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## Use of Drug Detection Canine's in Oregon after passage of Measure 91

### State of the Measure

In spite of the probability that Measure 91 will be modified by the Oregon State Legislature prior to July 1, 2015 when, by the terms of the measure, it is to go into effect, it is almost a certainty that some amount of non-medical production and possession of marijuana and marijuana derivatives will be legal for Oregonians over the age of 21. For Oregon prosecutors and law enforcement officers, legal marijuana will change the way in which drug detection canines are used in criminal investigations. The purpose of this memorandum is to advise these professionals how the changing law will affect how they perform criminal investigations with these animals.

### Narcotic Canines in Oregon

In Oregon, narcotic canines are trained to detect marijuana, cocaine, methamphetamine and heroin, but the animals are not trained to distinguish between substances. In other words, a dog will perform a behavior called an 'alert' when it detects the scent of any of the four substances, but the handler will not know which drug the dog is alerting to. Additionally, drug detection canines do not determine amounts of substance. A positive alert indicates only that the scent of one of the four drug types exists, not that there is a large or small amount of substance producing that scent.

As a result, the canine handler cannot know if the dog is responding to the scent of an illegal substance (e.g., heroin) or a legal quantity of a legal substance (e.g., 1 oz of marijuana). As such, after Measure 91 goes into effect, the handler will no longer be able to conclude, based on the dog's alert, that the handler has probable cause to believe the dog is responding to evidence of a crime. However, there is no need to take the animals out of service. Even under the new law, officers can continue to use narcotics canines in developing probable cause.

### Probable Cause in Oregon

In Oregon, the question of probable cause is defined by ORS 131.005 (11) as: "Probable cause" means that there is a substantial objective basis for believing that more likely than not an offense has been committed and a person to be arrested has committed it." Probable cause "... means that the facts upon which the warrant is premised must lead a reasonable person to believe that seizable things will probably be found in the location to be searched." State v. Anspach, 298 Or 375, 380-81 (1984). "Probably," means "more likely than not." State v. Maxfield, 133 Or. App 370 374, 891 mod on recon 134 OR App 542 (1995), State v. Usher, 135 Or App 143, 145 (1995), State v. Chambless, 111 Or App 76 80, rev den, 313 Or 210 (1992). Probable cause does not require certainty. State v. Goodman, 328 Or 318, (1999), State v. Herbert, 302 Or 237, 241 (1986).

Although the preceding authority references warrants and arrests, the scheme is the same for searches and seizures of evidence, either with or without a search warrant. "The probable cause analysis for a warrantless search is the same as for a warranted one." State v. Brown, 301 Or. 268, 274-76, (1986). Probable cause exists if the facts on which the officers relied would "lead a reasonable person to believe that seizable things will probably be found in the location to be searched." State v. Anspach, 298 Or. 375, 381 (1984). The standard is one of probability, not certainty. *Id.* at 380-81, 692 P.2d 602. In assessing probable cause, a court must consider the "totality of the circumstances, including

the officer's training and experience.” State v. Vasquez–Villagomez, 346 Or. 12, 23, (2009). In addition, the facts articulated in support of probable cause must be assessed in a commonsense and realistic fashion. State v. Coffey, 309 Or. 342, 346, 788 (1990); State v. Villagran, 294 Or. 404, 408 (1983).

So although a narcotics canine alert alone will no longer mean ‘it is more likely than not that’ illegal drugs are present in the area exposed to the dog, the alert is still relevant to the PC determination because the alert is part of the “totality of the circumstances” that the court must consider. In other words, the real difference in how narcotic canines are used after Measure 91 goes into law is that, although the alert is relevant, the officer will have to develop additional evidence to support the belief that evidence of a crime exists in the location to be searched.

#### Officer Development of Probable Cause with the aid of a narcotic canine.

The officer’s development of additional evidence will take many forms, but it will include the officer’s independent observations, the surrounding context and skilled questioning of the suspect. The evidence will often come from statements made by the suspect, information provided by credible informants, and to a lesser extent, the officer’s knowledge of the suspect’s historical use of substances other than marijuana.

For example, for many people, marijuana will remain as illegal as the other three drugs. An officer may independently determine that the suspect is under the age of 21 and would therefore fall outside the protections of Measure 91 altogether, or the officer may determine that the suspect is on criminal supervision, which would also fall outside the new law.

Additionally, the presence of children could make otherwise legal marijuana illegal. For example, a dog’s alert to material found in areas accessible to children could constitute evidence of the crime of Criminal Mistreatment under ORS 163.200 for, with criminal negligence, the actor withholding

adequate physical care from the child<sup>1</sup> or Recklessly Endangering Another under ORS 163.195 for the suspect's recklessly engaging in conduct which creates a substantial risk of serious physical injury to another person. One can imagine any number of situations in which marijuana, marijuana use and, perhaps especially, the production of marijuana extracts in close proximity to a child could constitute a dangerous condition<sup>2</sup>. A dog's alert to containers of pressurized solvents or glassware could be evidence of Unlawful Manufacturing of Marijuana (or other substance) under ORS 475.856. Perhaps most importantly, marijuana crimes, when they occur within 1000 feet of a school, are likely to remain in place even after Measure 91 goes into effect and an alert by a drug detecting canine will have the same legal effect as it always had.

Other examples include:

1. A canine alert on a car with a driver who shows signs of intoxication. The presence of even legal marijuana could be evidence of DUII under ORS 813.010 so a dog alert will often have the same effect that it has always had.

2. A canine's alert to containers that, in the officer's training and experience, are not consistent with marijuana consumption like small sections of wax paper, hypodermic syringes, crystalline powder or surgical tubing could be enough for probable cause.

3. "No marijuana" response. After a canine alert, police might consider adopting a policy of simply asking the suspect if he or she is in possession of marijuana. Reportedly, in Colorado this has become routine under the legal theory that , if the suspect him or herself excludes marijuana from the

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<sup>1</sup> Or even Criminal Mistreatment in the First Degree under ORS 163.205 for knowingly doing the same thing.

<sup>2</sup> Note that Measure 91 addresses the manufacture of 'marijuana extracts' involving high pressure solvents like butane, hexane, isopropyl alcohol and other highly flammable – even explosive – gasses. A remarkably dangerous production technique, Colorado especially has experienced a substantial number of explosions and fires in residential areas as a result of armature attempts at creating this concentrated form of marijuana extract since their law went into effect.

range of possible controlled substances contained in the area to be searched, the officer has probable cause to believe that their only substances the dog could have alerted to are illegal.

### The Search Warrant Cure

Although, as discussed above, the probable cause analysis for search warrants is the same as it is for warrantless searches, the DOJ recommends that law enforcement agencies use search warrants whenever possible, especially in the early days of Measure 91. Besides shifting the burden on the defense, a search warrant will give the court the benefit of a considered decision before the search is even performed. Courts have the freedom to modify the warrant, ask questions, request follow up work and express their concerns early in the search and seizure process. The result could be twofold: 1) the articulation of probable cause is likely to be clearer if it is first reviewed by a court and modified as appropriate and, 2) search warrant review may have an educational effect on courts as they familiarize themselves with the use of narcotic canines under this new law.

However, the fact that the animal is trained to alert to marijuana is a crucial fact to disclose in a search warrant. Failure to do so can easily result in suppression of evidence seized under the terms of the search warrant because a court must be given the opportunity to consider that the dog may have alerted to a legal substance. The Oregon DOJ recommends that this disclosure be explicit and incorporate this following language:

“Canine (insert name of animal) was trained and certified prior to the effective date of Measure 91. Canine (name) is trained to detect the presence of marijuana, heroin methamphetamine and cocaine. Canine (name) cannot communicate which of these substances s/he has detected. Canine (name) can detect minuscule amounts of these four substances. Canine (name) cannot communicate whether the detected substance is present as residue or in measureable amounts. Despite these limitations, Canine (name’s) alert helps provide probable cause to believe that evidence of a crime may be found in the place to be searched when added to these additional facts:”

List facts below.

### Conclusion

In most circumstances, Measure 91 will mean that a drug detection canine alert will no longer automatically support a conclusion that it is more likely than not that evidence of a narcotics crime exists. This is because there is no way to tell if the animal is alerting to illegal substances or legal quantities of marijuana. However, an alert is not without value to the investigation. The alert, in conjunction with other evidence, can be helpful in contributing to the development of probable cause under the 'totality of the circumstances' test. Ultimately, it will be the training, experience and skill of the officer that makes the difference between the seizure of admissible evidence and a successful motion to suppress.