard still applies to stops to investigate criminal offenses (or to expand the scope and duration of a traffic stop to investigate a criminal offense). Under the new law, manufacture and delivery of drugs remain crimes.

Possession remains **criminal** only if it involves the following:

Quantities of specific-drug offenses:			
LSD	40 or more user units	ORS 475.752(7)(b)(A)	A misd.
Psilocybin	12 gram(g) or more	ORS 475.752(7)(b)(B)	A misd.
Methadone	40 or more user units	ORS 475.824(2)(c)	A misd.
Oxycodone	40 or more pills	ORS 475.834(2)(c)	A misd.
Heroin	1 g or more	ORS 475.854(2)(c)	A misd.
MDMA	1 g or more; or 5 or more pills	ORS 475.874(2)(c)	A misd.
Cocaine	2 g or more	ORS 475.884(2)(c)	A misd.
Meth	2 g or more	ORS 475.894(2)(c)	A misd.
Commercial drug offenses involving:[3]			
Schedule I	Any, incl. LSD and psilocybin	ORS 475.752(7)(a)	B fel.
Schedule II	Any amount	ORS 475.752(8)	C fel.
Methadone	Any amount	ORS 475.824(2)(b)	C fel.
Oxycodone	Any amount	ORS 475.834(2)(b)	C fel.
Heroin	Any amount	ORS 475.854(2)(b)	B fel.
MDMA	Any amount	ORS 475.874(2)(b)	B fel.
Cocaine	Any amount	ORS 475.884(2)(b)	C fel.
Meth	Any amount	ORS 475.894(2)(b)	C fel.

As shown above, drug possession is criminal only when accompanied by CDO factors or if the amount of the substance exceeds the specified threshold. Thus, unless the officer has a specific and objective factual basis for believing that the suspect possesses drugs in a quantity exceeding the threshold or that CDO factors are present, the officer can initiate a stop for the violation-level offense only based on *probable cause*.

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[3] ORS 475.900(1)(b): CDO involves three or more factors, such as unlawful possession of guns or possession weapons for use in a controlled substance offense, possession of packaging or manufacturing materials, drug records, stolen property, or modification of structures to facilitate a drug offense or use of public lands. Other factors apply only when the crime involved specific controlled substances—*i.e.*, such as delivery of certain substances (heroin, cocaine, methamphetamine, lysergic acid diethylamide, psilocybin or psilocin) "for consideration," or possession of more than a specified amount of a particular substance.

For example, even if an officer reasonably suspects that a suspect has *some* drugs, that fact alone does not establish probable cause to believe that the suspect has *a criminal quantity* of the substance. *See, e.g., State v. Tallman*, 76 Or App 715, 720 (1985) (discovery of less than one ounce of marijuana "cannot by itself create probable cause to search for more"); *State v. Huff*, 253 Or App 480, 490-91 (2012) (mere discovery of meth pipe with residue in defendant's RV did not provide probable cause to search the RV for more drugs). Similarly, to support a reasonable suspicion that three CDO factors are present, the officer must be able to point to specific and articulable facts about the particular suspect that reasonably would give rise to that suspicion.

And, as explained below, Measure 110's decriminalization of "mere possession" of drugs not only impedes officers' abilities to stop a person for having drugs, but also their ability to further investigate during an otherwise lawful stop if they suspect that the person has drugs. That is because an officer's investigation during a stop for one purpose must be "reasonably related" to that offense, unless the officer has independent reasonable suspicion of a *crime* that would justify a separate investigation. An officer's discovery that the detainee has a noncriminal quantity of a controlled substance does not, by itself, provide grounds to expand a stop in order to inquire or request consent to search for evidence of a criminal-level drug offense.

B. EXTENSION OF LAWFUL STOP: WHEN CAN AN OFFICER INVESTIGATE A PERSON FOR DRUG POSSESSION DURING A STOP FOR AN UNRELATED PURPOSE?

The Oregon Supreme Court recently rejected the Court of Appeals' longstanding "unavoidable lull" rule, which allowed inquiries unrelated to the basis for the initial stop as long as it did not extend the duration of the stop. The supreme court held that an extension of the stop occurs either when the duration is extended or when an officer investigates beyond the subject matter of the original stop. Now, "all investigative activities, including investigative inquiries," that are unrelated to the reason for the stop are unlawful unless the state can prove that there was "independent constitutional justification." *State v. Arreola-Botello*, 365 Or 695 (2019).

Under *Arreola-Botello*, it appears that the level of "independent constitutional justification" that will justify an unrelated investigation during a stop is the same as the justification that would be required if an officer stopped a suspect to conduct that investigation.[4] In other words, the level of suspicion needed to extend the scope of a stop will depend on whether the officer seeks to investigate a **violation** or a **crime**.

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[4] In *Arreola-Botello*, the court noted that the officer's inquiries could have been justified if the officer had "reasonable suspicion that [the] defendant had engaged or was about to engage

1. Extension of an unrelated stop to investigate a drug *violation* requires probable cause.

As stated above, in Oregon, an officer needs **probable cause** to initiate a stop or any other constitutionally significant inquiry related to a **violation**. Thus, under *Arreola-Botello*, an officer can ask questions or otherwise investigate a violation drug offense during an unrelated stop only based on probable cause for the violation.

If PC develops for a violation-level offense, the officer can ask only those questions reasonably related to that offense. Such questions might include:

- Questions about the specific drugs for which PC exists;
- A request for consent to search for those drugs;
- A command to hand over the drugs, because the officer has authority to seize contraband.
    - Note: An officer cannot actually enter a vehicle—which is a separate event with different constitutional significance—to seize contraband unless a warrant exception applies, such as consent, exigency, or the automobile exception, described below.

- Questions about whether the suspect possesses *other* drugs, unless it is clear that the officer is shifting the investigation to *criminal* activity without reasonable suspicion.
    - Example: A question whether there are "a lot more drugs" or whether CDO facts exist is clearly investigating a crime, not the original violation.

Questions about packaging materials or other evidence of a *crime* must be based on independent suspicion that the person is engaged in *criminal* activity in drugs, as explained below.

2. Extension of an unrelated stop to investigate a drug *crime* requires reasonable suspicion for that crime.

An officer who develops suspicion during a stop that a person is engaged in a drug *crime* must be able to articulate facts supporting **reasonable suspicion** to inquire about or otherwise investigate the criminal activity. Here are some examples:

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in *criminal conduct*." 365 Or at 714. But the court treated unrelated questions or investigation during the initial stop as a separate stop that requires its own constitutional justification.

- **Possession of a criminal quantity of a controlled substance.** During a stop for another offense, an officer with reasonable suspicion that the defendant possesses a controlled substance in a quantity—or under other circumstances—that would make it a crime, rather than a violation, can ask questions related to the *crime*.

    - **Substances with low threshold amounts.** In the case of possession of substances for which the legislature has set low threshold amounts, the same facts that support probable cause for the violation may often be sufficient to establish reasonable suspicion of a criminal amount, if the officer can articulate why he or she reasonably believed that the amount exceeded the threshold.[5] For example, it takes only a gram of heroin for possession to be a crime; thus, it may not take a lot more than a belief that the person has *some* heroin to suspect a crime.

- **Drug possession, plus three CDO factors.** If an officer has reasonable suspicion for possession of a controlled substance and that three or more CDO factors are present, the officer can inquire about that crime during an unrelated stop. But in that scenario, it may be just as easy for the officer to rely on reasonable suspicion for delivery of a controlled substance, rather than trying to explain facts supporting a belief that specific CDO factors are present.

- **DUII.** An officer who reasonably suspects DUII can ask questions about the presence of alcohol or a controlled substance because that is reasonably related to the purposes of a DUII investigation**.** *State v. Williams*, 297 Or App 384, *rev den*, 365 Or 658 (2019). *See also* pages 67-70 of the DOJ Search and Seizure Manual (2020 ed) for other cases with facts supporting reasonable suspicion for DUII.

C. HOW WILL MEASURE 110 IMPACT OFFICERS' ABILITY TO ARREST AND TO SEARCH ABSENT CONSENT OR A SEARCH WARRANT?

As we all know, an officer lacks authority to make a custodial arrest for a violation, so Measure 110's reclassification of most conduct involving drug possession to violations eliminates any arrest authority that formerly would have been available for that

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[5] Even when an officer does not know the quantity of drugs involved, if an officer articulates reasonable suspicion of a *crime*, the fact that it is possible the defendant may possess only a *violation*-level quantity does not restrict the officer from investigating the crime. *State v. Acuna*, 264 Or App 158, 169 n 4, *rev den*, 356 Or 400 (2014).

conduct.[6] In addition, some exceptions to the warrant requirement depend on whether the suspect was subjected to a lawful arrest. For example, most inventories of a person and his or her belongings are permitted only upon an arrest, and a search incident to arrest is allowed only if there is a lawful custodial arrest. In those circumstances, the lack of authority to arrest will mean that officers no longer will have authority to conduct a search that previously would have been allowed.

Automobile exception. One exception to the warrant requirement, the automobile exception, still applies, even to violation-level offenses. The automobile exception to Article I, section 9, permits a warrantless search of a vehicle if the vehicle "is mobile at the time it is stopped by police," and the officer has probable cause "to believe that the vehicle contain[s] contraband or evidence of a crime." *State v. Brown*, 301 Or 268, 274 (1986). Contraband includes evidence of violations. *State v. George*, 287 Or App 312 (2017), *rev den*, 363 Or 744 (2018) (finding that automobile exception applied to justify warrantless search for evidence of an open container violation); *State v. Smalley*, 233 Or App 263, *rev den*, 348 Or 415 (2010) (finding that the automobile exception applied to justify a search for suspicion of less than an ounce of marijuana). *See also State v. Tovar*, 256 Or App 1, 10 (2013), *rev den*, 353 Or 868 (2013) (describing holding in *Smalley*). The automobile exception will therefore justify a search of a vehicle if car was mobile at the time of the stop and the officer has probable cause to believe that the car contains drugs, even if the amount of drugs possessed would be only a violation.

> ***A word of caution about probable cause:*** Probable cause for purposes of the auto exception is probable cause to believe that evidence or contraband is *in* the vehicle, not merely probable cause that the person has committed a crime. That is, "'additional facts' beyond mere physical possession of drugs must be presented to establish the probability that *further* evidence of criminal activity will be found" in the vehicle. *State v. Sunderman*, 304 Or App 329, 343 (2020) (search under the automobile exception was unlawful because the presence of unused methamphetamine pipes did not "establish probable cause of current possession"); *see also State v. Tovar*, 256 Or App 1, 9 (2013), *rev den*, 353 Or 868 (2013) (the "scope" of search pursuant to the automobile exception "is defined by the

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[6] For that reason, Measure 110 limits officers' ability to take a youth into custody for drug possession now classified as a violation. *See* ORS 419C.080(1) (a youth can be taken into custody without a warrant or court order "[w]hen, if the youth were an adult, the youth could be arrested without a warrant"). Thus, an officer cannot take a youth into custody based on the youth having committed a violation under Ballot Measure 110. Instead, the officer must issue a citation, returnable to the juvenile court. ORS 419C.085. ***Note:*** ORS 419C.370(1)(b) authorizes a juvenile court to enter an order directing that "offense[s] classified as violation[s] * * * be waived to municipal court if the municipal court has agreed to accept jurisdiction." That statute appears to authorize such an order with respect to violations under Ballot Measure 110.

warrant that the officer could have obtained").[7] It should also be noted that an officer's observation of a defendant's intoxication—without more—is insufficient to establish the inference that a defendant presently possesses a controlled substance. *Sunderman*, 304 Or App at 343; *State v. Schmitz*, 299 Or App 170, 177 (2019).

Thus, if an officer sees a user amount of drugs in plain view, the officer may conduct a limited search of the automobile for the purpose of seizing those drugs. To search the car for additional drugs, however, the officer most likely will need to articulate facts establishing probable cause to believe that the car contains additional drugs. If an officer has probable cause to believe that there are additional drugs in the car, the officer may search the car and any containers that might reasonably contain the drugs.

Please note that the continuing validity of the automobile exception is at issue before the Oregon Supreme Court in *State v. McCarthy*, case no. S067608.

Probable cause and exigency. Additionally, a search for, or the seizure of, contraband may also be permissible pursuant to the probable cause and exigency exception to the warrant requirement. The probable cause prong refers to the justification for the issuance of a warrant. *See State v. Matsen*, 287 Or 581, 586-87 (1979) (finding that officers had probable cause to search, but "the state failed to prove that destruction of contraband or the escape of the defendants was imminent"). Contraband is a permissible object of a search and seizure warrant. ORS 133.535(2). Hence, an officer with probable cause to believe that a person has contraband could seek a warrant to search that person.

Moreover, if that officer also has an objectively reasonable belief that there is an exigent circumstance, that officer may be justified in conducting the search or seizure without seeking a warrant. "An exigent circumstance is a situation that requires the police to act swiftly to prevent danger to life or serious damage to property, or to forestall a suspect's escape or destruction of evidence." *State v. Stevens*, 311 Or 119, 126 (1991). Hence, if an officer reasonably believes that a person may destroy contraband before the officer could lawfully obtain a warrant, the officer may seize that contraband.

D. PROSECUTION OF DRUG VIOLATIONS

1. Can the state rely on a presumptive field test result at trial?

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[7] *Tovar* distinguished its probable-cause holding from that in *State v. Huff*, 253 Or App 480, 486-88 (2012), which is not an automobile-exception case, but which explained that, in that case, discovery of a quarter gram of meth and a pipe with residue in the defendant's RV did not establish probable cause to search the RV because the officer's affidavit did "not provide *any* potential linkage between the presence of some drugs and the likelihood of more drugs."

The first question is whether a presumptive field test, if admitted, will be sufficient to prove the identity of a controlled substance in a violation trial. In most circumstances, a field-test result will be legally sufficient to prove a violation by a preponderance of the evidence under ORS 153.076(2).

Another question relates to the foundation for admission of a field-test result, which will be treated as "scientific" evidence under OEC 702. The obvious difficulty in a violation case is that the defendant often will appear *pro se* (*i.e.*, without an attorney), in which case the district or city attorney's office may assist with the case preparation and subpoena witnesses, but the officer generally makes any legal arguments to the court. ORS 153.076, 153.083. Unless the legislature enacts a statute that would affirmatively make presumptive field tests admissible in these cases, prosecutors will either need to ensure that officers are trained on—and prepared to respond to—potential evidentiary objections to the field test or provide direct assistance when objections arise.

A trial court generally has an obligation as a gatekeeper to require an evidentiary foundation for scientific evidence—often by application of the *Brown/O'Key* multi-factor test—but there are circumstances in which a full evidentiary hearing is not required to establish scientific validity of the science underlying a particular technique. One circumstance involves scientific evidence that is the subject of *prima facie* legislative recognition under *State v. Helgeson*, 220 Or App 285 (2008) and *State v. O'Key*, 321 Or 285 (1995). That is, if the legislature has determined that evidence obtained using a particular scientific technique is admissible, that is at least *prima facie* evidence of its validity and can support its admission at trial. In the case of presumptive field tests, the legislature has provided (in ORS 475.235(3)) that their results are admissible in grand jury and other preliminary proceedings, thereby recognizing the underlying "science" to be valid. In short, that legislative recognition is one way to establish scientific validity without application of the *Brown/O'Key* multifactor test.

Another way of establishing the scientific foundation without a full hearing is to establish that the principles or methodology underlying field testing are "universally accepted" and thus are a "clear case" in which no additional foundational evidence is required for admission. *See O'Key*, 321 Or at 293; *see also State v. Branch*, 243 Or App 309 (2011) (principles underlying LIDAR speed measurement are universally accepted). Note that the requirement of "universal acceptance" applies to the scientific principles used in the technique, not the ultimate *result* of the testing.

Finally, even if the trial court believes that it must apply the *Brown/O'Key* multi-factor test, the state could rely on evidence—from the manufacturer or other source of information—explaining the methodology and error rates for the results.

The OSP crime lab has provided some simple explanations of the two methods involved in field testing (**Raman spectroscopy**, the technique underlying the TruNarc handheld analyzer, and **Colorimetric reagent analysis**, which is the testing method underlying the NIK color tests), along with scientific sources for those explanations. DOJ has compiled those explanations into "cheat sheets" that explain the testing methods and summarize the legal arguments in support of the use of judicial notice and *prima facie* legislative recognition as foundation for the reliability of testing based on those techniques. DOJ hopes that the "cheat sheets" are useful tools in court.

2. What if a defendant fails to appear on a citation?

If a defendant is cited for a possession violation and fails to appear on the citation or any other court appearance, the court can issue an order to show cause why the defendant shall not be held in contempt. ORS 153.064(2). The show-cause order can be served by certified mail with return receipt requested, and if that cannot be done, the defendant must be served *personally* with the order. If the defendant is served and does not appear as required by the order, the court can issue an arrest warrant. ORS 153.064(2). A person who knowingly fails to appear on a citation or other court appearance required after the person is served with a citation can be charged with failure to appear in a violation proceeding under ORS 153.992. If the person fails to appear on that misdemeanor charge, the court may issue an arrest warrant. ORS 153.064(1).

E. FURTHER MEASURE 110 RESOURCES (AND RECOGNITION OF AUTHORSHIP)

This memorandum is the result of substantial work by attorneys for the Oregon Department of Justice, as well as the assistance of the Oregon State Police Crime Laboratory. If you have questions, please feel free to call any of the authors of this memo: Criminal Justice Division AAG Kurt Miller, at 503-378-6347; or Appellate Division AAGs Leigh Salmon, Joanna Jenkins, Philip Thoennes, and Jennifer Lloyd, at 503-378-4402.

Please do not forget to use the attached "cheat sheets" in court if you believe they will be helpful for purposes of establishing the scientific foundation for presumptive field tests in violation trials.

RAMAN SPECTROSCOPY/TRUNARC™ PRESUMPTIVE FIELD TEST

How it works: The TruNarc handheld analyzer is the field version of an instrument that has been used in laboratories, including crime labs, since the 1970s. The instrument is a presumptive test that analyzes substances in their packaging, which greatly reduces the risk of losing evidence or exposing an officer to dangerous substances. The instrument operates on the principles of Raman spectroscopy. This method focuses a laser on a sample to measure the spectrum of light that passes through the sample at different wavelengths. The instrument compares the measurements to known standards of substances to make a presumptive identification, which is then displayed to the officer. The properties of Raman scattering were discovered in 1928 and practical applications have been universally accepted in the scientific community for decades.[8]

Foundation for admission at trial: There are two possible bases on which the trial court can find that the technique is reliable scientific evidence:

1. The court can take judicial notice because the technique is universally accepted in the scientific community. Because the scientific principle of Raman spectroscopy is universally accepted in the scientific community, and the TruNarc instrument applies that principle to identify the substance at issue in a violation trial, the court can find that this is a "clear case," and also a case for judicial notice of the indisputable scientific validity, such that the state is not required to present additional scientific foundation to satisfy the *Brown/O'Key* test for the admissibility of scientific evidence as discussed in *State v. Branch*, 243 Or App 309 (2011), *rev den*, 351 Or 216 (2011) (LIDAR involves scientific evidence, but requires no scientific foundation because it presents a clear case, and a case for judicial notice).

2. The technique is a subject of *prima* facie legislative recognition. Further, ORS 475.235(3)(a) provides that a presumptive field test is *prima facie* evidence of the identity of the substance for purposes of grand jury and a preliminary hearing. Because the legislature has accepted presumptive tests for those purposes, the trial court may find that presumptive tests are the subject of *prima facie* legislative recognition of the reliability of that process for testing substances such that the state is not required to present additional evidence to satisfy the *Brown/O'Key* foundation for the admissibility of scientific evidence as discussed in *State v. Helgeson*, 220 Or App 285 (2008) (testing for BAC involves scientific evidence, but requires no scientific foundation because it is the subject of *prima facie* legislative recognition of the testing process).

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[8] K. S. Krishnan; Raman, C. V. (1928). "The Negative Absorption of Radiation", *Nature*, 122 (3062): 12-13; Moffat, A.C. et al., (editors). *Clarke's Analysis of Drugs and Poisons*, (most recent edition) the Pharmaceutical Press, Volume 1, (chapter on Raman Spectroscopy); Lewis, I.R. and H.G.M. Edwards (editors), *Handbook of Raman Spectroscopy*, Marcel Dekker, Inc., 2001. pp. 1-40, 733-748; *Gardiner, D.J. (1989). Practical Raman spectroscopy. Springer-Verlag;* Ravreby, M. D., Gorski, A., "Effects of Crystal Habits in Heroin on the Infrared Spectra", Proceedings of the International Symposium on the Forensic Aspects of Controlled Substances, 1988, pp. 165-167; Guidelines on Raman Handheld Field Identification Devices for Seized Material. United Nations Office on Drugs and Crime. www.unodc.org/documents/scientific/Guidelines_Raman_Handheld_Field_dentification_Devices.pdf

COLORIMETRIC ANALYSIS/NIK® PRESUMPTIVE FIELD TEST

How it works: NIK brand tests, as well as other colorimetric reagent test kits, have been used by officers and in laboratories for decades. The kits are a presumptive test that detects the presence of a particular class of drugs by a simple method whereby the officer places a small portion of the substance in the kit. A specific color change will indicate a presumptive positive for the specified compound. These tests are based upon the known chemical color reactions when two substances are exposed to each other. The science of chemical color tests dates to 1859 and practical applications have been universally accepted in the scientific community for decades.[9]

Bases for admission at trial: There are two possible basis on which the trial court can find that the technique is reliable scientific evidence:

1. The court can take judicial notice because the technique is universally accepted in the scientific community. Because the scientific principle of colorimetric analysis is universally accepted in the scientific community, and the test kit used by an officer applies that principle to identify the substance at issue in a violation trial, the court can find that this is a "clear case," and also a case for judicial notice of the indisputable scientific validity, such that the state is not required to present additional scientific foundation to satisfy the *Brown/O'Key* test for the admissibility of scientific evidence as discussed in *State v. Branch*, 243 Or App 309 (2011), *rev den*, 351 Or 216 (2011) (LIDAR involves scientific evidence, but requires no scientific foundation because it presents a clear case, and a case for judicial notice).

2. The technique is a subject of *prima* facie legislative recognition. Further, ORS 475.235(3)(a) provides that a presumptive field test is *prima facie* evidence of the identity of the substance for purposes of grand jury and a preliminary hearing. Because chemical reagent tests based on colorimetric analysis are presumptive tests under ORS 475.235(6), the trial court may find this is the subject of *prima facie* legislative recognition of that testing method such that the state is not required to present additional foundational evidence to satisfy the *Brown/O'Key* test for the admissibility of scientific evidence as discussed in *State v. Helgeson*, 220 Or App 285 (2008) (BAC testing involves scientific evidence, but requires no scientific foundation because it is the subject of *prima facie* legislative recognition of the testing method).

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[9] Alim A Fatah. Color Test Reagents/Kits for Preliminary Identification of Drugs of Abuse. National Institute of Standards and Technology (NIST): Maryland; 2000; Rapid Testing Methods of Drugs of Abuse. United Nations Office on Drugs and Crime: Vienna; 1995; A.C. Moffat, M.D. Osselton, and B. Widdop (Eds.), *Clarke's Analysis of Drugs and Poisons*, 3rd Edition, Pharmaceutical Press, London, p. 279-300 (Vol. 1: colour tests), 978-979 (Vol.2: ephedrine); Feigl F, Anger V. Spot Tests in Organic Analysis. Amsterdam, Netherlands: Elsevier Science B.V; 1966; Feigl F, Anger V. Spot Tests in Inorganic Analysis. Amsterdam, Netherlands: Elsevier Science B.V; 1972; Moffat, A. C., Osselton, M. D., Widdop, B., & Watts, J. (2011). *Clarke's analysis of drugs and poisons: In pharmaceuticals, body fluids and postmortem material*. London: Pharmaceutical Press; Andrea E. Holmes et al. Evaluation of the NIK® test: Primary general screening test for the presumptive identification of drugs. Int J Cri & For Sci. 2:5, 81-137; 2018; David J S, Michael J K, Marco P, Andrea E H. General Advantages and Disadvantages of the NIK Narcotic Test. J Forensic Sci & Criminal Invest. 2018; K. Grates, J. Ring, K. Savage, T. Denicola, V. Beall, J. Dovyak, E. Schlomer, Conclusion of Validation Study of Commercially Available Field Test Kits for Common Drugs of Abuse, National Forensic Science Technology Center; 2008.

M110 Summary

As of 2/1/2021, Measure 110 will limit officers' authority to investigate, search, and arrest for drug possession.

INITIAL STOP FOR DRUG POSSESSION:

- **A stop for a *violation* offense requires probable cause that the suspect committed the offense.**
- **A stop for a *crime* requires reasonable suspicion that the suspect has committed that crime.**
  - PCS in the following quantities or with additional factors are criminal:
    - Heroin—one gram or more
    - 3,4 methylenedioxymethamphetamine (MDMA)—at least: 1 gram, or 5 tablets, pills, capsules
    - Methamphetamine—2 grams or more
    - Methadone—40 or more user units
    - Oxycodone—40 or more pills, tablets, or capsules
    - Cocaine—two grams or more
    - LSD—40 or more user units
    - Psilocybin or psilocin—12 grams or more
    - PCS in Schedule I or II (including the above specific drugs) *and* three or more CDO factors

EXTENSION OF A STOP: ANY UNRELATED INQUIRY REQUIRES LEGAL JUSTIFICATION:

- **Officer can ask questions and investigate a drug *violation* during an unrelated stop when:**
  - Specific, articulable facts make it *probable* that the suspect possesses drugs; and
  - Investigation is limited to the violation for which there is PC
    - Questions must be reasonably related to investigating the possession violation
    - Officer can ask for consent to search, but only for the drugs for which there is PC

- **Expansion of a stop to investigate drug *crimes* requires reasonable suspicion of that crime.**
  - PCS in specified quantities or with CDO factors (see above).
  - DUII: Questions about the presence of alcohol or drugs are reasonably related to DUII**.**

ABILITY TO ARREST AND TO SEARCH BASED ON VIOLATION PCS:

- **M110 does not change authority to search for *crime* evidence. But some warrant exceptions depend on a lawful arrest (which is not permitted for a violation).**
    - Most inventories of a person apply only upon an arrest
    - *Search incident to arrest* requires PC to arrest for a *crime*.

- **Plain view: authorizes a seizure of contraband from a lawful vantage point**
    - An observation made in the course of a plain-view seizure *may* support a more expanded search

- **Automobile exception applies to violation drug possession.**
  - Allows search of a vehicle that was **mobile** when it was stopped only when there is **PC** that *contraband* or evidence of a crime is inside.
    - Contraband means anything the law prohibits possessing.
  - This search is **limited** to an entry to seize the contraband to which the PC relates
    - PC for commission of a drug crime does not, by itself, provide PC that drugs are in the *car*:
    - Possession of *some* drugs does not, on its own, supply PC that *more* drugs are present.
    - Intoxication, in and of itself, does not supply PC that the suspect *currently* has drugs.
  - To search for *more* drugs, there must be other facts that establish PC that *more* drugs are present.
    - If so, you may search any area or containers that might reasonably contain those drugs.

- **PC & Exigency**
    - If an officer has PC that a subject possesses contraband and reasonably believes an exigent circumstance exists (e.g. destruction of evidence) the officer may seize the contraband.