TESTIMONY OF
TERRY ROBINSON
TECHNICAL SUPERVISOR
DECEMBER 6, 2005

TERRY ROBINSON,
having been first duly sworn, testified as follows:

CROSS EXAMINATION By Mr. Burrows:

Q. Would you agree that as of today that the instrument used in this case is not being used?
A. That is correct.

Q. It's out of service?
A. Yes, sir.

Q. For the record, would you put the number down of the machine -- how many machines are out of service today? In other words, due to this potential problem -- or how would you describe it.
A. One, that one. And it's not really due to that reason, it's due to we're waiting on an upgrade package from DPS to be announced so that we can place it into the instruments.

Q. Give me your educational background in regards to understanding computer software biorhythms, that sort of thing.
A. I'm not a software engineer. I'm a software user.

Q. What was your -- prior to moving into the breath test area, did you have any training in the breath test machine or any understanding of it?
A. No, sir. I had never seen it before in my life.

Q. All your training has been on the job, so to speak?
A. Yes, sir.

Q. And your background major is in zoology, minor in chemistry?
A. Correct.

Q. Do you have a Master's?
A. No, sir.

Q. How long have you been in that program?
A. In Dallas?

Q. I know you were in San Antonio previously.
A. Correct. Over all, a little over seventeen years.

Q. How many times have you come to court in that seventeen years and said the person on trial was not intoxicated?
A. I don't recall if I've ever said that.

Q. So the State calls you, and every time, without looking at the video, you testify that the person's intoxicated?

A. No, sir. I have testified on numerous occasions that when I perform retrograde extrapolation that it's been -- the alcohol concentration may have been below a 0.08. And not having heard the testimony of the arresting officer and so on, I leave the decision in those cases up to the triers of facts, as in all decisions.

Q. But you've never said that the person was not intoxicated?
A. Not in those words, no, sir.

Q. Would you agree that scientists that study this instrument, they disagree about whether it's accurate or not?
A. Yes, sir.

Q. Would you also agree that the amount of alcohol being measured in this instrument -- I mean, technically, inside the instrument we're talking about in the millionths of a gram?
A. Yes, sir. If we were actually measuring a mass or a weight it would be very, very small.

Q. The amount of breath a person blows -- I know it's a continuous blow through a tube, but when it takes a snapshot it's about a third of a cup -- about a third of a Coke can of breath in that machine?
A. Yes, sir, about a third of a 12-ounce can.

Q. About the amount of air in this cup, approximately?
A. A little bit less than that, even.

Q. So the amount of breath in that cup they're measuring in the millionths of a gram of alcohol?
A. Again, if we were measuring a solid material and weighing it, but we're measuring a gas.

Q. So, if I at breakfast this morning, I get one of those Sweet and Low packages, that's a gram?
A. Yes.

Q. And if you had an instrument that could divide that into one millionths of that gram that's what we're talking about?
A. Yes, sir. That would be one millionths of that weight, yes, sir.

Q. So would you agree that -- and then once that measurement is made inside the instrument there has to be, I call it, a log rhythm or a calculation of some sort to come up with this 17?
A. Correct.

Q. Do you have any knowledge how that log rhythm works?
A. No, sir. That's in the computer part of the instrument that I've never seen.

Q. Did the manufacturer, because of, I suppose, proprietary interests, they don't want somebody seeing their product, they don't release that information?
A. That's my understanding, yes.

Q. You nor anyone else other than the manufacturer knows how that calculation is made.
A. That is my understanding, yes, sir.

Q. But you will agree if there's an error inside the instrument when they're measuring that one millionths of a gram of alcohol, if there's an error ever so slight, by the time it gets calculated up to the 17 the exponential parts of that error becomes very large?
A. If we go back to the original premise, if we were measuring a volume -- or, excuse me, a weight measurement or solid measurement that would be true, but we're not.

Q. The filter wheel has to, obviously, turn at a certain rate?
A. Yes, sir.

Q. It's called a motor speed?
A. Yes, sir.

Q. And y'all check that?
A. We check it, yes, sir.

Q. Do you know off the top of your head what that's suppose to be?
A. We keep it between 2200 and 2400 revolutions per minute.

Q. Is that what the manufacturer says to keep it?
A. I am not exactly sure. There is a -- in the new software it has to be over 2200 revolutions per minute or it will fail the motor test.

Q. You don't know what the manufacturer says?
A. It doesn't -- all the manufacturer says is that it has to be over 2200 revolutions per minute. It does not have to be a specific number.

Q. And how fast do y'all measure it?
A. As far as--

Q. Speed of the motor wheel. When y'all check it --
A. Oh, I'm sorry. We will usually -- if the instrument motor speed is varying any more than five counts at a time, we'll take the instrument out of service. The instrument will still operate and will pass the circuitry check, but it's only a matter of time before it completely fails.

Q. Who sets the motor speed here in Dallas County?
A. We do.

Q. At what speed do you set it?
A. We set it between 2200 and 2400 revolutions per minute.

Q. Does the manufacturer say that's where they want it?
A. Again, the software, it has to be over a certain speed or it will fail the circuitry check. The manufacturer does not say it has to be set at a specific revolutions per minute within that range.

Q. Would you agree that the minimum breath sample, to obtain a proper -- in other words, assuming someone's blowing into the instrument, the minimum length of breath, six seconds.
A. It depends on the concentration of the sample.

Q. Be fair to say you've seen hundreds of tests where a person has blown six seconds and you've gotten a score that you've testified to was accurate?
A. Sure.

Q. So on the videotape the jury can tell the amount 8 of seconds the person is blowing into it because there's a tone?
A. Correct.

Q. And on the videotape in this case do you remember the length of seconds that my client blew on the first test?
A. No, sir. I haven't seen the video.

Q. But the jury can listen to the tone -- and you've had cases where six seconds is sufficient?
A. Sure.

Q. And on the second test -- let me be very clear. When I say "first test," I'm talking about the invalid test.
A. Okay.

Q. And within the invalid test there has to be two tests?
A. Not necessarily.

Q. Theoretically, to make it a proper test?
A. On an invalid test, in this particular instance, it may have occurred on the first breath sample or the second breath sample.

Q. I'm with you. But to be an accurate test there has to be a sample given and then about three minutes later there's another sample given?
A. Correct.

Q. Now, this instrument was purchased in about 1999; is that correct?
A. One moment. No, this instrument was purchased in January or February of 2004.

Q. Would you agree that Austin has sent a letter saying what the problem was with this instrument?
A. Yes, sir.

Q. They didn't study this instrument, did they?
A. Yes, they did.

Q. You sent this particular instrument to Austin?
A. I hand-carried it there.

Q. How long did they study it?
A. They had it for about two weeks and then, I believe, they sent it to CMI.

Q. Would you agree that the length of breath a person blows into the instrument will affect the score?
A. Yes, sir.

Q. Would you also agree that on the front of the instrument -- in other words, the jury can't see it, but they see the instrument sitting on the table and there's a screen, an LCD screen?
A. Correct.

Q. And a person -- is that right?

A. It's not really a liquid crystal, it's -- I'm not exactly sure what it's called, but it's a display, an illuminated display. Yes, sir.

Q. In other words, a person blows into the instrument and the operator's looking at the screen and then stars will appear on the instrument?
A. After the instrument has accepted the sample as essentially alveolar or deep lung, yes, sir.

Q. Okay. It takes about four or five seconds for that first star to appear?
A. Again, it depends on the volume of sample that the subject is providing.

Q. Then the second star will appear?
A. After the initial acceptance of the sample each subsequent three seconds another asterisk or star will appear.

Q. And you teach your operators to note mentally the number of stars on the first test and try to coordinate -- get the same number of stars on the second test?
A. Correct.

Q. In other words, in this case on the videotape, which you haven't seen, but on the --

MR. BURROWS: Can I approach the witness?

THE COURT: Yes.

Q. (By Mr. Burrows) I'm going to move to the second test. The operator notes how many stars are on this test. Then the operator, on the second test, waits three minutes to do the second and say, "Blow into the machine." Are you aware that on the second test the operator said, "That's good. You can stop"?
A. No, sir, I'm not aware of that.

Q. But that would be consistent with what you're teaching, correct?
A. Sure.

Q. Because he noted a certain number of stars on the first test. And then they -- the second number of stars, they have to stop there.
A. Yes, sir. That is a technique that some operators use.

Q. Because the length of breath can make the test go higher; isn't that true?
A. Yes, sir.

Q. Now, as a defense attorney, that gives the police officer a lot of discretion. The police officer can tell the clients, keep blowing, keep blowing, to get a higher score; isn't that true?
A. It will go higher to -- only to the concentration of alcohol concentration that's in the person's system.

Q. Regards of theory, you'll have to agree that the longer they blow the higher they score.
A. That portion of it, yes, sir, I agree with.

Q. You'll have to agree that it only takes six seconds to get a score.
A. No, sir, that's not true. It depends on the volume of the sample and the concentration of the sample.

Q. Are you saying that you cannot get a score with two stars?
A. Yes, sir, you can.

Q. How many stars are in this case?
A. I don't know.

Q. So, scientifically, a test should be run exactly the same each time. How is it that the operator has the power to tell someone to keep blowing and then tell them when to stop blowing?
A. Again, it's just a technique that some operators use. They can't see the test results as the subject is blowing. All they can see is the asterisks.

Q. Well, is that reference sample that's run between the tests --
A. Yes, sir.

Q. -- that's at a specific length of time every time; isn't it?
A. Yes, sir.

Q. Why?
A. I don't really know. It's just been programmed that way. It runs for about 20 seconds.

Q. Would you agree that from this case the reference sample was drifting, the scores on the reference solution?
A. At the time this test was run?

Q. Yes.
A. There may have been a little bit of a difference, yeah, two or three thousandths of a gram.

Q. Do you have your notes there?
A. Yes, sir.

Q. Would you look at the --

MR. BURROWS: May I approach, your Honor?

THE COURT: Yes.

Q. (By Mr. Burrows) Would you look at the reference solution when the invalid test was run and tell the jury what the reference solution was?
A. Yes, sir. It was a 0.071 grams per 210 liters.

Q. And then with the next test, what was the reference solution?
A. 0.076 grams per 210 liters.

Q. So that's called drifting?
A. Sure.

Q. And in that measurement within the machine even at that low level we've got a, what I'll call, significant drifting. What would you call it?
A. I would call it five thousandths of a gram and the reference analysis still being within tolerance.

Q. If it were two-thousandths of a gram, it would be out of tolerance.
A. Less than that, yes, sir.

Q. So we're very close for this machine to be out of tolerance?
A. On that invalid test, yes, sir, two thousandths of a gram.

Q. Would you agree that two people, let's say, of the same sex, same approximate body weight, they eat the same, they drink the same amount, and they're tested at the same time, can have different breath test scores|
A. Sure.

Q. Up to 42 percent variance?
A. I don't agree with that.

Q. What would you say?
A. I would agree that they could be subtly different, but not 42 percent. Unless you're talking about very, very low alcohol concentrations and then it can be as much as a hundred percent difference.

Q. Would you agree there are other experts that do not work for the government that say variance can be as high as 42 percent?
A. I believe I've read that yes, sir, and I believe it was at a very low alcohol concentration.

Q. Are you -- you've talked about your phone modem checks earlier.
A. Correct.

Q. Now, these phone modem checks -- you've actually had phone modem checks where when you're checking it in your office at your computer validates whatever -- it says it's operating correctly.
A. Right.

Q. And then you get a call from the field that says it's broke; that's happened, hasn't it?
A. No, not that it's broke. We've had instances in which the instrument may not communicate at all because of a modem issue. The printer may be out of paper, or something of that nature, that the operators aren't quite sure how to handle. So, yes, we've gotten calls before when it's not something the instrument does check during the circuitry check or the calibration check during the modem calls.

Q. Would you agree that just because the instrument prints out a slip does not mean we have an accurate score?
A. That's true.

Q. Because there's been instances where the slips been printed out, the person's been arrested, and then you had to write them a letter to say, sorry -- not sorry, but, as a professional person, you're saying there was some sort of error with this machine?
A. Yes, sir, that has happened.

Q. And it's happened on this instrument?
A. I don't believe on this instrument, no, sir.

Q. How many instruments do you have in operation, typically, on a day-to-day basis?
A. At any one time, twenty-seven.

Q. And they're here in Dallas County?
A. I would say about half of those, thirteen, fourteen.

Q. (In audible) in operation in Dallas County, because you're talking about all the suburbs and such?
A. Correct.

Q. At what point do you teach -- let me get very specific here. You're the person in charge -- are you the top man in this organization?
A. We're all peers. We're all equally qualified.

Q. You teach the operators underneath your -- I call it the military chain of command.
A. Yes, sir.

Q. Teach them protocol, et cetera. And you are aware that if a person goes into the jail, they don't have to take a breath test.
A. That is true.

Q. And you are aware that it's the officer's discretion to offer breath or blood?
A. Correct.

Q. But y'all -- when I say "y'all," the police department offers a breath test, because it's much easier and much cheeper?
A. I wouldn't say -- I would say the main reason is it's non-invasive and the results are obtained very shortly after the test is conducted.

Q. So a blood test would be just as easy?
A. Sure.

Q. So you are aware that if a person agrees to a breath test they have two hours to have their own physician come down and take a blood test.
A. A physician or someone else that's qualified by statute, correct.

Q. Do you agree that most people don't know they have that right?
A. Probably not.

Q. And would you agree that in a case where a person agrees to take the breath test, they're doing everything the government asks, they should be informed of that right as a safeguard of the breath test score?
A. It's not my decision to make.

Q. Who's decision is it to make?
A. The statute was written by the legislature and rulings on interpretations of the statutes have been done by various levels of appeals courts.

Q. The law says you don't have to tell them. You don't have to tell a person of their right to have a blood test.
A. There's case law that says they do not have to be informed of what that statute says.

Q. But I want to know where the letter is and who wrote it that says, "Do not tell them. Do not tell a citizen they have a safeguard to this system right here"?
A. I don't know about that. I've never authored a letter that says anything like that.

Q. Obviously this is not the first time I've discussed this issue with you.
A. Sure.

Q. As a defense attorney, you see my side?
A. Absolutely.

Q. Because, as a defense attorney, we have a breath test that has no preservation of the sample.
A. Right.

Q. I have nothing to reanalyze.
A. Right.

Q. And you know that if a blood test is given, and it's just as easy to give a blood test, that that blood test is preserved for six months or some period of time?
A. I believe in our facilities we keep blood samples that are submitted for a year.

Q. So if a client comes in and says, something's wrong here, I say, well, we'll just go have it reanalyzed, and we get to reanalyze the blood.
A. Yes, sir. You can an amount of blood and have it analyzed at an independent laboratory of your choice.

Q. So now the breath test program here in Dallas is, they offer the breath test that the client has no way to reanalyze; fair to say?
A. Yes, sir. There's no way to reanalyze a breath sample.

Q. And they don't tell them about their right to a blood test.
A. They're not specifically taught that. If there are operators that do that, they have decided to do that themselves. And it's not just here in Dallas County, it's in the whole state. It's a state statute. It's not a rule that our office has made.

Q. It would be accurate to say you don't let these people talk to a lawyer before you give them that breath test?

MS. EDWARDS: Objection, Your Honor, the question is argumentative.

THE COURT: Overruled.

A. No, they don't have access to counsel at that point in the proceedings.

Q. (By Mr. Burrows) Well, there's no law that says you can't. It's just something the police departments say: We're not going to allow it; we're not going to permit it. Isn't that true?
A. My understanding is that that's still part of the investigatory process, and they do not have access to counsel during the investigation. Only when it becomes interrogatory do they have that access or they should be notified of that access.

Q. And from my point of view here's my question to you as the man in charge. If you're so sure about the accuracy of this instrument, why not tell people they have a right to a blood test? Get theses blood tests and then this issue is over.
A. Again, it's not my choice to make. I'm simply following legislative statute and case law.

Q. The legislative statute, which you're well aware of, simply says a person has the right to a blood test if they can get a nurse or physician down there?
A. Yes, sir. And it goes on to say that the police do not -- they only have to offer reasonable opportunity for that person to do that and they must offer that, if requested to do so, within two hours from the time of the arrest, and, if that request is made, they do not have to transport that person anywhere for that sample to be done.

Q. But I'm simply saying -- and I know I'm wearing this out. Nowhere in the statute does it say, okay, police departments, do not tell people about this law?
A. Not in the statute itself, no, sir.

Q. Not in any case law.
A. There's case law from the Fifth Court of Appeals in Forth Worth that does say that they do not have to tell a person of that opportunity.

Q. Do not have to. But it does not say, do not tell.
A. No, sir, it does not say specifically do not tell anybody that.

Q. It's the discretion of the government.
A. It's at the discretion of the officer, certainly.

Q. Well, that's the government, isn't it?
A. Well, I guess so. They work for the city of Dallas.

Q. Tell the jury what kind of warranty this manufacturer gives on this instrument, system warranty.
A. "The warranty," and I quote from CMI, "coverage extends only to the original purchaser and does not include abuse, misuse, cable switches or use of the product for other than it's intended purpose. This warranty also does not apply if the product is adversely affected by attaching any feature device to it or is in any way tampered with or modified without express written permission from CMI Incorporated," end quote.

Q. Well, y'all tampered with this machine.
A. No, sir, we haven't tampered with it.

Q. Y'all adjust it, y'all work with it, y'all -- that's not called tampering?
A. Not in my vocabulary, no, sir.

Q. Y'all have to adjust the wheel on the filter. Y'all set that speed yourself. That's tampering, isn't it?
A. No, sir, that's maintenance and repair.

Q. Do you agree that nowhere in that warranty does the manufacturer say, we guarantee you'll get an accurate score with this instrument?
A. No, sir, it doesn't say that.

Q. Do you find that odd they're selling a product that they won't even guarantee it will give an accurate score?

MS. EDWARDS: Objection, Your Honor, the question calls for speculation.

THE COURT: Overruled.

A. No, sir. I don't think that's odd at all.

Q. (By Mr. Burrows) You've read the manufacturer's book where they sell this program?
A. At one time I had, yes, sir.

Q. And in that book they also sell -- it's called CMI; that's the company?
A. Correct.

Q. It used to be Colorado, now it's in Kentucky.
A. Correct.

Q. And Kentucky doesn't use this instrument, do they?
A. I don't know what Kentucky uses.

Q. Would you agree that with inside that manual that they sell this breath test instrument they also sell another part called the Toxi-Trap?
A. I don't know if they do any more. They used to offer it, yes, sir.

Q. Would you agree that we've had other cases where you've said you don't agree with the accuracy of the Toxi-Trap?
A. Correct.

Q. Just for the jury, the Toxi-Trap is a device that you can connect to the instrument and it preserves the breath sample so a defense attorney could test the sample later?
A. Correct. It's a silica gel tube that traps the breath sample and the sample can actually be extracted from that silica gel at a later date.

Q. You've said under oath before you don't think that devise is accurate.
A. No, sir, I don't. And I have said that, yes, sir.

Q. Don't you find it odd that the manufacturer in the same magazine they'll sell one product that you're testifying to is accurate and another product that's not accurate?
A. Well, again, I don't know if they offer this any longer. They didn't offer it for very long once there was some quality control testing done on the Toxi-Trap device.

Q. The reference solution. You have -- on the side of the instrument there's a jar that's -- what's the capacity? Is it about a liter?
A. The jar is probably about 750-milliliters and the solution itself is about a hundred milliliters.

Q. And there's a thermometer in that solution?

A. Correct.

Q. Who makes that thermometer?
A. Depends on who makes the reference sample device. In this case it was Guth Laboratories and they are in Harrisburg, Pennsylvania.

Q. You're professionally satisfied that the thermometer is accurate?
A. Yes, sir.

Q. How do you check it?
A. It comes from the factory. It's NIST traceable. And we will, from time to time -- now, I don't believe we ever did this with this thermometer, but when we take the devices out of service, if they need to be repaired, we'll verify it against another NIST traceable thermometer that we have in our toxicology laboratory. But I don't believe that was done in this case, because this was a relatively new instrument.

Q. Here's the point. That solution has to be a specific temperature, plus or minus .02?
A. Point 2 degrees centigrade.

Q. Point 2 degrees centigrade. 34 degrees, plus or minus .2?
A. Correct.

Q. And if it's not, then that's a problem?
A. If it's not it will give a high or low reference analysis result, and if it's too high the reference result will be out of tolerance.

Q. The 34 degrees centigrade equates to the temperature of your breath as it comes out of your mouth?
A. Yes.

Q. Now, what was the temperature -- if a person has a temperature, they have a cold or something, that can increase the breath test score.
A. Yes, sir, it can. Elevate the core body temperature which can subsequently elevate the exhaled breath temperature, and potentially raise the breath test score.

Q. There's an instrument on the market that actually measures the person's temperature before they take the test; do you agree?
A. A breath test instrument?

Q. Yes.
A. There may be, although I'm not aware of it.

Q. Do you clean the filter wheel in this instrument?
A. When we bring it in for maintenance or repair, yes, sir, we do.

Q. In other words, the photo -- do you call it the photo wheel, filter wheel?
A. Filter wheel, yes, sir.

Q. How often do you to clean it to make sure there's not something on the wheel?
A. Once every -- when we bring it in for service, we will take it out of the instrument, which is usually once every eight to thirteen, fourteen months, I would take the instrument out of service.

Q. You've got to tamper with the machine, then, don't you?
A. No, sir. We actually repair it or maintain it.

Q. Did you ever talk with CMI to see what their definition of tampering is?
A. No, sir.

Q. There have been instances where your maintenance problems have printed out -- the machine says "operating correctly," and, then, at a later date, the reliability of the instrument was in question?
A. I can think of one time when that happened.

Q. The instrument here costs around $6,000?
A. Correct.

Q. Now, in blood testing, we talked about infrared testing. That instrument is about $125,000?
A. Give or take, yes, sir. Head space gas chromatograph.

Q. So, you think this breath test instrument is just as accurate as a blood test?
A. If proper procedures are followed, yes, I do.

Q. Do you think breath testing is as accurate as blood testing?
A. Yes, sir, again, if proper procedures are followed.

Q. You'll have to agree that scientists disagree with you on that issue.
A. Sure.

MR. BURROWS: Just a few more questions, Judge.

Q. (By Mr. Burrows) Fifteen-minute observation period, would you discuss that with the jury, briefly?
A. Sure. It's required by regulations. It has to be done immediately prior to the test, it has to be at least fifteen minutes in length. And, again, its purpose is to ensure that the subject doesn't place anything in their mouth nor do they have anything in their mouth that they can exhale into the instrument and cause damage to it.

Q. And, so, there are other instruments on the market called portable breath test instruments; you're aware of those?
A. Yes, sir.

Q. And an officer may stop someone and give a portable breath test, there could be a problem if someone has just had something to drink?
A. Absolutely.

Q. In other words, if I'm having dinner tonight and someone says, hey, take this portable breath test, and I take it, what's wrong with that? I mean, theoretically, scientifically, what's wrong with that?
A. The instrument that counsel's talking about uses a different technology. And one of the problems of that technology is -- or potentially is the presence of what we call mouth alcohol, or alcohol residing in the mouth after drinking. Preliminary breath test devices are not capable of distinguishing a reading that is due to mouth alcohol or is due do essentially alveolar or deep lung breath.

Q. So it takes about fifteen minutes for alcohol to dissipates out of a person's mouth?
A. It takes anywhere from six to ten minutes, depending on if a person has any extensive dental work.

Q. I want to go back to the reference solution --
A. Yes, sir.

Q. -- and what the instrument reads there. It was suppose to read a .08. That's the predicted value?
A. Yes, sir.

Q. It read a .071 on the first test.
A. Correct.

Q. That's a wrong score, isn't it?
A. No, sir. It's within the plus or minus 0.01 grams per 210 liters, so it's a valid reference analysis. It is lower than the predicted value, yes, sir.

Q. Without saying what it was, there was a score on that first invalid test, wasn't there?
A. Yes, sir.

Q. And without saying what it was, there was a score on that second part of the invalid test?
A. No, sir. That's when the invalid sample occurred.

Q. Are you aware my client blew eight seconds on that, supposedly, invalid sample?
A. Again, it doesn't have necessarily anything to do with the time. It has to do with the volume and the way in which the sample is delivered.

Q. You've testified in other cases that as long as that tone is blowing there's sufficient volume going through that instrument.
A. I don't believe I've testified to just the tone. All that tone means is that the person is providing a sample with sufficient pressure.

MR. BURROWS: May I approach the witness?

THE COURT: Yes.

Q. (By Mr. Burrows) I'm going to go back to State's Exhibit -- on the Texas Department of Public Safety letter.
A. Yes, sir.

Q. State's Exhibit No. 5, the first time he scores a 00.
A. Correct.

Q. But then he took it again and arrested him?
A. Correct. That was on a different instrument.

Q. Then Navarro, same scenario?
A. Yes, sir.

Q. But in my client's case, he gets a score and the second time it's zero?
A. No, sir, it's not zero at all.

Q. Without saying what the second score is, show me the second score on this test.
A. It says for the second subject reading, it says, "IVS," which is an abbreviation for an invalid sample.

Q. So, it's not a score?
A. Correct.

Q. So, it's not a zero?
A. No, sir.

Q. Could it be under 08?
A. I don't believe so, no, sir.

Q. Can you say positively?
A. Yes. I believe I can say it was not below a .08.

MR. BURROWS: Pass the witness, Judge.

(Whereupon, the State continued with redirect and then the following recross began.)

RECROSS EXAMINATION By Mr. Burrows:

Q. You're familiar with the Texas Counsel on Alcohol Abuse?
A. Yes, sir.

Q. Would you agree that they have written studies that say at a .15 every person tested was unmistakably drunk?
A. Well, there's a big difference between being drunk and being intoxicated, in my opinion.

Q. Drunk is farther down the scale than being intoxicated?
A. No, it doesn't have anything to do with a scale. It has to do with outward appearance.

Q. That's my point. At a .15 all people are -- outwardly appear to be drunk, according to the Texas Counsel on Alcohol Abuse?
A. I would agree that at .15 every person is impaired and cannot operate a motor vehicle safely. But, as I testified earlier, that happens at almost half that level in scientific studies.

Q. I just want a specific -- if you haven't read the study, just say you haven't read it. Do you know about the Counsel on Alcohol Abuse, do they or do they not say at a .15 all people are unmistakably drunk?
A. I've never read that.

Q. You disagree with it?
A. It depends on what context they use the word "drunk." If they use it in the same context that I do, I would say that that's true.

MR. BURROWS: May I approach the witness?

THE COURT: Yes.

Q. (By Mr. Burrows) I want you to take a 170-pound male, and I want to know there's a range of alcohol that's in that individual's body. In other words, if that individual blows a .172, it equates to a number of, let's say, beers.
A. That's right.

Q. Would you agree that it reflects in his body, when we see him on that videotape, if this test is accurate, he has nine beers in his body.
A. My number's a little bit lower. I say seven to eight standard drinks in his system at the time the test is conducted.

Q. That's the same as if I went to lunch today and had eight beers at lunch and came back and had eight beers in my body, we're seeing this individual on this videotape?
A. Yes, sir.

Q. How many people --
A. If you weigh approximately the same as he does, yes, sir, that's correct.

Q. So, common knowledge or common sense would tell you that unless a person has a very high tolerance level, they're going to have slurred speech, if they have eight beers in their body?
A. Possibly, unless they have a high tolerance.

Q. They're going to have problems walking?
A. Again, possibly.

Q. They're going to have a problem reading?
A. Again, they might have trouble doing that.

Q. Well, with eight beers in the body -- have you ever tested anyone within an hour that's actually drank eight beers?
A. Probably not quite the amount of eight beers for a someone that size, but between seven to eight, six to seven. The dosing in the operators' school is that they hit three triples in about forty-five minutes.

Q. Most of those people tested were police officers?
A. Yes, sir.

Q. How did that officer appear? Tell us about his speech, his walk, his stance.
A. Anywhere from falling down --

Q. No. I want to know about this one who had eight beers in his body.
A. I've seen hundreds.

Q. Okay. How many people in those hundreds that had eight or nine beers in their body that did not have slurred speech?
A. There was a minority, but I would say probably ten to fifteen percent of them.

Q. What about people not having problems walking?
A. The same.

Q. So one out of ten people can have eight or nine beers and have no outward signs of intoxication, in your opinion?
A. Sure.

Q. You say that quickly.
A. I say it quickly, because I've seen it. I've seen people with twice the alcohol concentration that only elicited any signs of intoxication by their breath and their bloodshot eyes, and we all know other things can cause that.

Q. But that's with the assumption that the machine is accurate.
A. Well, in these cases, yes, sir. The subjects were or had been tested, but there were other things that had been done, as well, to point to their intoxication, not just breath alcohol test.

Q. You'll have to agree that 85 percent of the time, even in your opinion, a person that's had eight beers in their body, not that they have had eight beers all night, but they've still got eight beers in their body, 85 percent of the time they're going to have slurred speech, a problem walking?
A. Most people, yes, sir, would. I would agree with that. Most people would exhibit some outward signs of intoxication.

Q. And, as the leader in this department, don't you think that today you should write a directive that, operators, if we get a breath test score that's inconsistent with common knowledge, tell those people they have a right to a blood test?
A. Again, that's not up to me.

MR. BURROWS: Pass the witness

(End of Excerpt)

STATE OF TEXAS*
COUNTY OF DALLAS*
I, Laura Weed, Official Court Reporter in and for the County Criminal Court No. 2 of Dallas, State of Texas, do hereby certify that the above and foregoing contains a true and correct transcription of all portions of evidence and other proceedings requested in writing by counsel for the parties to be included in this volume of the Reporter's Record in the above-styled and numbered cause, all of which occurred in open court or in chambers and were reported by me. I further certify that this Reporter's Record of the proceedings truly and correctly reflects the exhibits, if any, offered by the respective parties.

_____
Laura Weed, CSR No. 2112
My Commission Expires 12/31/06