



Testimony of Allen Gilbert, executive director, ACLU-Vermont, on H. 228, DUI oral testing bill, March 30, 2016

My sense is the Transportation committee, and perhaps the House Judiciary Committee as well, has an interest in pursuing and possibly acting on H. 228.

It is very unlikely we would be discussing any of this if it were not for the push to medicalize, decriminalize, and legalize marijuana. There is something about marijuana that has put it on a different trajectory from the country's most common addictive substances, tobacco and alcohol.

Marijuana's story, I believe, is what might be called "marginalization." Marijuana (along with other drugs) became associated with marginalized populations, such as African-Americans and Hispanics. And that made it OK to demonize.

In 2013 the National ACLU issued a report, based on FBI statistics, concerning the arrest rate of African-Americans vs. Caucasian-Americans for marijuana possession. Statistics were broken down by state and county. In Vermont, a black person was four times more likely to be arrested for having marijuana than a white person. Rutland County was found to have the highest disparity – a black person there was 16 times more likely to be arrested for marijuana possession than a white person.

Giving police the authority to use new-science saliva drug testing will, we fear, only increase disparate arrest rates of non-white populations while not necessarily getting impaired drivers off the road. Profiling helps illustrate some of the problems with the testing regimen in H. 228.

Please consider these points as you continue your review of the bill:

- 1. Police almost always have "reasonable suspicion" for pulling over any driver.** The simplest infraction – drifting outside your lane by crossing the center-line or shoulder markings – is enough to stop someone. And police have asserted in some cases that someone who drives perfectly – drifting over no lines and exceeding no speed limits -- is driving suspiciously because no one ever drives like that. So it is not necessarily true that the "suspicion" that someone is impaired is reasonable. The human vagaries in navigating a banked curve or avoiding a rough surface can be the pretext for a stop. For African-Americans (especially young males), we've learned that even a tiny bit of snow touching the small renewal sticker on the lower right of your license plate can be enough for getting pulled over – and being interrogated about drug use.
- 2. Once a driver is pulled over, s/he feels vulnerable** – even when you know you've done nothing wrong. It's natural; your liberty to move about freely has been revoked. You're nervous, and that only makes you appear more suspicious.

3. **If saliva testing is instituted, litigation over stops and the testing is bound to increase.** We know already that DUI cases involving alcohol are many lawyers' bread and butter – and those 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. H. 228 does not provide for testing of impairment; it provides for testing of any detectable presence of an array of drugs, some therapeutic and some recreational.

4. The use of marijuana in Vermont for certain medical conditions is legal. Yet most medical marijuana cannot be ordered through a prescription. This means that **the affirmative defense in H. 228 that someone has a prescription to use a legal substance will not apply to medical marijuana** -- because no prescriptions are written for marijuana. Someone with a prescription for oxycontin may get a pass when charged with impaired driving while someone smoking medical marijuana – hours before jumping into his/her car – is prosecuted.

5. **Another part of “proving” impairment may be evaluation of the suspect by a Drug Recognition Expert (DRE). Essentially, you must prove your innocence.** The DRE will look into your eyes for “nystagmus,” or oscillations. You may be asked to cross your eyes. The DRE will use a “pupilometer” to measure their size. He'll look into your nose and mouth, feel your pulse, take your blood pressure, check muscle tone, and look for needle tracks. You'll have to balance on one leg, hold the other one in front of you at a slight angle and count to 30 – without waving your arms or losing your balance. There are 12 “tests” in all. If three of them are positive, you'll likely be charged.

6. Last week in this committee the state crime lab's senior chemist was asked for her opinion on H. 228. Anything that helps to detect and prosecute impaired drivers is good, she said. That's hard to argue with. But her logic in how you determine impairment was flawed. She didn't think it was wise to put in a specific “per se” standard for impairment (as we have for alcohol); none has been objectively established. Yet lack of a per se standard isn't an obstacle to charging impairment, she argued. The determination of impairment is a combination of factors, not just the numbers you blow or spit, she said; it's the totality of everything the officers have observed, and it's the test result (of any amount of a regulated drug) that backs that up. The flawed logic here is the movement from objectivity to subjectivity. **The answer to the question of “What's impairment?” gets changed from an objective number (.08) to a subjective “totality” of everything an officer says s/he's observed.** This is backed up by a test that doesn't measure against a tolerable level of a drug in someone's body (as with alcohol) but looks for the presence of even a nanogram of substances sometimes abused but also used widely for pain management or treating insomnia.

7. **We remain concerned about the possible morphing, at some future date, of saliva drug testing into a combination drug/DNA swab test.** We again ask that the bill contain an express prohibition against the taking of DNA; we had suggested language last year regarding this.

The legislature may decide this year to utilize the still-evolving tool of saliva drug tests. But it is certain that if such tests are allowed, there will be extensive litigation that will likely continue for years. **Adopting a saliva test system must be carefully weighed with the costs of owning and operating the system, and of the litigation that will result.**