

May 14, 2019

To: Fire and Police Commissioners, Executive Director Butler and the FPC Staff
Re: MPD's request to add Drug Recognition Experts to SOP 120: Operating While Intoxicated
From: Paul Mozina

There are serious issues regarding the MPD's request to use Drug Recognition Experts (DRE).

[Is the 12-Step Drug Recognition Evaluation Scientific?](#)

SOP 120 — Operating While Intoxicated attempts to introduce the pseudo-science of the DRE into a realm where objective scientific research, establishing causative relationships between various substances and impairment to operate a vehicle, has not been done. In addition, it inappropriately attempts to introduce the use of DREs in the Schools, and in the context of other criminal offenses totally unrelated to operating a vehicle.

SOP 120.135.B

“Following the evaluation, an opinion is formed regarding the subject's impairment, in which the DRE is able to testify to in court as an expert witness.”

Expert Witness? They are police officers, not medically trained doctors! They undergo 72 hours of academic training and only need to score 80% to pass. They do a minimum of 12 field evaluations, covering only 4 of the 7 drug categories, and only need to attain a 75% toxicology confirmation rate.

The pseudo-science that purports to legitimize the opinions of the DRE's is already being challenged by the ACLU in Vermont and Georgia.

[Vermont ACLU questions police use of drug recognition experts. Sep. 19, 2018:](#)

"What we do question is whether drug recognition experts are rigorously trained in methods that have scientific, evidentiary backing and it's just not clear to me that we've reached that point yet," said Lia Ernst of the ACLU of Vermont.

[ACLU of Georgia files suit against Cobb County for unconstitutional DUI drug arrests. Sep. 25, 2017:](#)

“The people of Cobb County should be outraged that their police department wasted scarce resources harassing and jailing innocent people,” said Sean J. Young, legal director of the ACLU of Georgia. “The Cobb County Police Department needs to be held accountable for these flagrant violations of constitutional rights.”

THC can be detected in the blood long after the effects have passed. It is a gross injustice to assert that the mere presence of any level of THC in the blood is evidence of impairment.

Drug Recognition Experts used for other criminal cases

Consider the request in SOP 120 to authorize the use of a DRE in other criminal cases unrelated to operating a vehicle. Here is one example of another type of criminal case:

Wisconsin Statute 941.20 Endangering safety by use of dangerous weapon.

(1) Whoever does any of the following is guilty of a Class A misdemeanor:

(a) Endangers another's safety by the negligent operation or handling of a dangerous weapon.

(b) Operates or goes armed with a firearm while he or she is under the influence of an intoxicant.

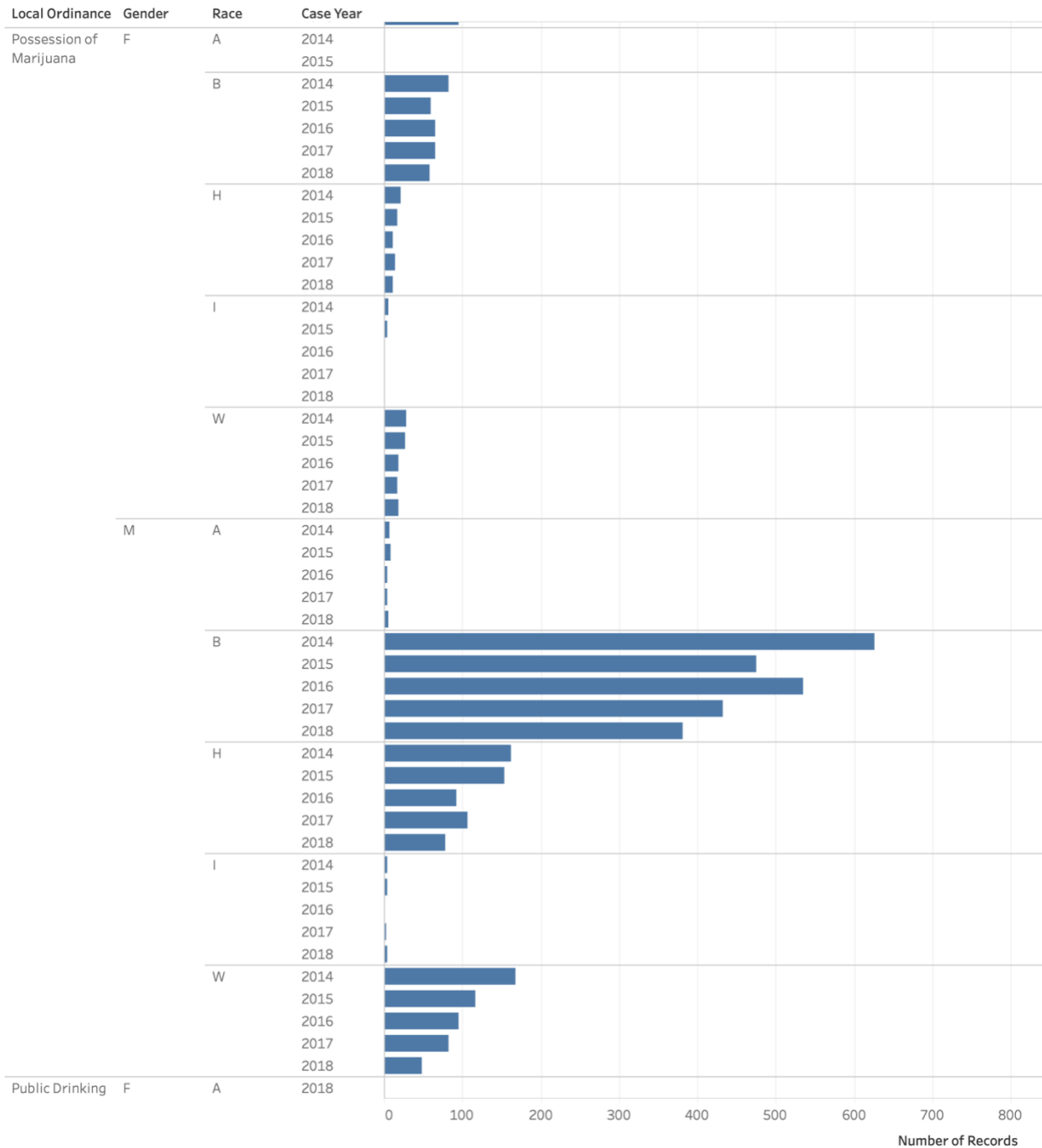
(bm) Operates or goes armed with a firearm while he or she has a detectable amount of a restricted controlled substance in his or her blood. A defendant has a defense to any action under this paragraph that is based on the defendant allegedly having a detectable amount of methamphetamine, gamma-hydroxybutyric acid, or delta-9-tetrahydrocannabinol in his or her blood, if he or she proves by a preponderance of the evidence that at the time of the incident or occurrence he or she had a valid prescription for methamphetamine or one of its metabolic precursors, gamma-hydroxybutyric acid, or delta-9-tetrahydrocannabinol.

The use of the DRE in criminal cases not specifically related to operating a vehicle exposes a serious contradiction: In criminal cases, the element of the crime related to being under the influence of an intoxicant 941.20(b) has the caveat (bm) that — the defendant has a legitimate defense if they consumed the substance based on a doctor's prescription. Will the same caveat apply in the case of the operator of a vehicle? Is there an objective standard by which a person can be held criminally liable for harming another person based on the amount of a substance they consumed, or is this merely an arbitrary rule based on whether the consumption of the substance was approved by a physician? Are you impaired or not? Is it Justice i.e. Lawful, to say that operating a vehicle while impaired because you self-medicated with a controlled substance is a crime, but operating a vehicle while impaired because a physician medicated you is not a crime?

Potential for Racial Bias

Given the disproportionate rate at which black men are charged with marijuana possession, as shown below in the City of Milwaukee Municipal Court data 2014-2018, what outcomes can be predicted for who will receive the majority of OWI violations based on the mere presence of any amount of THC in their blood? How many Black or White people charged with other crimes will see the prosecution's probable cause puffed up by a DRE's opinion?

The Black and Brown people in the City of Milwaukee are already seriously over-policed by an agency that is under Court Orders to address the racial bias they have demonstrated over the past years. Do we just trust the experts at the MPD regarding the use of DREs and hope that another ACLU lawsuit is not waiting in the wings?



DREs in the schools

SOP 120.135.B

“DRE’s may also be utilized to conduct evaluations in schools when a student is suspected of being under the influence of drugs while in the educational environment and other criminal investigations such as sexual assaults, endangering safety by use of a dangerous weapon, recklessly endangering safety, and any other crime where being under the influence of drugs is an element of the offense.”

It is inappropriate for the MPD to try to include the use of DRE's in the schools, and for other criminal investigations totally unrelated to operating a vehicle while intoxicated, into SOP 120.

- Does the MPD have memorandums of understanding with MPS and Private Schools regarding the use of DRE's?
- Can DRE's conduct evaluations in grade schools, high schools and colleges?
- Will the DRE be engaged *after* the person is arrested at the school?
- Will the parents of juvenile students be notified and is their consent required?
- Where will the chemical tests be performed?

Additional questions for the FPC

If the MPD wants to use DRE's in the context of other criminal investigations unrelated to operating a vehicle, then shouldn't they specifically enumerate those procedures in an SOP dedicated to that purpose?

Did the FPC do any research to validate whether or not — the assertions made by the International Association of Chiefs of Police and the National Highway Traffic Safety Administration that the opinions of DRE's are based on objective proven science — are true?

Did the FPC do any research into the ACLU lawsuits pending in Vermont and Georgia challenging the legitimacy of the use of DRE's?

What will it cost the MPD to have one or more DRE's available 24/7? How many DRE's will the MPD need?

Does the DRE evaluation consider racial, ethnic and cultural differences, or age or sex, or is it a one-size-fits-all protocol?

How will the FPC monitor the MPD's use of DRE's to verify that they are not being used in a way that produces racially biased outcomes?

To be consistent, and assuming the goal really is to reduce the harms that one vehicle operator may inflict via their negligence on any other human being, shouldn't the MPD also consider:

- Operating while texting?
- Operating while on the Phone?
- Operating while being distracted by a passenger?
- Operating while being very tired?
- Operating while under the influence of too much caffeine?

There are a myriad of things that may cause the operator of a vehicle to make a mistake while driving that causes the death of, or serious bodily injury to, another human being. To employ a subjective, pseudo-scientific evaluation, and arbitrarily single out the mere presence of any

controlled substance in the blood or urine as indication of actual impairment while operating a vehicle, is an injustice that will lead to abuse.

Resources

Wisconsin Traffic Safety Reporter Vol. 14 No.3 2011

<https://wisconsin.gov/Documents/about-wisdot/newsroom/newsletters/safety/tsr-vol14no3.pdf>

“But, as NHTSA administrator David Strickland points out, “Drug involvement does not necessarily imply impairment or indicate that drug use was the cause of the crash.” He notes that while many years of real-world observation and empirical evidence have shown a strong relationship between alcohol BAC levels and impairment, the same evidence isn’t yet available for drugs.”

Drug Recognition Experts Are Accurate, But Maybe Not Accurate Enough

STEPHEN BITSOLI — June 11, 2018: <https://www.legalreader.com/drug-recognition-experts/>

Federal Lawsuit Raises Questions about the Reliability of Drug Recognition Experts (DREs) in DUI cases: <https://www.ejanzekovichlaw.com/federal-lawsuit-raises-questions-about-the-reliability-of-drug-recognition-experts-dres-in-dui-cases/>

The methodological quality of three foundational law enforcement drug influence evaluation validation studies: <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3828623/>

HORIZONTAL GAZE NYSTAGMUS – HOW IT WORKS/HOW TO CHALLENGE AND EXCLUDE IT: <https://ncdd.com/horizontal-gaze-nystagmus-how-it-works-how-to-challenge-and-exclude-it/>

American Optometric Association – Nystagmus:

<https://www.aoa.org/patients-and-public/eye-and-vision-problems/glossary-of-eye-and-vision-conditions/nystagmus>

FIELD SOBRIETY TESTS: ARE THEY DESIGNED FOR FAILURE?:

<http://www.duistopped.us/Clemson%20Study%20FIELD%20SOBRIETY%20TESTS%20-%20ARE%20THEY%20DESIGNED%20FOR%20FAILURE.pdf>

Judge tosses evidence in OUI stop by drug recognition expert Posted Saturday, April 13, 2019:

<https://www.berkshireagle.com/stories/judge-tosses-evidence-in-oui-stop-by-drug-recognition-expert,570445>

Federal Lawsuit Raises Questions about the Reliability of Drug Recognition Experts (DREs) in DUI cases: <https://www.ejanzekovichlaw.com/federal-lawsuit-raises-questions-about-the-reliability-of-drug-recognition-experts-dres-in-dui-cases/>

Drug Evaluation Classification Program(DEC/P/DRE) <http://www.cjcenter.org/idi/DRE/basic.html>