

# **ROADSIDE DRUG TEST INNOCENCE ALLIANCE**

## **FIELD DRUG TEST POLICY BRIEFING**

Each year, over 750,000 people in the U.S. are arrested for drug possession based on roadside/field drug test kits. These drug test kits, which cost around \$2.00 each, are small plastic pouches containing chemicals that are intended to change color when an illegal substance is added to the pouch. Yet, these colorimetric tests are often inaccurate in identifying controlled substances because they are only capable of identifying aspects of chemical compounds, many of which are shared by both illegal substances and legal substances as commonplace as Krispy Kreme donut glaze, soap fragments, sugar, sugar substitutes, folic acid and melatonin tablets, or medications such as Benadryl. Unlike laboratory or portable electronic instruments, colorimetric field drug tests are incapable of identifying the specific chemical structure or “fingerprint” of a controlled substance.

As a result, every year, tens of thousands of innocent people are jailed and burdened with drug convictions that afflict them for life based on error-prone colorimetric drug tests.

A landmark study, released in January 2024 by the Quattrone Center for the Fair Administration of Justice at the University of Pennsylvania, found that colorimetric field drug tests were the “largest known contributing factor to wrongful arrests and convictions in the U.S.” In addition, the study determined that Black Americans were falsely arrested based on inaccurate field drug tests at a rate three times higher than their white counterparts.

At the Roadside Drug Test Innocence Alliance, we advocate for reform in the way these inaccurate field drug test kits are used in arrests, prosecutions, and convictions, and for the adoption of more accurate and widely available test alternatives.

### **THE PROBLEM**

According to the Quattrone Center study, every year over 750,000 people are arrested based on field drug test kits. Although the true error rate of field drug tests on a national basis could not be determined, the study found that approximately 30,000 people are falsely arrested each year, implicated by a presumptive colorimetric test kit. The study further noted that false positive rates of 15% and as high as 38% have been observed.

<https://www.law.upenn.edu/institutes/quattronecenter/reports/field-drug-test-study/field-drug-tests-and-wrongful-convictions/>

The impact of these error-prone tests had previously been identified on a local basis in Harris County, Texas, where 94 of 140 drug possession exonerations in 2016 and 2017 resulted from

prosecutions involving roadside/field tests that inaccurately identified illegal substances. Similarly, a 2017 investigation by Fox News Atlanta found 145 instances of wrongful arrests based on false positive results, including 64 for suspected methamphetamine.

As far back as 1974, five decades ago, the Commerce Department's National Bureau of Standards stated that roadside drug test kits "should not be used as sole evidence for the identification of a narcotic or drug of abuse." In 1978, the Department of Justice determined that "field tests should not be used for evidential purposes." Following a 2016 Pro Publica investigation, Sirchie, one of the leading roadside/field drug test manufacturers, added a warning label to its printed cocaine test instructions stating, "ALL TEST RESULTS MUST BE CONFIRMED BY AN APPROVED ANALYTICAL LABORATORY." In virtually all jurisdictions, due to this known unreliability, roadside/field drug tests are inadmissible at trial. Instead, for trial purposes, prosecutors may only introduce a laboratory test in seeking to establish the guilt of the accused. However, 95% of drug possession cases are settled by plea agreement, without the benefit of a confirmatory laboratory test.

For the many defendants who cannot afford bail, remaining in jail for weeks or months awaiting a confirmatory laboratory test is not an option. Their detention has a known coercive effect due to loss of employment, housing and, in extreme cases, the removal of children into the foster system. As a result, the majority of those jailed accept plea deals that leave them burdened with a drug possession conviction. As the Quattrone Center study makes clear, tens of thousands of innocent defendants plead guilty each year to drug possession when, in fact, the substance that was the basis for their conviction is not a controlled substance.

Concerns about the accuracy of field drug test kits and resulting inadmissibility have been known for decades. However, the extent of wrongful convictions and the disproportionate impact on Black people had never fully been quantified prior to the Quattrone Center field drug test study.

The good news is that many police departments and prosecutors' offices have already embraced new technology or policies, and successfully moved away from using field drug test kits as a basis for arrest and prosecution. Many did so because of concerns for officer safety due to the risk of fentanyl exposure. Other agencies did so because of concerns about the unacceptably high rate of false positives. For instance, in September 2023, the Jacksonville, Florida sheriff's department instructed officers to stop using colorimetric tests after they discovered that Benadryl and other over-the-counter medications could test positive for illegal substances using field drug test kits. Of those departments that ceased using colorimetric tests, several use portable electronic test devices that accurately provide probable cause for arrest. Whatever the reason agencies have moved away from using roadside drug tests, we are unaware of any reports of public safety impact. In addition, we are not aware of any police or sheriff's department that discontinued use of field test kits and then later reinstated their use.

## **RECOMMENDED SOLUTIONS**

### **POLICE AND SHERIFF'S DEPARTMENTS**

Today, many of the largest police and sheriff's departments in the U.S., in cities such as Los Angeles, Houston, Phoenix and San Diego do not use field drug test kits. Based on decades of known accuracy issues and the successful adoption of alternative tools and policies, it is clear that field drug test kits are not a reliable or necessary tool to support arrests or convictions. Recognizing the alternative solutions already adopted by many agencies around the country, and to avoid the wrongful arrest of tens of thousands of innocent people each year, we recommend that:

- Police and sheriff's departments cease using roadside/field drug test kits as probable cause for arrest for simple drug possession, but rather cite and release suspects pending a confirmatory laboratory test.
- If an agency wishes to use a preliminary test to support probable cause for arrest, a portable electronic device that relies on technology such as mass spectrometry or spectroscopy should be deployed in the field.
- If a roadside/field drug test kit is used as probable cause for an arrest and the arrest results in the entry of a guilty plea, the arresting agency should always obtain a confirmatory laboratory test. If the confirmatory laboratory test establishes a false positive result, the defendant should be notified of the test result, and the prosecuting agency should work with the defendant to expunge the conviction.

In 2018, the Forensic Technology Center within the National Institute of Justice (NIJ), stated that "color-based tests are not always accurate" and issued a comprehensive study of other more accurate portable electronic field test devices. The NIJ noted that these devices "offered significant advantages over traditional color-based testing, including comprehensive one step testing, objectivity, specificity, safety, chain of custody corroboration, technical support, and versatility." The study also found that "portable presumptive drug testing instruments and single use, color-based tests have comparable costs over time, despite the initial price difference." Here is a link to the full NIJ Study of Field Portable Devices for Presumptive Drug Testing:

<https://forensiccoe.org/landscape-study-of-field-portable-devices-for-presumptive-drug-testing/>

### **PROSECUTORS**

Prosecutors exercise their discretion every day with the goal of furthering the fair administration of justice. It is within the authority of every prosecuting agency to ensure that roadside drug tests no longer represent the largest source of wrongful arrests and convictions. To accomplish this, we recommend that prosecutors:

- Cease accepting roadside/field drug test kits as a basis for prosecution for simple drug possession.
- Decline to offer or accept guilty pleas for simple possession unless there is a laboratory test confirming the presence of a controlled substance.

- If plea agreements continue to be offered without a laboratory test, require a confirmatory laboratory test in every instance, and if a false positive is reported, notify the defendant and work with the defendant to expunge the guilty plea.

The adoption of these simple solutions will result in justice for thousands of innocent people each year and save millions of dollars and other resources currently spent prosecuting and incarcerating people based on inaccurate roadside/field drug tests.

## **LEGISLATORS**

In January 2024, Senator Scott Wiener (D-San Francisco), introduced a bill in California to limit the use of inaccurate roadside drug tests. SB912, the Requiring Objective and Accurate Drug (ROAD) Testing Act will preclude law enforcement agencies from using the result of a colorimetric field drug test to establish probable cause for arrest or the institution of charges for drug possession, conviction or sentencing prior to a reliable confirmatory test from a crime laboratory. In his announcement regarding SB912, Senator Wiener stated his desire to “eliminate the use of what appears to be the nation’s leading cause of wrongful convictions from the California criminal legal system.” Also, that “the use of these inaccurate tests fuels racial inequality in the criminal legal system - Black Americans are subject to erroneous colorimetric drug tests at three times the rate of their white counterparts. With accurate, scientific alternatives available, there is no reason to rely on junk colorimetric tests to make arrests when a suspicious substance is discovered in the field.”

<https://sd11.senate.ca.gov/news/20240109-senator-wiener-introduces-first-nation-bill-limit-use-inaccurate-roadside-drug-tests>

In virtually every state, field drug test kits are likely the largest contributor to wrongful arrests and convictions. We recommend that legislators consider the adoption of field drug test legislation that will support law enforcement’s ability to protect public safety while also protecting their constituents from the risk of wrongful arrest. Sample field drug test legislation is included in the appendix to this Policy Briefing.

## **CORRECTIONAL AUTHORITIES**

The error rate of field drug test kits is particularly egregious when used for mail and contraband screening in carceral facilities. A 2020 study by the Massachusetts Department of Corrections found that field drug test kits used for mail screening of synthetic cannabinoids had a false positive rate of 38%. It is unacceptable that inmates are placed in solitary confinement, have their prison time extended, and visitation and other privileges withdrawn due to a field drug test that was described as "little better than a coin flip" by Suffolk Superior Court Judge Brian Davis in a 2021 class action lawsuit against the Massachusetts Department of Corrections. We therefore recommend that correctional authorities revise their practices relating to the use of field drug tests, as follows:

- Stop using field drug test kits for mail screening or testing of suspected contraband.

- If field drug tests kits continue to be used, they should be used only as a basis for further investigation.
- No sanctions of any kind should be applied to any inmate in the absence of a laboratory test from an approved crime laboratory.

### **CONCERNED CITIZENS AND THE WRONGLY ARRESTED**

If individuals have concerns about the use of field drug tests in their community, they should write to their local law enforcement and elected officials, referencing or enclosing a link to the Quattrone Center study, and ask that these error-prone tests no longer be used as a basis for arrest and prosecution for simple possession of suspected controlled substances.

For those whose lives have been derailed by an erroneous arrest and prosecution, or a sanction within a carceral facility due to an incorrect field drug test result, we want to hear from you. If a prosecution is pending, we also want to know. We are not able to provide legal advice but may be able to offer support in other ways or to correct the record.

### **CONCLUSION**

Wrongful arrests and other sanctions based on outdated and inaccurate field test technology are a needless tragedy for the individuals impacted, their families and communities, and especially Black communities that are impacted at three times the rate of their white counterparts. In addition, wrongful arrests are an enormous waste of taxpayer dollars and do a disservice to the men and women in law enforcement by undermining trust in our criminal justice system.

The Roadside Drug Test Innocence Alliance is committed to working in partnership with all stakeholders to limit the documented harm caused by inaccurate field drug test kits, while supporting the equitable and effective administration of justice. For more information on how we can work together, please email us at [connect@rdtinnocencealliance.org](mailto:connect@rdtinnocencealliance.org).

## **SAMPLE FIELD DRUG TEST LEGISLATION**

All law enforcement agencies and prosecutorial entities shall adopt regulations for the arrest and prosecution of simple possession drug arrests to ensure reliable and accurate identification of controlled substances and maintain the integrity of convictions. In order to do so, law enforcement agencies and prosecutorial entities shall adopt, at a minimum, the following requirements:

- (1) Results of a colorimetric field drug test conducted by a law enforcement agency shall not be considered for the determination of probable cause for arrest, the institution of charges for drug possession, conviction, or sentencing prior to a confirmatory test from a crime laboratory.
- (2) Individuals suspected of simple possession shall be cited and released.
- (3) In any case where a colorimetric field drug test is used for any reason, any individual charged with simple drug possession shall be entitled to plead to the offense of simple drug possession, but shall be entitled to withdraw their plea and move for dismissal of charges in the event of a confirmatory laboratory test that finds that there was no controlled substance in the sample. The defendant may request a confirmatory test at any time during the pendency of the case or subsequent to the entry of the plea.

For purposes of this legislation, “colorimetric field drug test” means a field-testing drug kit that consists of color test reagents for the preliminary identification of narcotics. It does not apply to kits that use thin layer chromatography as the identification procedure nor to kits that identify drugs in body fluids.