



Comments by Allen Gilbert, executive director, ACLU-Vermont, regarding oral drug testing, April 7, 2016

Oral drug testing raises serious constitutional issues. A government official asking someone to give a sample of their saliva by spitting into a small vial is a search and seizure issue. Protections guaranteed by the 4th Amendment to the U.S. Constitution and Article 11 of the Vermont Constitution come into play.

The American Civil Liberties Union has testified in the House Transportation Committee regarding the saliva testing bill (H. 228) considered there, first in 2015 and now again in 2016. Since Judiciary is now also examining oral drug testing, we would like you to know of our concerns.

We told House Transportation that we have three areas of concern about the use of oral drug testing as outlined in H. 228.

Our first area of concern is the standard of impairment in the bill. Any detectable amount of any regulated drug in a person's body is deemed to impair a person's ability to operate a motor vehicle.

- No nexus is created between the presence of a drug and the degree of impairment that renders the person incapable of driving safely.
- The bill seeks to identify people using drugs, even legal ones, rather than identifying people not capable of driving.

We recognize that in the re-draft of the marijuana bill presented by Chair Grad on April 6, possible THC impairment is tied to alcohol impairment (at a lower level of .05 BAC than the standard .08 BAC). You have been told in testimony from law enforcement that there is firm science behind the belief that alcohol plus marijuana increases a person's impairment. We think it's important that these studies be identified so they can be reviewed by the committee and other witnesses. Since judging the exact effect of marijuana alone on an individual has proved elusive, it's difficult to understand how coupling it to another drug produces impairment deemed to be greater than impairment otherwise permitted under current alcohol laws.

Our second area of concern is the science behind the oral testing devices.

- These devices have not been in use for very long. In some jurisdictions that have tried them (such as certain states in Australia), it is our understanding from testimony in the House Transportation Committee by the Defender General that the devices have been largely abandoned as ineffective.
- The oral drug test study conducted by NMS Labs of Willow Grove, Pa., for the Vermont Department of Public Safety consisted of a small sample of 58 individuals – 49 from a court-ordered rapid intervention program and nine other individuals under investigation for impaired driving-related offenses. While the two different devices tested were reported as providing reliable results for the presence of marijuana, they showed decreased reliability for other drugs (additionally, the presence of some drugs could not

be tested because they had not been used by any of the subjects). The study's conclusion was that "overall performance of the devices would seem to meet the immediate need of providing useful supplemental investigative information to officers in the field." "Supplemental" information is a low standard for something that will be used to determine whether someone can be charged with impaired driving.

- Buying one testing unit for each of Vermont's 70+ law enforcement agencies (a goal described in testimony on Thursday) would cost close to a quarter-million dollars (an estimated \$3,000 per unit x 70 agencies). Each test is estimated to cost between \$20 and \$30. Additional expenses will be incurred on an ongoing basis to ensure the machines' accuracy.

Our third area of concern is how the saliva sample might be used. We feel there must be an express prohibition against the taking of DNA from the sample since saliva testing has become a common test for DNA analysis (the test used by the commercial enterprise 23andme.com is a saliva test, for example).

- We don't think that the provision in the current bill, at 23 VSA 1202 (a) (5), provides adequate protection against DNA collection. We have suggested language be added to the bill to ensure that a person's DNA privacy is protected. DNA is like any other information – once collected, uses beyond the original purpose are identified. Circumstances arise that some argue justify expansion of the stated purpose, and the previous protection drops away.
- We ask that any new statutory language authorizing oral drug testing – either through H. 228 or the Grad bill -- include an express prohibition against the taking of DNA samples from the test saliva.

We identified a fourth concern when we testified this year before the House Transportation Committee. It concerns medical marijuana. H. 228 contains a provision that if someone is charged with impaired driving, the person can use as an affirmative defense the lawful use of a prescribed legal substance. That language excludes the use of the affirmative defense by registered medical marijuana users, however, because no prescriptions are written for medical marijuana. We worry that medical marijuana patients may run into the same problem under the THC + .05 BAC provision of the Grad bill. Such people are likely to have THC in their saliva, but it cannot necessarily be said they are impaired. An affirmative defense covering their use of medical marijuana is necessary.

A final note: If Vermont institutes saliva testing, litigation -- over traffic stops and saliva tests -- will only increase. We already know DUI alcohol cases are many lawyers' bread and butter. And these cases involve defined impairment standards, a generally accepted way to measure individuals against those standards, and ongoing testing and verification of the instruments used to measure the presence of alcohol. Saliva testing is a new kind of test without the standards developed over many years for alcohol tests. Many issues will be ripe for litigation.

Thank you.