

NO. 123456

STATE OF TEXAS ) IN THE COUNTY COURT  
VS. ) AT LAW NUMBER 15  
JOE SMITH ) BEXAR COUNTY, TEXAS

**DEFENDANT'S MOTION TO SUPPRESS  
UNRELIABLE AND IRRELEVANT BLOOD TEST RESULTS**

TO THE HONORABLE COURT:

Joe Smith moves that the Court conduct a hearing pursuant to Rules 104(a), 702, and 403 of the Texas Rules of Evidence, and, after hearing evidence and the arguments of counsel, that the Court suppress the unreliable and irrelevant blood test results seized from him on January 27, 2023.

**I.  
Rules 104(a) and 702**

“Preliminary questions concerning the qualification of a person to be a witness, the existence of a privilege, or the admissibility of evidence shall be determined by the court, subject to the provisions of subdivision (b).” TEX. R. EVID. 104(a).

Rule 702 provides:

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise.

TEX. R. EVID. 702.

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## **II.** ***Daubert And Its Progeny***

The trial court acts as the gate-keeper with regard to the admissibility of expert testimony. Under Rules 104 and 702 of the Federal Rules of Evidence, the Court must determine outside the presence of the jury that “an expert's testimony both rests on a reliable foundation and is relevant to the task at hand.” *Daubert v. Merrell Dow Pharmaceuticals, Inc*, 509 U.S. 579, 597 (1993). *Daubert's* requirement that the reliability and relevance of expert testimony be established outside the presence of the jury also applies in Texas. *Kelly v. State*, 824 S.W. 2d 568, 573 (Tex. Crim. App. 1993). The proponent’s burden to prove relevance and reliability is “by clear and convincing evidence.” *Id.* This burden exists for all scientific evidence, whether or not it is novel. *Hartman v. State*, 946 S.W.2d 60, 63 (Tex. Crim. App. 1997). The general principles announced in *Daubert* and *Kelly* are also applicable to non-scientific evidence admitted under Rule 702. *Nenno v. State*, 970 S.W. 2d 549, 560-61 (Tex. Crim. App. 1998).

## **III.** **The Rules And Law Applied To This Case**

The Information in this case alleges that Mr. Smith operated a motor vehicle while intoxicated on January 20, 2023, and that his blood showed a concentration of 0.15 or more at the time the analysis was performed. Counsel anticipates that the State of Texas will attempt to meet its burden of proof by offering evidence that samples of Mr. Smith’s blood were seized by the Bexar County Sheriff’s Department (BCSO)

pursuant to a warrant on the date of his arrest; that later, on March 13, 2023, a sample was analyzed by the Texas Department of Public Safety (TDPS) to determine alcohol concentration; that, based on this analysis, a witness will testify to the results obtained; and that these results, according to the State, prove Mr. Smith was intoxicated while operating. Counsel has reviewed the discovery provided by the State of Texas, and submits that the results of the testing performed by TDPS in this case are both unreliable and irrelevant, and therefore inadmissible in evidence against Mr. Smith.

Specifically:

- Records from the BCSO reflect that the blood specimen collected from Mr. Smith was kept by that agency from January 27, 2023 to March 3, 2023, but there are no temperature monitoring records reflecting the temperature at which the specimen was maintained during this critical period. Consensus standards from the forensic toxicology community require blood specimens to be stored at less than 8°C. Counsel is advised that BCSO does not maintain any documentation of temperature monitoring records. It is known that blood is vulnerable to a variety of reactions that can alter the ethanol concentration *in vitro* (outside the body, or inside the tube) when a specimen is not refrigerated. Absent documentation establishing that the blood was stored at a proper temperature while it was in the custody of BCSO it should not be assumed that the concentration of alcohol in the specimen received by the laboratory was unchanged from any amount present at the time of collection. You cannot get a good result from a bad sample.
- Records reflect that the tubes containing Mr. Smith's blood were only 3/4 filled, and not completely filled, as protocol requires. The tube manufacturer's instructions warn the user that underfilled tubes may lead to inaccurate analytic results. Empty evacuated tubes are supposed to be stored at room temperature, protected from temperature extremes (from 39 - 77 degrees Fahrenheit). If they are stored too cold or too hot, the glass/rubber stopper seal may be compromised, introducing ambient air to the previously sterile container, and rendering it unsuitable for a blood alcohol test. The only obvious indication of such a leak would be insufficient vacuum to collect a full tube of blood. Unless there is a documented reason for an underfilled tube (*e.g.*, needle withdrawn to protect a

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violent patient; subject had low blood pressure due to traumatic injury) it may indicate that the tube was not sterile when the specimen was collected. The presence of viable microorganisms in a blood specimen means it would be vulnerable to *in vitro* fermentation that could increase the ethanol concentration inside the tube.

- The automated instrument batch that included Mr. Smith's samples was initiated at 5:57PM. According to an Information Sheet, the analyst observed that the instrument "stopped acquiring data" at 7:20PM, and the analyst restarted the injection sequence starting with vial #10 (the last quality control sample in the opening sequence). Records do not document any investigation into the cause of the anomaly, or any corrective actions taken by the analyst. Similarly, there is no evidence that either the analyst or the reviewer evaluated results from the entire batch run to determine whether the experimental conditions were unchanged throughout, as necessary for a valid batch. Restarting the batch sequence rested on the unverified assumption that batch conditions were not impacted by the interrupted sequence. Review of batch data demonstrate that such an assumption was invalid; the anomaly affected the test results.
- The analyst used a dual-channel diluter to make critical measurements of sample volumes that directly and significantly affected Mr. Smith's reported ethanol result. As required by consensus standards, and as a generally accepted scientific imperative, each measurement instrument must be calibrated annually at the value it is used. Calibration records document that the channel of the diluter with the larger syringe was calibrated on March 3, 2023, so it was properly calibrated on March 13, 2023 when it was used to measure internal standard into Mr. Smith's samples. However, no calibration record documents calibration of the channel with the smaller syringe, used to measure Mr. Smith's blood. You can't get a reliable result from a device that hasn't been calibrated.
- Records reflect that all of the known samples included in the batch that included Mr. Smith's samples were prepared in water. Toxicology consensus standards require the analysis of known samples prepared in blood when unknown blood samples are analyzed. The inclusion of "matrix-matched" controls is necessary to show that the analysis is capable of properly analyzing blood on the day in question.
- The analyst used glass ampoules of Certified Reference Materials (CRMs) as calibrators for her method. These CRMs are manufactured with a known

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concentration of ethanol, documented on a certificate that says the solution should be used immediately after opening the ampoule. Storing the solution after the glass has been broken open voids the warranty, because the true concentration of ethanol can no longer be known. Forensic toxicology consensus standards require compliance with the manufacturer's storage instructions, and documentation of the date each CRM is opened. The analyst in this case did not document the date each CRM ampoule was opened. This means the laboratory's reported ethanol result is untraceable, and unsuitable for comparison to a legal limit.

- At best, even if every step of the analytical process had been performed in accordance with all applicable requirements and under best scientific practices, the blood test results obtained in this case are not capable of determining whether Mr. Smith was intoxicated at the time he was operating a motor vehicle, as is required by the Texas Transportation Code.

#### **IV. Counsel Requests A Hearing**

Counsel requests, pursuant to the cited rules and cases, that the Court hold a hearing, outside the presence of the jury, and before the jury is selected, at which the State is required to establish by clear and convincing evidence that all expert testimony it presents in this case be both relevant and reliable, and therefore admissible under Rules 702 of the Texas Rules of Evidence. Also, the probative value of the evidence must not be substantially outweighed by its potential to unfairly prejudice, mislead, confuse or waste the jury's time. TEX. R. EVID. 403. Counsel submits, for the reasons stated in this motion, that the State will fail to meet its burden to establish both the relevance and the reliability of the testing done on the blood in this case, and its admissibility under Rule 403. Accordingly, the results of that testing are inadmissible before any factfinder that will hear the merits of this case.

Respectfully submitted:

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/s/ Mark Stevens

MARK STEVENS

Attorney for Defendant

### **CERTIFICATE OF SERVICE**

I certify that a copy of Defendant's Motion To Suppress Unreliable and Irrelevant Blood Test Results has been electronically delivered to the District Attorney's Office, Bexar County Justice Center, 300 Dolorosa, San Antonio, TX 78205, on January 5, 2024.

/s/ Mark Stevens

MARK STEVENS

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**ORDER**

On this the \_\_\_\_\_ day of \_\_\_\_\_, 2025, came on to be considered Defendant's Motion To Suppress Unreliable and Irrelevant Blood Test Results, and the Motion is:

(GRANTED) (DENIED).

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JUDGE PRESIDING