

# **Cannabis Defense**

- Who Cares about Weed?
- The legalization of Hemp and CBD
- Today's 4<sup>th</sup> Amendment Challenges
- What's the deal with Delta 8?

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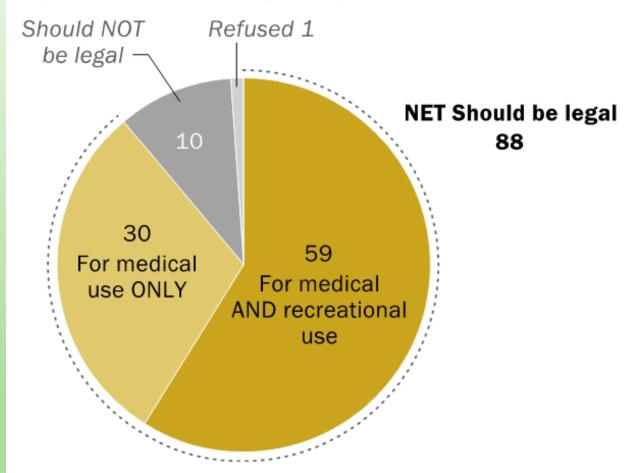


# Nation and State polls favor legalization

- 88% of Americans support legalization
- 11% of Americans oppose legalization

## Just one-in-ten U.S. adults say marijuana should not be legal at all

% of U.S. adults who say marijuana ...



Source: Survey of U.S. adults conducted Oct. 10-16, 2022.

PEW RESEARCH CENTER

44 states have some form of legalization

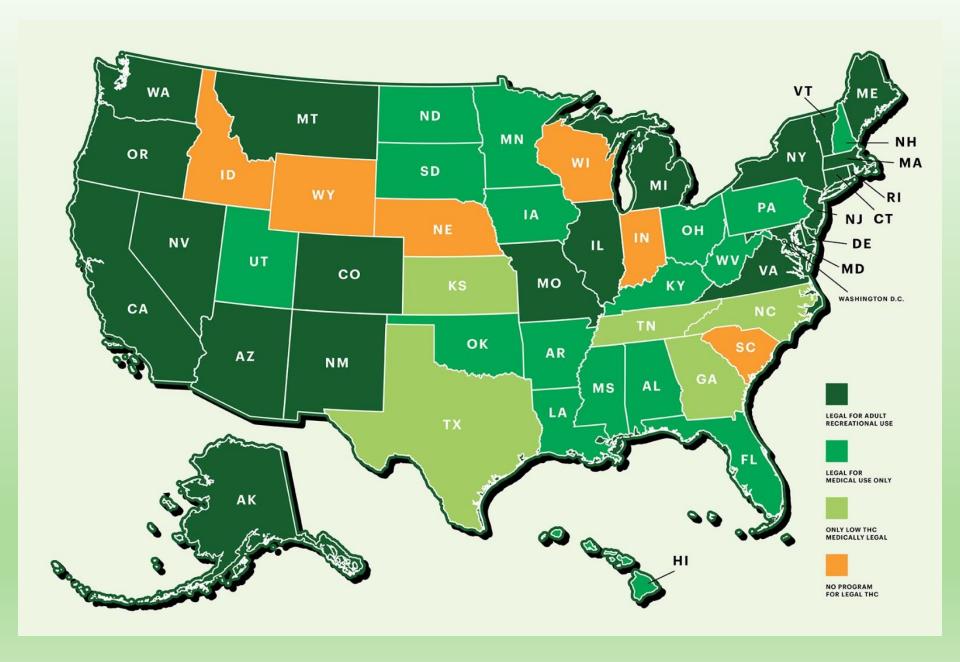




States with Legalization

24
states
and DC
fully
LEGAL





#### **DEA to Rescheduled MJ???**

#### Schedule I

- Drugs with High Abuse Risk
- No Safe, accepted medical use
- Heroin, LSD, PCP Crack Cocaine

#### Schedule III

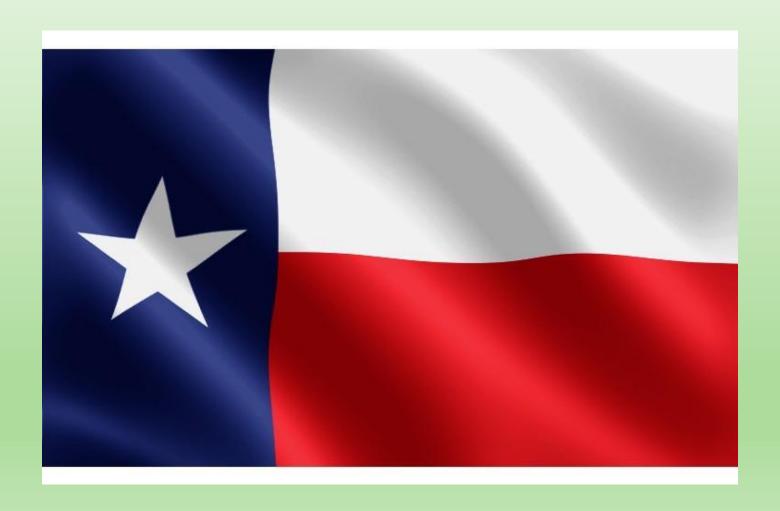
- Drugs with lowest abuse risk
- Safe and accepted medical use
- Tylenol 3, Valium, Xanax

## **Hearing Postponed...**

Originally scheduled for January 21, 2025

No Set Timeline

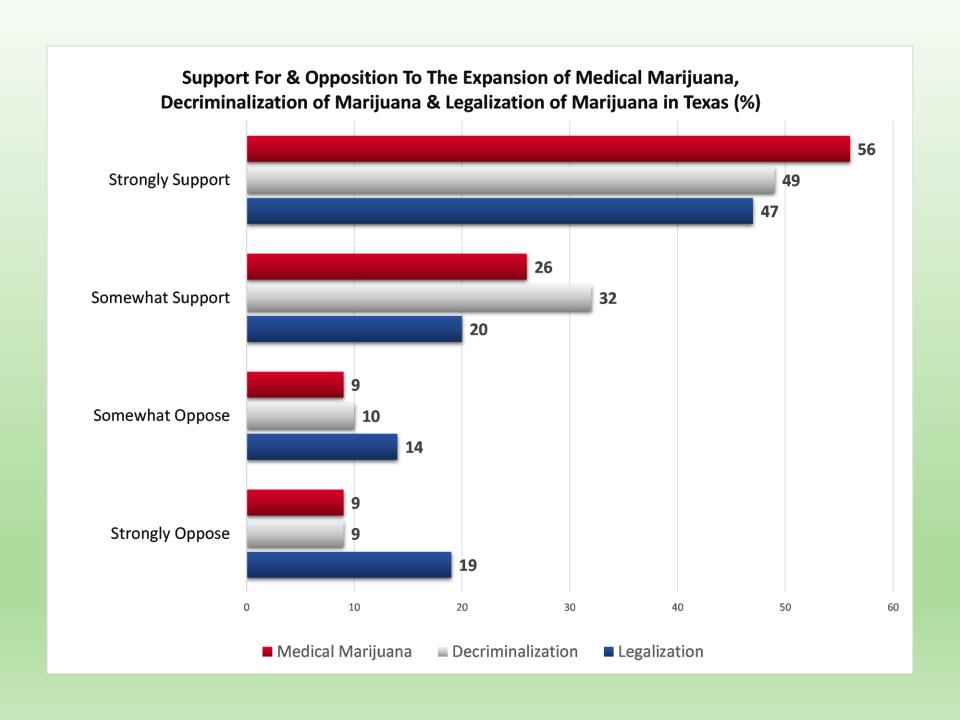
#### Where do Texans stand?





- **82%** Texans for some form of legalization
- 16% Texans against legalization

# Strong Support in Texas



#### Senate Bill 3??

Are you for real??

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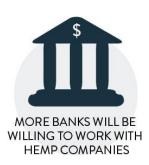
- Goal to create legal hemp market
- Directed USDA to establish a national **regulatory framework** for **hemp production** in the United States.
- Passed November 2018

#### **2018 FARM BILL EFFECT**

Under the 2018 Farm Bill, hemp has been removed from the Controlled Substances Act (CSA) and is now considered an agricultural product.



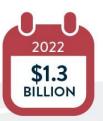


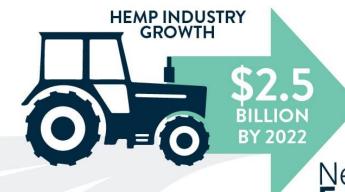




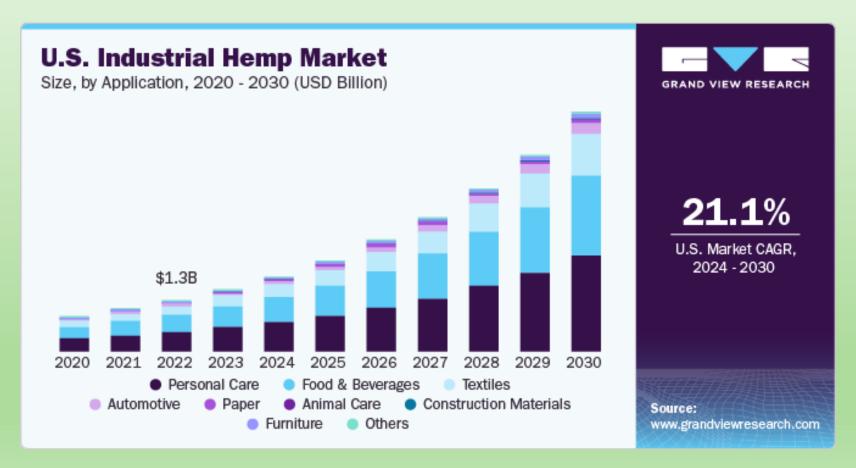
HEMP-DERIVED CBD PRODUCT SALES







# US Hemp Industry worth \$1.63 Billion in 2023



## Global Hemp Industry to reach \$115 Billion by 2030

#### **Industrial Hemp Market Size Estimation 2022 |** Industry Is Expected To Reach Valuation of **USD 115.13 Billion Till 2030**

**NEWS PROVIDED BY** ReportsandData May 06, 2022, 15:18 GMT







Rising demand for hemp-based plastic and for renewable raw materials are some key factors driving market revenue growth

NEW YORK CITY, NEW YORK, USA, May 6, 2022 /EINPresswire.com/ -- The global Industrial Hemp Market size is expected to reach USD 115.13 Billion in 2030 and register a



#### Contact

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More From This Source

Brain Monitoring Market Will Reach

revenue CACD of 33.8% over the forecast period, according to a latest report by Deports and Data, Dising

#### STALK

**FIBER** 

**HURDS** 



**TEXTILES** 



INSULATION



ROPE



PAPER

ORGANIC COMPOST



ANIMAL BEDDING



FIBER BOARD

#### **SEEDS**

OIL

SEED CAKE

**HEMP NUT** 



COOKING/SEASONING OIL



FLOUR



MILK/DAIRY



DIETARY SUPPLEMENT



BEER



BODY CARE PRODUCTS



ANIMAL FEED



BAKERY

GRANOLA



FUEL



PROTEIN POWDER



PAINT

**ROOTS** 

LEAVES/FLOWERS

# U.S. Domestic Hemp Production Program



# Texas House Bill 1325



#### House Bill 1325 - "Hemp Bill"

- Immediately effective June 10, 2019
- Authorizes the <u>production</u>, <u>manufacture</u>, <u>retail sale</u>, and <u>inspection of industrial</u> <u>hemp crops</u> and <u>products</u> in Texas.
- Includes <u>consumable hemp products</u> which contain <u>cannabidiol (CBD)</u>, as well as other edible parts of the hemp plant.

What did
HB 1325
do?

 Texas Department of Agriculture shall develop a plan to monitor and regulate the production of hemp in Texas

#### **Hemp Law**

- Texas Department of Agriculture
- TDA Regulates Industrial Production Hemp

- Department of State Health Services
- DSHS Regulates Consumable CBD

#### **Hemp Law**

- Texas Department of Agriculture
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## What is HEMP?

## What is MARIJUANA?

#### Cannabis Sativa L.





#### The Stash





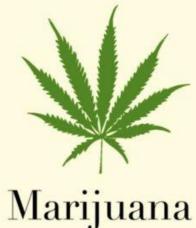




# What is Hemp?

"Hemp" means the plant Cannabis sativa L. and any part of that plant, including the seeds of the plant and all derivatives, extracts, cannabinoids, isomers, acids, salts, and salts of isomers, whether growing or not, with a delta-9 tetrahydrocannabinol concentration of not more than 0.3 percent on a dry weight basis.





Marijuana and industrial hemp are different varieties of the same plant species, Cannabis sativa L.

- Contains less than 1% percent THC on a dry-weight basis

- Contains 3 to 15% THC on a dry-weight basis

- Grown for fiber or seeds

- Grown for flower buds and leaves

- No psychoactive effects

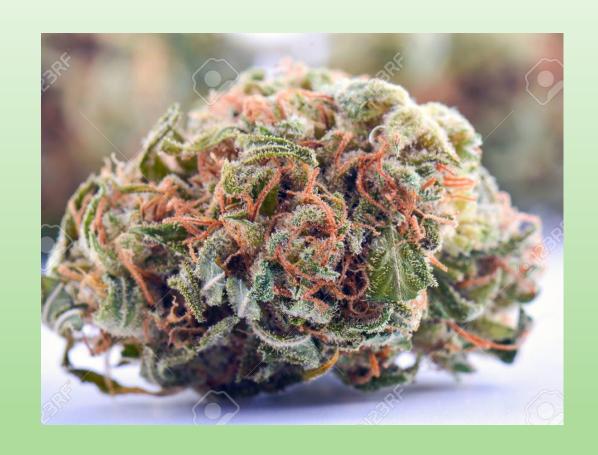
- Some psychoactive effects

- You can grow hemp if licensed or authorized under a state, tribal, or USDA hemp program

- You cannot produce medical or recreational marijuana with a hemp license

SOURCE: U.S. Department of Agriculture, (2022, April 25). Hemp Production Program Questions and Answers. Agricultural Marketing Services. https://www.ams.usda.gov/rules-regulations/hemp/questions-and-answers

Hemp



What is Hemp?

**Cannabis** 

with a THC concentration

of less than 0.3%

#### THC

#### CANNABIS CONCENTRATES



CRUMBLE Dried oil with a honeycomb like consistency



BADDER/BUDDER Concentrates whipped under heat to create a cake-batter like texture



SHATTER
A translucent, brittle, & often golden to amber colored concentrate made with a solvent



DISTILLATE
Refined cannabinoid oil
that is typically free of
taste, smell & flavor. It is
the base of most edibles
and vape cartridges



CRYSTALLINE Isolated cannabinoids in their pure crystal structure



DRY SIFT
Ground cannabis filtered
with screens leaving behind
complete trichome glands.
The end-product is also
referred to as kief



ROSIN End product of cannabis flower being squeezed under heat and pressure



BUBBLE HASH
Uses water, ice, and mesh
screens to pull out whole
trichomes into a pastelike consistency

# **Cannabis Concentrate**

- Kief or sift
- Hash
- Rosin
- Live Resin
- Shatter Wax
- Crumble Wax
- Honeycomb Wax
- Budder or Badder
- Pull and Snap
- Tinctures
- THC Oil
- BHO & CO2 Extract Oil
- Rick Simpson Oil
- Distillates, Isolates & Crystralines

## Dab

- Shatter
- Wax
- Resin
- Types of hash oil.

# Solvent Concentrates

- Shatter
- Crumble & honeycomb
- Budder & badder
- Wax products
- Live Resin
- CO2 oil
- THC oil
- Butane-Honey Oil (BHO)
- Rick Simpson Oil (RSO)

## Resin











### **CBD**



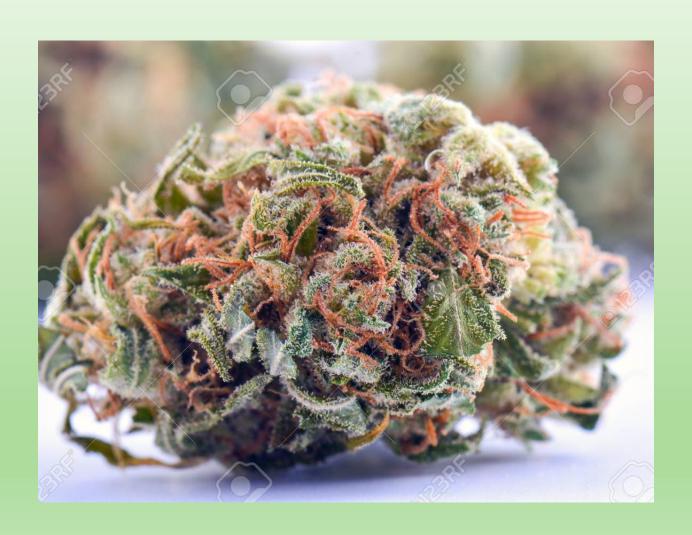
### **THC Drinks**



# **HEMP Derived...?**



### **Hemp Flower**



### **Old Flower Definition**

Marihuana = Cannabis sativa L.

### **Old Flower Definition**

- HSC 481.002, (Definitions)
- (26) "Marihuana" means the plant
   Cannabis sativa L., whether growing or not,
   the seeds of that plant, and every
   compound, manufacture, salt, derivative,
   mixture, or preparation of that plant or its
   seeds.

### **Current Flower Definition**

Marihuana = Cannabis sativa L. greater that .3% THC

### **Current Flower Definition**

- The term does not include:
- (F) hemp, as that term is defined by Section 121.001, Agriculture Code.

# **Hemp Definition**

"hemp" means <u>Cannabis</u> with a <u>THC</u> concentration of <u>less</u> than <u>0.3%</u>

# Old Controlled Substance/THC Definition

- HSC 481.002, (Definitions)
- (5) "Controlled substance" means a substance, including a drug, an adulterant, and a dilutant, listed in Schedules I through V or

**Penalty Group** 1, 1-A, **2**, 2-A, 3, or 4. The term includes the aggregate weight of any mixture, solution, or other substance containing a controlled substance.

# **Old PG2/THC Definition**

- HSC 481.103 (Penalty Group 2)
- Tetrahydrocannabinols, other than marihuana, and synthetic equivalents of the substances contained in the plant, or in the resinous extractives of Cannabis, or synthetic substances, derivatives, and their isomers with similar chemical structure and pharmacological activity

# **Old PG2/THC Definition**

- HSC 481.103 (Penalty Group 2)
- Tetrahydrocannabinols, other than marihuana, and synthetic equivalents of the substances contained in the plant, or in the resinous extractives of Cannabis, or synthetic substances, derivatives, and their isomers with similar chemical structure and pharmacological activity

### **Current THC Definition**

 The term does not include hemp, as defined by Section 121.001, Agriculture Code, or the tetrahydrocannabinols in hemp.

Bc there is ALWAYS some THC in hemp

# Cannabidiol (CBD) Definition

- HSC 443.201
- (1) "Consumable hemp product" means food, a drug, a device, or a cosmetic, as those terms are defined by Section 431.002, that contains hemp or one or more hemp-derived cannabinoids, including cannabidiol.

## What is THCA...?

# What is Hemp Derived THC...?



#### The Stash









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### What does that mean?



**Changes Probable Cause** 



Changes what is required to be proven by the state



Changes what bounds of what science can validate



Changes what you can set up in Voir dire



**Changes Jury Instructions** 



Changes your negotiations strength

# We always had the Jury



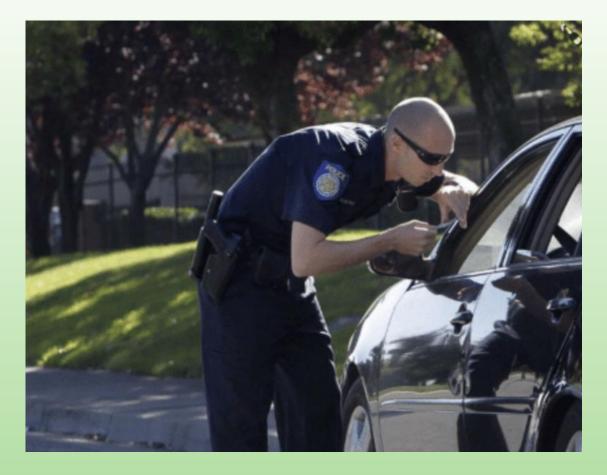
It was always a type of Nullification



But now we have real weapons!

### No more PC for flower?

- Warrantless Vehicle stops
- Search Warrants
- Hemp and MJ are <u>Indistinguishable</u>



 MJ and Hemp look and smell the same

"Distinct odor of MJ emanating from the vehicle"



#### Contents lists available at ScienceDirect

#### Plant Science

journal homepage: www.elsevier.com/locate/plantsci



Review article

#### Terpenes in Cannabis sativa – From plant genome to humans

Judith K. Booth, Jörg Bohlmann\*

Michael Smith Laboratories, University of British Columbia, 2185 East Mall, Vancouver, B.C., V6T 1Z4, Canada



#### ARTICLE INFO

Keywords:
Cannabls
Strains
Specialized secondary metabolism
Standardization
Entourage effect
Terpenes
Cannabinoids
Terpene synthase

#### ABSTRACT

Cannabis sariw (cannabis) produces a resin that is valued for its psychoactive and medicinal properties. Despite being the foundation of a multi-billion dollar global industry, scientific knowledge and research on cannabis is lagging behind compared to other high-value crops. This is largely due to legal restrictions that have prevented many researchers from studying cannabis, its products, and their effects in humans. Cannabis resin contains hundreds of different terpene and cannabinoid metabolites. Many of these metabolites have not been conclusively identified. Our understanding of the genomic and biosynthetic systems of these metabolites in cannabis, and the factors that affect their variability, is rudimentary. As a consequence, there is concern about lack of consistency with regard to the terpene and cannabinoid composition of different cannabis 'strains'. Likewise, claims of some of the medicinal properties attributed to cannabis metabolites would benefit from thorough scientific validation.

#### 1. Introduction

Cannabis sativa (cannabis) is thought to have originated from central Asia, and has been domesticated for over 5000 years [1]. Cannabis varieties that are low in psychoactive cannabinoids are used for the production of fiber and oilseed. However, the most valuable cannabis product today is the terpene- and cannabinoid-rich resin with its various psychoactive and medicinal properties. The resin is produced and accumulates in glandular trichomes that densely cover the surfaces of female (pistillate) inflorescences and, to a lesser degree, the foliage of male and female plants (Fig. 1). In total, more than 150 different terpenes and approximately 100 different cannabinoids [2] (Fig. 2) have been identified in the resin of different cannabis types (Table 1). The predominant cannabinoids in cannabis grown for medicinal or recreational use are <sup>Δ</sup>9-tetrahydrocannabinolic acid (THCA) and cannabidiolic acid (CBDA). While cannabinoids are the primary psychoactive and medicinal components of cannabis resin, volatile terpenes (monoterpenes and sesquiterpenes) contribute many of the different fragrance attributes that influence consumer preferences.

Different cannabis types and their derived consumer products are commonly referred to with 'strain' names. These names often relate to fragrance attributes conferred, at least in part, by terpenes [3]. Different 'strains' may be distinguished by morphological features or differences in the chemical composition of the resin. However, due to a history of largely illicit cannabis production, cannabis 'strains' are often poorly defined genetically. 'Strains' may lack reproducibility with

regard to profiles of terpenes and cannabinoids [4,5]. The species encompasses large genetic diversity, with most strains having high levels of heterozygosity and genetic admixture [5,6]. Cannabis is wind-pollinated, which also contributes to variability of cannabis metabolites. As a result, many cannabis 'strains' lack the level of standardization that producers and consumers are accustomed to with other crop plants, such as genetically and phenotypically well-defined grapevine varieties. In the absence of proper genetic or genomic characterization, some attempts have been made at chemotaxonomic classification of cannabis 'strains' based on terpenes, and cannabis plants have also been described as belonging to different chemotypes (Table 1). However, the complexity of terpene biosynthetic systems, and the many different sources of terpene variation, renders these efforts often futile; in general, concepts of chemotaxonomy have been outdated by genome sciences, and chemotypes cannot reliably substitute for properly genotyped plants.

With the lifting of some of the legal restrictions on cannabis research in Canada, and in some other jurisdictions, there is now an opportunity to build stronger scientific knowledge of the genomic, molecular and biochemical properties that define terpene and cannabinoid profiles in different cannabis 'strains'. This in turn can support the development of a larger number of well-defined cannabis varieties. Another aspect that requires new research are the various effects that are attributed to cannabis terpenes in humans. While some of the effects of the cannabinoids have been scientifically explained, there is a great deal of uncertainty about the effects of cannabis terpenes in humans

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<sup>\*</sup> Corresponding author.



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#### **FIVE MOST COMMON TERPENES**











MYRCENE Herbal

PINENE Pine

CARYOPHYLLENE Peppery

**LIMONENE** Citrus

TERPINOLENE Fruity

Also found in hops, mango and lemongrass. Found in pine needles, rosemary, basil and dill. Found in black pepper, cloves and cinnamon. Also found in fruit rinds, rosemary, juniper and peppermint. Also found in nutmeg, tea tree, cumin and lilacs.

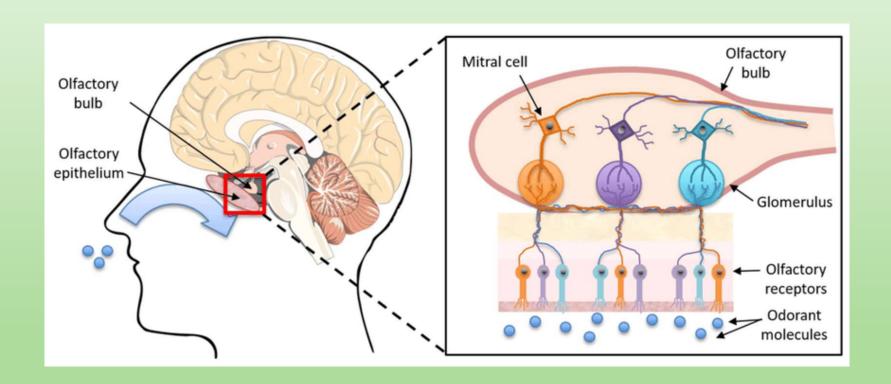


merryjanescannabis.ca

### **Physiology of Smell**

"A compound smells if it is sufficiently volatile. This applies predominantly to monoterpenes, but also to various sesquiand diterpenes, as fragrances reach the appropriate receptors of the epithelium of the olfactory organ in the upper part of the nose. A molecule induces a specific sense of smell in the nose provided that its shape exactly matches a complementary cavity of the receptor, much as a key fits into a lock."

Breitmaier E. Terpenes: Flavors, Fragrances, Pharmaca, Pheromones. Weinheim: WILEY-VCH; 2008; pp. 176-177.



# Law Enforcement Recognizes the Problem

#### OFFICE OF THE STATE ATTORNEY ELEVENTH JUDICIAL CIRCUIT

#### KATHERINE FERNANDEZ RUNDLE STATE ATTORNEY



#### INTEROFFICE MEMORANDUM

TO: Law Enforcement Agencies within the DATE:

August 5, 2019

Eleventh Judicial Circuit of Florida

FROM: KATHERINE FERNANDEZ RUNDLE

Marijuana Cases in the Wake of

State Attorney

the "HEMP" Bill

Eleventh Judicial Circuit (Senate Bill 1020)

On June 25, 2019, Governor DeSantis signed into law Senate Bill 1020, also known as the "Hemp" Bill. This law, which has significant impact upon law enforcement, took effect on July 1, 2019. The bill creates a state hemp program, which legalizes the possession and use of hemp. Hemp is defined in the bill as "the plant Cannabis sativa L. and any part of that plant, including the seeds thereof, and all derivatives, extracts, cannabinoids, isomers, acids, salts, and salts of isomers thereof, whether growing or not, that has a total delta-9 tetrahydrocannabinol concentration that does not exceed 0.3 percent on a dry-weight basis." See Florida Statute §581.217(3)(d).

The Bill also changes the definition of "Cannabis" in Florida Statute §893.02 such that the term "Cannabis" does not include hemp as defined in s. 581.217.

Hemp and cannabis both come from the same plant, Cannabis sativa L. The only difference between hemp and cannabis is that hemp has a total delta-9 tetrahydrocannabinol (THC) concentration that does not exceed 0.3 percent. If the THC concentration of the plant does not exceed .3 percent, then the plant is hemp, and is legal in Florida. If the THC concentration of the plant does exceed .3 percent, then the plant is cannabis, and is illegal in Florida.

This significant change in the law will impact police and prosecutors in Florida, just as it has impacted police and prosecutors in other jurisdictions that have had similar legislation enacted. The greatest impact will be upon probable cause determinations by police and sheriff's offices, and upon State Attorney's Offices' ability to prove beyond a reasonable doubt that a substance is cannabis, an illegal controlled substance under Florida Statute 893.02, and not hemp.

Because hemp and cannabis both come from the same plant, they look, smell, and feel the same. There is no way to visually or microscopically distinguish one from the other. Similarly, since hemp can be and is - also smoked, there is no olfactory way to distinguish hemp from marijuana. In either their raw vegetative state, or while burning, both hemp and cannabis smell the same. Accordingly, the only way to distinguish legal hemp from illegal cannabis is through quantitative testing.

#### A. Probable Cause Determinations

Since there is no visual or olfactory way to distinguish hemp from cannabis, the mere visual observation of suspected cannabis – or its odor alone – will no longer be sufficient to establish probable cause to believe that the substance is cannabis.

Some agencies have established what they have referred to as an "odor plus" standard for establishing probable cause. Some of the factors that may lend themselves to helping to establish probable cause include – but are not limited to – the following:

- 1. Information or intelligence regarding illicit activity prior to the stop
- 2. Knowledge of the subject's prior recent criminal history for narcotics violations
- 3. Observation of a hand-to-hand transaction prior to the stop
- 4. Admission that the substance is in fact illegal cannabis
- 5. Conflicting or nonsensical statements
- 6. Nervousness, such as:
  - a. Sweating when it is not hot
  - b. Shaking or trembling hands
  - c. Avoiding eye contact
- 7. Furtive movements
- 8. Discarding, destroying, or trying to hide a substance
- 9. A large amount of currency
- 10. Currency in rubber-banded "quick count bundles"
- 11. Masking agents such as fabric softener, air fresheners, or coffee grinds
- 12. Firearms or other weapons
- 13. Drug paraphernalia, such as baggies, pipes, heat sealers, or scales (although legal hemp may be stored in a baggie and smoked in a pipe as well)
- 14. Signs of impairment on a driver (such as bloodshot, watery eyes or slurred speech)

This is a non-exhaustive list of some additional factors that may, in various combinations, lend themselves to establishing probable cause. Law enforcement officers should consider each of these factors, as well as look for other evidence of illegality, before taking any action that requires probable cause. We recommend that you consult your police legal advisor for guidance on particular factual scenarios that your officers may encounter in the field. Probable cause has always been assessed under the totality of the circumstances.

B. Prosecutions of Cannabis Offenses Since the Hemp Bill Came into Effect

In any criminal trial involving a cannabis offense, the state is required to prove beyond a reasonable doubt that the suspected substance is, in fact, illegal cannabis, and not hemp. As stated previously, since cannabis and hemp are visually and microscopically identical – and smell exactly the same – in

#### A. Probable Cause Determinations

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Some agencies have established what they have referred to as an "odor plus" standard for establishing probable cause. Some of the factors that may lend themselves to helping to establish probable cause include – but are not limited to – the following:



#### NORTH CAROLINA STATE BUREAU OF INVESTIGATION

3320 Garner Road P.O. BOX 29500 Raleigh, NC 27626-0500 (919) 662-4500 FAX: (919) 662-4523



#### Industrial Hemp/CBD Issues

#### Background

Session Law 2015-299 established the North Carolina Industrial Hemp Commission and initiated a pilot program to study the feasibility of industrial hemp as a crop in NC. Industrial hemp is the plant species Cannabis Sativa, which is the same species as marijuana. Industrial hemp contains low levels of tetrahydrocannabinol (THC), which is the psychoactive ingredient in marijuana, a Schedule VI controlled substance in NC. Industrial hemp is engineered to contain high levels of cannabidiol (CBD), which is not psychoactive and has many alleged health benefits including treatment for some forms of epilepsy. It should be noted that the FDA recently approved a pharmaceutical CBD drug called Epidiolex, which can be prescribed by a physician for epilepsy. This is the only FDA approved use of CBD for a medical condition.

There are several types of industrial hemp:

- One variety is grown for seed oils. Oil is extracted from the seeds and used in various food products such as bread, shampoos, and granola products;
- 2. One variety looks like long stalks of bamboo and is grown for fiber for textiles and rope; and
- 3. One variety looks like marijuana and grows "buds" just like marijuana. CBD is extracted from the buds. This type looks just like marijuana, including the leaves and buds, and it smells the same as marijuana. In fact, there is no way for an individual to tell the difference by looking at the plant; one would need a chemical analysis to tell the difference.

The NC Department of Agriculture (NC DAG) oversees the growers of industrial hemp in NC by providing licenses to growers who qualify. NC DAG performs inspections of fields and indoor grown space and takes plant samples which are tested to determine the percentage of THC. If the percentage of THC is determined to be greater than 0.3%, NC DAG burns the plants. NC DAG's lab has the capability to determine the percentage of THC; however, they outsource the testing to a private lab in Durham due to the high number of samples that are submitted.

Due to the popularity of CBD, the overwhelming majority of NC licensees are growing the CBD producing variety of hemp, rather than the variety for clothing and rope. As of July 2018, there were 348 licensed growers on 4548 licensed acres and in 1,630,485 square feet of indoor greenhouse space. As of January 2019, there were well over 500 licensed growers in NC. There are a number of large processing facilities that have recently opened in NC. Hemp grown in NC, as well as many other states, are processed into various CBD containing products in these facilities. These products include balms, lotions, salve, oils, capsules, cigarettes, cigars, and "buds." There are CBD dispensaries that have opened in NC in order to sell these products; in addition, the products are sold in hundreds of tobacco shops, convenience stores, and pharmacies. CBD liquids are sold for vaping. Food products labeled to contain CBD are sold in stores across NC in the form of gummies, trail mix, lollipops, and many other food products. These products are expensive; with a small 4-ounce bottle of CBD oil sold for \$80.00 or a small bag of CBD trail mix for \$40.00. These products are being sold in large quantities, with little oversight by a regulatory body. Recently the FDA banned CBD from food products, dietary supplements, and products claiming medicinal benefits. Currently, the NC DAG is sending letters to notify store owners that they cannot sell food products containing CBD.

#### Issues for Law Enforcement

There is no easy way for law enforcement to distinguish between industrial hemp and marijuana. There is currently no field test which distinguishes the difference.

Hemp and marijuana look the same and have the same odor, both unburned and burned. This makes it impossible for law enforcement to use the appearance of marijuana or the odor of marijuana to develop probable cause for arrest, seizure of the item, or probable cause for a search warrant. In order for a law enforcement officer to seize an item to have it analyzed, the officer must have probable cause that the item being seized is evidence of a crime. The proposed legislation makes possession of hemp in any form legal. Therefore, in the future when a law enforcement officer encounters plant material that looks and smells like marijuana, he/she will no longer have probable cause to seize and analyze the item because the probable cause to believe it is evidence of a crime will no longer exist since the item could be legal hemp. Police narcotics K9's cannot tell the difference between hemp and marijuana because the K9's are trained to detect THC which is present in both plants. Law enforcement officers cannot distinguish between paraphernalia used to smoke marijuana and paraphernalia used to smoke hemp for the same reasons. The inability for law enforcement to distinguish the difference between hemp and marijuana is problematic in all marijuana prosecutions, from small amounts to trafficking amounts of plant material. There is at least one District Attorney's Office in NC which is currently not prosecuting marijuana cases due to the inability of law enforcement to distinguish the difference between hemp and marijuana.

While NC DAG oversees the hemp growers in NC to ensure that the THC levels are within legal limits, there is currently no regulation of hemp and CBD products. This is particularly concerning because processors in NC are making hemp and CBD products using hemp grown all over the US. We do not verify that hemp grown in another state contains less than the percentage THC required by law, which means that products made in NC may contain a higher percentage of THC than what is allowed by law. Retail products currently sold in NC include hemp 'buds' or plant material, hand rolled hemp cigarettes and hemp cigars, CBD/Hemp oils, and edible candies, gummies, and food products. Law enforcement has encountered employees in some businesses who encourage the purchase of hemp products as a legal marijuana alternative. Consumers can currently purchase hemp buds and rolling papers in the same store and then roll a hemp "joint" and smoke it. (Note: On the last page of this document is a series of photographs of "hemp" products sold in stores in NC).

The North Carolina State Crime Laboratory does not conduct testing to differentiate between hemp and marijuana. The State Crime Lab, as well as most municipal crime labs in NC, perform a qualitative analysis on plant material to determine whether THC is present. All hemp and CBD products contain some level of THC; therefore, the crime labs will report these products as containing marijuana or THC, which are both Schedule VI controlled substances. While it has been suggested that additional funds be allocated to the Crime Lab in order to add additional chemists and equipment to conduct the quantitative analysis described above, this will not resolve the issue. As previously mentioned, law enforcement cannot seize an item without probable cause that the item is evidence of a crime. Not being able to distinguish between hemp and marijuana defeats the previous basis for probable cause to seize items believed to be marijuana.

Many products for sale in commercial businesses are intentionally mislabeled to contain CBD, but they contain harmful Schedule I controlled substances, synthetic cannabinoids, "bath salts," and other adulterants such as rat poison. Law enforcement cannot rely on the product labels to accurately identify the ingredients or percentages. For example, if a package of hemp "buds" has a label that states it contains less than 0.3% THC, law enforcement cannot rely on the label to be accurate. The product could contain marijuana or another controlled substance. But law enforcement does not currently have the legal right to seize the product and the crime labs do not have the ability to confirm the percentages. The crime labs can only identify THC or other controlled substances.

According to the FDA, CBD cannot be contained in food products such as gummies, lollipops, etc. This is particularly concerning for several reasons: first, children could purchase these products as there is no purchasing age limit;

### The TDCAA recognizes the Problem

- "The distinction between marijuana and hemp requires proof of the THC concentration of a specific product or contraband, and for now, that evidence can come only from a laboratory capable of determining that type of potency—a category which apparently excludes most, if not all, of the crime labs in Texas right now. Various law enforcement agencies—including DPS—and other local or private crime labs will have to purchase new instrumentation and change certain testing procedures to be able to supply that new information to the courts before criminal cases involving marijuana go to trial. Until then, there will be no easy way to determine whether the weed your officers seized is illegal marijuana."
- See "Interim Update: Hemp", Texas District & County Attorneys Association, 24 June 2019, available at: <a href="https://www.tdcaa.com/legislative/interm-update-hemp/">https://www.tdcaa.com/legislative/interm-update-hemp/</a>.





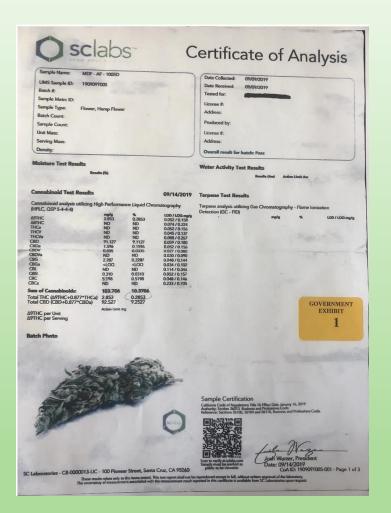


### VISUAL ID IS IMPOSSIBLE

**★ THE TEXAS TRIBUNE** 

He spent a month in Texas jail accused of hauling 3,350 pounds of marijuana. But lab results say it was legal hemp.





Sum of Cannabinoids:

Total THC (Δ9THC+0.877\*THCa)
Total CBD (CBD+0.877\*CBDa)

103.706

2.853 92.527 0.2853

9.2527



- K9 not trained to distinguish
- False positives
- The sniff is no longer reliable PC
- People v. McKnight
   Colorado Supreme
   Court

### "K9 alerted to presence of Narcotics"



# People v. McKnight 446 P.3d 397 (May 2019)

- Dog alerted on a pipe that later had meth
- But dog is cross trained and can render a false positive
- "A sniff from a dog trained to alert to marijuana is a search in Colorado that must be supported by probable cause and justified under an exception to the warrant requirement."

ALL K9
cases are
F@#\$ED
now!!!



Meth, coke, heroin, MJ, will all get false positives



All dogs must be retired









**Happy Retirement!!!** 

### THE K-9 DETECTION TEAM



### **Narcotics-Detection K-9s**

- Valuable tool used by law enforcement during the <u>war on drugs</u>.
- 40 years of case law has developed concerning most 4<sup>th</sup> Amendment scenarios.
- When used <u>properly</u> and under the <u>right</u> <u>conditions</u>, drug-dogs work...

#### **Areas to Sniff out Success**

- Was there violation of the Fourth Amend.?
  - (a lot of bark, no bite)
- Was the "K-9 Alert" reliable to establish P.
   C.?
  - (the Real Focus)
    - Look at the actions of the Narcotics Detection Team.
    - Look at the "Alert" itself.
    - Look at the Reliability of the K-9.

#### **Narcotics Detection Team**

- The Team works as a "Unit."
- A trained Handler.
- A trained K-9.
- Reliable only when both are working together properly.



# In General, a Sniff is not a Search

- U.S. v. Place, 462 U.S. 696 (1983)
  - Exposure of luggage to a <u>trained</u> narcoticsdetection dog is not a search for 4<sup>th</sup> Amendment purposes.
- Illinois v. Caballes, 543 U.S. 405 (2005)
  - Where <u>lawful</u> traffic stop did not <u>extend beyond</u> time necessary to issue ticket and conduct inquires incident to the stop, other officer's arrival and use of narcotics detection dog to sniff around the <u>exterior</u> of vehicle did not rise to level of infringement of 4<sup>th</sup> Amendment rights.

### U.S. v. Place, 462 U.S. 696 (1983)

#### • Rational:

- The initial taking of the luggage was a reasonable temporary seizure under *Terry*
- "A K-9 sniff by a well-trained narcotics detection dog,... does not require opening the luggage."
- "It does not expose non-contraband items that otherwise would remain <u>hidden from public view</u>, as does, for example, the officers rummaging through the contents of the luggage."

### U.S. v. Place, 462 U.S. 696 (1983)

#### Rational:

- The is "<u>much less intrusive</u> than a typical search."
- A sniff <u>does not subject the property owner</u> to "<u>embarrassment and inconvenience</u> of a less discriminate and more intrusive investigation method."

# *Illinois v. Caballes,* 543 U.S. 405 (2005)

- Motorist stopped with R.S. for a lawful traffic violation.
- While a warning citation being written, second officer arrived with K-9 and sniffed exterior of vehicle.
- Stop lasted no more than 10 minutes.
- Dog Alerted.

### **Caballes** Sniff

- Trained narcotics detection K-9 Team
- <u>Lawful</u> traffic stop
- Traffic stop does not <u>extended beyond time</u> <u>necessary</u>
- Sniff around the <u>exterior</u> of vehicle

### Florida v. Harris,

568 US.\_\_\_ (2013)

 SCOUTS addressed the reliability of a dog sniff by a detection dog trained to identify narcotics, under the specific context of whether law enforcement's assertions that the dog is trained or certified is sufficient to establish probable cause for a search of a vehicle under the Fourth Amendment. Harris was the first Supreme Court case to challenge the dog's reliability, backed by data that asserts that on average, up to 80% of a dog's alerts are wrong.

### Florida v. Harris,

568 US.\_\_\_ (2013)

The Court unanimously held that <u>if a bona fide</u>
 organization has certified a dog after testing his
 reliability in a controlled setting, or if the dog has
 recently and successfully completed a training
 program that evaluated his proficiency, a court can
 presume (subject to any conflicting evidence
 offered) that the <u>dog's alert provides probable</u>
 cause to search, using a <u>"totality-of-the-circumstances</u>" approach.

### Florida v. Harris,

568 US.\_\_\_ (2013)

- Most important point,
- You can look to the underlying reliability of the K9

## Discovery of K-9 Training and Certification Materials

- Since only a trained, certified, and reliable Narcotics Detection Team can give Probable Cause, then:
- full <u>disclosure of training and certification</u>
   <u>materials is vital</u> to an adequate defense.

# The Focus of the Motion to Suppress

- Was the "Alert" <u>sufficiently reliable</u> to establish probable cause for the Search?
  - Look at the Alert itself
  - Explore the reliability of the Team to do its job
    - Was the Team properly trained?
    - Does the Team execute its job according to that training?

# How can K9 distinguish between Hemp and MJ?

- K9 CANNOT
- NO "Alerts" will be sufficiently reliable

# Motions to Suppress in State Court???

# Motions to Suppress in State Court

• The issue is still open...

# Arguments that Smell of MJ is NOT PC

- All Texas post-Hemp Legalization COA cases still leave open the question of the smell of MJ versus smell of Hemp
- Here are the cases:

### Cortez v. State

2022 WL 17817963 (Tex. App.—Dallas [Dec. 20, 2022] no pet. h.)

- Cortez claimed the Trial Court erred when it concluded there was probable cause to support the search of his vehicle based on smell of Marijuana
- Marijuana smells just like Hemp!

### Cortez v. State

2022 WL 17817963 (Tex. App.—Dallas [Dec. 20, 2022] no pet. h.)

- Dallas Court of Appeals ignored the argument
- Cited Stringer v. State, from the Houston Court of Appeals from 2020
- BUT, Stringer cited pre-hemp legalization case as authority. (Post-Legalization Opinion)

### Cortez v. State

2022 WL 17817963 (Tex. App.—Dallas [Dec. 20, 2022] no pet. h.)

 Just because the case is post 2019 doesn't mean its citing post hemp legalization authority.

### McAfee-Jackson v. State,

2021 WL 3888245 (Tex. App.—Beaumont [Sept. 1, 2021], no pet.).

- Post Hemp Legalization case
- Appellant did not file a Motion to Suppress
- At trial officer admitted he could not tell the difference between MJ and Hemp

### McAfee-Jackson v. State,

2021 WL 3888245 (Tex. App.—Beaumont [Sept. 1, 2021], no pet.).

- Officer admitted that the exhibits were actually "zero THC Hemp bought at corner store"
- Then, during trial, Defendant Moved to Suppress
- COA ruled the MTS was <u>UNTIMELY</u>

## McAfee-Jackson v. State,

2021 WL 3888245 (Tex. App.—Beaumont [Sept. 1, 2021], no pet.).

- TAKE AWAY:
- File Motion to Suppress timely
- File Motion In Limine regarding Odor
- Object at earliest testimony regarding odor

### Trevino v. State

2022 WL 16542596 (Tex. App.—San Antonio Oct. 31, 2022, pet. ref'd).

- Trevino, argued the State failed to prove she possessed MJ as defined by the new statute
- *I.e.*, THC concentration over 0.3%
- COA agreed, but Defendant arrested in 2017
- Pre-2019 case!

### Isaac v. State

675 S.W. 3d 116 (Tex. App.—San Antonio 2023, no pet).

- 4th COA discussed similarity in appearance and smell of hemp and MJ
- Relied on *Cortez*
- Found under <u>Totality of Circumstances</u> odor of MJ was PC
- But: Totally Distinguishable!

### Isaac v. State

675 S.W. 3d 116 (Tex. App.—San Antonio August 2023, no pet).

- Under Totality of Circumstances:
- Cops got a report of a suspicious person
  - Dude acting High
- Two joints in center consoled
- D showed signs of intoxication
  - Sluggish movement, red glassy eyes
- Plus the odor of MJ

### State v. Gonzales

676 S.W. 3d 261 (Tex. App.—Dallas Oct. 12, 2023).

- COA held that odor of marijuana from a vehicle was probable cause to search.
- Reversed the trial court's suppression
- Most recent COA case
- Cites Cortez
- Does address and acknowledge the Hemp Bill

### State v. Gonzales

676 S.W. 3d 261 (Tex. App.—Dallas Oct. 12, 2023).

- But Hemp Bill prohibits manufacturing hemp for smoking
- Officers testified that hemp is not regularly smoked in public.
- (But the bill only prohibits manufacture of smokable hemp)

### State v. Gonzales

676 S.W. 3d 261 (Tex. App.—Dallas Oct. 12, 2023).

Worst case yet but:

- CCA still has not weighed in
- Future MTS's must present evidence that smokable him is common.

It got wrong that hemp isn't smoked

# Motions to Suppress in Federal Court???

# 2022 Federal Suppression of Odor of MJ

### IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS CORPUS CHRISTI DIVISION

UNITED STATES OF AMERICA	§	
	§	
vs.	§	NO. 2:20-cr-01105-1
	§	
JORGE DAMIAN SOLIZ, JR.	§	

### DEFENDANT'S MOTION TO SUPPRESS AND REQUEST FOR HEARING

### TO THE HONORABLE NELVA GONZALES RAMOS, UNITED STATES DISTRICT JUDGE FOR THE SOUTHERN DISTRICT OF TEXAS, CORPUS CHRISTI DIVISION:

COMES NOW JORGE DAMIAN SOLIZ, JR., by and through his undersigned Counsel, Donald H. Flanary, III., and Amanda I. Hernandez, and, pursuant to Federal Rule of Criminal Procedure 12(b)(3)(C) and the Fourth, Fifth, Sixth, and Fourteenth Amendments to the United States Constitution, respectfully moves this Honorable Court to hold a hearing on this Motion prior to trial and thereafter issue an order suppressing and excluding any and all evidence and statements, physical and testimonial, seized or obtained or derived from or through or as a result of illegal acts on behalf of the Government in this criminal prosecution which violated the Defendant's rights as guaranteed to him under the United States Constitutions and under federal statutes. In support thereof, Defendant would respectfully show as follows:

While there are many uses for hemp, smokable hemp has become very widespread. In 2020, the national smokable hemp market grew to between \$70 million and \$80 million.<sup>5</sup>

2. "Hemp" and "Marijuana" are indistinguishable to the naked eye and nose, look and smell the same, and law enforcement therefore cannot differentiate between the two without sending the substance to a lab for scientific testing.

Law enforcement, nor any person, can distinguish marijuana from hemp without scientific testing. As noted above, the plant species Cannabis sativa L. includes both hemp and marijuana. As such, both contain some amount of the chemicals THC and CBD. The difference between hemp, which can be legally possessed and purchased, and marijuana, which remains a controlled substance under federal law and prohibited under Texas law, is the differing amounts of CBD and THC in the plant. While marijuana typically has typically lower amounts of CBD and higher amounts of the THC, hemp has low amounts of THC and typically higher amounts of CBD<sup>6</sup>.

Because "marijuana" and "hemp" flowers are from the same Cannabis Sativa family, it logically follows that they look and smell the same<sup>7</sup>. The differentiation between marijuana and hemp, as well as the different forms of CBD, though potentially similar in either appearance or smell based on their state, is most often dependent on the level of THC within the substances.

<sup>&</sup>lt;sup>5</sup> Exclusive: Smokable hemp market worth up to \$80 million for 2020, with fivefold growth predicted. Hemp Industry Daily. (Sept. 2, 2020). Available at: <a href="https://hempindustrydaily.com/exclusive-smokable-hemp-market-worth-up-to-80-million-for-2020-with-five-fold-growth-predicted/">https://hempindustrydaily.com/exclusive-smokable-hemp-market-worth-up-to-80-million-for-2020-with-five-fold-growth-predicted/</a> ("For 2020, market researchers at Nielsen project sales in the current smokable-hemp market to reach \$70 million to \$80 million. That includes categories such as loose CBD flower, hemp-CBD pre-rolls, cigars and other inhalables.")

<sup>&</sup>lt;sup>6</sup> Small, Ernest et al. Hemp: A New Crop with New Uses for North America. Trends in New Crops and New Uses. p. 284–326. (J. Janick and A. Whipkey eds., 2002) (noting the common inverse relationship between amounts of THC and CBD in cannabis). Available at: https://www.hort.purdue.edu/newcrop/ncnu02/v5-284.html.

<sup>&</sup>lt;sup>7</sup> It is well established that hemp and marijuana are "varieties of the same species, Cannabis sativa L." See Evaluating the Impact of Hemp Food Consumption on Workplace Drug Tests, attached as Exhibit 2 at 692 (The primary difference is that marijuana has a higher concentration of the psychoactive compound cannabinoid delta 9 tetrahydrocannabinoi, more commonly known as THC); see also United States v. Bignon, 18-CR-783 (JMF), 2019 WL 643177, at \*2 (S.D.N.Y. Feb. 15, 2019), aff'd, 813 Fed. Appx. 34 (2d Cir. 2020) "Thus, it is fair to infer, and on that basis the Court finds, that the odor of burning marijuana and the odor of burning hemp are similar — or, more to the point, that one could reasonably mistake one odor for the other" (footnote omitted).

While there are many uses for hemp, smokable hemp has become very widespread. In 2020, the national smokable hemp market grew to between \$70 million and \$80 million.<sup>5</sup>

2. "Hemp" and "Marijuana" are indistinguishable to the naked eye and nose, look and smell the same, and law enforcement therefore cannot differentiate between the two without sending the substance to a lab for scientific testing.

Law enforcement, nor any person, can distinguish marijuana from hemp without scientific testing. As noted above, the plant species Cannabis sativa L. includes both hemp and marijuana. As such, both contain some amount of the chemicals THC and CBD. The difference between

Currently, there is no way to distinguish between hemp and cannabis based on plain view or odor alone. Accordingly, officers can no longer search a vehicle based solely on the odor of cannabis. Now you must articulate additional factors that lead you to believe that the substance is illegal cannabis, based on the totality of circumstances. You need "odor plus." <sup>10</sup>

3. Even Police Canines trained in drug detection cannot distinguish between hemp and marijuana.

Canines are trained to detect the presence of marijuana by smelling terpenes in the substance, but both hemp and marijuana contain the same terpenes and a drug detection canine unit will alert to either substance, incapable of distinguishing between the two<sup>11</sup>. In canines, the ability to smell is controlled by the primary olfaction system in the brain. <sup>12</sup> Canines have a highly

marijuana, nor can its officers or its K-9s detect the difference in odor<sup>14</sup>. Moreover, the U.S. Drug Enforcement Administration put out a request for information on private companies that might have the technology for field tests sensitive enough to distinguish between hemp and marijuana<sup>15</sup>.

4. Neither the Fifth Circuit, nor any court, has meaningfully dealt with the issue presented in this case.

The Fourth Amendment to the United States Constitution protects American citizens from unlawful and arbitrary seizure of property by the state. Improperly seized evidence, even if indicative of criminal activity, is inadmissible in court as a violation of this Constitutional protection of our rights <sup>16</sup> Since the adoption of the 2018 Farm Bill, an officer cannot rely on sight

## What happened???

He plead guilty before hearing

# Suppression of K-9 Alert bc No PC when trained on MJ

### IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS CORPUS CHRISTI DIVISION

NO. 2:24-cr-00415-2

### DEFENDANT'S MOTION TO SUPPRESS AND REQUEST FOR HEARING [Filed Under Seal]

### TO THE HONORABLE NELVA GONZALES RAMOS, UNITED STATES DISTRICT JUDGE FOR THE SOUTHERN DISTRICT OF TEXAS, CORPUS CHRISTI DIVISION:

NOW COMES ERIC BARCLAY, Defendant in the above-entitled and numbered cause, by and through his undersigned Counsel, Donald H. Flanary, III., and, pursuant to Federal Rule of Criminal Procedure 12(b)(3)(C) and the Fourth, Fifth, Sixth, and Fourteenth Amendments to the United States Constitution, respectfully moves this Honorable Court to hold a hearing on this Motion prior to trial and thereafter issue an order suppressing and excluding any and all evidence and statements, physical and testimonial, seized or obtained or derived from or through or as a result of illegal acts on behalf of the Government in this criminal prosecution which violated the

# Set for Hearing on MTS MAY 21 In Corpus Christi Divisions Southern District

# K-9 CANNOT distinguish between legal hemp and illegal MJ

illegal to possess. See id.

2. Even if the Court were to find that the Canine alerted, the Canine is not reliable.

If the Court were to find that the canine alerted, said canine is not reliable and said alert should not be used to support probable cause. In the *Martinez* case, the Fifth Circuit also noted:

When a dog that is "trained to alert ... [to] contraband or people" does so "alert[] in the near presence of a particular vehicle, that action is sufficient to give rise to probable cause to search that vehicle." *Dovali-Avila*, 895 F.2d at 207. "A defendant, however, must have an opportunity to challenge ... a dog's reliability." *Harris*, 568 U.S. at 247, 133 S.Ct. 1050.

The Supreme Court addressed how courts should evaluate a dog's reliability in Florida v. Harris, 568 U.S. at 243–48, 133 S.Ct. 1050. "The question—similar to every inquiry into probable cause—is whether all the facts surrounding a dog's alert, viewed through the lens of common sense, would make a reasonably prudent person think that a search would reveal contraband or evidence of a crime." Id. at 248, 133 S.Ct. 1050.

Martinez, 102 F.4th at 684-85 (emphasis added).

Here, even if the Court were to find that the Canine "Columbus" did alert to the vehicle, the facts surrounding the alleged alert, viewed through the lens of common sense, fail to make reasonably prudent person to think that a search would reveal contraband or evidence of a crime.

a. The Canine cannot distinguish between legal hemp and illegal marijuana.

The Canine utilized at the checkpoint on the date in question cannot distinguish between legal hemp and illegal marijuana. According to the "USBP Detection Canine Team Certification" of December 20, 2022, the team of BPA Kathryn Bennett and Canine Columbus was certified in

### Will show the Court:

- Cannabis
- Marijuana vs. Hemp
- Terpenes
- Cannabis scent
- K9 olfactory Detection of Cannabis

## **Explain Terpenes with Science**





Remiero

### The Cannabis Terpenes

Sarana Rose Sommano 1,2,3,\*,0, Chuda Chittasupho 3,4, Warintorn Ruksiriwanich 3,4,0 and Pensak Jantrawut 3,4

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Academic Editor: Luca Valgimigli



Received: 6 November 2020; Accepted: 8 December 2020; Published: 8 December 2020

Abstract: Terpenes are the primary constituents of essential oils and are responsible for the aroma characteristics of cannabis. Together with the cannabinoids, terpenes illustrate synergic and/or entourage effect and their interactions have only been speculated in for the last few decades. Hundreds of terpenes are identified that allude to cannabis sensory attributes, contributing largely to the consumer's experiences and market price. They also enhance many therapeutic benefits, especially as aromatherapy. To shed light on the importance of terpenes in the cannabis industry, the purpose of this review is to morphologically describe sources of cannabis terpenes and to explain the biosynthesis and diversity of terpene profiles in different cannabis chemovars.

Keywords: essential oil; hemp; marijuana; trichomes; volatile profile

## **Explain K9 Olfactory Sensitivity**



Available online at www.sciencedirect.com

APPLIED ANIMAL BEHAVIOUR SCIENCE

Applied Animal Behaviour Science 97 (2006) 241-254

www.elsevier.com/locate/applanim

## Naturalistic quantification of canine olfactory sensitivity

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> Accepted 27 July 2005 Available online 6 September 2005

#### Abstract

Despite the large and growing dependence on dog-handler teams for solving "real world" problems of odor detection, recognition and localization, no comprehensive methodology for countifying the completifies of such teams has been reported. We developed on empressely in which

### **Show K9 Handler Bias**

Anim Cogn (2011) 14:387–394 DOI 10.1007/s10071-010-0373-2

ORIGINAL PAPER

### Handler beliefs affect scent detection dog outcomes

Lisa Lit · Julie B. Schweitzer · Anita M. Oberbauer

Received: 30 March 2010/Revised: 13 December 2010/Accepted: 14 December 2010/Published online: 12 January 2011 © The Author(s) 2011. This article is published with open access at Springerlink.com

Abstract Our aim was to evaluate how human beliefs affect working dog outcomes in an applied environment. We asked whether beliefs of scent detection dog handlers affect team performance and evaluated relative importance of human versus dog influences on handlers' beliefs. Eighteen drug and/or explosive detection dog/handler teams each completed two sets of four brief search scenarios (conditions). Handlers were falsely told that two conditions contained a paper marking scent location (human influence). Two conditions contained decoy scents (food/toy) to encourage dog interest in a false location (dog influence). Conditions were (1) control; (2) paper marker; (3) decoy scent; and (4) paper marker at decoy scent. No conditions contained drug or explosive scent; any alerting response was incorrect. A repeated measures analysis of variance was used with search condition as the independent variable and number of alerts as the dependent variable. Additional nonparametric tests compared human and dog influence. There were 225 incorrect responses, with no patterns differed by condition. There were more correct (no alert responses) searches in conditions without markers. Within marked conditions, handlers reported that dogs alerted more at marked locations than other locations. Handlers' beliefs that scent was present potentiated handler identification of detection dog alerts. Human more than dog influences affected alert locations. This confirms that handler beliefs affect outcomes of scent detection dog deployments.

**Keywords** Dog · Canine · Scent detection · Social cognition · Interspecies communication

#### Introduction

In the early twentieth century, a horse named Clever Hans was believed to be capable of counting and other mental tasks. The psychologist Oskar Pfungst confirmed that

# We should have an answer by Rusty Duncan!!!

# OK, Hemp and MJ are Indistinguishable...

But what about everything else?



 Can you tell the difference between a THC pen and a CBD pen?

# No more PC for Pens and Cartridges

### IF no Probable Cause

- 1. Obviously, arrest suppressed
- 2. But seizure suppressed too
- 3. And post arrest statements admitting its THC suppressed also
- 4. AND testing to confirm it is THC suppressed!

# **HUGE DEAL!!!**

If no pre-arrest admissions a pen is THC, its virtually impossible to prosecute!

### What's left to Prosecute?

- 1. "License and registration", "here's my weed officer"
- 2. "Is that a THC pin I see in your hand?" "Why yes it is Officer!"
- 3. California THC Sticker on the Pen
- 4. "No Officer, its certainly not CBD"

### What about a field test?

But can a field test give PC to arrest?

NO, because .3% of THC is allowed

## If no suppression issues?

- Ok fine, we'll try it.
- It's always been about their Burden or Nullification

# We always have the Jury

You can't prove its not Hemp or CBD

### **Burden to Prove What???**

- State must prove:
- Concentration, not just that it is MJ or THC
- Over .3%

### **Proving Concentrates**

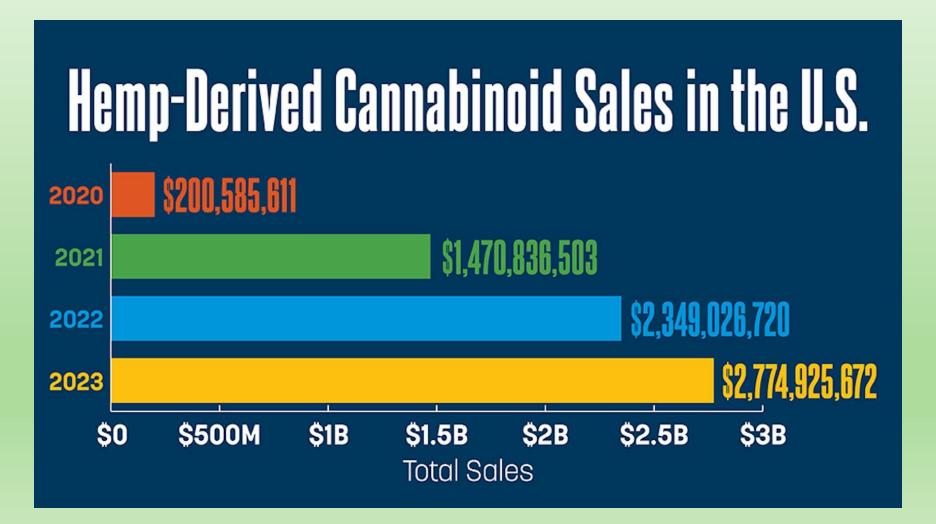
- Must prove its not CBD
- But also
  - Defendant's INTENT
- "Oh Gosh Officers, I thought it was CBD"

### **HEMP Derived THC!!**

### Remember THC "in" Hemp

- The term does not include hemp, as defined by Section 121.001, Agriculture Code, or the tetrahydrocannabinols in hemp.
- How do they know this THC didn't come from Hemp?

# Hemp-Derived Huge Industry!!



### What is THCA???

- Is it THC?
- Is it Delta 9?
- Is it illegal?
- How is it made?

### How it's made...?



### How it's made...?

- The act of smoking creates THC!
- There are only trace amounts of Delta9
   THC in Cannabis

### What is Decarboxylation

Acid form + heat produces the active form + CO<sub>2</sub>

### THAT'S RIGHT!!!

ARGUGMENT:

- Theres NO\* Delta 9 THC in MJ!!
- (\*very little Delta 9)
- (Never tested)

### **Compassionate Use Act**

- Low THC marijuana has been legal since 2015
- HSC 487.001—.201 authorizes the cultivation, processing, and dispensing of low-THC cannabis to prescribed patients with intractable epilepsy

Crime Records

#### **Compassionate Use Program**



#### **OVERVIEW**

The Texas Compassionate Use Act (Senate Bill 339) was enacted by the Texas Legislature in 2015 (84th Legislative Session). The bill required DPS create a secure registry of physicians who treat epilepsy, Read more...

**OVERVIEW** 

#### LAWS AND REGULATIONS

Enabling statutes, administrative rules, and related information may be found here.

LAWS AND REGULATIONS





#### LICENSING AND REGISTRATION

Application and renewal instructions and related information may be found here.

> LICENSING AND **REGISTRATION**

Crime Records

<u>Home</u> > <u>Compassionate Use Program</u> > Overview

### **Overview**



The Department of Public Safety (DPS) administers the Compassionate Use Program (CUP) in Texas, under the authority of the Texas Health and Safety Code, Chapter 487. Through the program, DPS operates a secure online registry of qualified physicians who can prescribe low tetrahydrocannabinol (THC) to patients with specific medical conditions. The registry, called the Compassionate Use Registry of Texas (CURT), is designed to prevent more than one qualified physician from registering as the prescriber for a single patient, is accessible to law enforcement agencies and dispensing organizations to verify patients of low-THC cannabis, and allows a physician to input safety and efficacy data derived from the treatment of patients for whom low-THC cannabis is prescribed. DPS also manages the licensing of organizations that dispense low-THC cannabis to patients in the Compassionate Use Registry of Texas.

### **Qualifying Conditions**

ALS (Amyotrophic Lateral Sclerosis)	ALZHEIMER'S DISEASE And other dementias	AUTISM  And other spectrum disorders	CANCER
CEREBRAL PALSY	EPILEPSY  And other seizure disorders	HUNTINGTON'S DISEASE	MS (Multiple Sclerosis)
PARKINSON'S DISEASE	PERIPHERAL NEUROPATHIES	PTSD	SPASTICITY



**ABOUT US** 

PATIENTS

MEDICINE

LEARN

**PHYSICIANS** 

**CONTACT US** 

PATIENT PORTAL

FREE CONSULTATION

#### MEDICINE



#### 0:1 THC-ONLY TINCTURE

REFILL YOUR PRESCRIPTION

#### **ACTIVE INGREDIENTS (SINGLE CONCENTRATION)**

10 mg THC per 1 mL of tincture

SIZE

30 mL (300 mg THC)

**PRICES** 

\$60

**FLAVORS** 

**Unflavored (contains Terpenes)** 

**BLENDS** 

Plus (contains Terpenes)

Crime Records

<u>Home</u> > <u>Compassionate Use Program</u> > Licensing & Registration

## Licensing & Registration Compassionate Use Registry of Texas (CURT)

- Access CURT Now
- Physician Application Instructions (PDF)
- Physician Registration
- Physician Search

#### **Program Information**

- Dispensing Organization Licensing
- Employee Registration
- Fingerprinting Instructions

#### **Contact Information**

- Consumer Complaint Sign (PDF)
- Customer Support: (512) 424-7293



#### **Compassionate Use Registry of Texas**



**Texas Compassionate Use Program** 

Login	
User Name	
Password	
	Login
Forgot User Name	Forgot Password
Regulatory Services Division For more information about the Compassiona	nata Ha Drawam disk have

### Still going to Trial

- If after all that...
- Good luck on State getting an expert!!

### What kind of TESTING?

- No experts
- Not using scientifically validated testing protocols
- No uncertainty data

### Get an expert

- Where?
- They don't have one
- Better call Daniel Mehler

## Assuming the got their shit together

- NO WAY TO DO CONCENTRATIONS
- Can't do Gas chromatography
- Flame ionization
  - Heat Problem
  - THCA + heat = CO2 and THC

### Decarboxylation

Acid form + heat produces the active form + CO<sub>2</sub>





DEA 250 – Quantitation of  $\Delta^9$ -Tetrahydrocannabinol (THC) and  $\Delta^9$ -Tetrahydrocannabinolic Acid (THCA) by Liquid Chromatography

#### Scope:

DEA 250 is an external standard, multi-point calibration method used for the quantitation of  $\Delta^9\text{-}$  Tetrahydrocannabinol (THC) and  $\Delta^9\text{-}$  Tetrahydrocannabinolic Acid (THCA)

#### Procedure:

1. Grind at least 200 mg of dry plant material and then sieve the ground material through a 40-mesh screen (425 µm particle size)

2. Weigh two separate portions of 100 mg of the material from step 1 into two separate centrifuge tubes

3. Add 5mL of 80:20 ACN: MEOH into each centrifuge tube, and vortex for 2-3 seconds

Column Temperature: 35  $^{\circ}$ C Injection Volume: 5  $\mu$ L

Injection Solvent: 80% Acetonitrile (ACN) / 20%

Methanol

Autosampler Temperature: 4 °C

Flow: 1.6 ml/min

Mobile Phase: A: 0.085% H<sub>3</sub>PO<sub>4</sub> in water; B: 0.085%

H<sub>3</sub>PO<sub>4</sub> in Acetonitrile Gradient Program:

0.00-3.00 min: 30:70 A/B

3.00-7.00 min: 30:70 A/B to 15:85 A/B 7.00-7.01 min: 15:85 A/B to 5:95 A/B

7.01-8.00 min: 5:95 A/B

8.00-8.01 min: 5:95A/B to 30:70 A/B

8:01-10.0 min: 30:70 A/B

Detection: 220 nm Sampling Period: 200 msec Peak Width: > 5 s

Limitations:

#### Scope:

DEA 250 is an external standard, multi-point calibration method used for the quantitation of  $\Delta^9$ -Tetrahydrocannabinol (THC) and  $\Delta^9$ -Tetrahydrocannabinolic Acid (THCA)

#### **Procedure:**

- 1. Grind at least 200 mg of dry plant material and then sieve the ground material through a 40-mesh screen (425  $\mu$ m particle size)
- **2.** Weigh two separate portions of 100 mg of the material from step 1 into two separate centrifuge tubes
- **3.** Add 5mL of 80:20 ACN: MEOH into each centrifuge tube, and vortex for 2-3 seconds
- 4. Sonicate for 15 minutes
- 5. Centrifuge at 1000 rpm for 2 minutes
- **6.** Transfer each supernatant into a 10 mL volumetric flask and dilute to mark using 80:20 ACN: MeOH
- **7.** If necessary, performed a second dilution using 80:20 ACN: MeOH to attain target concentration.
- 8. Pass the final solutions via a 0.45  $\mu m$  filter and into an autosampler vial.

#### **Internal Standard Solution:**

N/A

#### **Standard Solution:**

FIOW: 1.6 MI/MIN

**Mobile Phase:** A: 0.085% H<sub>3</sub>PO<sub>4</sub> in water; B: 0.085%

H<sub>3</sub>PO<sub>4</sub> in Acetonitrile

**Gradient Program:** 

0.00-3.00 min: 30:70 A/B

3.00-7.00 min: 30:70 A/B to 15:85 A/B 7.00-7.01 min: 15:85 A/B to 5:95 A/B

7.01-8.00 min: 5:95 A/B

8.00-8.01 min: 5:95A/B to 30:70 A/B

8:01-10.0 min: 30:70 A/B

Detection: 220 nm

Sampling Period: 200 msec

Peak Width: > 5 s

#### Limitations:

 $\Delta^8\text{-}$  THC and  $\Delta^9\text{-}$  THC are not baseline resolved when both compounds are present in similar concentration. If  $\Delta^8\text{-}$  THC is present in the sample at a high concentration, resolution between  $\Delta^8\text{-}$  THC and  $\Delta^9\text{-}$  THC should be greater than 1.3.

#### **Acceptance Criteria:**

**Selectivity**:  $\Delta^9$ -THC and  $\Delta^9$ -THCA are resolved (R

≥1.5) from each compound tested.

**Linearity**: At least seven concentrations were within

95-105% overall average sensitivity (response/concentration) limits.

**8.** Pass the final solutions via a 0.45  $\mu m$  filter and into an autosampler vial.

#### **Internal Standard Solution:**

N/A

#### **Standard Solution:**

Cayman Phytocannabinoid Mixture 5 (CRM)

#### **Quality Control Solutions:**

Prepare two QC solutions for use as positive controls during quantitative analysis. These two solutions are prepared such that their target analyte concentrations represent the low and high ends of the method's working range.

#### **Chromatographic System:**

Instrument: Shimadzu LC-2030C Plus Cannabis

Analyzer

Column: Shimadzu Nexleaf CBX for Potency: 150 mm

x 4.6 mm, 2.7 μm

Validated Quantitative Method Summary Date Posted: I/08/2021

#### **Acceptance Criteria:**

**Selectivity**:  $\Delta^9$ -THC and  $\Delta^9$ -THCA are resolv  $\geq 1.5$ ) from each compound tested.

**Linearity**: At least seven concentrations we 95-105% overall average sensitivity (response/concentration) limits.

**Repeatability**: Relative Standard Deviation each concentration tested was less than 2% **Recovery**: Experimentally measured withir 103%.

#### **Working Range:**

 $\Delta^9$ -THC: 29.2 to 125 µg/mL

 $\Delta^9$ -THCA: 13.1 to 250 µg/mL

### One Possible way

- High Performance Liquid Chromatography
- Do you know what that is?
- Good neither does anyone else!
- GOLD STANDARD

### **Adam's Hemp Case**

### Hemp Cigarette COA

Searched at the border checkpoint in Kingsville

Seized 30lbs and his Cadillac





DESERT VALLEY TESTING 51 W. Weldon Ave Phoenix, Arizona 85013 480-788-6644

www.desertvalleytesting.com

	Sample Information		
Sample Iden ification	Vance Global All Natural Blend 2019001048 VG-ANB Flower 04/12/19 03/30/19		
Laboratory Number			
Batch Number			
Matrix			
Analyzed Date			
Extraction Date			
Cannabinoid (HPLC)	%	mg/g	
Compound		2	
CBD-V	0.03%	0.31	
CBD-A	14.67%	146.69	
CBG	ND	ND	
CBD	0.19%	1.90	
THC-V	ND	ND	
CBN	ND	ND	
Delta 9-THC	ND	ND	
CBC	ND	ND	
THC-A	0.58%	5.84	
Delta 8-THC	ND	ND	
Cannabinoids Total			
Max Active THC	0.51%	5.13	
Max Active CBD	13.10%	130.99	
T. Active Cannabinoids	0.22%	2.22	
Total Cannabinoids	15.47%	154.75	
Max	Active Ratios		
N	A:1 CBD to THC		
0.	0:1 THC to CBD		

Cann	abinoid %	
16.00%	■ CBD-V	E CBD-A
14.00%		
12.00%	* CBG	# CBO
10.00%	■ THC-V	T CBN
8.00%	· incv	CON
6.00%	■ Deta 9-1	HC . CBC
4.00%		
2.00%	m THC-A	Delta 8-THC
0.00%		



Chemist: EP

RS (GCMS-HS)	PPM	RL
Compound		
Propane	ND	5.0
isobutane	ND	5.0
n-Butane	ND	5.0
Ethanol	ND	5.0
Isopentane	ND	5.0
Acetonitrile	ND	5.0
Acetone	ND	50.0
2-Propanol	ND	5.0
n-Pentane	ND	5.0
n-Hexane	ND	5.0
Chloroform	ND	5.0
Tetrahydrofuran	ND	5.0
Benzene	ND	5.0
Carbon Tetrachloride	ND	5.0
n-Heptane	ND	5.0
Toluene	ND	5.0
Xylenes	ND	10.0

Resid		
	PM # Propan	
0	kobuta	
9	n-Butar	ne
8	# Bhano	
70	■ kopent	
7	# Aceton	
6	M Aceton	
	8 2-Propo	
5	III n-Penta	
4	- n-riexa	
3	■ Tetrahy	
5-1	■ Benzer	
2		Tetrachloride
1	n-Hept	ane
	# Tolueni	
0	■ Xylene	5

	g/Vance
	1
m	g THC/Vance
	ND
m	g CBD/Vance
	130.99
(mg) total	cannabinoids/Vance
	154.75
(mg	CBD/Package
-	1309.94

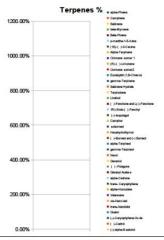
Metals	PPM	RL
Compound		
Lead	ND	0.018
Arsenic	ND	0.007
Cadmium	ND	0.004
Mercury	ND	0.020

RL=Reporting Limit NA=Not Applicable NT=Not Tested ND=Non Detected





Terpene (GC-MS)	%	mg/g
Compound	1.1	
alpha-Pinene	NT	NT
Camphene	NT	NT
Sabinene	NT	NT
beta-Myrcene	NT	NT
Beta-Pinene	NT	NT
p-men ha-1-5-diene	NT	NT
(1S)-(+)-3-Carene	NT	NT
Alpha-Terpinene	NT	NT
Ocimene Isomer 1	NT	NT
(R)-(+)-Limonene	NT	NT
Ocimene Isomer2	NT	NT
Eucalyptol (1,8-Cineole)	NT	NT
gamma-Terpinene	NT	NT
Sabinene Hydrate	NT	NT
Terpinolene	NT	NT
Linalool	NT	NT
(+)-Fenchone and L(-)-Fenchone	NT	NT
1R)-Endo-(+)-Fenchyl	NT	NT
(-)-Isopulegol	NT	NT
Camphor	NT	NT
Isoborneol	NT	NT
Hexahydrothymol	NT	NT
(+)-Borneol and (-) Borneol	NT	NT
alpha-Terpineol	NT	NT
gamma-Terpineol	NT	NT
Nerol	NT	NT
Geraniol	NT	NT
(+) -Pulegone	NT	NT
Geranyl Acetate	NT	NT
alpha-Cedrene	NT	NT
trans- Caryophyllene	NT	NT
alpha-Humulene	NT	NT
Valencene	NT	NT
cis-Nerolidol	NT	NT
trans-Nerolidol	NT	NT
Guaiol	NT	NT
(-)-Caryophyllene Oxide	NT	NT
(+)-Cedrol	NT	NT
(-)-alpha-Bisabolol	NT	NT
Total Terpenes	NT	NT





#### **NMS Labs**

CONFIDENTIAL

Integrated Forensic Services 2302 113th Street, Suite 200, Grand Prairie, Texas 75050 e-mail: DFW@nmslabs.com Phone: (866) 880-7018 Fax: (215) 366-1501 Barry K. Logan, Ph.D. F-ABFT, Laboratory Director

**Drug Chemistry Final Report** Report Issued 09/18/2019 07:36

To: 148699

Kenedy County Sheriff's Office

175 Cuellar Avenue

Case ID Number 19-DFW-015194

**Agency Number Date of Offense** 

Color Test, Microscopic Analysis, Thin Layer Chromatography (TLC), Weight/Volume

1900542 08/18/2019

Offense

Drug/Narcotic Offenses, Drugs

Sarita, TX 78385

Name(s)/(DOB):

MARHAL, JASON (06/07/1995)

Item(s) Received:

Lab Item # Agency Item # Description One hand-rolled cigarette containing plant-like material (1) 1 Name/Airbill **Delivery Method Description** Received Date 8641 5936 1225 FedEx 9/12/2019 **Results and Conclusions:** Result Compound/Comment Lab Item # Confirmed Marihuana/Marijuana\* 1 0.66 g (+/-0.01 g) (0.02 oz) (net) Weight 1 sample(s) tested Method of Analysis: **Analysis Reported Name** 

#### Reference Comment(s):

Lab Item #

\*The Federal Farm Act of 2018 and various State Statutes create a legal differentiation between hemp and marijuana. Hemp is defined as any part of the plant cannabis sativa that has Delta-9 Tetrahydrocannabinol (Delta-9 THC) content of less than 0.3% by weight, consistent with the statutes in all 50 US states with the exception of West Virginia. Plant material with a concentration of 0.3% Delta-9 THC or greater, is marijuana. Please refer to your individual state's legislation for further information.

Pending further analysis for the concentration of Delta-9 THC. Results will be issued in a separate report.

Determination

DA's NMS **TESTING** 



#### NMS Labs

#### CONFIDENTIAL

#### **Integrated Forensic Services**

2302 113th Street, Suite 200, Grand Prairie, Texas 75050 e-mail: DFW@nmslabs.com Phone: (866) 880-7018 Fax: (215) 366-1501 Barry K. Logan, Ph.D. F-ABFT, Laboratory Director

3	Weight/Volume Determination
4	Weight/Volume Determination
5	Weight/Volume Determination
6	Weight/Volume Determination
7	Weight/Volume Determination
8	Weight/Volume Determination
9	Weight/Volume Determination
10	Weight/Volume Determination
11	Gas Chromatography/Mass Spectrometry (GC/MS), Pharmaceutical Identification to
	Reference, Weight/Volume Determination

#### Reference Comment(s):

Amphetamine is a Texas PG-2 substance.

\*The Federal Farm Act of 2018 and various State Statutes create a legal differentiation between hemp and marijuana. Hemp is defined as any part of the plant cannabis sativa that has Delta-9-Tetrahydrocannabinol (Delta-9-THC) content of not more than 0.3% by weight, consistent with the majority of US state statutes. Plant material with a concentration of greater than 0.3% Delta-9-THC, is defined as marijuana. Please refer to your individual state's legislation for further information. The testing performed includes a GC/MS analysis to differentiate hemp and marijuana. The analysis does not include a screen for other drugs unless otherwise indicated. If additional testing is required, please contact NMS Labs' Client Support at 1-844-276-1182.

The remainder of the submitted evidence is scheduled to be returned unless alternate arrangements are made by you prior thereto.

The weight of evidentiary item(s) expressed as a decimal represents the truncated value. This report indicates the analytically determined weight of the evidentiary item(s) with an expanded uncertainty (k=2.576) corresponding to 99.00% confidence. Any weight  $\pm$  expanded uncertainty which encompasses 0.00 g shall be considered to be not significantly different than 0.00 g.

I affirm that I have reviewed all data used to produce this report.

Case 21-DFW-016556 was electronically signed on 04/07/2022 16:08

Nina A. Salazar M.S., Forensic Chem Team Leader



330 Loch'n Green Trail Arlington, Texas 76012-3458 817-275-2691 Fax: 817-275-1883 Andrew T. Armstrong, PhD Marion K. Armstrong, MSPH, MBA, CIH Kelly L. Wouters, PhD Karen M. Deiss, BS

#### Laboratory Report for Controlled Substances

Evidence Released By: Kenedy County Sheriff's Office Date Received: 02/21/2022

Evidence Released To: Armstrong Forensic Laboratory, Inc. Lab File No: C2FR02408-1

Cause No: 2019-CRF-116 Date of Offense: Not Provided

Defendant's Name/DOB: Marhal, Jason - Not Provided Container No: 19-09-0833-ME

Laboratory ID	Agency Item	Analysis Requested	Evidence Description
C2-02408A-001A	19-DFW- 015194-1900542	Held without Analysis	Evidence is held without analysis
C2-02408A-002A	19-DFW- 015194-1900542	Held without Analysis	Evidence is held without analysis
C2-02408A-003A	19-DFW- 015194-1900542	Controlled Substance and Concentration	Ten (10) boxes, each containing ten (10) cigarlike objects, each with a green leafy, plant material. The contents from one (1) object were analyzed and reported as C2-02408A-003A.
C2-02408A-004A	19-DFW- 015194-1900542	Held without Analysis	Evidence is held without analysis

Lab Number:	C2-02408A-003A	Net Weight:	0.02 ounces (0.72 grams ± 0.02 grams)
Date of Analysis:	02/28/2022	Reserve Weight:	0.01 ounce (0.31 grams ± 0.02 grams)
Requested Analysis	Results	Identification	Method of Analysis
Controlled	Positive	Cannabis sativa L.	Macroscopical Examination
Substance	Positive	Cannabis sativa L.	Microscopical Examination
Concentration	2.11% ± 0.25%	CBD - Cannabidiol	HPLC-DAD
Concentration	$< 0.078\% \pm 0.009\%$	CBN - Cannabinol	HPLC-DAD
Concentration	$< 0.078\% \pm 0.009\%$	THC - delta-9 Tetrahydrocannabinol	HPLC-DAD
Concentration	< 0.078% ± 0.009%	THCA-A - delta-9 Tetrahydrocannabinolic acid	HPLC-DAD
Concentration	$< 0.078\% \pm 0.013\%$	Total THC - Total delta-9 Tetrahydrocannabinol	HPLC-DAD

### Our Independent Testing

### **Cannabis DWI**

Numbers don't connect to LEVELS of intoxication

Numbers don't connect to TIME of intoxication



®ଝୁଲ≱ NHTSA

DOT HS 812 440

July 2017

Marijuana-Impaired Driving
A Report to Congress

### Field Sobriety Tests and THC Levels Unreliable Indicators of Marijuana Intoxication

Researchers investigated how marijuana affects skills required for safe driving and found that biofluid levels of THC did not correlate with field sobriety test performance or marijuana intoxication, regardless of how the cannabis was ingested.



### **Motions In Limine**

- Don't say Marijuana
- Or until and expert can offer that opinion

### **Try Good Ol'fashion Nullification**

- Talk about all the public opinion stats
- Google pop culture references to weed
- Be honest, talk about how you smoke weed
- Tell them about the prosecutors that smoke weed!!!

# Win your case in Voir Dire

- Get them talking about weed.
- If you can't talk for 30 minutes to a jury about weed, what are you doing here!
- Just talk about weed and the hypocrisy of criminalization
- Isn't the arrest enough!!!

# DON'T forget that Jury Instruction

- Make sure you have it ready before trial
- Make sure .3% concentration is there
- Make sure it mentions hemp or CBD

# **Necessity**

Section 9.22 - Necessity

#### Conduct is justified if:

- (1) the actor reasonably believes the conduct is immediately necessary to avoid imminent harm;
- (2) the desirability and urgency of avoiding the harm clearly outweigh, according to ordinary standards of reasonableness, the harm sought to be prevented by the law proscribing the conduct; and
- (3) a legislative purpose to exclude the justification claimed for the conduct does not otherwise plainly appear.

Tex. Pen. Code § 9.22

Amended by Acts 1993, 73rd Leg., ch. 900, Sec. 1.01, eff. 9/1/1994.

# Its just a weed case bro!

- What do you have to lose???
- If you can't convince a jury to find a guy not guilty on MJ, should you really be trying cases.
- And if you can't try cases then you don't deserve to plea them
- You have no RIGHT to be pleaing clients until you can win!!!

# Guess what fed guys??

- Same stuff generally applies!
- Same Hemp definition

### Be a PAIN IN THE ASS

- Make the case as difficult and challenging as possible
- And there's more....

# **Constitutional Challenges**



FEDERAL MOTION TO DISMISS



STATE
PRE-TRIAL WRIT

## **Federal Motion to Dismiss**

- DEA investigation and surveillance
- Search Warrant issued
- 1500 plant grow house in San Antonio
- Nothing imported from out of state

#### IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TEXAS SAN ANTONIO DIVISION

UNITED STATES OF AMERICA	§	
	§	
VS.	§	CRIMINAL NO. 5:16-CR-00320-FB
	§	
MICHAEL MYERS	§	

#### MOTION TO DISMISS UNCONSTITUTIONAL ENFORCEMENT OF MARIJUANA PROHIBITION PROVISIONS OF THE CONTROLLED SUBSTANCES ACT

#### TO THE HONORABLE SENIOR UNITED STATES DISTRICT COURT JUDGE FRED BIERY FOR THE WESTERN DISTRICT OF TEXAS:

NOW COMES MICHAEL MYERS, the Defendant in the above styled and numbered cause, who by and through undersigned Counsel, respectfully files this Motion to Dismiss Unconstitutional Enforcement of Marijuana Prohibition Provisions of the Controlled Substances Act in this case pursuant to the Due Process and Equal Protection Clauses of the Fourteenth and Fifth Amendments of the Constitution of the United States, the Faithful Execution Clause in Article II, § 3, cl. 5 of the Constitution of the United States, the Principle of Equal Sovereignty, the Separation of Powers Doctrine established in Articles I, II, and III of the Constitution of the United States, and the Commerce Clause in Article I, § 8, cl. 3 of the Constitution of the United States, and for good cause shows the following:

The Defendant is charged with Conspiracy to Manufacture Marijuana in violation of 21 U.S.C. §§ 846 and 841(a) and Using and Maintaining Drug Premises in violation of 21 U.S.C. § 856.

## 1. Selective Prosecution

The Defendant is being selectively prosecuted in violation of the Fifth Amendment. The Defendant's selective prosecution is deliberately based on an arbitrary classification, namely, his choice to exercise protected legal rights. These protected rights are his right to equal sovereignty based on State citizenship and his right to travel. This prosecution has a discriminatory purpose because the Government chooses to enforce the Controlled Substances Act against citizens living and operating in Texas but not in Colorado or Washington. The prosecution has a discriminatory effect because other similarly situated individuals in Colorado and Washington are not being prosecuted for the same offenses as the Defendant despite the same conduct. The Government's classification along State lines lacks any conceivable basis to a compelling or legitimate government interest, and therefore fails to justify the selective policy.

## 2. Faithful Execution Clause

Under the guidance and authority of the President, the Justice Department has identified eight federal enforcement priorities to shape the investigation and prosecution of marijuana crimes under the Controlled Substances Act in response to changing State marijuana laws. This Policy is outlined in the "Cole Memo." The eight priorities identified by the Department of Justice misstate the intent of Congress when enacting the Controlled Substances Act. While the Justice Department cites strained resources as the justification for a narrowed field of federal priorities, the policy described in the Cole Memo represents an unconstitutional failure of the Executive to "take Care that the Laws be faithfully executed" as required by Article II, § 3, cl. 5 of the Constitution of the United States.

# 3. Principle of Equal Sovereignty

The policy of selective enforcement, <u>discriminating based on State</u> <u>citizenship and location, must undergo heightened scrutiny under the</u> <u>principle of equal sovereignty</u>. The Executive Branch's policy of discrimination fails heightened scrutiny because the disparate geographic coverage of the policy is not sufficiently related to the problem it targets. If the Department of Justice desired to efficiently use their resources to achieve the intent of the Controlled Substances Act, more frequent prosecutions would take place in the jurisdictions in which no local law enforcement officers assist in crime fighting efforts versus in jurisdictions with laws nearly identical to the Controlled Substances Act and a supportive local law enforcement effort.

# 4. Separation of Powers Doctrine

The President's selective enforcement of the Controlled Substances Act violates the Separation of Powers Doctrine. The Executive Branch allows citizens of Colorado and Washington to engage in marijuana related business activities by not enforcing the Controlled Substances Act. The policy pronounced in the Cole Memo is a de facto regulation of commerce. This action creates a de facto legal market for the cultivation and distribution of marijuana within those States. The Constitution does not grant the President the power to regulate this commerce or create these otherwise prohibited markets without Congressional authority. The President far exceeded his Constitutional authority under the guise of prosecutorial discretion and the resulting scheme is a violation of Articles I, II, and III of the Constitution of the United States.

# 5. The Controlled Substances Act lacks any Rational Basis

The federal prohibition of the possession, manufacture, and distribution of marijuana legislated in the Controlled Substances Act has lost its rational basis because the law is not enforced uniformly across the country. Arguments that marijuana prohibition is rationally related to a legitimate government interest are nullified when the Executive Branch and its subordinate agencies arbitrarily allow marijuana cultivation and distribution in some states and not in others. The Federal Government can name no reason consistent with Congress's findings when enacting the Controlled Substances Act that it enforces the marijuana prohibition of the Controlled Substances Act in a State with strict marijuana prohibition, like Texas, but fails to enforce marijuana prohibition of the Controlled Substances Act in States that allow recreational cultivation and distribution (Colorado and Washington).

# So how'd that go Don??

Ahhh, probation, duh!

## **State Pre-Trial Writ**

Attacking the Texas Controlled Substances
 Act

MARIO GUTIERREZ, IV.	§	BEXAR COUNTY, TEXAS
	§	
	§ §	AT LAW NO. 2
EX PARTE	§	IN THE COUNTY COURT
	NO. CC516362	Accepted Date: 5/1/2019 10:16 AW  Accepted By: Graciela Mares  /s/ Graciela Mares  Deputy Clerk
	WRIT 2935	E-FILED Bexar County, County Clerk Lucy Adame-Clark Accepted Date: 5/1/2019 10:16 AM

#### APPLICATION FOR PRE-TRIAL WRIT OF HABEAS CORPUS SEEKING RELIEF FROM UNCONSTITUTIONAL STATUTE & UNCONSTITUTIONAL PROSECUTION

#### TO THE HONORABLE GRACE M. UZOMBA, JUDGE OF THE COUNTY COURT AT LAW NO. 2 OF BEXAR COUNTY, TEXAS:

COMES NOW MARIO GUTIERREZ, IV., Applicant in the above-entitled and numbered cause, by and through Donald H. Flanary, III., and Amanda I. Hernandez, his attorneys, and presents this pre-trial Application for Writ of Habeas Corpus Seeking Relief from Facially Unconstitutional Statute pursuant to the Fifth, and Fourteenth Amendments to the United States Constitution; Article 1, § § 10, 12, and 19 of the Texas Constitution; and Article 11.09 of the Texas Code of Criminal Procedure.

Applicant is currently charged and held under conditions of bond in this Court with one misdemeanor count of Possession of Marijuana, 0 to 2 oz., in cause number 516362.

#### I. BASIS FOR WRIT

Applicant is illegally confined and restrained of his liberty by virtue of these unconstitutional charges. The charges are illegal because they are based on a facially invalid statute which criminalizes the possession of marijuana. This statute violates multiple rights protected by the both the United States Constitution and Texas Constitution. Section 481.121 of the Texas Healthy and Safety Code, titled "Offense: Possession of Marihuana," is unconstitutional on its face for the following reasons:

E-FILED
Bexar County, County Clerk
Lucy Adame-Clark
Accepted Date: 4/29/2019 4:26 PM
Accepted By: Victoria Rodriguez
/s/ Victoria Rodriguez

Deputy Clerk

* *	-	-	10	-
			63	

STATE OF TEXAS	§	IN THE COUNTY COURT
	§	
vs.	§	AT LAW 2
	8	
MARIO GUTIERREZ, IV.	§	BEXAR COUNTY, TEXAS

#### MOTION TO DISMISS [Seeking Relief From Facially Unconstitutionally Statute]

#### TO THE HONORABLE GRACE M. UZOMBA, JUDGE OF THE COUNTY COURT AT LAW NO. 2 OF BEXAR COUNTY, TEXAS:

COMES NOW MARIO GUTIERREZ, IV., Defendant in the above-entitled and numbered cause, by and through Donald H. Flanary, III., and Amanda I. Hernandez, his attorneys, and files this Motion to Dismiss Seeking Relief From Facially Unconstitutional Statute pursuant to the Fifth, and Fourteenth Amendments to the United States Constitution; Article 1, § § 10, 12, and 19 of the Texas Constitution; and Article 11.09 of the Texas Code of Criminal Procedure.

Defendant is currently charged and held under conditions of bond in this Court with one misdemeanor count of Possession of Marijuana in cause number 516362.

#### I. BASIS FOR MOTION TO DISMISS

Defendant is illegally confined and restrained of his liberty by virtue of these unconstitutional charges. The charges are illegal because they are based on a facially invalid statute which criminalizes the possession of marijuana. This statute violates multiple rights protected by the both the United States Constitution and Texas Constitution. Section 481.121 of the Texas Healthy and Safety Code, titled "Offense: Possession of Marihuana," is unconstitutional on its face for the following reasons:

# Dormant Commerce Clause

- Unduly burdens interstate commerce by attempting to place an outright ban on the transportation of marijuana, including medical marijuana, which is legal in all of Texas's neighboring states; and
- It violates the Fundamental Right to Travel.

# **Up in Smoke**

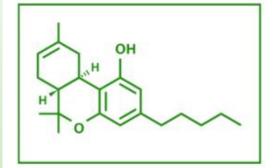
- No One Cares about Weed anymore
- The legalization of Hemp and CBD
- Today's 4<sup>th</sup> Amendment Challenges
- What's the deal with Delta 8?

## What is Delta-8 THC?

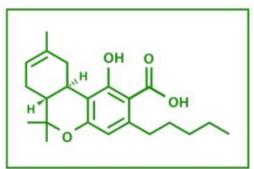
- An Isomer of Delta 9 THC
- Only occurs in minuscule levels in cannabis
- Synthetically manufactured by chemical conversion of CBD

# Technically...

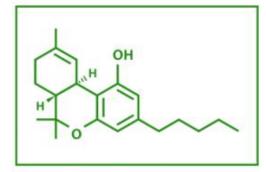
Delta 8 is also Hemp Derived THC



Delta-8-Tetrahydrocannabinol

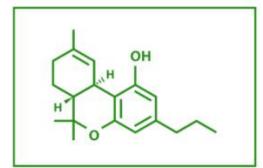


Delta-8-Tetrahydrocannabinolic acid

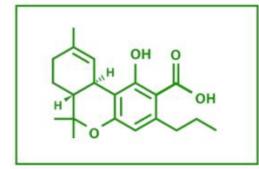


Delta-9-Tetrahydrocannabinol

Delta-9-Tetrahydrocannabinolic acid



Delta-9-Tetrahydrocannabivarin



Delta-9-Tetrahydrocannabivarinic acid

## What does Delta-8 do?

- Binds to the CB1 receptors in the central nervous system
- Is psychoactive, but less than Delta-9

# Why is it a thing?

- Since 2020 an oversupply of CBD extracted from hemp caused the price of CBD to drop
- Chemists began to convert CBD to Delta-8
- It is produced industrially by synthesizing
   CBD with solvents, acids and heat.
- Now sold on the grey market

# Is Delta-8 illegal?

Police and Prosecutors want to know

#### **RECEIVED**

By Opinion Committee at 4:24 pm, Nov 05, 2021



#### BRETT W. LIGON

District Attorney 9th Judicial District **RQ-0439-KP**FILE# <u>ML-49051-21</u>
I.D.# **49051** 

Michael R. Holley First Assistant District Attorney

Christopher R. Smith, Chief Investigator Melisa G. Appleton, D.A. Administrator

November 1, 2021

Hon. Ken Paxton Attorney General of the State of Texas ATTN: Opinion Committee P.O. Box 12548 Austin, TX 78711-2548

> Re: request for an opinion regarding whether the exclusion of "tetrahydrocannabinols in hemp" from the statutory definition of "controlled substance" precludes prosecution of individuals for the possession and sale of delta-8 tetrahydrocannabinol products derived from hemp.

Dear Attorney General Paxton:

Montgomery County peace officers have encountered products labeled for sale as containing a therapeutic or intoxicating concentration of delta-8 tetrahydrocannabinol (THC). I request your legal opinion regarding the following issue:

Are products containing concentrated or synthesized delta-8 THC still unlawful to possess or sell under sections 481.103, 481.113 and 481.116 of the Texas Health and Safety Code? Or are delta-8 THC products no longer subject to prosecution under section 481.002(5) of the Health and Safety Code—which excludes "tetrahydrocannabinols in hemp" from the statutory definition of "controlled substance"—if the delta-8 THC is extracted or synthesized from lawfully-grown hemp products?

This office respectfully suggests that the attorney general confirm that possession or sale of concentrated or synthesized delta-8 THC products remains a criminal offense under the Health and Safety Code; and that the section 481.002(5) exclu-

# TCDLA Cannabis Committee's Conclusion?

# Delta-8 is illegal

- Yes, it is illegal
- Because it is synthesized and it is an isomer
- Hemp derived Delta-8 is legal
- MJ derived Delta-8 is illegal

 We should have said because of the conflict it resolves in the favor of the defendant

## **Delta-8** is **NOT** safe

- Very little testing on humans
- Illegally produced
- No manufacturing is regulated
- Contains impurities in the manufacturing process

# But they still can't prove it!

 Labs still cannot prove that the Delta-8 isn't hemp derived. "My 'go to' book for patients needing accessible, accurate, and well-presented educational information on all aspects of this healing plant." —ETHAN RUSSO, M.D., medical director, PHYTECS

# CANNABIS PHARMACY

THE PRACTICAL GUIDE TO MEDICAL MARIJUANA

UPDATED

MICHAEL BACKES Foreword by ANDREW WEIL, M.D.

JACK McCUE, M.D., MEDICAL EDITOR





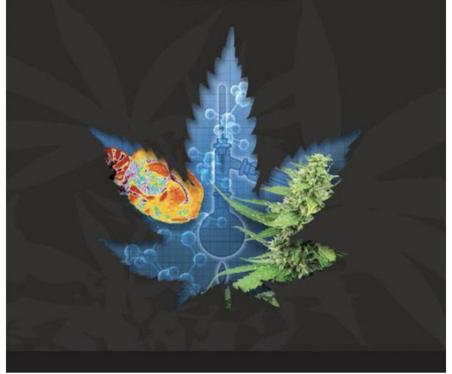
#### EMERGING ISSUES IN ANALYTICAL CHEMISTRY

BRIAN F. THOMAS, SERIES EDITOR

# THE ANALYTICAL CHEMISTRY OF CANNABIS

Quality Assessment, Assurance, and Regulation of Medicinal Marijuana and Cannabinoid Preparations

BRIAN F. THOMAS MAHMOUD A. ELSOHLY





# HANDBOOK OF CANNABIS

Edited by Roger G. Pertwee

OXFORD

# NEVER plea to jail or prison

A pro-se defendant can do better than that

210-789-3181 donflanary@hotmail.com







210-789-3181 donflanary@hotmail.com





# The NEW Hemp Industry







Must have a Hemp Grower's License

To CULTIVATE,
HANDLE, or
TRANSPORT OUT
OF STATE

So You
Want to
Grow
Hemp In
Texas?



DOA will be developing rules and regulations



Rules must cover sampling, inspection, and testing (including lab standards)



Rules must provide due process and an appeals



# What DSHS must do

Establish a manufacturing licensure program for consumable hemp products.



Create a registration process for retailers selling consumable hemp products containing CBD.

#### What DSHS must do

 Work with DPS on random testing for consumable hemp products containing CBD sold at retail. Random testing will not occur until the retail registration process is established after the TDA state plan approval.



- Application for license: not to exceed \$100
- Renewal of a license: not to exceed \$100
- Participation fee for each location under a license: not to exceed \$100

- Site modification fee: not to exceed \$500
- Testing fee (pre and post harvest): not to exceed \$300
- Only other allowable fees will be to certify organic and certify seeds, which are To Be Determined

# Hemp Grower's License

- Must have to cultivate, handle, or transport hemp
- Not required to manufacture a consumable product
- Department will produce the applications

## Hemp Grower's License

- License must be issued within 60 days to qualified applicants
- Valid for 1 year, renewable annually
- Will be revoked for a felony controlled substance conviction

#### **Transportation**

- State will issue a SHIPPING CERTIFICATE and MANIFEST with a UNIQUE IDENTIFIER attached to the shipment
- Cannot transport anything else with a hemp shipment
- Must document origin specifically

#### **Transportation**

 Peace officers can inspect and sample the shipment. Unless they have probable cause, they MAY NOT SEIZE the plant material 210-789-3181 donflanary@hotmail.com







210-789-3181 donflanary@hotmail.com

