

**TESTIMONY OF Brian Swift  
IN SUPPORT OF House Bill 808**

**House Judiciary Committee  
Maryland General Assembly  
February 26, 2020**

Thank you to the Maryland House Judicial Committee for hearing HB 808. This important piece of legislation introduced by Delegate Geraldine Valentino-Smith has the potential to save lives and position Maryland as a leader in reducing drug-impaired driving, a crime that has personally affected me and shattered my family.

Drug-impaired driving is a deadly public health and safety problem. The tragic consequences associated with the decision to drive impaired is something I know all too well. Unfortunately, my life was forever changed on March 20th, 2013. On that day, my sister and I received a call that no one should ever have to hear. It was a call that dramatically altered the course of my life.

The person on the other end of the phone told us that my parents were involved in a crash. My dad was dead, and my mom was being transported to a hospital to treat her injuries. After three additional agonizing days of watching my mother cling to life, she succumbed to her injuries and died.

We would come to find out that the driver of the logging truck who ran a red light, struck, and killed my parents was operating a commercial motor vehicle with a suspended license, driving recklessly, and driving the truck while under the influence of a controlled substance. He tested positive for THC, the main psychoactive and impairing component of cannabis.

After another battle, just to get a trial, the driver would eventually be convicted and sentenced to a mere five years for his crimes. Under the circumstances, this seemed like an incredibly light punishment. My parents were robbed of their golden years and my family was torn apart. All we have are memories because this selfish act robbed us of holidays, celebrations, and milestones with my mom and dad. Every act of impaired driving has the potential to inflict widespread pain and every single day more lives are lost to a crime that is entirely preventable.

It is hard to put into words the uncertainty, doubt, anger, and other emotions you feel in a time of tragedy. While we have had some time to deal with our reality, many victims and future victims of these selfish acts of violence will never get justice or get their loved one back.

But what we can do is create positive change. Out of tragedy comes the opportunity to change the status quo, to do things differently in order to save lives. We can pass new laws and use tools and technology already available to prevent this problem in the first place. That should be the goal of every person who wants to protect public safety – ensuring that we have the ability to protect innocent people by identifying and removing impaired drivers from the roadways.

## Michigan's Oral Fluid Roadside Analysis Pilot Program

Following the death of my parents, I advocated for change in Michigan and the legislators listened. More importantly, they acted. Public Act 242 and 243 of 2016, otherwise known as the *Barbara J. and Thomas J. Swift Law*, initiated an oral fluid drug testing pilot in five Michigan counties in November of 2018. The pilot program is run by the Michigan State Police (MSP) and involves other law enforcement agencies. Under the law, only certified Drug Recognition Experts (DRE), officers who have specialized training in identifying drug impairment, are permitted to participate in the pilot. While oral fluid testing has been piloted numerous times in multiple states, the enactment of this law was groundbreaking because it was the first time that a state legislature mandated and funded a pilot. It is now considered a model that other states should replicate.

Under the pilot program, a DRE may require a person to submit to a preliminary oral fluid analysis to detect the presence of a controlled substance in the person's body if he or she suspects the driver is impaired by drugs. Refusal to submit to a preliminary oral fluid analysis upon a lawful demand of a police officer is a civil infraction.

As part of oversight of the program, the Michigan State Police are responsible for developing regulations and selecting/certifying devices for use. The device that MSP chose for the pilot is the SoToxa Mobile Test System made by Abbott. This handheld device can test for six classes of drugs in oral fluid including THC (cannabis), cocaine, methamphetamine, amphetamine, opiates, and benzodiazepines. SoToxa was chosen for Michigan's pilot program because it is portable (necessary for roadside use), accurate, easy to use, and produces rapid test results. This technology was recently selected by Popular Science for its list of "*Best of What's New 2019 Tech Innovations.*" The device is also used in other roadside oral fluid programs including Alabama, Canada, Spain, etc.

It is important to note that nothing in the pilot program changes the normal protocol in a drugged driving investigation. Even though the SoToxa can indicate the presence or absence of drugs in a driver's oral fluid, it cannot determine whether that driver's ability to operate a motor vehicle is impaired. That is an important distinction. Unlike with alcohol, there is no scientific impairment standard for drugs at this time. Therefore, to establish probable cause, an officer must determine an individual is impaired. Officers in the pilot program still need to establish impairment through a roadside investigation, which includes observations of driving, physical observations, driver's admissions, and performance on the standardized field sobriety tests. The results of the oral fluid screening can help establish probable cause within the context of the broader impaired driving investigation. The oral fluid swab also does not substitute the 12-step drug evaluation that DREs are trained to perform on suspected drugged drivers. Oral fluid screening is a tool that can enhance current practice, not replace it.

Drugged driving investigations also require the collection of a chemical sample for confirmatory or evidential testing at a forensic laboratory. In most states, that sample is blood. If a driver refuses to voluntarily submit to a blood draw, then a warrant must be obtained in order to collect the sample. In Maryland, DRE data reveals that the refusal rate remains high and the delay this causes leads to the loss of evidence because drugs metabolize rapidly within the body. The longer it takes to get the blood, the lower the drug levels are likely to be when it is analyzed. While oral fluid is being used for screening purposes at the roadside, it is also possible to collect a sample to be sent to the laboratory for confirmation testing. This latter process is far more sophisticated than initial screening and provides

quantitative results (i.e., the amount of drug detected in the sample); only confirmatory test results are used for evidentiary purposes in court. In Michigan, the sample collection process is as follows. An initial oral fluid sample is collected to complete the roadside screening. This provides rapid results that indicates whether someone is positive or negative for the drugs the device tests. A second oral fluid swab is collected to be sent to Forensic Fluids Laboratory in Kalamazoo for confirmatory testing. This second swab is voluntary and there is no penalty if a driver refuses to provide the sample (unlike with the initial screening). In addition to the two oral fluid samples, a blood draw is also taken and sent to the MSP Forensic Laboratory for confirmatory testing. MSP then compared the findings of the roadside oral fluid screening with the two laboratory confirmation tests (blood and oral fluid) to see how closely the results aligned.

The oral fluid samples collected pursuant to the pilot program are not admissible in court. Under Michigan law, only breath, blood, and urine samples are admissible as evidence in impaired driving investigations. The oral fluid results are to be used like preliminary breath test results in drunk driving cases. Again, this is because the roadside tests are for screening purposes.

While the pilot initiative was underway, a ballot initiative to legalize recreational cannabis use in Michigan passed in 2018. Cannabis sales commenced in late 2019. States that are considering expanding access to cannabis should take into consideration the potential for increases in impaired driving and proactively provide law enforcement with the resources needed to increase training, high visibility enforcement efforts, and drug testing.

In February of 2019, officials released the results of the five-county pilot to the legislature as required by the law. They were remarkable. Eighty-eight of the 92 results collected at the roadside were later confirmed by an independent laboratory or blood test. The high degree of accuracy demonstrates the great promise this technology holds to identify drug-impaired drivers and get them off the roads. Not surprisingly, cannabis was found to be the most prevalent drug found by the roadside testing program which aligns with national fatality data and roadside surveys.

Due to the success and need to collect more sample data, we pushed for more funding to help Michigan officials expand the pilot. In October, lawmakers appropriated an additional \$626,000 to expand the pilot to almost all of Michigan's 83 counties. More than 50 law enforcement agencies and over 100 DREs from around the state are actively participating in the pilot which is set to conclude this fall. The results of the second pilot will be reported by the end of 2020. Our next step is to work with a coalition of committed stakeholders to make Michigan's law and oral fluid program permanent in all 83 counties and expand the use of this technology to all law enforcement agencies.

### **Opportunity for Action in Maryland**

The state of Maryland has an opportunity to follow an established model for change. For several years, Delegate Valentino-Smith and Senator Kagan has advocated for an oral fluid pilot program comparable to the approach that Michigan enacted with Public Act 242/243. It is my hope that every state in the country will recognize the tremendous life-saving potential of roadside oral fluid testing and I am committed to educating and working with policymakers to make this a reality. In Maryland, the fact that these discussions have been occurring for some time demonstrates that there is interest in and support for drug-impaired driving prevention and enforcement.

The success of Michigan's initial five-county pilot and subsequent investment in its expansion should give you confidence and evidence on which to advance this piece of legislation. Through this pilot, you will gain a better understanding of the nature of the drug-impaired driving problem here in Maryland – which can vary from one county to another. Being able to examine this data can inform other decisions about how best to target this problem whether it be through enforcement, public messaging and awareness campaigns, or a combination of countermeasures. The added benefit of instituting this type of initiative is that it communicates to your constituents your commitment to protecting their safety and the safety of their loved ones when they are driving on Maryland roadways. I would venture that there is no other crime that affects the lives of so many people from every walk of life. Anyone can become a victim of impaired driving at any time. My parents and my family were unfortunate enough to fall into that category.

In addition to listening to my experience, I also encourage you to take into consideration the opinions of the experts. Victims are not the only people who support this type of legislation. Respected national traffic safety organizations such as Responsibility.org, MADD, and We Save Lives support HB 808. You also have support from criminal justice practitioners here in Maryland including law enforcement agencies in some of your largest counties and prosecutors. You have testimony from experts in the field including Lt. John Flannigan who was involved in an oral fluid pilot in Vermont, and forensic toxicologists in Alabama and Michigan who are actively involved in oral fluid programs. All of these stakeholders are focused on a singular goal – eliminating impaired driving. I trust that you will take their support into consideration and recognize that they make these decisions based on science, data, and proven effectiveness. The international community has already embraced this approach and it is time for the United States to catch up.

I would like to thank Delegate Valentino-Smith and her co-sponsors for being leaders on this important safety issue as well as the members of this committee as I understand that many of you have advanced impaired driving legislation, as well. Every Maryland legislator can save lives by supporting this pilot and putting it into practice. We have done it in Michigan, and we will support you in your efforts to implement it just like we did.

This is NOT a debate about which drugs are more or less harmful. It's not about alcohol vs. cannabis vs. opioids, etc. This is about protecting public safety. This issue is about as non-partisan as it can get. HB 808 is about stopping people who get behind the wheel of a vehicle while impaired and choose to put other people's lives at risk. We have had tremendous success reducing alcohol-impaired driving by instituting enforcement and testing. It is time to replicate this proven approach for drugs. The good news is that we finally have the technology available to be able to do this consistently. This pilot is an important and necessary first steps towards actualizing change and reducing drug-impaired driving.

I'm confident this pilot program will open the eyes of the public as to how many people on our roads are driving under the influence of drugs and the danger they pose. When you consider the number of people who drink, take drugs, and are texting while driving, it's a scary proposition. If you don't think tragedy can't happen to you, my experience proves otherwise. Vote to implement HB 808 and make Maryland a national leader. More importantly, vote yes to protect the lives of your constituents and your own family. Thank you.