

ISSUES IN DUI DRUG CASES

1) WHAT IS A DRUG?

- a) Although paragraph (6) of the DUI laws specifically refers to "controlled substance(s) listed in the Illinois Controlled Substances Act", Illinois DUI law does not define the term "drug" as it is used in paragraphs (3), (4) or (5) of 11-501(a).

- b) Black's Law Dictionary (5th ed.)(West Publishing) defines "Drug" as "An article intended for use in the diagnosis, cure, mitigation, treatment or prevention of disease in man or other animals and any article other than food intended to affect the structure or any function of the body of man or other animals. 21 U.S.C.A. Section 321(g)(1). The general name of substances used in medicine: any substance, vegetable, animal, or mineral, used in the composition or preparation of medicines; any substance used as a medicine. See Controlled Substance Acts."

- c) Merriam-Webster's Online Dictionary defines the noun 'drug' as follows:
 - 1 a** *obsolete* : a substance used in dyeing or chemical operations
 - b** : a substance used as a **medication** or in the preparation of medication
 - c** *according to the Food, Drug, and Cosmetic Act*
 - (1) : a substance recognized in an official pharmacopoeia or formulary
 - (2) : a substance intended for use in the **diagnosis**, cure, mitigation, treatment, or prevention of disease
 - (3) : a substance other than food intended to affect the structure or function of the body
 - (4) : a substance intended for use as a component of a medicine but not a device or a component, part, or accessory of a device
 - 2** : a commodity that is not salable or for which there is no demand —used in the phrase *drug on the market*
 - 3** : something and often an illegal substance that causes addiction, habituation, or a marked change in consciousness

2) THE DUI STATUTE

§ 625 ILCS 5/11-501. Driving while under the influence of alcohol, other drug or drugs, intoxicating compound or compounds or any combination thereof.

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(a) A person shall not drive or be in actual physical control of any vehicle within this State while:

(1) the alcohol concentration in the person's blood or breath is 0.08 or more based on the definition of blood and breath units in Section 11-501.2;

(2) under the influence of alcohol;

(3) under the influence of any intoxicating compound or combination of intoxicating compounds *to a degree that renders the person incapable of driving safely*;

(4) under the influence of any other drug or combination of *drugs to a degree that renders the person incapable of safely driving*;

(5) under the combined influence of alcohol, other drug or drugs, or intoxicating compound or compounds *to a degree that renders the person incapable of safely driving*; or

(6) there is any amount of a drug, substance, or compound in the person's breath, blood, or urine resulting from the unlawful use or consumption of cannabis listed in the Cannabis Control Act, a controlled substance listed in the Illinois Controlled Substances Act, an intoxicating compound listed in the Use of Intoxicating Compounds Act, or methamphetamine as listed in the Methamphetamine Control and Community Protection Act.

(b) The fact that any person charged with violating this Section is or has been legally entitled to use alcohol, other drug or drugs, or intoxicating compound or compounds, or any combination thereof, shall not constitute a defense against any charge of violating this Section.

3) DUI DRUG CASES REQUIRE PROOF THAT DRUG HAS AN INTOXICATING EFFECT AND THAT IT HAS RENDERED THE PERSON INCAPABLE OF SAFELY DRIVING

- a) There is no "generic" offense of "driving under the influence" (*People v. Bitterman*, 142 Ill.App.3d 1062, 1064, 97 Ill.Dec. 146, 492 N.E.2d 582 (1986)), and it is axiomatic that the drug in question must have some intoxicating effect (see *People v. Vanzandt*, 287

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Ill.App.3d 836, 845, 223 Ill.Dec. 186, 679 N.E.2d 130 (1997)). *People v. Workman* 312 Ill.App.3d 305, 310, 726 N.E.2d 759, 762, 244 Ill.Dec.784, 787 (Ill.App. 2 Dist.,2000)

- b) Evidence regarding the drug's physiological effects, the amount required to produce any significant effect, or how the drug would affect a person's ability to drive safely, is the type of evidence relevant to sustain a charge of DUI drugs in *People v. Workman* 312 Ill.App.3d 305, 312, 726 N.E.2d 759, 764, 244 Ill.Dec.784, 789 (2d Dist. 2000)
- c) The evidence must also show that the person was rendered incapable of safely driving from the drug. *People v. Vanzandt* 287 Ill.App.3d 836, 839, 679 N.E.2d 130, 132, 223 Ill.Dec.186, 188 (5th Dist.,1997)

4) IS A POLICE OFFICER QUALIFIED TO RENDER AN OPINION THAT A PERSON WAS UNDER THE INFLUENCE OF DRUGS?

- a) An arresting officer, when qualified as an expert, may testify as to whether a defendant is under the influence of drugs. *State v. Rifkin*, 438 A.2d 1122, 1124-25(Vt. 1981)). "We hold that an arresting officer or other witness may give an opinion as to whether a defendant is under the influence of drugs and to a degree rendering him incapable of driving safely only when qualified as an expert, *State v. Stevens*, 137 Vt. 473, 477, 408 A.2d 622 (1979); *Cross v. Estate of Patch*, 123 Vt. 11, 178 A.2d 393 (1961), to determine these issues from the symptoms displayed. Absent such expertise, the witness may testify only to what he in fact observed. The connection between the symptoms observed and the influence of a drug must then be made by a qualified expert." *State v. Rifkin* 140 Vt. 472, 477, 438 A.2d 1122, 1124 - 1125 (Vt., 1981)
- B) The question of whether a witness has been adequately qualified and tendered as an expert on a subject is within the discretion of the trial court. "The trial judge is afforded wide latitude of discretion in determining the admissibility of expert testimony, and his decision will not be overturned on review unless clearly and prejudicially erroneous." *People v. Colombo*, 118 Ill.App. 3d 882, 887, 455 N.E.2d 733 (1st Dist. 1983).

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- C) In order for a witness to be adequately qualified as an expert it must be demonstrated that a witness possesses special skills or knowledge beyond that of the average layman. “It is well established that an individual will be permitted to testify as an expert if his experience and qualifications afford him knowledge which is not common to lay persons and where such testimony will aid the trier of fact in reaching its conclusion.” People v. Mack, 128 Ill. 2d 231, 538 N.E.2d 1107, 1116 (1989), cert. denied, 110 S.Ct. 1170 (1990)(quoting People v. Jordan, 103 Ill. 2d 192, 469 N.E.2d 569 (1984)). See also, People v. Jackson, 145 Ill.App. 3d 626, 633, 527 N.E.2d 448 (1st Dist. 1988)(where the court held that “Generally, an expert witness is qualified if, because of his skill, training, or experience, he is better able to form a more accurate opinion as to the matter under consideration than is an ordinary person.”); People v. Taylor, 236 Ill.App. 3d 223, 603 N.E.2d 611 (1st Dist. 1992).
- d) Laypersons and unqualified police officers are not qualified to testify in court as to whether an individual is under the influence of drugs. As stated in People v. Bitterman, 142 Ill. App. 3d 1062, 1065, 97 Ill. Dec. 146, 149, 492 N.E.2d 582, 585 (1st Dist. 1986):

"The opinion of a qualified police officer that an individual was under the influence of a drug or drugs is by its nature circumstantial evidence, since it depends on that officer's drawing an inference of drug intoxication from the facts he observed personally. (See, People v. Rhodes (1981), 85 Ill. 2d 241, 248–49, 52 Ill. Dec. 603, 422 N.E.2d 605 (defining circumstantial evidence).) Here, had Kasppar been trained on the observable effects of drugs on humans, he would have been entitled to offer his opinion regarding defendant's drug intoxication. That opinion, however, would only be circumstantial evidence. If there were direct evidence contradicting that opinion (*i.e.*, the results of a blood test for the presence of drugs), then the trier of fact would be entitled to assign the opinion little or no weight. (See, People v. Williams (1980), 87 Ill. App. 3d 860, 42 Ill. Dec. 824, 409 N.E.2d 439 (trial court may reject expert opinion on question of fitness if inconsistent with facts proven, even in absence of contrary expert opinion); St. Paul Fire and Marine Insurance Company v. Michelin Tire Corporation (1973), 12 Ill. App. 3d 165, 298 N.E.2d 289.) We note parenthetically that in People v. Jacquith (1984) 129 Ill. App. 3d 107, 84 Ill. Dec. 357, 472 N.E.2d 107 the defendant sought to introduce toxicologic drug tests he submitted to after his release by the police the day of the offense, but was barred by the trial court. Defendant asserted that the ruling was error on appeal, but we did not reach the issue in light of our disposition of other issues.

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- e) The opinion of an officer regarding whether a person is under the influence of drugs is circumstantial evidence that may be considered sufficient provided that the officer has the relevant skills, experience, or training to render such an opinion; in other words, the officer would have to be qualified by the court as an expert in order to reach such a conclusion. *People v. Workman* 312 Ill.App.3d 305, 310, 726 N.E.2d 759, 762, 244 Ill.Dec.784, 788 (Ill.App. 2 Dist.,2000)

5) IF SO, WHAT IS THE FOUNDATION FOR NECESSARY FOR AN OPINION THAT A PERSON IS UNDER THE INFLUENCE OF DRUGS?

- a) In *People v. Shelton*, 303 Ill. App. 3d 915, 237 Ill. Dec. 12, 708 N.E.2d 815 (5th Dist. 1999), the court held that laypersons and police officers could not render any opinion that a person was under the influence of drugs or a combination of alcohol and drugs, without specialized training. The police officer's six years' experience with drug users, and the "small block" of training in DUI school regarding drug influences, was determined to be insufficient. Police officer's opinion testimony that motorist was under influence of drugs, and that drug usage rendered him incapable of driving safely, lacked adequate foundation and was inadmissible, where officer testified that he had only "limited training" in how to detect drug users, and his testimony did not indicate extensive personal experience with drug users, but instead used word "we," which could have meant others in his department who had frequent dealings with drug users. *People v. Shelton* 303 Ill.App.3d 915, 708 N.E.2d 815, 237 Ill.Dec. 12 (Ill.App. 5 Dist.,1999)

- B) In *People v. Smith* (1967), 253 Cal.App.2d 711, 61 Cal.Rptr. 557, the court rejected defendant's contention on appeal that the trial court had erred in allowing a police officer to offer his opinion with regard to whether defendant was under the influence of drugs when arrested. The court stated that scientific evidence is not always necessary to establish whether a defendant is under the influence of a drug; as in other criminal matters, circumstantial evidence can at times support a conviction. The testimony of a police officer who has been qualified by the court as an expert may well be sufficient. In *Smith*, the police officer whose testimony was found sufficient to sustain defendant's conviction was a narcotics officer, had 2 1/2 years experience, had made between 500 and 600 narcotics-related arrests, and had examined narcotics addicts and observed them in all stages of addiction and debilitation. In addition, he testified that he had previously had 2 1/2 years of "premedical training." The officer testified that the defendant had been driving eight miles an hour causing cars to "back up" behind him; his vehicle was

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weaving; he was slumped over the wheel; he had slurred speech; and was drowsy almost to the point of passing out. After stopping the defendant, the officer observed that scar tissue “followed the veins up the defendant's arms”; his pupils were “pin-pointed” and did not expand or contract when exposed to light; and, that, although the defendant claimed to have been drinking, there was no odor of alcohol on his breath.

- C) In *Smithart v. State* (1974), 503 S.W.2d 283, the Texas Appellate Court held that the opinion testimony of a police officer with only a few months of experience was insufficient to support defendant's conviction for driving while under the influence of drugs. Other Texas cases involving more experienced police officers have found them competent to testify whether a defendant was under the *115 influence of drugs. In *Hudson v. State* (1971), 453 S.W.2d 147, the court found that an officer who had “many years of experience” and had often dealt with people under the influence of drugs was qualified to testify that defendant was under the influence of drugs.
- D) In *People v. Jacquith*, 129 Ill.App.3d 107, 472 N.E.2d 107, 84 Ill.Dec.357 (1st Dist. 1984) neither testified that they had previous experience with narcotics-users, nor that they had made any arrests for driving under the influence of drugs. Officer Gilbrick stated only that he had made over 100 arrests for “driving under the influence,” and that he had been trained at the police academy in “the areas of alcohol and drugs.” Officer Golden, who claimed no experience with drug arrests, testified that he believed, based on defendant's behavior and appearance, that defendant was under the influence of alcohol and “some other influence.” Stated the Court in *Jacquith*:

"This is not the level of expertise that has been held necessary in those jurisdictions which have addressed the issue of competent evidence to sustain a conviction for driving under the influence of drugs." *People v. Jacquith* 129 Ill.App.3d 107, 115, 472 N.E.2d 107, 112-113, 84 Ill.Dec. 357, 362 - 363 (1st Dist.,1984)

- E) In *People v. Vanzandt* 287 Ill.App.3d 836, 839, 679 N.E.2d 130, 132, 223 Ill.Dec.186, 188 (5th Dist.,1997) the officer testified that he had made several hundred DUI arrests in his 18-year career and had many more opportunities to observe persons who were under the influence of either alcohol or drugs. The officer also testified that his father-in-law was a diabetic and an alcoholic, and because of this personal experience he could tell the difference between someone who had alcohol on their breath and someone whose breath odor was the result of their diabetic condition. When asked if he was familiar with

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whether alcohol had a greater effect on the physical abilities and symptoms of diabetics, he stated that was "hard to say." He stated that based on his experience with his father-in-law he knew that alcohol affected a person's blood sugar level and could cause severe problems for a diabetic. He further stated that a person who was taking insulin was not supposed to drink because there is sugar in alcohol. There was no evidence which would indicate that insulin, either by itself or in combination with alcohol, would render a person incapable of driving safely. Although the officer testified that alcohol would affect a diabetic's blood sugar level which in turn would affect a person's coordination and ability to think clearly, the court found that he was not qualified to give expert testimony on the complex physiological effects that alcohol produces in diabetics.

- f) In *People v. Workman* 312 Ill.App.3d 305, 311-312, 726 N.E.2d 759, 76, 244 Ill.Dec.784, 789 (Ill.App. 2 Dist.,2000) the officer was found unqualified on appeal. The officer did not testify that he had any significant experience or expertise in detecting whether a person was driving under the influence of drugs and whether the person was influenced by a drug to such a degree that it prevented his driving safely. The officer was not knowledgeable about lorazepam, its nature, or its effects on a driver. He did not display the level of expertise necessary to sustain the charge. The only test the officer claimed to have available to him to detect whether someone was under the influence of a drug was the HGN test, a test he did not administer. The officer only became suspicious that defendant might be under the influence of something other than alcohol after he discovered the medicine bottle and after defendant had "passed" the breath test.
- g) The Drug Evaluation and Classification (DEC) Program trains police officers and other approved public safety officials as drug recognition experts (DREs) through a three-phase training process:

Drug Recognition Expert Pre-School (16 hours)
Drug Recognition Expert DRE School (56 hours)
Drug Recognition Expert Field Certification (Approximately 40 – 60 hrs)

- (1) The training relies heavily on the Standardized Field Sobriety Tests (SFST's), which provide the foundation for the DEC Program. Once trained and certified, DREs become highly effective officers skilled in the detection and identification of persons impaired by alcohol and/or drugs. DREs are trained to conduct a

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systematic and standardized 12-step evaluation consisting of physical, mental and medical components.

- (2) Because of the complexity and technical aspects of the DRE training, not all police officers may be suited for the training. Experience has shown that training a well-defined group of officers proficient in impaired driving enforcement works well and can be very effective.
- (3) The DRE classroom training is designed to assist the student achieve three broad goals and eight specific learning objectives.
- (4) Goals:
 - (i) Determine if an individual is under the influence of a drug or drugs other than alcohol, or the combined influence of alcohol and other drugs, or suffering from some injury or illness that produces similar signs to alcohol/drug impairment;
 - (ii) Identify the broad category or categories of drugs inducing the observable signs and symptoms of impairment; and
 - (iii) Progress to the Field Certification Phase of the training.
- (5) Source: The International Drug Evaluation and Classification Program -DECIP | 515 N. Washington Street, Alexandria, VA 22314 | Telephone 703.836.6767
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6) METHODS OF DETERMINING DRUG IMPAIRMENT

i) The 7 Drug Categories

- (1) Physicians have long recognized that different types of drugs affect people differently. Nonetheless, drugs may be categorized or classified according to certain shared symptomatology or effects.

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- (2) The DRE categorization process is premised on these long-standing, medically accepted facts. DREs classify drugs in one of seven categories: Central Nervous System (CNS) Depressants, CNS Stimulants, Hallucinogens, Phencyclidine (PCP) and its analogs, Narcotic Analgesics, Inhalants, and Cannabis. Drugs from each of these categories can affect a person's central nervous system can impair a person's normal faculties, including a person's ability to safely operate a motor vehicle.
- (1) Central Nervous System (CNS) Depressants
- (i) CNS Depressants slow down the operations of the brain and the body. Examples of CNS Depressants include alcohol, barbiturates, anti-anxiety tranquilizers (e.g., Valium, Librium, Xanax, Prozac, and Thorazine), GHB (Gamma Hydroxybutyrate), Rohypnol and many other anti-depressants (e.g., as Zoloft, Paxil).
- (2) CNS Stimulants
- (i) CNS Stimulants accelerate the heart rate and elevate the blood pressure and "speed-up" or over-stimulate the body. Examples of CNS Stimulants include Cocaine, "Crack", Amphetamines and Methamphetamine ("Crank").
- (3) Hallucinogens
- (i) Hallucinogens cause the user to perceive things differently than they actually are. Examples include LSD, Peyote, Psilocybin and MDMA (Ecstasy).
- (4) Dissociative Anesthetics
- (i) One of the seven drug categories. It includes drugs that inhibit pain by cutting off or dissociating the brain's perception of the pain. PCP and its analogs are examples of Dissociative Anesthetics.
- (5) Narcotic Analgesics
- (i) A narcotic analgesic relieves pain, induces euphoria and creates mood changes in the user. Examples of narcotic analgesics include Opium, Codeine, Heroin, Demerol, Darvon, Morphine, Methadone, Vicodin and OxyContin.
- (6) Inhalants
- (i) Inhalants include a wide variety of breathable substances that produce mind-altering results and effects. Examples of inhalants include Toluene, plastic cement, paint, gasoline, paint thinners, hair sprays and various anesthetic gases.

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(7) Cannabis

(i) Cannabis is the scientific name for marijuana. The active ingredient in cannabis is delta-9 tetrahydrocannabinol, or THC. This category includes cannabinoids and synthetics like Dronabinol.

(ii) Source: The International Drug Evaluation and Classification Program - DECP | 515 N. Washington Street, Alexandria, VA 22314 | Telephone 703.836.6767

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h) The DRE Protocol

(1) The DRE protocol is a standardized and systematic method of examining a Driving Under the Influence of Drugs (DUID) suspect to determine the following: (1) whether or not the suspect is impaired; if so, (2) whether the impairment relates to drugs or a medical condition; and if drugs, (3) what category or combination of categories of drugs are the likely cause of the impairment. The process is systematic because it is based on a complete set of observable signs and symptoms that are known to be reliable indicators of drug impairment.

(2) A DRE never reaches a conclusion based on any one element of the evaluation, but instead on the totality of facts that emerge. The DRE evaluation is standardized because it is conducted the same way, by every drug recognition expert, for every suspect whenever possible. Standardization is important because it makes the officers to be better observers, helps to avoid errors, and promotes professionalism.

(3) The 12-Step DRE Protocol

The DREs utilize a 12-step process to assess their suspects:

1. Breath Alcohol Test

The arresting officer reviews the subject's breath alcohol concentration (BrAC) test results and determines if the subject's apparent impairment is consistent with the subject's BrAC. If so, the officer will not normally call a DRE. If the impairment is not explained by the BrAC, the officer requests a DRE evaluation.

2. Interview of the Arresting Officer

The DRE begins the investigation by reviewing the BrAC test results and discussing the circumstances of the arrest with the arresting officer. The DRE asks about the subject's behavior, appearance, and driving. The DRE

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also asks if the subject made any statements regarding drug use and if the arresting officer(s) found any other relevant evidence consistent with drug use.

3. Preliminary Examination and First Pulse

The DRE conducts a preliminary examination, in large part, to ascertain whether the subject may be suffering from an injury or other condition unrelated to drugs. Accordingly, the DRE asks the subject a series of standard questions relating to the subject's health and recent ingestion of food, alcohol and drugs, including prescribed medications. The DRE observes the subject's attitude, coordination, speech, breath and face. The DRE also determines if the subject's pupils are of equal size and if the subject's eyes can follow a moving stimulus and track equally. The DRE also looks for horizontal gaze nystagmus (HGN) and takes the subject's pulse for the first of three times. The DRE takes each subject's pulse three times to account for nervousness, check for consistency and determine if the subject is getting worse or better. If the DRE believes that the subject may be suffering from a significant medical condition, the DRE will seek medical assistance immediately. If the DRE believes that the subject's condition is drug-related, the evaluation continues.

4. Eye Examination

The DRE examines the subject for HGN, vertical gaze Nystagmus (VGN) and a for a lack of ocular convergence. A subject lacks convergence if his eyes are unable to converge toward the bridge of his nose when a stimulus is moved inward. Depressants, inhalants, and dissociative anesthetics, the so-called "DID drugs", may cause HGN. In addition, the DID drugs may cause VGN when taken in higher doses for that individual. The DID drugs, as well as cannabis (marijuana), may also cause a lack of convergence.

5. Divided Attention Psychophysical Tests

The DRE administers four psychophysical tests: the Romberg Balance, the Walk and Turn, the One Leg Stand, and the Finger to Nose tests. The DRE can accurately determine if a subject's psychomotor and/or divided attention skills are impaired by administering these tests.

6. Vital Signs and Second Pulse

The DRE takes the subject's blood pressure, temperature and pulse. Some drug categories may elevate the vital signs. Others may lower them. Vital signs provide valuable evidence of the presence and influence of a variety of drugs.

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7. Dark Room Examinations

The DRE estimates the subject's pupil sizes under three different lighting conditions with a measuring device called a pupilometer. The device will assist the DRE in determining whether the subject's pupils are dilated, constricted, or normal. Some drugs increase pupil size (dilate), while others may decrease (constrict) pupil size. The DRE also checks for the eyes' reaction to light. Certain drugs may slow the eyes' reaction to light. Finally, the DRE examines the subject's nasal and oral cavities for signs of drug ingestion.

8. Examination for Muscle Tone

The DRE examines the subject's skeletal muscle tone. Certain categories of drugs may cause the muscles to become rigid. Other categories may cause the muscles to become very loose and flaccid.

9. Check for Injection Sites and Third Pulse

The DRE examines the subject for injection sites, which may indicate recent use of certain types of drugs. The DRE also takes the subject's pulse for the third and final time.

10. Subject's Statements and Other Observations

The DRE typically reads Miranda, if not done so previously, and asks the subject a series of questions regarding the subject's drug use.

11. Analysis and Opinions of the Evaluator

Based on the totality of the evaluation, the DRE forms an opinion as to whether or not the subject is impaired. If the DRE determines that the subject is impaired, the DRE will indicate what category or categories of drugs may have contributed to the subject's impairment. The DRE bases these conclusions on his training and experience and the DRE Drug Symptomatology Matrix. While DREs use the drug matrix, they also rely heavily on their general training and experience.

12. Toxicological Examination

After completing the evaluation, the DRE normally requests a urine, blood and/or saliva sample from the subject for a toxicology lab analysis.

Source: NHTSA *Drug Evaluation and Classification Training* "The Drug Recognition Expert Training School" January 2006 Edition HS 172 R 1/06

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i) ARIDE OVERVIEW: A Training Option Bridging the GAP between SFST and DRE

- (1) The Advanced Roadside Impaired Driving Enforcement (ARIDE) program was developed by the National Highway Traffic Safety Administration (NHTSA) with input from the International Association of Chiefs of Police (IACP), Technical Advisory Panel (TAP), and the Virginia Association of Chiefs of Police. ARIDE was created to address the gap in training between the Standardized Field Sobriety Testing (SFST) and the Drug Evaluation and Classification (DEC) Program.
- (2) The SFST program trains officers to identify and assess drivers suspected of being under the influence of alcohol, while the DEC Program provides more advanced training to evaluate suspected drug impairment. The SFST assessment is typically employed at roadside, while an officer trained as a drug recognition expert (DRE) through the DEC Program conducts a drug evaluation in a more controlled environment such as a detention facility.
- (3) ARIDE is intended to bridge the gap between these two programs by providing officers with general knowledge related to drug impairment and by promoting the use of DREs in states that have the DEC Program. One of the more significant aspects of ARIDE is its review and required student demonstration of the SFST proficiency requirements. The ARIDE program also stresses the importance of securing the most appropriate biological sample in order to identify substances likely causing impairment.
- (4) ARIDE is a 16-hour training course and may be taught by DREs and DRE instructors. The training will be conducted under the administration and approval of the DEC Program state coordinator.

7) ARE THERE LEGAL DIFFERENCES BETWEEN PRESCRIBED DRUGS AND 'STREET' DRUGS FOR DUI PURPOSES

- i) If the offender is not *legally* entitled to consume the drug, intoxicating compound, or cannabis in question, then the person can be found guilty of DUI under 11-501.6 if there is any amount of the drug or cannabis(or its byproduct)(or cannabis) in his blood, breath, or urine. No unsafe driving or actual impairment is required.

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- ii) The constitutionality of this statute has been challenged and upheld. *People v. Briseno* 343 Ill.App.3d 953, 278 Ill.Dec. 641, 799 N.E.2d 359 (1st Dist 2003). *People v. Fate* 159 Ill.2d 267 (1994); *People v. Gassman* 251 Ill.App.3d 681 (2d. Dist 1993)
- iii) The mere admission to consumption of cannabis or an illegal substance is insufficient to prove a violation of 11-501(a)(6). As written, it would be virtually impossible to prove a violation of 11-501(a)(6) without chemical testing or expert testimony. In *People v. Allen*, 375 Ill. App. 3d 810, 313 Ill. Dec. 735, 873 N.E.2d 30 (3d Dist. 2007) the defendant admitted to consuming cannabis the night before driving. Nevertheless, the court reversed the conviction for 11-501(a)(6), stating that:

"To prove all of the elements of the offense charged, the State needed to prove beyond a reasonable doubt that defendant had cannabis "in" his breath, urine, or blood. 625 ILCS 5/11-501(a)(6) (West 2006). The only witness called by the State was Officer Wojowski, who clearly stated that it was "impossible" to tell whether defendant had zero milligrams or 100 milligrams of cannabis in his breath or blood. This testimony by Officer Wojowski is fatal to the State's case. The statute does not criminalize having breath that smells like burnt cannabis. Furthermore, even though the trial court found the officer's testimony credible regarding defendant's admission of smoking cannabis the night before his arrest, the State put on no evidence that there would have been "any amount" of the illegal drug in defendant's "breath, urine, or blood" at the time of defendant's arrest as a result of smoking cannabis the night before. The State needed some testimony that, based on the evidence, defendant had at least some cannabis or THC "in his breath, urine, or blood."

- iv) Section 11-501(a)(6) is designed to ban driving a vehicle with any amount of an unlawful controlled substance in a person's breath, blood or urine. In *People v. Rodriguez*, 2009 WL 2259492 (Ill. App. Ct. 1st Dist. 2009), the court found that it was not "unlawful" under 11-501(a)(6) for a person to drive a vehicle while taking controlled substances, so long as the person possessed a prescription. (The appeals court did state, however, that such a person could still receive a DUI if they were in fact impaired from the drug or drugs, under 11-501(a)(4)). The court further found that the defendant would bear the initial burden of producing proof of the prescription, and then the burden would shift to the state to disprove the legality of the possession beyond a reasonable doubt.

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- v) In an odd case called *People v. Briseno*, the court upheld a DUI cannabis conviction under 11-501.6 (any amount in breath, blood, urine), even though it appears as if it was prosecuted and analyzed on appeal as an 11-501.4 (under the influence of drugs) violation. The court stated that the evidence was sufficient to support a conviction for driving under the influence (DUI) of cannabis, even if results of field sobriety test were inadmissible, where a police officer detected the odor of cannabis on the defendant's breath and in the defendant's car, and the defendant admitted smoking marijuana right before driving. The Defendant was found guilty of zero tolerance cannabis based on several additional factors including: (1) defendant's operation of a motor vehicle; (2) the officer's testimony that he smelled a strong odor of cannabis in defendant's vehicle; (3) the officer's testimony that he smelled the odor of cannabis on defendant's breath; (4) defendant's admission that he smoked cannabis in his vehicle just before driving his vehicle; (5) defendant's slurred speech; (6) defendant's dilated pupils; (7) defendant's motor skills being slower than average; and (8) defendant's performance on the field sobriety tests. The evidence revealed that the police officer, during the previous 3 1/2 years, had extensive experience and training in drug detection. He took regular training and classes regarding cannabis detection at the Police Academy and outside the Academy. He also trained recruits regarding cannabis detection. The officer made several dozen arrests of people driving under the influence of cannabis and testified in a couple dozen cases involving persons driving under the influence of cannabis. Based on his experience and training, the trial court found Officer Stevens to be an expert in determining whether a person was under the influence of cannabis. This finding was upheld on appeal. *People v. Briseno*, 343 Ill. App. 3d 953, 278 Ill. Dec. 641, 799 N.E.2d 359 (1st Dist. 2003).

8) ARE THERE IMPAIRMENT THRESHOLDS IN DRUG CASES LIKE THERE ARE FOR ALCOHOL?

- (a) The senator who sponsored the original zero tolerance DUI legislation which has now been enacted stated that it was designed to "curb the incidence of drug driving, as we have drunk driving." (86th Ill. Gen. Assem., Senate Proceedings, May 25, 1989, at 21 (statement of Senator Barkhausen).) The flat prohibition against driving with *any* amount of a controlled substance in one's system was considered necessary because "there is no standard that one can come up with by which, unlike alcohol in the

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bloodstream, one can determine whether one is--driving under the influence." 86th Ill. Gen. Assem., Senate Proceedings, May 25, 1989, at 23 (Statements of Senator Barkhausen regarding Senate Bill 1182. The eighth amendment to House Bill 2576 of the 86th Illinois General Assembly incorporated Senator Barkhausen's legislation).

- (b) The zero tolerance law was also upheld against constitutional challenges on appeal, based in part on the fact that there were no 'per se' limits that could be employed to determine if someone was intoxicated from 'street drugs' or controlled substances. People v. Fate, 159 Ill. 2d 267, 201 Ill. Dec. 117, 636 N.E.2d 549 (1994); People v. Gassman, 251 Ill. App. 3d 681, 190 Ill. Dec. 815, 622 N.E.2d 845 (2d Dist. 1993). Such is no longer the case.
- (c) Sources for determining the levels of drugs where impairment is medically presumed include the following:
 - (a) *Mayo Clinical Procedure* • January 2008;83(1):66-76
 - (b) NHTSA *Drug and Human Performance Fact Sheet* DOT HS 809 725 (April 2004)
 - (c) *Winek's Drug & Chemical Blood-Level Data* 2001
 - (d) *Physician's Desk Reference* (updated annually)

9) ARE THERE DIFFERENT METHODS OF ANALYSIS FOR THE PRESENCE OF DRUGS?

- (a) The analysis for the qualification (presence) and quantification (measurement) of drugs or intoxicating compounds or cannabis is usually performed through the testing of blood or urine, although the breath of an individual could theoretically be analyzed.

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- (b) Drug testing often involves two stages. The first stage is a screening tests (also referred to as 'preliminary tests' or 'field tests'). Examples of screening tests include immunoassay, thin-layer chromatography (TLC), gas chromatography (GC) and spectrophotometry (color tests). This initial test alone is generally insufficient as far as both the scientific and legal community are concerned. Zeese, *Drug Testing Legal Manual* § 2:2 (2d ed.) West Publishing (2009)
- (c) The second stage involves confirmatory tests (those whose methods are considered acceptable to a forensic or scientific certainty). The most common confirmatory methods of analysis are gas chromatography/mass spectrometry (GC/MS) or liquid chromatography/mass spectrometry (LC/MS) or High Pressure Liquid Chromatography (HPLC). The confirmatory test should never involve the same method that was used for the screening stage. Zeese, *Drug Testing Legal Manual* § 2:3 (2d ed.) West Publishing (2009)
- (d) The amount of information necessary to determine the validity of drug testing exceeds the parameters of this article. Good sources for more detailed information on methods of drug testing include:
- (i) Zeese, *Drug Testing Legal Manual* (2d ed.) West Publishing (2009)
 - (ii) Barry Levine, *Principles of Forensic Toxicology* (3rd Edition) AACCC Press (January 2010)
 - (iii) McNair, Harold M. & Miller, James M., *Basic Gas Chromatography: Techniques in Analytical Chemistry*, 2nd Ed., John Wiley & Sons, Inc., 2009.
 - (iv) Ettre, Leslie S. & Kolb, Bruno, *Static Headspace – Gas Chromatography: Theory and Practice*, 2nd Ed., John Wiley and Sons, Inc., 2006.
 - (v) Hübschman, Hans-Joachim, *Handbook of GC/MS: Fundamentals and Applications*, 2nd Ed. Revised, WILEY-VCH, 2009.
 - (vi) Miller, James M. & Miller, Jane C., *Statistics and Chemometrics for Analytical Chemistry*, 5th Ed., Pearson, 2009.
 - (vii) De Silva, G.M.S., *Basic Metrology for ISO 900 Certification*, 1st Ed., Butterworth-Heinemann 2009.

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- (viii) McMaster, Marvin C., *GC/MS: A Practical User's Guide*, 2nd Ed., John Wiley & Sons, Inc., 2006.
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- (xi) Dong, Michael W., *Modern HPLC for Practicing Scientists*, 1st Ed., John Wiley & Sons, Inc., 2006.
- (xii) McMaster, Marvin C., *HPLC: A Practical User's Guide*, 2nd Ed., John Wiley & Sons, Inc., 2007.
- (xiii) Fried, Bernard & Sherma, Jose, *Practical Thin-Layer Chromatography: A Multi-Disciplinary Approach*, 1st Ed., CRC Press, Inc., 1996
- (xiv) Hahn-Deinstrop, Elke, *Applied Thin-Layer Chromatography: Best Practice and Avoidance of Mistakes*, 1st Ed., WILEY-VCH, 2000.