

I oppose HB 1420, as the bill fails to address North Dakota's DUI statute. As a result, people can be wrongly charged with Driving Impaired While Under the Influence of Marijuana, or DUI-THC. Additionally, depending on how the bill is further amended, HB 1420 may have the unintended consequence of denying citizens their Sixth Amendment rights under the U.S. Constitution, and their Article 1, Section 12 rights under the North Dakota Constitution.

#### **NORTH DAKOTA'S DUI STATUTE**

North Dakota's DUI statute is NDCC § 39-08-01. This law states, in 1(a), that if a driver has a blood alcohol level of at least 0.08%, that driver is guilty of a DUI. The law also states, in part 1(c), that if, "that person is under the influence of any drug or substance or combination of drugs or substances to a degree which renders that person incapable of safely driving," that driver is guilty of a DUI. In 1(c), there is no listed level of any drug, THC or otherwise, that could quantify a person as legally impaired. All that is required in 1(c) is the presence of THC. Alcohol has the listed 0.08% level, in 1(a), but *any* amount of THC, in 1(c), renders a defendant automatically guilty of DUI-THC, leaving an accused driver no ability to present a defense in court.

Testing for DUI-Alcohol is commonplace in North Dakota: blood, oral fluid, or urine is tested to determine if a driver was impaired at the time law enforcement stopped the vehicle. Most commonly, a driver is taken to a police station and blows into the intoxilyzer machine where the blood alcohol level is measured, and proof is provided to law enforcement on a printout.

HB 1420 does not provide North Dakota law enforcement guidance on how to test for possible impaired driving from use of THC. Are there testing machines available to buy that can determine the level of impairment from THC in a required amount of time? Is there funding provided so all the police stations in North Dakota can purchase the approved machine(s) to test for levels of THC? Is there funding provided for proper training to all law enforcement personnel to properly operate THC testing machines?

None of these questions are addressed by HB 1420. Companies make breathalyzers to test whether or not a person has smoked marijuana within the past two hours, but the breathalyzers do not test if the person ate or drank THC. Should North Dakota wait to legalize recreational marijuana until THC levels can be measured from all forms of ingestion?

THC does not break down in the body as does alcohol. With alcohol, we drink, our blood alcohol level rises, our body processes the alcohol, and we finally get sober. Our level of drunkenness is detectable through tests of blood, oral fluid, or urine, and the oral fluid is measurable by an intoxilyzer machine. Alcohol processed by our bodies is a constant. The level of how drunk a person is now, combined with the knowledge of when that person stopped drinking, allows a trained technician to accurately state what the blood alcohol level was at any given hour from the moment of the time of the test, back to the time when the person stopped drinking. That's because the breakdown of alcohol in our bodies is a constant and takes hours. When a person stops drinking, after some hours, an amount of time that depends on how much a person drinks, an amount of time measured in hours, not in days, the alcohol is processed from a person's body and there is no test that will find measurable amounts of alcohol.

This is not the same with THC. In direct contrast with alcohol, and depending on how much THC a person uses, measurable and detectable inert THC can be found in a person's body for up to a month. When we drink, we get drunk, and when we use marijuana, that feeling of being drunk, the 'high' from THC use, feels, to humans, the same as alcohol use. I believe this similarity of the chemically induced 'high' makes people believe that those chemicals that give us that euphoric feeling are processed equally by our bodies. They are not. With THC, this feeling of euphoria lasts for a few hours, about four hours, and then the feeling fades as the THC becomes inert, and that person is then no longer 'high.' In fact, impairment to drive by THC happens within the first two

hours of ingestion. But THC, after it stops making a person 'high,' can stay in the body, in its inert form, for up to a month. THC is measurable even though its ability to get a person 'high' is no longer possible. A testable amount of THC in a person's body needs to be determinable whether it is inert THC, and therefore non-punishable, or is active THC, which could render a driver impaired.

Also, the State Legislature should enumerate penalties for DUI-THC in Century Code. Testing for THC is necessary, because without a scientific test, the judicial system across the State will vary wildly on punishment, fluctuating among all fifty-three counties. How a sheriff's deputy in western North Dakota 'feels' about a DUI-THC vehicle stop may vary with how a sheriff's deputy in eastern North Dakota 'feels' about a DUI-THC stop. And how does the locally elected State's Attorney in a northern county 'feel' about the use of recreational marijuana as compared to a State's Attorney in a southern county? In court, how is a judge to decide on punishment, if the legislature has not qualified and quantified the penalty phase of the trial with or without an amount of THC present at the time of the arrest? With all these feelings by North Dakota employees about THC, how is a citizen able to get a fair hearing, and one consistent across the State? Citizens can't.

### **THE CONSTITUTIONAL PROBLEM**

The Sixth Amendment of the U.S. Constitution, and Article 1, Section 12 of the North Dakota Constitution, state that defendants have the right to confront their accuser in court. In a DUI trial, the arresting law enforcement official testifies to what he or she observed. Also in the courtroom is the printout from the Intoxilyzer 8000 of the defendant's oral fluid test. (Or the printout of another machine of science that tested either blood or urine.) The printout from the intoxilyzer machine is needed, because the law states that the defendant's blood alcohol level must be at least 0.08%, tested within two hours of the traffic stop, and the printout is that proof. With this information, a defendant can mount a defense against the charge. Without a machine printout, all that the court and the defendant have is the word of the arresting law enforcement official, a 'feeling' from which a defendant cannot mount a legal defense.

Without a printout from a scientific device that determines the level of impairment of THC at the time that a law enforcement official stopped the vehicle, there is no proof of impairment that satisfies any requirement of the DUI statute. If a provision is not added to the DUI statute that measures the THC level in a manner that can determine a legal level of impairment, then defendants will not be able to make a defense against the charge by the State. There is no way for a defendant to be able to put together a defense against how the law enforcement official was 'feeling' at the time of the arrest. Without a scientific tool for law enforcement to use and present to a State's Attorney, there is no way for a citizen to fully confront his or her accuser as they currently do in a DUI-Alcohol trial. When charges are filed by the State's Attorney, with no way to confront an accuser, the constitutional rights of citizens are denied by the State.

### **ADDITIONAL NORTH DAKOTA CENTURY CODE SECTIONS**

Once the DUI statute has been amended to accommodate DUI-THC, the Legislature will need to address other affected statutes in Century Code. One example is NDCC § 39-20-01.1; chemical test of driver in serious bodily injury or fatal crashes. Part 2, in its final lines, states that, "a law enforcement officer shall request the driver to submit to a test or tests of the driver's blood, breath, or urine to determine ... the presence of other drugs or substances, or both." In its current form, this section of Century Code does not require a level of THC concentration, only its presence, to render a defendant guilty of DUI-THC. There will be additional sections of Century Code that will also need to be amended to reflect legal THC use. HB 1420 needs many more amendments before passage, to protect citizens and visitors living in, and those passing through, North Dakota.

Thank you for your time and attention.