

**CROSS-EXAMINING  
THE BREATH TEST TECHNICAL SUPERVISOR**

*“How To Try A DWI In Bexar County”*

**SAN ANTONIO CRIMINAL DEFENSE LAWYERS ASSOCIATION**

**Cadena-Reeves Justice Center  
Central Jury Room  
San Antonio, Texas  
August 24, 2007**

**Mark Stevens  
310 S. St. Mary's, Suite 1505  
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## The Breath Test

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After they convicted the defendant, the jurors told the defense lawyers: “We didn’t believe the police officer, but we had to find your client guilty because he was over the legal limit.”

Texas Administrative Code  
Title 37  
Chapter 19  
Rule 19.6(a)

“The primary function of the technical supervisor is to provide the technical, administrative and supervisory expertise in safeguarding the scientific integrity of the breath alcohol testing program and to assure the breath alcohol testing program’s acceptability for evidential purposes.”

Is your local breath test technical supervisor . . . .

- biased?
- incompetent?
- dependent on junk science?
- a user of bad equipment?
- all of the above?

Know just one thing.

The technical supervisor is not  
your friend in court.

Q. Please state your name for the record.

A. My name is George Allen McDougall, Jr.  
I am employed as the breath test technical  
supervisor for Bexar County.

## Get Paper

- Operator's manual
- Transcripts
- Scholarly articles
- Open records requests
- Subpoena duces tecum



Operator  
Manual

TEXAS BREATH  
ALCOHOL TESTING PROGRAM



OPERATOR MANUAL

Free On-line  
Version

<http://www.txdps.state.tx.us/bat/OPERATOR%20MANUAL%20rev%202003-06%20sec.pdf>



Give us your transcripts, please.

[www.sacdla.com](http://www.sacdla.com)

- Ernest Acevedo, III
- Kerrisa Chelkowski & Nico LaHood
- Leo Dougherty
- Adam Kobs
- Sam Lock
- Jimmy Parks
- George Scharmen
- Mark Stevens

INDIANA UNIVERSITY

## Center for Studies of Law in Action THE BORKENSTEIN COURSE

• FACULTY: KURT M. DUBOWSKI •

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### Topic Descriptions

- Theory and Practice of Breath-Alcohol Analysis
- Brief Historical Perspectives on Alcohol & Transportation
- Recent Research on Breath-Alcohol Analysis
- Blood-Alcohol Analysis

### Biographical Information

Kurt M. Dubowski, Ph.D., DABCC, DABFT was educated at Johns Hopkins University, New York University (A.B.), and The Ohio State University where he was awarded M.Sc. and Ph.D. degrees. He holds an honorary Doctor of Laws degree conferred by Capital University.

Dr. Dubowski joined the faculty of The University of Oklahoma in 1961 and is now George Lynn Cross Distinguished Professor Emeritus of Medicine; and was Director of Toxicology Laboratories and Forensic Science Laboratories 1961-1995.

He is also Chairman Emeritus of the Board of Tests for Alcohol and Drug Influence of the State of Oklahoma, and was the State Director of Tests for Alcohol and Drug Influence from 1967 to 1997.

Dr. Dubowski's professional activities have focused on laboratory medicine and forensic science, especially clinical and forensic chemistry and toxicology, resulting in 170 major publications in the scientific literature.

He is past president of the American Academy of Forensic Sciences and other boards and

Kurt M. Dubowski, Ph.D.

## A little math and science [a very little]

- Use math and science to force the expert to lower the score.
  - Partition ratios
  - Absorption and elimination
  - Elevated breath temperature
- Keep it short, sweet, and simple.
- If it is too complicated for you, it is too complicated for the jury.



A few easy points to make . . .  
[no math required]

## Cross-Examining the technical supervisor

The problem

The expert knows more than you about his area of expertise.

The solution

Level the playing field.

1. It's his lab, but its your courtroom.
  - a. Motions to suppress
  - b. Rule 705(b)
  - c. Get paper
  - d. Control the witness with smart questions

## Driving Is The Best Way To Judge Driving

Jimmy Parks

1 Q Okay. And he's instructed to get any repair on any of  
2 those machines -- that tag on it can be computerized;  
3 is that right?  
4 A Yes, sir.  
5 Q And that would be for your reference as well as to  
6 bring to court to show what's happened to the machine?  
7 A Yes.  
8 Q So that the jury can more or less understand what  
9 happened, you did not see Doug Billrey that night. Did  
10 you?  
11 A I have not met him until today.  
12 Q Yeah. You've never seen him before?  
13 A That is correct.  
14 Q So you really can't testify as to his -- his  
15 appearance, his smell, of intoxicants, or any other  
16 factors, could you?  
17 A Not at all; I cannot.  
18 Q And wouldn't it also be fair to say, Mr. McDougall,  
19 that, really, the best -- I guess probably the best  
20 indicator of a person's ability to operate a motor  
21 vehicle would be just watching him drive?  
22 A Yes.  
23 Q And you didn't see him drive that night?  
24 A No, I did not.  
25 Q And let me go -- pass that. On the machine, the amount

Q. And wouldn't it also be fair to say, Mr. McDougall, that. . . the best indicator of a person's ability to operate a motor vehicle would be just watching him drive?

A. Yes.

CHARLES FORCER GREEN P.O. Box 107 Saginaw, Texas 75172-0107



# It is not against the law to drink, then drive.

55

1 A. It depends on your definition of intoxicated.  
2 Q. What's your definition of intoxication?  
3 A. Not every time that a person puts alcohol in their  
4 body are they intoxicated.  
5 Q. Okay.  
6 A. I would say only when it affects their behavior in a  
7 major way.  
8 Q. Okay. In a major way?  
9 A. Yes.  
10 Q. Now, when we talked about -- or the State talked  
11 about that someone can go up -- or I just asked you, when you

**"in a major way"**

16 Q. And when the alcohol concentration goes down, that's  
17 called eliminating.  
18 A. Yes. In spite of the fact that the body is  
19 eliminating as well as absorbing at the same time.  
20 Q. Okay.  
21 A. They start -- the body starts to eliminate it as  
22 soon as you start drinking, but if you're drinking faster  
23 than the body can eliminate it, you are going up.  
24 Q. But just for clarification, when we start talking,  
25 up is absorbing, down is eliminating.

LETITIA MONCIVALS, CSA, APR  
COUNTY COURT AT LAW #8 (200)335-7005

Chelkowski & LaHood  
p. 55

Q. What's your definition of  
intoxication?

A. Not every time that a person puts  
alcohol in their body are they  
intoxicated. . . . I would say only  
when it affects their behavior in a  
**major way**.

Q. Okay. In a major way?

A. Yes.

## Testing While Intoxicated

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1 Q. IN the results were off by .001 from the two  
2 tests?

3 A. Yes, sir. Yes.

4 MR. BERNICKSON: We'll pass the  
5 witness.

6 CROSS-EXAMINATION

7 QUESTIONS BY MR. BERNICKSON:

8 Q. Good morning, Mr. McDougall.

9 A. Good morning.

10 Q. We all know and hear that Texas law requires  
11 us to come up with a number at the time of driving.  
12 Not just the time of testing, don't we?

13 A. The offense is at the time of driving. Yes,  
14 sir, that's correct.

15 Q. And that's -- when we talk about the  
16 relevant number, that's what we need to try to convey  
17 to the fact finder, is it not?

18 A. Yes, sir.

19 Q. Now, would you agree from the test record in  
20 front of you, you cannot tell us the exact breath  
21 alcohol content at the time of driving?

22 A. Yes, sir.

23 Q. In fact, do you even know the time of  
24 driving?

25 A. No, sir, I do not.

26 GLORIA BERNICKSON, CSM  
COURT REPORTER AND LIAISON  
270.335.1577

Q. "Texas law requires us to come up with a number at the time of driving, not just the time of testing . . . ?"

A. "The offense is at the time of driving. Yes, sir, that's correct."

Q. "Now would you agree from the test record in front of you, you cannot tell us the exact breath alcohol content at the time of driving?"

A. "Yes, sir."

## Three possibilities

the cases, that there are three possibilities in terms of a person's breath alcohol score at the time of driving compared to their breath alcohol score at the time of testing, are there not?

A. Yes, sir.

Q. One possibility is that the numbers would be exactly the same.

A. Yes, sir.

Q. It's also possible if a person was in the absorption state at the time of the testing that the breath alcohol score at the time of testing would be higher than at the time of driving.

A. Yes.

Q. In other words, that would be a false positive.

A. For the time of driving, yes.

Q. Do you know in this case whether the subject was in the absorptive phase, the elimination phase or the peak phase?

A. I have only the information on the test record. That's one point in time. I can't determine a curve from one point. I do not know.

Q. So you would agree then that you just don't know if the score at the time of driving was -- is over reported on that test record?

FLORIDA JUDICIAL, CBA  
COUNTY COURT AT LAW NO. 1  
215,339,2572

- Q. "there are three possibilities in terms of a person's breath alcohol score at the time of driving compared to their breath alcohol score at the time of testing, are there not?"
- A. Yes, sir.
- Q. One possibility is that the numbers would be exactly the same.
- A. Yes, sir.
- Q. It's also possible if a person was in the absorption state at the time of the testing that the breath alcohol score at the time of testing would be higher than at the time of driving.
- A. Yes.
- Q. In other words, that would be a false positive.
- Q. Do you know in this case whether the subject was in the absorptive phase, the elimination phase or the peak phase?
- A. I do not know.
- Q. So you would agree then that you just don't know if the score at the time of driving was -- is over reported on that test record?

## Three possibilities

1 A. I don't know. This states exactly what  
2 occurred at the time the sample was delivered. It  
3 does not relate to the exact amount at the time of  
4 stop.  
5 Q. Would you agree with me from what we've been  
6 discussing in the last few minutes that you could not  
7 tell the jury beyond a reasonable doubt that her  
8 breath test score was .080 or more at the time she was  
9 driving?  
10 A. Not with the information I have now.  
11 Q. What other information would you have to  
12 have to do that?  
13 A. There's a large variety of information, but  
14 it would certainly have to be more than what we have  
15  
16  
17  
18  
19  
20  
21  
22 Q. Would you agree with me that if her  
23 partition ratio was lower than that you would expect  
24 the score on your test record to be over reported for  
25 her?

**Thank you, sir.**

GLORIA SANCIO, CSR  
COUNTY COURT AT LAW NO. 1  
710.311.2572

A. I don't know. This states exactly what occurred at the time the sample was delivered. It does not relate to the exact amount at the time of stop.

Q. Would you agree with me from what we've been discussing in the last few minutes that you could not tell the jury beyond a reasonable doubt that her breath test score was .080 or more at the time she was driving.

A. Not with the information I have now.



## Assumptions are good

1 Q. So we have to make a few assumptions in  
2 order to try and arrive at a breath score at the time  
3 of driving in this case, do we not, sir?  
4 A. Yes, sir.  
5 Q. One thing we have to assume is that a valid  
6 15-minute observation period occurred.  
7 A. Yes, sir.  
8 Q. We also have to assume, would you agree,  
9 that the scientific theory underlying the Intoxilyzer  
10 5000 is valid.  
11 A. Yes, sir.  
12 Q. And you believe that.  
13 A. Yes, sir.  
14 Q. And then we have to assume that this  
15 particular Intoxilyzer 5000 was working correctly on  
16 the night in question.  
17 A. Yes, sir.  
18 Q. And you've already told us you believe  
19 that.  
20 A. Yes, sir.  
21 Q. But truth of the matter, you were not there  
22 that night.  
23 A. Yes, sir, that's correct.  
24 Q. You've never seen this woman before?  
25 A. Not to my knowledge.

SCOTIA 95014, CDA  
COUNTY COURT AT LAW NO. 1  
218.335.2572

Q. So we have to make a few assumptions in order to try and arrive at a breath score at the time of driving in this case, do we not, sir?

A. Yes, sir.

Q. One thing we have to assume is that a valid 15-minute observation period occurred.

A. Yes, sir.

Q. We also have to assume . . . that the scientific theory underlying the Intoxilyzer 5000 is valid.

Q. . . assume that this particular Intoxilyzer 5000 was working correctly on the night in question.

Q. But the truth of the matter, you were not there that night.

## How much money do you make?

1 Q. Okay.  
2 A. I only allow the instrument to be in service  
3 when I know it's working correctly. If it's not,  
4 there's no point in running a test that doesn't work  
5 correctly.  
6 Q. How much money do you make?  
7 MR. GARCIA: Objection.  
8 THE COURT: Overruled.  
9 THE WITNESS: I qualify for financial  
10 aid to send my daughter to college. I don't think  
11 it's excessive. I don't know. I need to answer that  
12 in a direct monetary amount, partly, because I don't  
13 know exactly what it is. There's too many variables.  
14 [REDACTED]  
15 Q. Too many variables in what you make?  
16 A. Yes, expenses. I mean, are we talking about  
17 gross? Are we talking about net? Are we talking  
18 about -- I mean, even the IRS can't --  
19 Q. I don't mean to embarrass you --  
20 A. But I really don't have an accurate number  
21 to give you. It changes depending on the  
22 circumstances of what the expenses were in a  
23 particular time frame that we --  
24 Q. The point I'm trying to make and maybe I'm  
25 just asking the question wrong.

MARIA E. GORDON, CSR  
(215) 575-8835

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A. I qualify for financial aid to send my daughter to college. I don't think it's excessive. I don't know. I need to answer that in a direct monetary amount, partly, because I don't know exactly what it is. There's too many variables.

Q. Too many variables in what you make?

A. Yes, expenses. I mean, are we talking about gross? Are we talking about net? Are we talking about -- I mean, even the IRS can't --

Q. I don't mean to embarrass you . . . .

A. But I really don't have an accurate number to give you. It changes depending on the circumstances of what the expenses were in a particular time frame that we. . . .



Well does defendant's exhibit number one refresh your memory?

### Open Records Request

- All contracts between Bexar County and McDougall.
- All records of payments to McDougall.
- All bids made by McDougall to work as Bexar County technical supervisor

MARK STEVENS  
JANITOR  
THOMAS LEE BERRY, TRUCK DRIVER  
AND T. ST. BERRY'S BROTHER  
SAN ANTONIO, TEXAS 78204-0000

April 10, 2007

Mr. John Reynolds  
Bexar County Auditor's Office  
212 Stensberg  
Suite 100  
San Antonio, Texas 78204

Dear Mr. Reynolds:

This request is made under the Texas Open Records Act, Tex. Gov. Code Ann. §§ 552.001 et. seq., which guarantees the public's access to information in the custody of governmental agencies. In accordance with Section 552.021 of the law, which requires that the "Officer for Public Records shall promptly produce such information for inspection or duplication, or both, in the offices of the governmental body," I respectfully request copies of the following:

1. All contracts between Bexar County and George Alan McDougall, Jr., breath test technical supervisor for Bexar County, or any companies with which Mr. McDougall is known to be affiliated, including Bexar Breath Testing, from the years 1978 until present.
2. All records of payments made by Bexar County to George Alan McDougall, Jr., breath test technical supervisor, or to companies with which Mr. McDougall is known to be affiliated, including Bexar Breath Testing, from the years 1978 until present.
3. All bids made by George Alan McDougall, Jr., breath test technical supervisor for Bexar County, or by companies with which Mr. McDougall is known to be affiliated, including Bexar Breath Testing, for work as the county's breath test technical supervisor for the years 1978 until present.

# Compensation

\$123,000 per year

\$10,300 per month

- 
- county reimburses expenses  
(not to exceed \$10,000)
  - county pays for office space  
and utilities
  - county pays for machines

filing of all test records and reports listed in paragraph 3.01.

3.05 County: CONTRACTOR shall conduct DWI-Breath-Test Orientation sessions for the Criminal District Attorney's Office as needed.

## STANDARD OF PERFORMANCE

4.01 CONTRACTOR shall comply with all applicable state and federal laws and regulations regarding the services contracted for in this Agreement, including but not limited to those promulgated by the Texas Department of Public Safety.

## COMPENSATION

5.01 In consideration for performing the duties in Section 3 of this Agreement, COUNTY shall pay CONTRACTOR an amount not to exceed \$41,100.00 for the four-month period beginning June 1, 2006 and ending September 30, 2006, and an amount not to exceed \$123,900.00 for the twelve-month period beginning October 1, 2006 and ending September 30, 2007, payable at the rate of \$10,300.00 per month.

5.02 COUNTY shall reimburse CONTRACTOR for reasonable expenses, which shall not exceed Ten Thousand Dollars (\$10,000.00) for the term of the Agreement, from the following categories:

Consumables (e.g., mouthpieces, test records, water bottles and caps, labels, ethyl alcohol)

Parts and Supplies (e.g., office supplies, postage, cleaning solvents, solder, supplies, computer parts and software, printer supplies, manuals for prosecutors, intoxilyzer cabinets, modems)

Onsite repair of instruments

Diagnostic and repair tools

COUNTY shall, in its sole discretion, determine the reasonability of expenses for which CONSULTANT requests reimbursement.

## MONTHLY STATEMENTS

6.01 CONTRACTOR shall submit monthly invoices for services provided and expenses incurred the previous month. The invoices shall be addressed to COUNTY and forwarded to the attention of:

Scientist, or cop?

# The Contract

## Purpose

“The purpose of this Agreement is to obtain a breath-test program to support the Bexar County Criminal District Attorney’s prosecution of DWI cases.”

THE STATE OF TEXAS                    §                    BREATH-TEST PROGRAM  
COUNTY OF BEXAR                    §                    SERVICES AGREEMENT

This Agreement is entered into on the \_\_\_\_ day of \_\_\_\_\_, 2006 by and between the COUNTY OF BEXAR, a political subdivision of the State of Texas, (“COUNTY”) and G. ALLEN MCDOUGALL, JR., and independent contractor (“CONTRACTOR”).

### PURPOSE

1.01 The purpose of this Agreement is to obtain a breath-test program to support the Bexar County Criminal District Attorney’s prosecution of DWI cases.

### TERM

2.02 The term of this Agreement is from June 1, 2006 to September 30, 2007. At COUNTY’s option, the term of this Agreement may be extended for one year.

### SERVICES

3.01 Technical Services: CONTRACTOR shall provide technical maintenance of County breath-test instruments. Maintenance shall include but not be limited to:

1. a maintenance check of each instrument and reference sample device as needed but at least once every 30 days or as required by the Texas Department of Public Safety; and
2. labor and parts for repair of instruments.

3.02 Technical Supervision: CONTRACTOR shall provide to COUNTY technical supervision of all certified breath-test operators in Bexar County, with the exception of those operators employed by the San Antonio Police Department. This supervision shall include all operators employed by the Texas Department of Public Safety and assigned to duties in Bexar County. CONTRACTOR shall make available two certified technical supervisors for the provision of such supervision, except when either supervisor is on vacation, for which CONTRACTOR shall give COUNTY two weeks notice.

3.03 Testimony: CONTRACTOR shall make available two persons qualified and acceptable to COUNTY to give expert testimony before the County and District Courts of Bexar County on the following subjects: (1) breath tests given with instruments maintained under this Agreement; (2) breath tests given by personnel supervised under this Agreement; and (3) alcohol and its effects on the blood.

3.04 Support Services: CONTRACTOR shall provide all clerical support services to include

## You are a policeman, not a scientist

- Not an MD, Ph.D, masters, or any sort of graduate degree
- Biology degree, not chemistry

1 believe the observation was not properly done, in terms of  
2 length of time, you would not come to court and testify  
3 about the machine, would you?  
4 A That's correct.  
5 Q You could not do it?  
6 A That is an assumption, yes, sir.  
7 Q Now, let me ask you a little bit about -- because  
8 they asked you about your education. You said you had a  
9 bachelor's degree in biology?  
10 A Yes, sir.  
11 Q Now, so just so we're all clear, you're not a  
12 medical doctor?  
13 A That's --  
14 Q He called you Doctor a minute ago. That was just  
15 a slip of the tongue?  
16 A He did?  
17 Q He did. But just so we're clear, you're not a  
18 doctor?  
19 A I'm not a doctor of any kind, Ph.D. or M.D. or  
20 J.D., I'm not any of those.  
21 Q Okay. And you don't have a Master's degree?  
22 A That's correct.  
23 Q Or any sort of graduate degree?  
24 A That is correct.  
25 Q And when you went to college -- By the way, what

## You are a policeman, not a scientist

- 16 hours undergraduate chemistry
- 6 additional hours of chemistry at UTSA so he could qualify
- A.B., Kenyon College, (Gambier, Ohio) 1967; What about a subpoena for his transcripts from Kenyon and UTSA?

1 year did you graduate from college, if I could ask?  
2 A Ancient history. 1967.  
3 Q All right. And that's when you got your bachelor's  
4 in biology?  
5 A Yes, sir.  
6 Q And you also took some chemistry in connection  
7 with that?  
8 A Yes, and I also took additional chemistry after I  
9 graduated.  
10 Q That's right. So how many hours of chemistry did you  
11 have as an undergraduate?  
12 A I believe it was 16 hours.  
13 Q And the regulations that you operate under, those  
14 proposed -- or those promulgated by the scientific  
15 director, actually require that a person with your job  
16 have 18 hours at the time he's certified?  
17 A Yes, sir.  
18 Q And you do that now? You have more than 18 hours now  
19 in chemistry?  
20 A Yes. I got additional six hours at UTSA in 1976,  
21 which was prior to my certification, so I had 22 hours at  
22 certification.  
23 Q So did you go back to school especially to take  
24 those six hours just so you could become certified on  
25 the instrument?



You are a policeman,  
not a scientist

- Went to work for  
SAPD as civilian in  
1975.

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1 A My employer felt it would be in my best interest  
2 and in his to have more chemistry under my belt and so  
3 the San Antonio Police sent me to UTSA to take those  
4 hours in physical chemistry.  
5 Q Not only more hours, I mean, not only to your  
6 benefit, but you couldn't even qualify today without  
7 those hours, could you?  
8 A Today I would not qualify. At that point, I believe  
9 I would have, but --  
10 Q And when you were in college, you didn't have any  
11 special training in breath test instruments, did you?  
12 A No, sir. It was not a course at college.  
13 Q And you had several jobs before you took this job, I  
14 take it, but I'm not going to pry into the particulars,  
15 but you had several jobs and one of which was, roughly  
16 1975 or '76, you went to work as a civilian in the  
17 San Antonio Police Department?  
18 A Yes, sir.  
19 Q And you were in the serology department?  
20 A I was in the laboratory, and my functions were  
21 serology, that was my job duties, but it was not a  
22 serology department.  
23 Q And serology is -- means having to do with blood?  
24 A Yes, sir.  
25 Q So you do all kinds of examinations on blood as a

You are a policeman,  
not a scientist

- Worked for SAPD for about a year and a half.
- Certified as operator while working for SAPD
- Became technical supervisor early 1977

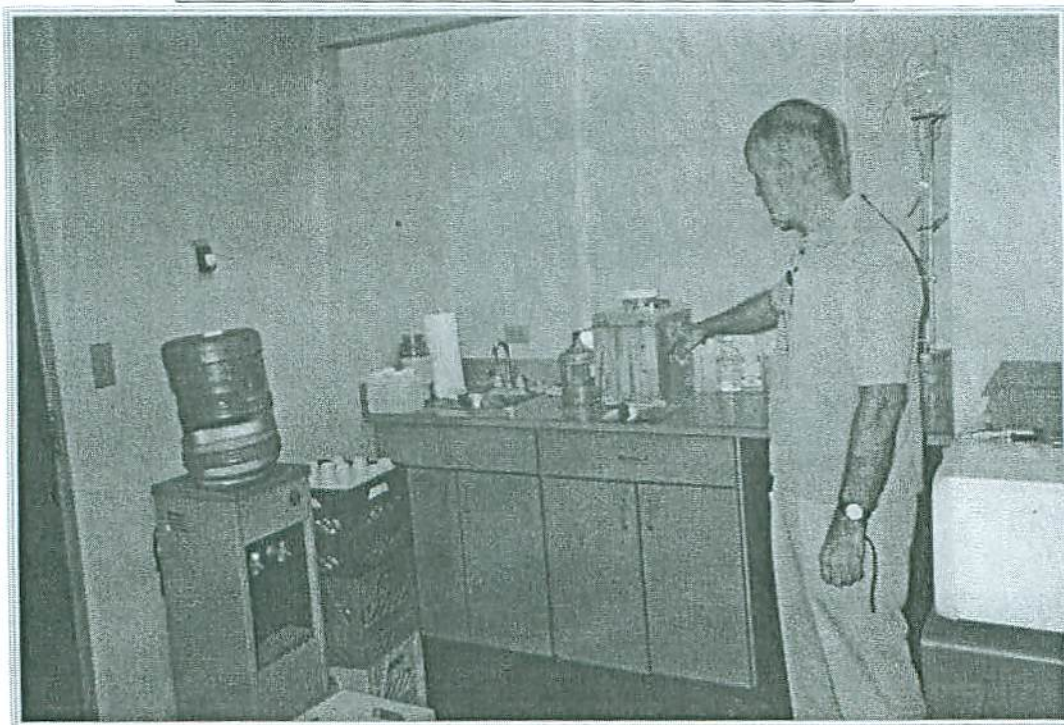
55  
1 serologist?  
2 A Yes, sir.  
3 Q How long did you work with the San Antonio Police  
4 Department?  
5 A About a year and a half.  
6 Q And since that -- After you left that job, is that  
7 when you got into the breath test instrument business?  
8 A No. I was actually certified as an operator when I  
9 was working for the San Antonio Police, and my functions  
10 in the laboratory were to repair the breathalyzers that  
11 they were using at that time. Even though I wasn't a  
12 technical supervisor, my immediate supervisor was, and he  
13 was instructing me on how to repair it, in anticipation of  
14 my perhaps becoming a technical supervisor in the future.  
15 Q So in other words, even while you were with the  
16 San Antonio Police Department, you were working with  
17 the breath test device?  
18 A Yes, sir.  
19 Q And you have been ever since?  
20 A Yes, sir.  
21 Q There's been continuity since 1975 or '76?  
22 A Yes, sir.  
23 Q What year?  
24 A I was a technical supervisor early 1977. I had  
25 been an operator since 1975, I guess.

## You are a policeman, not a scientist

- "I'm not a research scientist."
- Does not do "publishable research."
- Never published a single scholarly article in the entire time he has worked with the breath test device.
- In law enforcement since 1975.
- That's what he does right now.

1 Q You would agree with me that you're not an  
2 independent scientist, would you not, sir?  
3 A I'm not a research scientist. So I'm not sure  
4 independent has any relevance.  
5 Q Well, have you ever told me in the past that you  
6 were not an independent scientist?  
7 A I'm employed by -- I own a company which has a  
8 contract with the Government. So in that sense, you  
9 can say my duties are Government related. If that's  
10 not independent, then that's correct.  
11 Q And you're not a research scientist?  
12 A That is correct.  
13 Q You don't do that kind of research -- publishable  
14 research yourself?  
15 A That is correct.  
16 Q In fact, you've never published a single scholarly  
17 article in the entire time you've been working with this  
18 breath test device, have you?  
19 A That's correct.  
20 Q You've been in law enforcement since 1975?  
21 A Yes, sir.  
22 Q And that's what you're in right now, isn't it?  
23 A Yes, sir.  
24 Q Okay.  
25 A I do have duties teaching people how to operate

## The Lab



Photos by Jay Moritz

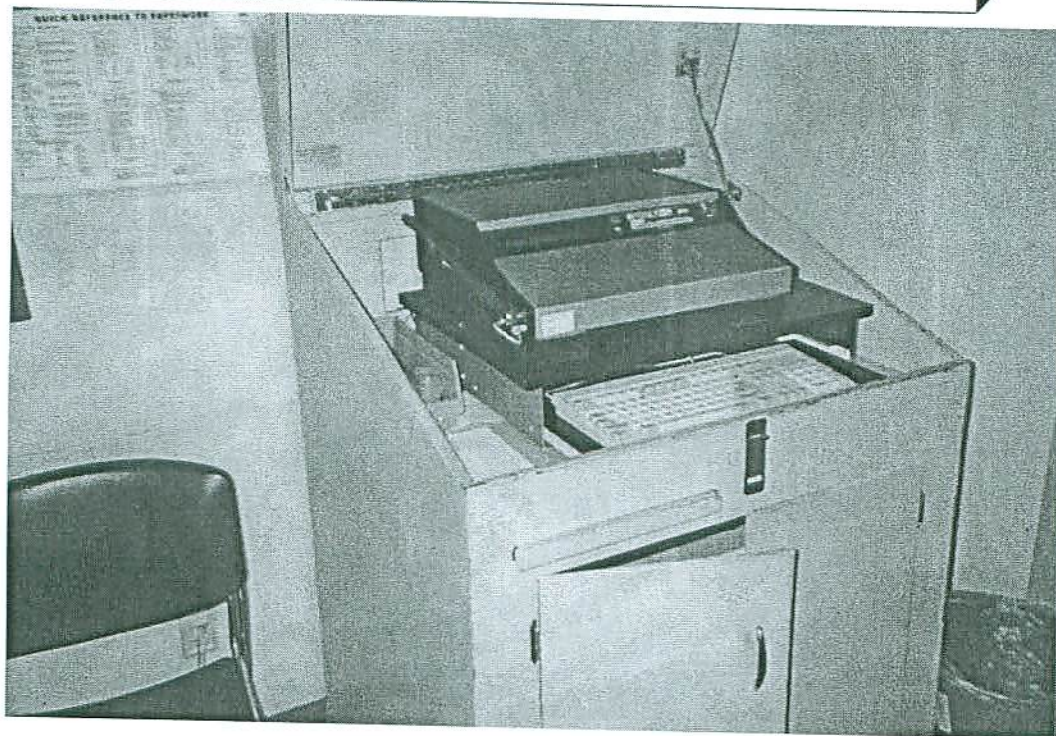


## The Lab



Photos by Jay Moritz

## The Machine



Photos by Jay Moritz



# The Script

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1 Q. So that was my question. You did actually write  
2 a list of questions and submitted it to the Bexar County  
3 District Attorney's Office several years ago?  
4 A. So. I was -- I was asked to sit down and  
5 propose questions, and we had a mutual back and forth as  
6 to what types of questions to be asked.  
7 Q. With the District Attorney's Office?  
8 A. Yes, sir.  
9 Q. So you sat down with some prosecutor and you and  
10 that prosecutor worked out questions and answers?  
11 A. Yes, sir.  
12 Q. And that script that you worked out then sounded  
13 very much like this script he read to you yesterday, did  
14 it not?  
15 A. It is going to be similar. It is covering the  
16 same points, yes, sir.  
17 Q. You don't know this man, Tom Brendel?  
18 A. To my knowledge, I have not seen him before  
19 yesterday.  
20 Q. You mentioned the 2100 blood to breath ratio.  
21 You don't know whether this man, in fact, has 2100 blood  
22 to breath ratio or not, do you?  
23 A. No, sir, I do not know.  
24 Q. And you say that that ratio understates most  
25 people's ratio, therefore, when you factor it into the

CANDY S. ZAVALA, CSR, RPR  
COUNTY COURT AT LAW NO. 3  
210-335-2171

- Q. You did actually write a list of questions and submitted it to the Bexar County District Attorney's Office several years ago?
- A. I was asked to sit down and propose questions, and we had a mutual back and forth as to what types of questions to be asked.
- Q. With the District Attorney's Office?
- A. Yes, sir.
- Q. So you sat down with some prosecutor and you and that prosecutor worked out questions and answers?
- A. Yes, sir.
- Q. And that script that you worked out then sounded very much like this script he read to you yesterday, did it not?
- A. It is going to be similar. It is covering the same points, yes, sir.

## There is no tox-trap

1 Q. You talked about the known weight of the  
2 alcohol and you've admitted that you did not weigh the  
3 alcohol in this particular simulator solution.  
4 A. Yes, sir. It was measured by volume.  
5 Q. We talked about the device to capture the  
6 solution. That's called the Tox-trap (sic), is it  
7 not?  
8 A. Yes, sir. Toxi-trap, I believe.  
9 Q. And you know that the machine, it advertises  
10 that device for sale to people who buy the Intellalyzer  
11 3000?  
12 A. The manufacturer markets that device, yes.  
13 The manufacturer of the Intellalyzer does market the  
14 Toxi-trap.  
15 Q. And markets it as a working -- an accurately  
16 working device?  
17 A. That's my understanding, yes.  
18 Q. It's still sold currently?  
19 A. Yes, sir. I believe to one state.  
20 Q. Well, I mean, it markets it across the  
21 board.  
22 A. Yes.  
23 Q. It advertises it across the board as a  
24 scientifically valid device for capturing the breath  
25 sample.

GLORIA MULLO, CSM  
COUNTY COURT AT LAW NO. 1  
210.338.2572

- the manufacturer markets the device as a scientifically accurate device for capturing the breath sample for retesting.

## There is no tox-trap

1 A. Yes.  
2 Q. But you said that the scientific director  
3 tested that and found it to be that it didn't work  
4 right?  
5 A. Yes, sir.  
6 Q. Who was that scientific director?  
7 A. I believe it was George Brown, but it may  
8 have also been J.D. Christian.  
9 Q. When was that done?  
10 A. When the Toxi-trap first came out, which I  
11 believe was in the 1970's.  
12 Q. Well, that was before the Intoxilyzer 5000  
13 came out, wasn't it?  
14 A. Yes, sir.  
15 Q. So has anybody tested the Toxi-trap with  
16 regard to the Intoxilyzer 5000, that you know of, in  
17 Texas?  
18 A. Not in Texas. I know the director in  
19 Colorado has reported --  
20 Q. Colorado is one of the states that uses the  
21 Toxi-trap, isn't it?  
22 A. Right. As regards that it doesn't work.  
23 Q. But they still use it in that state.  
24 A. It's required by law.  
25 Q. Now, have you done any testing on the

STORIA REC'D, CDP  
COUNTY COURT AT LAW NO. 1  
P# 335,3372

Q. So, has anybody  
tested the Toxi-trap  
with regard to the  
Intoxilyzer 5000, that  
you know of, in Texas?

A. Not in Texas.

## There is no tox-trap

90

Deaf-trap?

1 A. No, I have not.

2 Q. Have you read any of the written studies

3 that test the Toxi-trap?

4 A. No, sir, I haven't.

5 Q. You admit that you have no personal

6 knowledge of the abstraction period in this case?

7 A. Yes, sir. I was not there.

8 Q. You mentioned examining the machine on

9 11-23. That was a hands-on check by you personally?

10 A. Yes, it was.

11 Q. Of this particular Intoxilyzer 5005 device?

12 A. 2020. Yes, sir, this particular device.

13 Q. And then the next one was slightly less than

14 24 hours later?

15 A. Twenty-four hours after the test is

16 question, yes.

17 Q. Any other -- any problems noted at all in

18 any one of these two examinations?

19 A. So, sir, to the contrary, there were no

20 problems.

21 Q. What is the warranty on this particular

22 device?

23 A. Two years parts and labor.

24 Q. And that went into effect when?

25

GLORIA REED, CSR  
COUNTY COURT AT LAW NO. 1  
210.135.1973

Q. Now, have you done  
any testing on the  
Toxi-trap?

A. No, I have not.

Q. Have you read any of  
the written studies that  
test the Toxi-trap?

A. No, sir, I haven't.

## *Statement of Warranty*

CMI, Inc. warrants that each new product will be free from defects in material and workmanship, under normal use and service, for a period of one year from the date of invoice to the initial purchaser. CMI's obligation is limited to repairing or replacing, as CMI may elect, any part or parts of such product which CMI determines to be defective in material or workmanship. Warranty repairs will be performed only at authorized factory service centers.

Any part or product considered to be covered by the conditions of this warranty shall be returned, freight pre-paid, to an authorized service center. The repaired or replacement part or product will be returned from CMI pre-paid.

Repaired products are warranted for 90 days from the date of repair, subject to the same limitations at this warranty.

Warranty coverage extends only to the original purchaser and does not include normal wear and tear, unusual abuse, or use of the product for other than its intended purpose. This warranty is voided if the product is adversely effected by attaching any feature or device to it, or is in any way tampered with or modified without express written permission from CMI.

There are no warranties expressed or implied, including but not limited to, any implied warranties of merchantability or fitness for a particular purpose. In no event shall CMI be liable for any loss of profits or any indirect or consequential damages arising out of any such defect in material or workmanship.

As a further limit on warranty and as an express warning, the user should be aware that harmful personal contact may be made with seller's product use in automobiles in the event of violent maneuvers, collision, or other circumstance, even though said products are installed according to instruction. CMI specifically disclaims any liability or injury caused by the products in all such circumstances.

### **CMI, Inc.**

a subsidiary of MPD, Inc.  
316 East Ninth Street  
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## The "warranty"

- one year
- "There are no warranties expressed or implied, including but not limited to, any implied warranties of merchantability or fitness for a particular purpose."
- "In no event shall CMI be liable for any loss of profits or any indirect or consequential damages arising out of any such defect in material or workmanship."



1 that would prosecute an individual at a .08 alcohol  
2 level; is that right?

3 A Including California, yes, sir.

4 Q And we have Texas that will prosecute  
5 an individual if they reach the point of .10.

6 A Yes, sir.

7 Q And then the other figure you gave us was .15  
8 which would be --

9 A The same as general anesthesia.

10 Q Would be general anesthesia. That's what I'd  
11 like for you to elaborate on for the jury. What exactly  
12 does that term mean?

13 A That means if you were going to be performing  
14 an operation and you were worried about the subject  
15 feeling a lot of pain, if you could get him to 0.15 or  
16 the equivalent amount of anesthesia from another source,  
17 the person may be aware of what's going on, but you can  
18 operate on him and he wouldn't really feel any pain. It  
19 would be like having a bullet removed and taking a few  
20 shots; you could feel the probing, but you wouldn't feel  
21 much pain.

22 Q If an individual tested out three and a half  
23 hours after an accident, say around 3:50, 4:00 a.m., and  
24 the accident happened around midnight or a little after,  
25 12:20 or so, and you were to calculate that that

CATHERINE KERNODLE, CSR  
285th District Court (512) 220-2096

## Anesthesia (Jimmy Parks)

- 0.15 is the "same as general anesthesia."

- "That means if you were going to be performing an operation and you were worried about the subject feeling a lot of pain, if you could get him to 0.15 or the equivalent amount of anesthesia from another source, the person may be aware of what is going on, but you can operate on him and he wouldn't really feel any pain."



## Anesthesia (Chelkowski & LaHood)

81

1 A. They're accurate but not precise.  
 2 Q. Now, on that breath test slip there is a score of a  
 3 .159 and a .157, at 1:54 a.m.: is that correct?  
 4 A. Yes, ma'am.  
 5 Q. Is that what you see?  
 6 A. 1:54 and 1:56.  
 7 Q. Now, you have testified before that someone at .15  
 8 is going to be under general anesthesia; isn't that correct?  
 9 A. Yes, I have.  
 10 Q. General anesthesia, they would probably have  
 11 difficulty carrying a conversation; is that correct?  
 12 A. No. It means that a person could have a tooth  
 13 extracted that didn't need to be extracted and they wouldn't  
 14 feel any pain.  
 15 Q. Someone with a .15 is not going to feel pain if they  
 16 have their tooth extracted?  
 17 A. Not enough to get upset about. That's what I've  
 18 been told by dentists.  
 19 MS. CHELKOWSKI: Your Honor, I pass the  
 20 witness.  
 21 THE COURT: All right.  
 22 REDIRECT EXAMINATION  
 23 QUESTIONS BY MR. WOLFF:  
 24 Q. Mr. McDougall, have you been hired by defense  
 25 attorneys before in the past?

LETITIA MONTGOMERY, CSA, RPR  
 COUNTY COURT AT LAW #8 (210)335-2005

Q. "Someone with a .15 is not going to feel pain if they have their tooth extracted?"

A. "It means that a person could have a tooth extracted that didn't need to be extracted and they wouldn't feel any pain."

A. "Not enough to get upset about. That's what I've been told by dentists."

## Anesthesia (More Jimmy Parks)

1 Q. And can I just ask you a question. Did they  
2 admit to you that they were wrong some time after I  
3 asked you those questions?

4 A. Yes. There was --

5 MR. GARCIA: Objection, Your Honor.  
6 Irrelevant.

7 THE COURT: That's overruled.

8 THE WITNESS: Yes. There was a long  
9 period when it was unknown what the problem was. It  
10 kept going down and going back and until finally they  
11 admitted yes we went and checked the voltage or the  
12 polarity or something like that. After they  
13 corrected that, it worked like all the other times.

14 BY MR. PARKS:

15 Q. The testing, do you recall what the score  
16 would be that might be the equivalent amount of  
17 alcohol to general anesthesia?

18 MR. GARCIA: Objection.

19 THE COURT: Overruled.

20 THE WITNESS: Yes.

21 BY MR. PARKS:

22 Q. What would that be?

23 A. 0.125.

24 Q. 0.125 would be the general anesthesia?

25 A. Yes, sir.

MARIA E. GORDON, CSR  
(210) 525-8835

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Q. "do you recall what  
the score would be  
that might be the  
equivalent amount  
of alcohol to general  
anesthesia?"

A. "0.125."

1 Q. Okay. Now the general anesthesia that  
2 you're using in terminology would be the same type of  
3 alcohol content or same type of, I guess, anesthesia  
4 that we would be referring to in an operating room;  
5 is that right?

6 A. Yes, sir, it could be.

7 Q. And general anesthesia would be the type of  
8 anesthesia that would knock a person out for, say, a  
9 heart transplant operation?

10 A. That could be used for that but the general  
11 anesthesia doesn't have to be that intense. A person  
12 could be awake and aware of what's out there on the  
13 operation but feeling no pain like eye surgery, for  
14 example.

15 Q. Now, if a person were a .149 or about the  
16 equivalent of a .15 they would be in such a state,  
17 according to your testimony, that they could be  
18 operated on; is that correct?

19 A. Yes, sir.

20 Q. That we could perform a heart transplant on?

21 A. No, sir. We could operate on their eye, for  
22 instance, but I don't know about a heart transplant.

23 I think it would probably take a lot more anesthesia,  
24 certainly it would for me.

25 Q. Have you ever seen anyone, Mr. McDougall,

MARIA E. GORDON, CER  
(210) 520-0935

77

Q. "Now, if a person were a .149  
or about the equivalent of a .15  
they would be in such a state,  
according to your testimony,  
that they could be operated on;  
is that correct?"

A. "Yes, sir."

Q. "That we could perform a heart  
transplant on?"

Q. "No, sir. We could operate on  
their eye, for instance, but I  
don't know about a heart  
transplant. I think it would  
probably take a lot more  
anesthesia, certainly it would  
for me."

1 that was under general anesthesia that got up off the  
 2 operating table and went out and stood on one leg or  
 3 drove a car around or --

4 MR. GARCIA: Objection, Your Honor.  
 5 MR. PARKS: -- balance himself?

6 MR. GARCIA: What's the relevance to  
 7 this? I don't understand --

8 THE COURT: It's overruled. You may  
 9 continue.

10 THE WITNESS: No, sir, I have not.

11 BY MR. PARKS:

12 Q. Let me go back, then, to, I guess, if I  
 13 could, and I'll try to go through it fairly quickly.  
 14 The absorption/elimination rate, what is --

15 The machine is tested, for the jury's benefit, is  
 16 what the machine perceived to be the blood alcohol  
 17 content to be or breath alcohol content at the time  
 18 of the taking of the test; is that right?

19 A. Yes, sir.

20 Q. Okay. That machine can't tell us what the  
 21 breath alcohol content or blood alcohol content was  
 22 at the time an individual was driving, can it?

23 A. Not unless the test is performed at the time  
 24 they're driving.

25 Q. So if the test is performed a couple of

MARIA E. GORDON, CSR  
 (210) 520-8035

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Q. "Have you ever  
 seen anyone, Mr.  
 McDougall, that was  
 under general  
 anesthesia that got  
 up off the operating  
 table and went out  
 and stood on one  
 leg or drove a car  
 around or --"

A. "No, sir, I have  
 not."



# 5000EN

## INTOXILYZER™

### SPECIFICATIONS

**FUNCTIONAL:**  
 (1) Pump Sample: Automatic Inrush Valve  
 (2) Test Switch: Stops the flow of air entering and activates the test result registers

**Flowmeter:** Mass Flowmeter: Transmits actual air flow, emitting real-time, digital displays on, can be changed to measuring barometric pressure using the keyboard  
**Digital Display:** Management: 60 characters, show the operation of the unit and the measured values, and gives the actual test calculations by weight per volume  
**Failure Signal:** Signals the completion of an operation, the presence of a malfunction, an incorrect operation procedure, or an exhausted test tube

**Printed Data:** Serially Programmable printed report of test, model and serial number of the instrument, the test results and the date of the test on a multi-line dot-matrix printer or dot-matrix printer  
**Breath Sampling:** Instrument automatically senses and isolates the sample for the beginning of an operation in comparison with a nitrogen valve and minimum time requirement  
**Algorithms:** Algorithms: 1 used for air and time, and air, software tests, software, and instrument and diagnostic routines and test results in test, test time

**Computer:** The instrument has a fully automatic and diagnostic system, and a serial interface for PC and other equipment  
**Communications:** The instrument is equipped with an RS-232C and for external computer interface

**Resolution:** The instrument is equipped with two channels, which accurately measure air and external air flow

**Flow Rate:** The instrument is equipped with two channels, which accurately measure air and external air flow

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**OPTIONAL:**  
 (1) High Sample: Turbine-fan-driven in nitrogen gas, equipped in a test liquid medium, like electrolyte in water from 1000 hours

**Flowmeter:** Mass Flowmeter: Transmits actual air flow, emitting real-time, digital displays on, can be changed to measuring barometric pressure using the keyboard

**Digital Display:** Management: 60 characters, show the operation of the unit and the measured values, and gives the actual test calculations by weight per volume  
**Failure Signal:** Signals the completion of an operation, the presence of a malfunction, an incorrect operation procedure, or an exhausted test tube

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- "Every aspect of operation, from displaying and printing of information to the basic electrical and mechanical functions, is micro-computer controlled."

## Take the lower score

26

1 A. Yes.

2 Q. Now, is there anything in Texas law which

3 tells us which of the two samples we should accept in

4 court?

5 A. Yes. The lower one.

6 Q. Okay.

7 A. Giving the benefit of the doubt to the

8 defendant.

9 Q. All right. So can we just talk about

10 the .090?

11 A. Yes, sir.

12 Q. All right. Now, you know from your -- not

13 word for word, but you're cognizant and familiar with

14 the Mats decision?

15 A. Yes.

16 Q. And the things that the court refers to as

17 personal characteristics of the subject?

18 A. Of the incident, yes.

19 Q. Now, do you -- would you agree that you do

20 not have enough information about the personal

21 characteristics of the subject and the incident to

22 engage in retrograde extrapolation under that

23 decision?

24 A. I would agree with that at this time. I

25 have no other facts.

CLERK REC'D, CSM  
COUNTY COURT AT LAW NO. 1  
210.313.2972

Q. Now, is there anything in Texas law which tells us which of the two samples we should accept in court?

A. Yes. The lower one.



## Machine Tolerance

$\pm 0.005$

## Woman v. Machine

- Assume the subject is female.
- That she weighed 130 pounds at the time of the test.
- That she drank three-one ounce glasses of Bacardi rum and diet coke,
- Between 11:00 pm and 12:30 am on the date tested.
- What would that person's blood alcohol content be at 2:14 am?
- And that is far below the legal limit for intoxication in Texas?

## Machine v. Woman

- 0.14 at 2:14 am.
- How many drinks in system at time of test.
- Minimum.
- Either she is wrong or your breath test is?