

# Legal Considerations for Oral Fluids in New York State

# Vehicle & Traffic Law

## VTL 1194(2) Evidential Testing

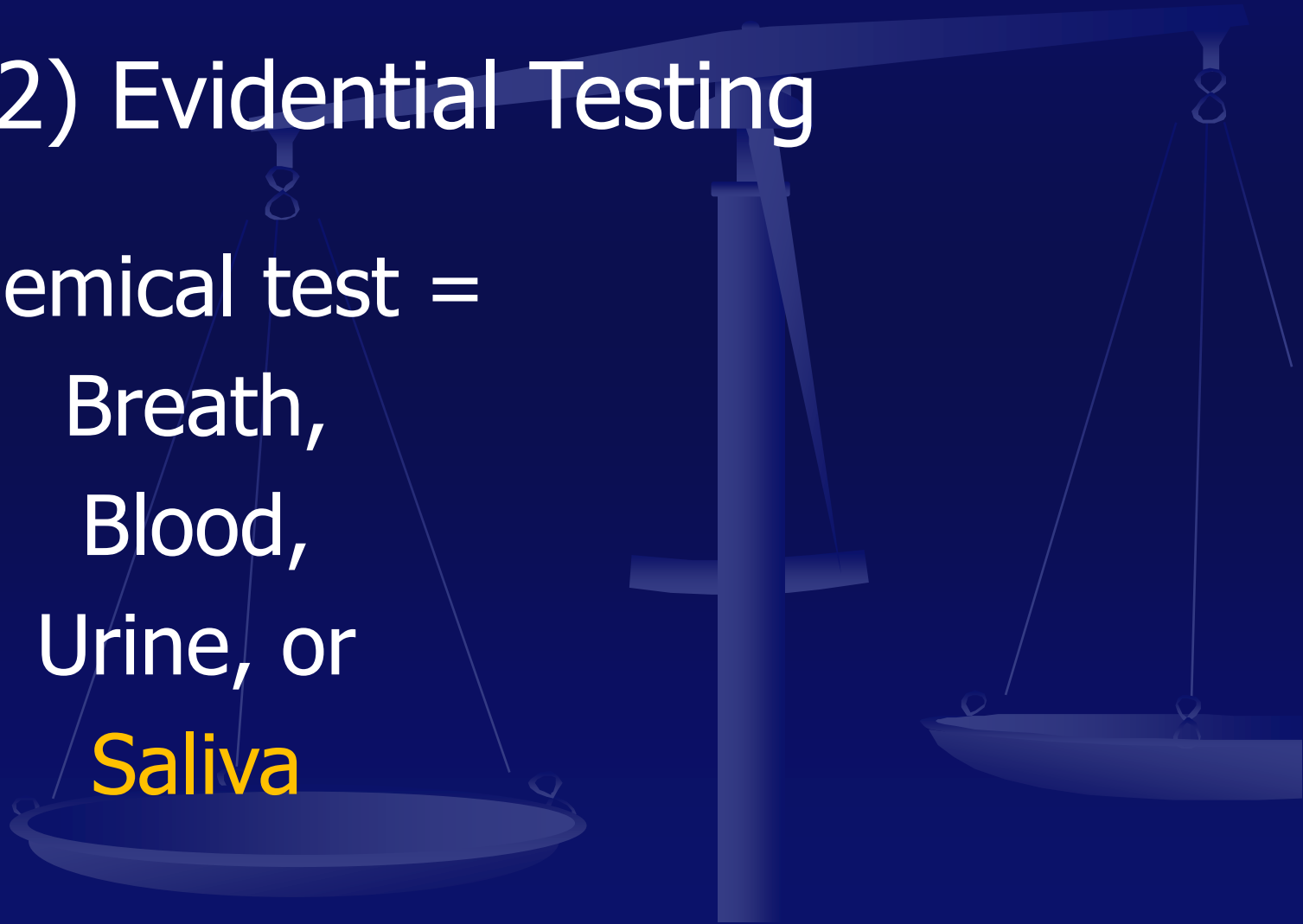
Chemical test =

Breath,

Blood,

Urine, or

**Saliva**



# Vehicle & Traffic Law

2. Chemical tests. (a) When authorized. Any person who operates a motor vehicle in this state is deemed to have given consent to a chemical test if requested to do so by a police officer. The test may be one or more of the following: breath, blood, urine, or saliva. For the purpose of determining the alcohol content of the blood provided that the test is administered by or at the direction of a police officer, the results of a chemical test of breath, urine or saliva, with respect to a chemical test of breath, at the direction of a police officer:

**IT'S THE SAME**

# Department of Health Regs

10 NYCRR 59.1 – definitions

(k) **Saliva** means oral fluid.



# Department of Health Regs



10 NYCRR 59.3

Permitting process for analysis of  
“blood, urine, and **saliva.**”

Permitting process is the same because  
the science is the same

# In Court

No NY cases yet.

But, the foundation arguments already exist.



# Basic Legal Principles Applicable to All Sample Collections

## Schmerber v. California, 384 U.S. 757 (1966)

- No implication of self incrimination (5<sup>th</sup> Amendment) with biological samples
- But it is a search
- Blood samples generally require warrants unless there are “exigent circumstances” or consent

# Basic Legal Principles Applicable to All Sample Collections

## Birchfield v. North Dakota, 579 U.S. 438 (2016)

- Distinguishes privacy interests between blood and breath
- Provides argument that OF is less invasive, like breath

## Maryland v. King, 569 U.S. 435, 446 (2013)

- Analogous collection of OF for DNA testing approved
- OF considered “gentler” than blood draw



# AAA Use of Oral Fluid to Detect Drugged Drivers: A Toolkit

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<https://publicaffairsresources.aaa.biz/wp-content/uploads/2022/04/FINAL-OF-Report-09.07.22.pdf>

Very useful overview of Oral Fluid Testing (Jen Limoges)

# AAA Use of Oral Fluid to Detect Drugged Drivers: A Toolkit

Cites to a California case admitting the results from a Draeger 5000 (as an evidential test) finding: “the correct scientific procedures were used . . . [t]he court further finds that there is sufficient reliable evidence of the drug screening test administered.” People v. Junior Salas (Register of Actions Kern County, California Case Number BF15363A. November 30, 2015) (The decision and an excerpt of testimony is in the appendix)

# AAA Use of Oral Fluid to Detect Drugged Drivers: A Toolkit

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Also includes an unpublished NY County Supreme Court case from 2007 finding the OF test could be relied upon in a probation revocation, after a hearing on the test's reliability.

*People v. Gonzales*, SCI #1092/06, also in the appendix

# Other Resources

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National Traffic Law Center(NTLC) Monographs including APRI: “Drug Toxicology for Prosecutors”

<https://ndaa.org/wp-content/uploads/Drug-Toxicology-for-Prosecutors.pdf>

DWI Prosecutor’s Handbook

<https://ndaa.org/resource/dwi-prosecutors-handbook/>

# Evidential Oral Fluid Testing

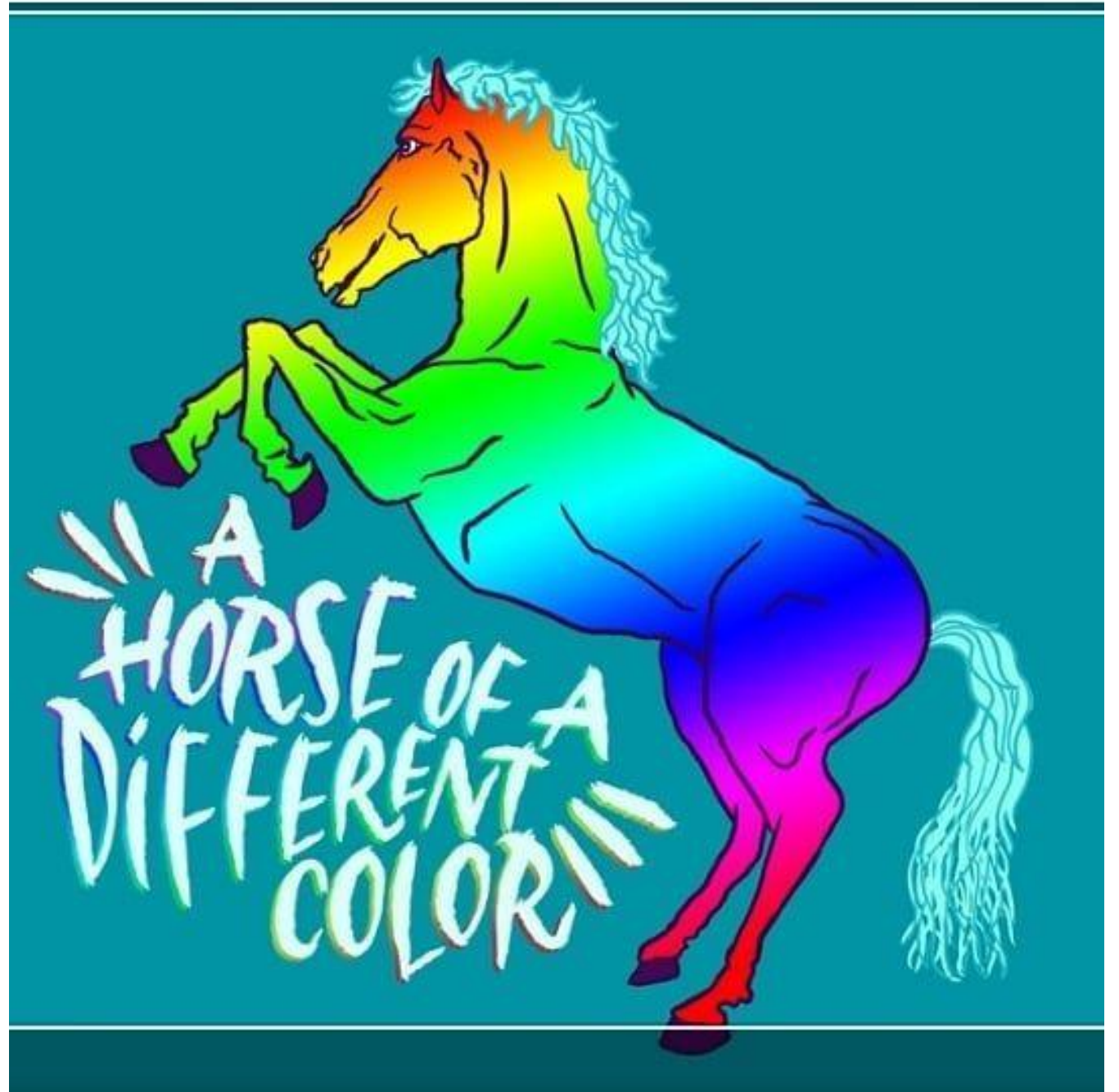
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The Legal Pitfalls of Using Oral Fluid Testing:

**NONE**



**Roadside  
Oral Fluid  
Screening:**



# Roadside OF Testing Devices



VTL §1194(1)(b)

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**DOESN'T  
HAVE TO  
BE**



# Establish Agency Protocol Considerations

- Should be similar to PBT use but...
- New technology receives greater scrutiny
- Training, certification, device maintenance
- Record-keeping
- Protocols must incorporate expected admissibility requirements
- On-scene script?
- Consent form?

# Example: NYPD



## PATROL GUIDE

Section: Vehicle Collisions		Procedure No: 217-02	
<b>VEHICLE COLLISIONS WHICH RESULT IN DEATH, SERIOUS INJURY AND LIKELY TO DIE, OR CRITICAL INJURY</b>			
DATE ISSUED: 08/19/13	DATE EFFECTIVE: 08/19/13	REVISION NUMBER:	PAGE: 1 of 4

### PURPOSE

To investigate vehicle collisions in which death, serious injury and likely to die, or critical injury has occurred and to present facts to the District Attorney.

### DEFINITION

CRITICAL INJURY – A critical injury will be determined based upon the on-scene assessment of Emergency Medical Services (EMS) personnel.

### PROCEDURE

After responding to a vehicular collision in which death, serious injury and likely to die, or a critical injury has occurred, follow normal vehicle collision procedures and, in addition:

Can also be used on some, but not all DRE call-out cases



**CONSENT TO SUBMIT**

**ORAL FLUID SAMPLES**

(08/15)

I, \_\_\_\_\_ of  
(Print Name) (Date of Birth)

\_\_\_\_\_  
(Address)

give consent to the New York City Police Department to take oral fluid samples and I understand that I have a right to refuse. I understand that my oral fluid will thereafter be submitted for analysis. I am giving my consent knowingly, voluntarily, intelligently and without threats or promises of any kind.

\_\_\_\_\_  
(Signature of Consenter)

\_\_\_\_\_  
(Time and Date)

Member of the Service Witness, Rank/Name (Print)	Tax No.	Shield No.	Command
Signature of Member of the Service Witness			Date

give consent to the New York City Police Department to take oral fluid samples and I understand that I have a right to refuse. I understand that my oral fluid will thereafter be submitted for analysis. I am giving my consent knowingly, voluntarily, intelligently and without threats or promises of any kind.

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(Signature of Consenter)

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(Time and Date)

# Prosecution Considerations:

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- Discovery....
- Frye Hearing?
  - Who will testify?
    - Manufacturer Representative?
    - Law Enforcement member responsible for maintaining OF devices?
- Foundation testimony until the device becomes commonplace

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