

VOICE for the DEFENSE

Official Journal of the Texas Criminal Defense Lawyers Association



Knox Jones
Incoming President of TCDLA

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VOICE for the DEFENSE

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VOICE for the DEFENSE



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EDITOR'S CORNER

Thankfully, someone is watching over our decadent and morally degenerate society. The trail we were following, enveloped by the branches of permissiveness and the weeds of ungodly indulgence has been cut and cleared. We can walk it safely, unconcerned about the corrupting nature of human nakedness, sexually explicit literature, or, heaven forbid, unconventional sexual practices. Why? Because the Dynamic Duo of the Reagan Administration, the Supreme Court, led by Justice Byron "Batman" White, and Attorney General Ed "Robin" Meese's Commission on Pornography have shown us the light. We have been saved from the most pervasively evil influence known: ourselves.

We have been told by the Supreme Court that we do not have a fundamental Constitutional right, in the words of dissenting Justice Blackmun, "to be let alone." And, although we have a constitutional right under *Stanley v. Georgia* to watch dirty movies in the privacy of our homes, we do not have a constitutional right to be dirty in the privacy of that home. Thus, watch it, but don't do it.

Within days of this decision the Commission on Pornography issued its report which concludes, among other enlightening things, that published pictures of naked people, particularly attractive women, are directly responsible for more reprehensible and disgusting images of sexual contact and these encourage the raping, plundering, and pillaging of women. (Hell, pirates did that before there were dirty pictures.) So, the Commission suggested methods and means for our local communities to rid themselves of the publications that some, not necessarily the majority, of the community find offensive. What this governmentally-sponsored, tax-funded committee did is suggest ways in which a select few in the community can prevent legal conduct. (Wouldn't it be nice if the government could similarly suggest ways to prevent illegal conduct?)

Our government, bless its heart, can now censor the private sexual activities of consenting adults in our bedrooms, living rooms, kitchens, etc. It is also telling us what we should read or watch.

Folks, we have the makings of some real problems. Southland Corporation no longer sells *Playboy* or *Penthouse* because the Commission on Pornography was going to publicize that 7-11 Stores caused sex offenses. In Tennessee, some people have filed a lawsuit against a school district because an elementary school textbook had a picture of a man, "Jim," cooking while his wife looked on. This, they contend, is contrary to the roles God and the Bible intended for the sexes to play. They want the book removed from the school. Wal-Mart has removed rock 'n' roll magazines and some records from its shelves because the television preacher, piano playing, singer, evangelist, Jerry Lee Lewis' cousin, Jimmy Swaggart said they were as bad an influence on our children as, believe it or not, drugs. Speaking of Swaggart, he also said recently that one of the most morally destructive movies of all time was "E.T." Why? Because it gave children an another-world figure, besides God, to worship.

One doesn't need to travel too far to see the recent influence of the Commission's report. In Bridgeport, Texas, some people have now petitioned to have those "girlie" magazines removed from the stores. According to Molly Ivins' column in the July 22, 1986, *Dallas Times-Herald*, the San Angelo City Council is debating an anti-pornography ordinance that would remove *Playboy*, *Penthouse*, *Hustler*, etc., and *Harlequin Romances* from the newsstands. If this passes, no longer will San Angelo have to suffer the degrading influence that saturates the community when housewives are exposed to scenes such as:

"Clint, slowly moving closer, his jet black hair wet with perspiration, his shirt banging loosely about his strong shoulders, reached out and swiftly enclosed her arms in his vise-like hands, and pulled her toward his pulsating chest. Feeling the wetness of his breast through her gown, she knew she couldn't, didn't, want to resist him. She leaned her head back to meet his caress, and their wet, hot lips touched, and . . ."

Well, thank God or the San Angelo City Council we may not have to worry about

that type of thing influencing us any longer.

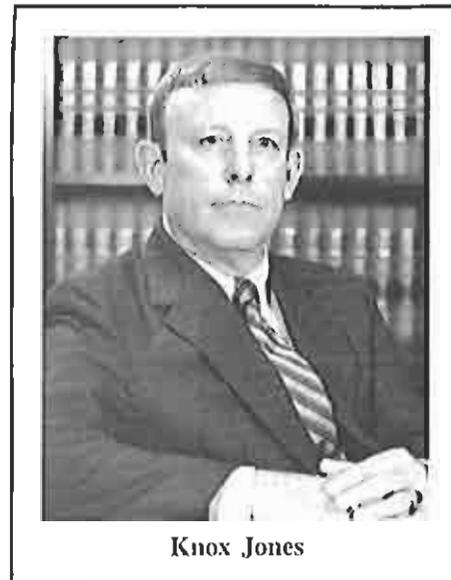
We have taken our privileges for granted for so many years that we have become complacent about their security. One's right to privacy is now limited to those activities that are traditional. One's right to read what he or she wants to read is being censored by inaccessibility. What is really alarming is that it has just begun and all it can do is get worse.

Since I will change careers in the near future, please permit me a moment of nostalgic reflection. I joined T.C.D.L.A. in 1972 as a new, aspiring, rather naive lawyer who wanted to specialize in criminal law. Charles Tessemer signed my application. This association and its purposes became an abiding interest. Because of my involvement with T.C.D.L.A. I became very good and close friends to some of the truly excellent criminal lawyers in this state. Richard Anderson, who through his leadership recently gave the Criminal Law Section of the State Bar some meaning. Bill Burge of Houston, one of the finest legally analytical minds I have seen. Tim Evans of Fort Worth, a criminal lawyer whose wit and imagination I envy. Bill Wood, one of my law partners, who is as good as anybody at projecting sincerity to a jury. Ron Goranson of Dallas who, in a Federal multi-million dollar counterfeit bond prosecution, showed me how a real lawyer can try a case. An exposure to lawyers of their caliber is only one benefit to be derived from T.C.D.L.A., but it is a significant one.

In September, 1986, Kerry FitzGerald will assume editorial responsibility for the *Voice*. I cannot think of anyone in this association more appropriate for the role. I just hope that the members of the association will help him to do his job. Although it is trite, it is nevertheless true: this publication can only be as good as the membership is willing to make it. The burden is upon the membership to fill the pages. Kerry's responsibility is to see that it makes sense.

It's been good for me; hope it was good for you. ■

PRESIDENT'S REPORT



Knox Jones

The criminal defense lawyer has the image created by the media for the last fifty years, including movies, television and the print media. The "mouthpiece"—the guy who gets the criminal off on "technicalities." The problem is that most people don't realize that these so-called "technicalities" are mandated by the United States Constitution, the State Constitution, statutory law, or case law developed over the last two hundred years. Take the Fifth Amendment, for example: the Constitution says that no person can be compelled to testify against himself. The reason?—to prevent "Star Chamber" proceedings and abuse by police or other government law enforcement agencies. That sounds fine and dandy—until, for example, someone murders a child and has a confession beaten out of him by the police. Is this person going to escape punishment? Does the Constitution protect *this* individual? Many of our citizens know the answer to these questions, but do not understand the *reason* behind the answer. The Constitution and the Bill of Rights protect individuals and minorities—even unpopular or heinous ones. If the accused have no rights, what will happen to those *wrongfully* accused? As long as the government has the power to accuse

and prosecute, there must be safeguards to prevent the abuse of that power. Do we want to live in a society where our hypothetical murderer was actually innocent?

The criminal defense lawyer is such a safeguard—one that is guaranteed by the Sixth Amendment. His "reason for being" is to prevent abuse of the individual citizen or minorities by the government. His job is to point out to judges and juries what the Constitution sanctions or does not sanction. His is the only function that ultimately stands between the individual and the abuse of government power.

As long as the media chooses to ignore the true function of the criminal defense lawyer—as long as our schools make little or no effort to educate our citizens about the importance and significance of the adversary system—and as long as we ourselves remain woefully lacking in our effort to disseminate this information to the public, we will remain stereotyped as the black sheep of the legal profession. It is ironic that what should be considered the highest calling a lawyer can aspire to is held in such low esteem by the public. The "Catch 22" aspect is that only if we fail in our obligation to protect the individual will the public become fully aware of the poten-

tial for abuse by the government. That is exactly what happened in Germany in 1938. But of course, it could never happen here . . .

It has become painfully obvious that the Criminal Defense Bar is now under attack. Recent stats indicate that between two and three hundred lawyers have been subpoenaed before grand juries in the past eighteen months. Who paid your fees? What do you know about your clients' assets? Can we create the impression you may be testifying against your own client? Can we drive a wedge between you and your client? Can we effectively deny your client's Sixth Amendment rights through intimidation of his lawyer?

If we are subpoenaed solely or partially for the purpose of harassment and intimidation, then we must file motions to quash and convince the bench that the entire structure of the adversary system in criminal law is in imminent danger. We can no longer afford the luxury of acquiescence.

Let this be the year that we make a commitment to ourselves and to one another: not only do we stand between our clients and the abuse of government power—we also stand up for ourselves and each other to prevent that same abuse. ■

A Review of Two Blood Alcohol Analysis Procedures

by Pat H. Donley
Forensic Chemist/DWI Consultant

Introduction

Alcohol misuse and abuse has been a social problem for much of man's existence. With the advent of the automobile as an everyday part of our lives, this problem has grown to tremendous proportions in terms of lost property and lives as a result of the drinking driver.¹ Countless studies have been conducted and consequently shown that a high percentage of multiple and single vehicle accidents occur, at least in part, due to alcohol abuse. It is estimated that approximately 50% of the casualties in motor vehicle accidents can be attributed to the effects of alcohol on both drivers and pedestrians.² Because of the obvious seriousness of this problem, interest is high in identifying and eliminating the drinking driver from the road-

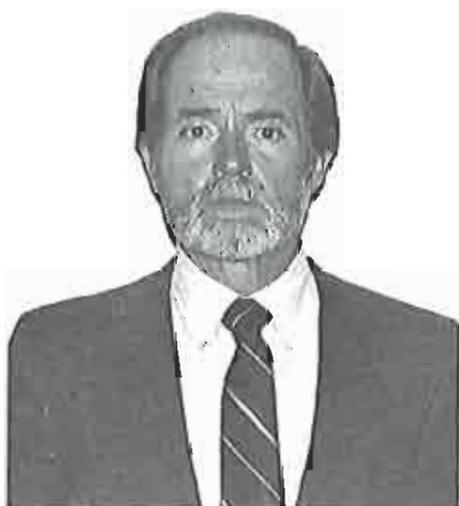
way.³ Law enforcement agencies have been charged with this responsibility.

While the obvious need for the removal of the drunken driver from our roadways is undisputed, the rights of the accused must be protected from overzealous attempts at social reform. It is therefore the intent of the remainder of this article to inform the judiciary, prosecutors, defense lawyers, and the general citizenry of two of the most popular blood alcohol procedures, as aid in order that they protect the innocent.

A great deal of time, energy and research has been exhausted in an effort to define, (1) the legal amount of alcohol necessary to produce intoxication,⁴ and (2) produce a scientifically sound method by which to measure this value. As alcohol intoxication deals with central nervous system depression, thereby affecting the

brain, a means of monitoring this level was required. Blood alcohol percent levels became the accepted correlation between alcohol concentrations⁵ and the resultant central nervous system depression when it was discovered that alcohol levels in the blood generally exist in a one to one ratio with the alcohol level in the brain.

Therefore, the direct analysis of blood for alcohol content has long been considered by the scientific community as the most reliable method for the determination of alcohol levels and their subsequent effects on an individual's⁶ sobriety.^{6a} Certain obvious disadvantages in the removal of blood from a living victim have made this procedure less popular, however, than breath or urine testing for alcohol content. Aside from the laboratory complexities of submitting to a blood test, other disadvantages also exist.⁷



Pat Donley is president of Forensic Associates, an independent crime laboratory located at the Wayland Baptist University Lubbock Center in Lubbock, Texas. He is an instructor in the criminal justice department of Wayland Baptist University as well as a consultant in forensic chemistry. Donley received his bachelor's degree in chemistry from Texas Tech and was employed as a forensic chemist by the Texas Department of Public Safety for approximately seven years and served as laboratory supervisor of the Lubbock D.P.S. crime laboratory.

He also served as the technical supervisor for the alcohol breath testing program for the West Texas and Panhandle areas, testifying in the second breath test case ever tried in the state. His current practice includes extensive involvement in

alcohol-related litigation, in both civil cases and criminal defense support. Additionally, he serves as a forensic consultant for the C.I.D. division of the Lubbock County Sheriff's Department. He is a member of the Analytical Division of the American Chemical Society, the American Association for the Advancement of Science, and the International Association of Arson Investigators. He has testified in about 750 trials in Texas and surrounding states. Donley is forty-three years old, married and the father of three children.

Forensic Associates serves as consultants for attorneys in both civil and criminal litigation. Areas of assistance include firearms testing, fire cause and origin determinations, arson accelerant identification, drug identification, DWI consultations, etc.

Disadvantages

Inconvenience

The taking of a blood sample is generally inconvenient, since most police agencies do not have the facilities for taking such samples readily available. Suspects must be taken to a doctor's office clinic or hospital, and a physician, qualified technician, registered professional or licensed vocational nurse must be located who is willing to withdraw the blood specimen.⁸ Adequate space must be available at the law enforcement facility, and containers for the specimen must be provided. The containers themselves present a problem, in that care must be taken to assure they are properly cleaned and contain adequate preservative and anticoagulant to attempt to keep the blood specimen in a proper condition for analysis. The blood specimen must be properly marked and sealed to insure the integrity of the chain of custody. The arresting officer must mail or hand deliver the specimen to the laboratory that is to conduct the analysis.

Discomfort

The taking of a blood sample is not only inconvenient, it is sometimes an unpleasant experience for the person from whom the sample is removed. Most people dread the thought of having blood taken from their arm, and often the dread of the experience is more painful than the actual insertion of the needle into the vein.

Time Delay

A major complaint about blood alcohol examinations is the relatively long period of time required to get a result back from the laboratory. When compared to the extremely quick response time of breath analysis, the blood alcohol examination seems especially long. It ordinarily takes several days for a submitted specimen to be worked and a report issued; whereas with breath alcohol analysis, the arresting officer has his answer within a maximum of two hours after the suspect has consented to give the specimen.

Expense

The expense of a blood alcohol analysis is usually relatively high due to the number

of man hours of labor involved. Not only must one secure the professional personnel for the taking of the blood, but also the time spent in the analysis by a properly trained chemist must be considered.⁹ Often the chemist is involved in the preparation of the blood alcohol sample tubes as well as the calibration of the scientific instrumentation used in the examination. This time might not be actually charged to the analysis. However, it is time spent and must ultimately be considered in the relative efficiency of the laboratory operation.

Precision: The Primary Concern

These disadvantages should be considered; however, the precision of the direct blood analysis should be of primary concern when one is dealing with the future of a person suspected of driving while intoxicated.¹⁰ A crucial aspect of direct blood analysis is at the very outset of the procedure, the taking of a proper sample. This sample ought to be taken following very careful guidelines and safeguards, to insure that no alcohol from an outside source contaminates the specimen withdrawn from the suspect. Notwithstanding, aside from a statutory directive which delineates persons who can take a blood specimen and unlike breath testing where written guidelines, procedures and administrative regulations mandate how breath sampling is to occur, there are no statutory, administrative or any other guidelines as to how law enforcement ought perform alcohol blood concentration analysis. Contamination may be prevented by eliminating alcohol from the process of drawing the blood sample. The use of alcohol swabs to cleanse the area from which a specimen is to be drawn should be discouraged and an aqueous solution of benzal-konium chloride or some other suitable aqueous disinfectant should be substituted. Sometimes a technician will not have proper disinfectant on hand and alcohol swabs will be substituted.¹¹ In such a case, the alcohol should be given adequate time to evaporate before penetrating through the skin with the syringe needle and drawing the specimen. Research indicates that a very small blood alcohol increase results from using alcohol sterilization material¹²; however, it is necessary to do everything possible to prevent errors

increasing the blood alcohol content.

Alcohol swabs should never be allowed to make contact with the needle being used to withdraw blood, as this could contribute to an erroneously high alcohol concentration. Cleaning the outer surface of the syringe/needle may give rise to serious errors since the alcohol from the cleaning procedure may fill the hollow needle, be drawn into the syringe, and later analyzed as alcohol present in the blood of the tested individual.

Chain of Custody

Generally, blood alcohol specimens are not analyzed for days after they have been collected. Therefore, provisions must be made to ensure that the specimen does not decompose and produce alcohol and/or other putrefaction products that could produce erroneous¹³ results.¹⁴ Blood alcohol tubes should contain an anticoagulant and a preservative, placed in them to insure that the specimen remains in a proper condition for analysis. Sodium fluoride is a commonly used preservative and may be used with sodium citrate which acts as an anticoagulant. Maintaining the specimen under refrigeration or maintaining it in a moderately cool atmosphere helps keep the specimen in good condition.

The proper sealing and labeling of a blood alcohol sample should be of primary concern to the defense attorney as well as the State.¹⁵ After the specimen has been properly collected, it should be sealed and identified with the name, date, time, and location. The arresting officer should sign the label on the blood tube and should maintain control of the specimen until it is submitted to the laboratory. The nurse, doctor, or qualified technician should date and initial the specimen container label so that it can be ascertained if proper procedure was followed.

Laboratory personnel who are charged with analyzing blood alcohol samples should be sure to note the name of the individual on the blood sample tube, and compare it to the name on the submission form or incident report. Any discrepancy between the submission form and blood tube should be noted and any unusual circumstances relating to the sample tube (leaking, improper seal, etc.) should be reflected in the analyst's file.

Blood Alcohol Concentration Analysis in Texas

Of the direct blood alcohol test methods available, two are predominantly utilized by law enforcement in Texas. The first method is commonly known as the Dubowski method, named after the man who developed the procedure, Dr. Kurt Dubowski. This procedure appeared in the "Proceedings of the American Academy of Forensic Sciences" in 1952 and is widely known in the field of forensic chemistry. A modification to the original procedure was made by Dr. Dubowski and J. R. Withrow which eliminated, by use of a catalyst, the necessity of heating the distillate-oxidizing reagent mixture. The catalyst, magnesium sulfate, which is added to the potassium dichromate/sulfuric acid solution, does not enter into the reaction, but simply causes the reaction to take place without heat. The article is called "A Photometric Microdetermination Method for Ethyl Alcohol in Biological Material."¹⁶

The second procedure to be discussed is that of gas chromatography. This method utilizes an instrument that separates the components of a mixture and allows for their identification and quantitation.

Dubowski Method

Principle: Specimens of any body fluid (or steam distillates of tissue homogenates) are distilled directly from tungstic acid to precipitate the proteins and separate the ethyl alcohol from the matrix. An aliquot of the aqueous distillate is mixed with a measured volume of standard potassium dichromate in sulfuric acid (in a closed container at 100 degrees Centigrade). Any alcohol present is oxidized to acetic acid with concomitant partial reduction of the yellow dichromate ($\text{Cr}_2\text{O}_7^{=}$) ions to blue-green chromic (Cr^{++}) ions as follows:

$$2\text{K}_2\text{Cr}_2\text{O}_7 + 8\text{H}_2\text{SO}_4 + 3\text{CH}_3\text{CH}_2\text{OH} - 2\text{Cr}_2(\text{SO}_4)_3 + 3\text{K}_2\text{SO}_4 + 3\text{CH}_3\text{COOH} + 11\text{H}_2\text{O}$$

The residual potassium dichromate is measured spectrophotometrically at 450 nm or 350 nm, and the corresponding alcohol concentration of the original specimen is obtained directly from a calibration curve or table prepared by analysis of solutions of known alcohol content.

Reagents

Oxidizing Reagent, 0.0214 N potassium dichromate

Exactly 1.0500 g anhydrous reagent grade potassium dichromate ($\text{K}_2\text{Cr}_2\text{O}_7$) are dissolved with mechanical stirring in 1 liter of 50 volume percent sulfuric acid (H_2SO_4) which is free of reducing substances. One milliliter of this reagent is equivalent to 0.247 mg of ethyl alcohol. The reagent is stable for 1 year or more at room temperature, and should be stored in a borosilicate glass bottle (preferably low-acidic glass), protected from light and absorption of atmospheric water vapor.

Sodium Tungstate, 1 percent w/v

112 g of reagent grade sodium tungstate ($\text{Na}_2\text{WO}_4 \cdot 2\text{H}_2\text{O}$) are dissolved in distilled-demineralized water and the volume adjusted to 1 liter. Stable indefinitely.

Sulfuric Acid, 1 N

28 ml of 36N (concentrated) reagent grade sulfuric acid (H_2SO_4) are added stepwise with caution to the 3 or 4 volume of distilled-demineralized water and the volume adjusted, after cooling, to 1 liter. Stable indefinitely.

Tartaric Acid, 10 percent w/v

100 g of reagent grade tartaric acid ($\text{H}_2\text{C}_4\text{H}_4\text{O}_6$) are dissolved in distilled-demineralized water and the volume adjusted to 1 liter. Stable indefinitely.

Apparatus

Distilling Apparatus

Direct and steam distillation apparatus of Dubowski and Shupe (Catalog No. JD-1390 & JD-1410, Scientific Glass Apparatus Co., Inc., Bloomfield, NJ 07003) or comparable all-glass distillation apparatus.

Heating Bath

A modular electric heating block (Catalog No. 6124-CO5 & 6124-C55, Temp-Blok Module Heater, Arthur H. Thomas Co., Philadelphia PA 19105) is convenient. However, any electric water bath at 100 degrees Centigrade, or electric con-

stant temperature bath with permanent water soluble bath fluid (UCON fluid 50-HB-280X, Union Carbide Chemicals Co., New York, NY 10017) at 100 degrees Centigrade can be used.

Photometer

Beckman Model DU II, Model B, Model DB or DB-G spectrophotometers, Bausch & Lomb Spectronic-20 spectrophotometer, Coleman Model b1/20 Junior II Spectrophotometer, Gilford Model 2000 or Model 300 spectrophotometers; or comparable spectrophotometer or photonic filter photometer with blue filter transmitting at 450 nm.

Procedure

Analysis of Blood, Urine, Saliva, Cerebrospinal Fluid, Tissue Distillates

1. Into a 125 ml distilling flask (250 ml for blood) are placed the following:
 - a) 20 ml of distilled-demineralized water
 - b) 2.00 ml of the specimen (1.00 ml

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specimens can be analyzed by collecting the distillate in a 5 ml volumetric flask, proceeding with steps three through five as usual)

- e) 5 ml of 1 N sulfuric acid
- d) 5 ml of 10 percent sodium tungstate
- e) The flask contents are mixed by swirling and the flask is attached to the distillation apparatus. Heating is begun when the blood has coagulated completely and has changed to a dark brown color.

2. Slightly less than 10 ml of distillate are distilled directly into a 10 ml glass stoppered volumetric flask in about 8 minutes, heating with a microburner with a 2.50 to 4.00 cm flame. The distillate is adjusted to the 10 ml mark with distilled-demineralized water, the flask stoppered, and the contents mixed thoroughly by repeated inversion.

3. Into a 13 × 100 mm borosilicate glass culture tube with Teflon-lined screw cap are placed 1.00 ml of distillate and 3.00 ml of oxidizing reagent. (When many analyses are performed, an automatic diluting-dispensing apparatus is very convenient; e.g., Model LD-1 Automatic Diluter, York Instrument Corp., Berkeley, CA 94710; otherwise manual syringe-dispensers are best employed to dispense all reagents; e.g., Catalog No. 3005-A Repipet, 5 ml, Labindustries, Berkeley, CA 94710). A reagent blank is prepared with 1.00 ml of distilled-demineralized water and 3.00 ml of oxidizing reagent. The tubes are closed, for contents mixed by vigorous rotation and the tubes heated for 8 minutes at 100 degrees Centigrade, immersed above the liquid level.

4. The tubes are cooled to room temperature (25 degrees Centigrade or less) under running tap water or in an ice bath. A portion of each solution is transferred to a suitable cuvette (1.00 cm pathlength Corex or borosilicate glass cuvettes are used with the Beckman spectrophotometers) and the absorbance or transmittance of each specimen is determined at 450 nm, against a reference cuvette containing the reagent blank.

5. The alcohol concentration of the unknown specimen, in percent weight/volume or mg/dl, is obtained directly from a calibration table or curve prepared by subjecting a series of biological specimen standards of known alcohol content to the entire analysis.

Analysis of Tissues

1. Approximately 10 g of frozen or ice cold tissue are rapidly liquefied in an ice cold Waring blender. Exactly 2.00 g of the liquefied sample are rapidly weighed out and transferred quantitatively to a 250 ml distilling flask with 30 ml of 10 percent tartaric acid solution. Two to three drops of silicone antifoam fluid (Dow Corning Antifoam AF emulsion 30 percent w/v used as a 10 percent w/v emulsion, Dow Corning Corp., Midland, MI 48640; Antifoam 60 emulsion, General Electric Co., Silicone Products Dept., Waterford, NY 12188) or 0.10 g of low melting paraffin compound are added, or silicone antifoam spray (Dow Corning Antifoam A spray) is used sparingly. The flask contents are mixed by swirling and the flask attached to the steam distillation apparatus.

2. Distilling in a rapid current of steam from a steam generator containing distilled-demineralized water, about 20 to 30 ml of distillate are collected into a 125 ml distilling flask within 8 to 10 minutes.

3. To the 125 ml distilling flask containing the steam distillate are added 5 ml 1 N sulfuric acid and 5 ml 10 percent sodium tungstate. The flask contents are mixed by swirling, the flask is attached to the direct distillation apparatus and the remainder of the procedure is carried out as for biological liquids (steps two through four of Procedure A).

4. The alcohol concentration of the tissue, expressed in percent w/v or mg/100 g, is obtained directly as in step five of Procedure A from the same calibration table.

Special Problems

1. Partially decomposed specimens are first distilled from the acid tungstate solution into another 125 ml distilling flask, to which are then added 10 ml of saturated aqueous mercuric chloride and 10 ml of 10 percent w/v calcium hydroxide suspension. This mixture is mixed by swirling, allowed to stand a few minutes, and then redistilled and the analysis is completed as in Procedure A.

Calibration

1. Blood or other specimens demonstrably free of volatile reducing substances are used to prepare calibration standards containing 0 to 0.35 percent w/v ethanol in

steps of 0.05 percent w/v.

2. The prepared calibration samples are analyzed in duplicate according to the procedure outlined and *absorbance* or *transmittance* measurements made against the reagent blank reference.

3. The absorbance values obtained are plotted on a rectangular coordinate plot of absorbance units as the ordinate versus alcohol concentration of the original sample in percent w/v or mg/dl as the abscissa, and a best fit straight line is drawn through these points and the origin. Alternately, transmittance values may be plotted as the ordinate on semi-logarithmic paper versus alcohol concentration as the abscissa.

Sources of Error in Dubowski Method

Although the method described above is generally highly regarded as a method for blood alcohol determination, the possibility of erroneous results exists. The greatest source of error exists in the quality control or lack of it in the testing laboratory and the analytical technique of the examining technician/chemist conducting the procedure. The blood alcohol calibration curve prepared in this procedure is absolutely critical to the proper determination of the alcohol concentration present in the unknown blood specimen.¹⁸ The blood distillate derived from this procedure and the potassium dichromate reagent solution are both compared to this calibration curve, therefore any constructional or procedural error has a direct impact upon the final analysis results.

During the course of the calibration curve preparation, any value deviations should be noted and the calibration process continued until all deviations have been rectified. If these deviations are allowed to remain in the calibration curve and are translated into the resulting chart used to report analysis results, these errors are difficult to identify. By whom, when and how this calibration curve was prepared should be of primary concern and attention. This calibration curve can and should be checked periodically by the testing facility, by the analysis of known alcohol standards and comparing the resultant values to the calibration curve.

All glassware used in measuring and

continued on page 9

SIGNIFICANT DECISIONS REPORT

EDITOR: Catherine Greene Burnett
ASSOCIATE EDITORS:
Richard A. Anderson
David L. Botsford
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Stanley I. Weinberg

C O U R T O F C R I M I N A L A P P E A L S

* * * NOTE: SUMMER RECESS BEGAN JULY 9, 1986 * * *

Seyed Ramezan MOOSAVI, No. 715-84 -- Opinion on Appellant's PDR: Court of Appeals Reversed; Remand for Review of Ground of Error -- Judge W. C. Davis -- 6/11/86

OFFER OF PROOF -- READING INTO TRIAL RECORD ONLY THE EXPECTED TESTIMONY OF WITNESS EXCLUDED BY COURT IS OFFER OF PROOF AND PRESERVES ERROR FOR APPEAL WITHOUT INCLUDING QUESTION SOUGHT TO BE ASKED:

During punishment phase of trial Defendant tried to elicit testimony of psychiatrist about Defendant's state of mind at time of offense for mitigation of punishment. Before the bench, outside jury's presence, D's attorney stated on record what he believed answer would be. This was enough to be offer of proof under Art. 40.09, Sec. 6(d)(1), V.A.C.C.P., without question asked.

Nothing in statute requires offer of proof to be in question and answer form, just a "concise statement ... of what the evidence would show". Here it is clear from record that the trial judge knew precisely what he was excluding. Where the subject matter of the question was evident, no purpose would be served by requiring an offer of proof to contain the questions that would have been asked.

Jerome Edward DEGRATE, No. 989-85 --- Appellant's PDR Refused
-- Per Curiam Opinion, 7/9/86

PETITIONS FOR DISCRETIONARY REVIEW -- GUIDELINES FOR DRAFTING:

The Court refused Appellant's PDR because he "presented no reasons as to why this Court should review the opinion of the court of appeals". Here the D only presented 12 grounds for review which were an exact duplication of the grounds of error presented to the C/A; he presented no "reasons for review".

Tex.Cr.App.R. 304(d) provides that a PDR shall contain "Reasons for Review. A direct and concise argument, with supporting authorities, amplifying the reasons relied on for the granting of review."

Tex.Cr.App.R. 302(c) has a "non-exhaustive" list of six reasons to be considered in deciding whether to grant review on PDR. Court suggests that they be incorporated into the "reasons for review" portion of the PDR, and provides this guideline and warning:

"... the portion of the petition designated "Reasons for Review" should specifically address the court of appeals opinion and its effect on our jurisprudence. This presentation should not go into a detailed analysis, but should briefly set out relevant cases and statutes, and note any alleged misstatements or omission of relevant facts. A discussion of principles of law, without reference to the holding of the court of appeals, will usually be insufficient to persuade this Court to exercise its discretionary jurisdiction."

The Court also warns that an assertion that the court of appeals was in error as to some point of law, standing alone, may also be insufficient to require further review.

NOTE: On the same day that Degrade was handed down, approximately 30 other Appellant's PDRs were refused with the notation ("See Degrade") whereas an additional 30 were merely refused. The new appellate rules effective September 1, 1986, incorporate Rules 304(d) and 302(c) so Degrade will have continued validity.

Paul Tommy OJEDA, No. 966-82 -- Opinion on Appellant's PDR:
Court of Appeals and Trial Court Affirmed -- Judge W. C. Davis,
7/2/86 [See also Gonzales discussed next.]

LESSER INCLUDED OFFENSES -- WHAT EVIDENCE WILL BE SUFFICIENT TO RAISE "SUDDEN PASSION" ? TESTIMONY FROM THIRD PERSON THAT D WAS HIT AND HE RESPONDED WAS INSUFFICIENT TO RAISE.

D complained of t/c's failure to give requested charge on voluntary manslaughter based on testimony of his girlfriend that she and D were attempting to avoid the conflict [which the Court describes as an "ambush" by 15 people in The Summit parking garage] when they were struck by the deceased's belt. Court acknowledges that if evidence from any source raises issue, a defensive theory or lesser included charge should be given. Here, however, the evidence only presented an objective recitation of acts -- there was no evidence about D's apparent frame of mind, i.e., angry, scared, etc.

Isidro Sanchez GONZALES, No. 1148-84 -- Opinion on State's PDR: Court of Appeals Reversed, Remand for Consideration of Other Grounds -- Judge White, 7/2/86, Dissenting Opinion by Judge Clinton [Joined by Judges Miller and Teauge]

LESSER INCLUDED OFFENSES -- WHAT EVIDENCE WILL BE SUFFICIENT TO RAISE "SUDDEN PASSION"? TESTIMONY FROM DEFENDANT THAT HE WAS SCARED WAS INSUFFICIENT TO RAISE; NO AUTOMATIC RIGHT TO INSTRUCTION ON VOLUNTARY MANSLAUGHTER WHENEVER SELF-DEFENSE IS RAISED BY THE EVIDENCE: Facts: In a bar D witnessed confrontation between his friend and victim. D left bar first, and went to friend's car and waited. Victim exited club, and D saw him walk to his car and get something out of his trunk. Without being certain that victim had retrieved a gun, D got his friend's automatic pistol, left car and walked away. D testified that victim came up behind him and fired a shot. D turned and fired.

Court found that evidence clearly raised the issue that D had acted in self-defense. However, majority did not find that evidence indicated D acted under the immediate influence of sudden passion arising from adequate cause. In the majority's view, D indicated at most that he was scared of the victim. In the context of all of D's testimony, this fear of victim did not amount to terror which would qualify as "sudden passion".

The Court held it was incorrect to assume that a D feels sudden passion whenever a soon-to-be deceased victim provokes him with a gun and specifically disavowed language by the Court of Appeals holding that, "It would be difficult to imagine a specific event more likely to cause anger, rage, resentment or terror in a person of ordinary temper than to have someone aim a gun at you and fire."

Instead, the majority ruled that a "mere claim of fear" does not establish sudden passion and noted that D did not indicate through his testimony that he was emotionally aroused at the time

of the shooting.

DISSENT: Judge Clinton sets out D's testimony on direct examination and disagrees with majority's interpretation that D's testimony indicates he acted coolly in spite of his fear. He argues that the majority does not specify in what respect the evidence was found lacking and posits that majority seems to have established "that at least when the evidence raises self defense, before it may be said that it also raises voluntary manslaughter, there must be some additional showing, apart from the circumstances themselves, that appellant was in fact enraged, resentful or terrified." In contrast, Dissent cites cases under the former penal codes for proposition that evidence of some particularly grievous provocation by the deceased, besides tending strongly to establish adequate cause, can also serve as evidence that D was in fact provoked.

Arturo CASILLAS, et al, No. 304-84 -- Opinion on Appellant's PDR: Court of Appeals and T/C Affirmed -- Judge Miller, 7/2/86
JURY CHARGE -- INSTRUCTION LIMITING USE OF CO-CONSPIRATOR STATEMENT NOT REQUIRED; TEXAS WILL ADOPT FEDERAL JAMES TEST UNDER TEXAS RULE OF CRIMINAL EVIDENCE 104(a):

Facts: The complicated factual scenario is best summarized in the opinion; however, greatly simplified, the evidence showed that 5 Ds agreed to set up a corporation, capitalize it with funds from a Minority Enterprise Small Business Investment Corporation [called "Tejas"] of which they were directors, and then divide up the funds approximately equally among themselves in the form of loans to businesses they would own. That course of conduct was prohibited by the Small Business Admission regulation on conflicts of interest. Each D testified at trial and lengthy segments of each D's grand jury testimony was read before the jury.

On appeal Ds complained of t/c's refusal to give a limiting instruction to jury concerning admissibility of co-conspirators' hearsay. Relying on Lewis [237 S.W. 293 (1951)] Court noted that all of the Ds' own testimony was sufficient to authorize their convictions. There was no valid justification for the charge here because each of the hearsay declarants was at trial and testified to virtually the same decision to make the loans shown by the grand jury testimony.

Court notes that same result is indicated by Texas Rule of Criminal Evidence 104(a) effective 9/1/86. Court signals its desire to adopt the James [590 F.2d 575 (5th Cir. 1979)] rule rather than the prior Texas practice of shared responsibility between judge and jury in determining whether conspiracy existed and Ds were a part of it. Under James those are threshold considerations for t/j and NOT jury questions.

TERM "SUBSTANTIAL RISK OF LOSS" DEFINED FOR PURPOSES OF REVIEWING SUFFICIENCY: Ds were prosecuted for misapplication of fiduciary property under Section 32.45, an element of which is that the misapplication occurs "in a manner that involves substantial risk of loss to the owner of the property or to a person for whose benefit the property is held." The term "substantial risk of loss" is not defined in the penal code. Court adopts test that the risk must be, at least, more likely than not.

SBA REGULATION IS A "LAW" UNDER THIS SECTION: Section 32.45, P.C., includes in its definition of "misapply" any dealing with the property that is "contrary to ... (B) a law prescribing the custody or disposition of the property". For purposes of this section Court held that SBA regulation is such a law. To do so Court relied on Section 1.07 definition of law as including "a rule authorized by and lawfully adopted under a statute" and on Plaster [567 S.W.2d 500 (1978)] in which judicial notice was taken of two sections of the Code of Federal Regulations.

Robert Amaya et al, No. 304-84 -- Opinion on Appellant's PDR: Reversed and Acquittal Entered -- Judge Miller -- 7/2/86

"PARTIES" -- HIGHER LEVEL OF "COMPLICITY" REQUIRED FROM THOSE DENOTED PARTIES THAN THOSE DENOTED PRIMARY ACTORS: [Note: This is the companion case to Casillas, Supra.] Holding: When a defendant is being prosecuted as a party, he cannot be held criminally accountable without some indication that he knew he was assisting in the commission of an offense.

The Court recognizes that the distinction between the degree of complicity required for parties as contrasted with primary actors is one that had not been "directly made" by the Court before, and uses the term "primary actor" to denote one who would have been called a "principal" at common law and a "party" to denote one who would have been an "accomplice" at common law. Although the two defendants in this case [who were not shown by the evidence to be in a fiduciary capacity to the small business at the time they took part in the transaction] would be held liable as "primary actors" whether or not they realized they were breaking the law, in a prosecution as a "party", there would have to be a showing that they knew the conduct [dispensing funds to the fiduciaries] was criminal.

Judge Miller noted that typically, a defense to culpability under the law of parties tends to focus on ignorance of the conduct sought to be aided. He suggests that is because most Penal Code offenses involve conduct that is inherently "criminal" in nature -- conduct that by its very nature supplies proof of the parties' knowledge that the conduct is "criminal" [i.e., murder, kidnapping, sexual assault, perjury, bribery, robbery].

Jimmy Rex WHALEY, No. 365-84 -- Opinion on Appellant's and State's PDR: Conviction Affirmed, Court of Appeals Reversed -- Judge White, 7/2/86

[NOTE: This is a good example of what can happen on PDR. D won in Court of Appeals and cause was reversed and remanded. D filed for rehearing and Court of Appeals withdrew its original opinion and once again reversed. D, although victorious, sought PDR on Speedy Trial ground. Review was granted. State in turn sought and was granted PDR on the two grounds that were sustained by Court of Appeals in reversing. End result was that State's position prevailed on PDR and original conviction was affirmed.]

SPEEDY TRIAL ACT -- WHAT HAPPENS WHEN SAME OFFENSES ALLEGED AS VIOLATION IN ORGANIZED CRIME ACT COUNT AND IN SEPARATE COUNT, AND THREE INDICTMENTS ARE FILED -- EACH REFINING INITIAL INDICTMENT BY ADDING AMOUNTS OF SUBSTANCE OR MANNER OF TRANSFER? SHOULD ANNOUNCEMENT UNDER 1ST INDICTMENT CARRY FORWARD? D was indicted three times and argued on appeal that the offenses alleged in the 1st and 2nd indictments were different offenses than those alleged in the 3rd (and final) indictment:

5/21/82	D arrest for delivery of hydromorphone and marijuana
6/18/82	1st indictment -- alleges unlawful delivery of hydromorphone and marijuana under both Organized Crime Act and Controlled Substances Act
6/22/82	State's written announcement of ready
8/24/82	2nd indictment -- like 1st but sets out amount of controlled substance and that delivery made by actual transfer. Also alleges 2 additional counts of possession.
8/24/82	State's written announcement of ready
11/8/82	D granted M/Continuance
11/12/82	3rd indictment -- in addition to 1st indictment allegation of delivery and 2nd indictment allegation of amounts, this final indictment alleged manner and means of delivery by actual and constructive transfer. Did not contain 2nd indictment's allegations of possession. State's written announcement of ready

12/6/82

Trial on 3rd indictment.
State drops OCE charge.
D convicted on unlawful delivery under
TCSA.

Noting that the offenses of unlawful delivery of hydromorphone and marihuana are subject to exactly the same proof whether included in the same count as an Organized Crime Act violation or alleged in a separate count, Court found that the unlawful delivery charges in 1st indictment were the same cases as in 2nd and 3rd indictments; therefore, Rosebury [659 S.W.2d 655 (1983)] inapplicable. First announcement of ready carried compliance with STA forward to 3rd indictment.

NO DEFINITION OF "CONSTRUCTIVE TRANSFER" -- NOT ERROR UNDER FACTS AND CHARGE GIVEN: The term "constructive transfer" has no statutory definition but has acquired a caselaw meaning [Rasmussen, 608 S.W.2d 205 (1980)]. T/C did not give jury a specific definition of constructive transfer but error was harmless because jury was charged on law of parties and evidence showed D delivered the controlled substances and received the money through the actions of a 3rd person.

Robert Roy ROBBINS, No. 513-84 -- Opinion on Appellant's Motion for Rehearing on PDR: Conviction Reversed, Remanded to Court of Appeals -- Judge W.C. Davis -- 7/2/86

JURY CHARGE -- INTERPLAY BETWEEN CAUSATION [Section 6.04(a)] AND INVOLUNTARY MANSLAUGHTER [Section 19.05(a)(2)]: Facts: St offered evidence to prove that D was intoxicated at time of accident and that such intoxication caused the collision and death of the victim. D's defense was that accident was due to his exhaustion and not due to his consumption of several beers, although he admitted drinking them. The jury charge as a whole alternated between stating that the jury must find that "by reason of such intoxication" D caused the death, and then allowing conviction if intoxication "contributed to cause the same" without explaining the limits of the contribution required by Section 6.04(a). D objected at trial that the charge lessened St's burden on proof on causation.

Held: Charge improper because jury could have found D guilty even though they concluded that the concurrent cause [exhaustion] was clearly sufficient to have produced the death and that the other cause [intoxication] while it contributed, was clearly insufficient by itself to have produced death. Case remanded to Court of Appeals for harm analysis under Almanza.

* * * Identical issue in Gary Bill CRABB, No. 391-85 decided on same date and also remanded to Court of Appeals for Almanza harm analysis.

* * * * *

C O U R T S O F A P P E A L S

Samuel Ervin OLIVER, No. 02-85-132-CR -- Aggravated Assault Conviction Reversed and Remanded -- Tarrant County, 6/26/86

FAILURE OF STATE TO PRODUCE WARRANT WHEN DEFENDANT CHALLENGES ADMISSION OF EVIDENCE WHICH IS FRUIT OF ARREST UNDER WARRANT IS ERROR:

C/A recognizes that where accused objects to introduction of evidence, claiming it is unlawfully seized, and State relies on search or arrest warrant to justify introduction, State must produce the warrant. C/A holds that same rule applies when accused objects to the form of the warrant "since the purpose for the production of the warrant is for the trial court to ascertain that it is regular on its face, meeting all necessary requirements."

Samuel R. GERSH, NO. 05-85-635-CR -- Criminal Mischief Conviction Reversed and Remanded -- Dallas County, 6/30/86

PRESUMPTIONS: "TAMPERING WITH UTILITY METER" PRESUMPTIONS UNCONSTITUTIONAL AS APPLIED:

Section 28.03, V.T.C.A., Penal Code, dealing with tampering with a utility meter, includes a presumption that:

"it shall be presumed that a person in whose name ... [the utility] was last billed and who was receiving economic benefit of said ... [utility], has knowingly tampered with the ... [meter] if the communication or supply has been: (1) diverted from passing through a metering device; or (2) prevented from being correctly registered by a metering device."

C/A notes that evidentiary devices, such as presumptions, must not shift the burden of proof to the accused or relieve the fact finder's responsibility to find the ultimate facts beyond a reasonable doubt. Such presumptions are unconstitutional unless it can "at least be said with substantial assurance that the presumed fact is more likely than not to flow from the proved fact on which it is made to depend", citing Leary v. United States, 395 U.S. 6 (1969) Analyzing presumption in Sec. 28.03, C/A determines that fact consumer last got the bill does not support presumption that consumer tampered with meter. The use of presumption was unconstitutional as applied.

Review of Procedures

continued from page 8

transferring specimens and distillates should be in good condition and of proper quality. Analytical grade volumetric glassware is required in this and all analytical procedures to insure that accurate quantities are transferred and collected. Prior to beginning this analysis procedure, all glassware should, therefore, be inspected as to quality, cleanliness and dryness.

Precision in delivering volumes of material should be employed to insure correct amounts. Of particular importance is the measurement of the one milliliter portion of the alcohol distillate to be reacted with the oxidizing reagent. It should be noted here that volumetric glassware is calibrated in two manners; both to contain a certain volume at a certain temperature and to deliver a certain volume at a given temperature. Deviations in this prescribed temperature affect the amount of liquid measured.

The usage of repipetting devices is common practice for dispensing procedural reagents in high volume blood alcohol laboratories. These devices are utilized to deliver specific volumes of reagents in the blood alcohol analysis procedure, including the oxidizing reagent. Their advantage over single reagent measurements is rapidity. These repipetting devices should be checked at each test, however, to insure accurate and consistent delivery of specific amounts.

A reduction in the amount of oxidizing reagent delivered would have a direct impact on the blood alcohol results, producing an erroneously high reading. Likewise any fluctuations in reagent volumetric measurements have a direct effect on the accuracy and integrity of the blood alcohol calibration curve and the resultant analysis chart.

Interfering contaminants contained in the water used in this procedure should be considered. Although the examining laboratory probably distills its own water, the possibility of this water containing foreign materials exists and should therefore be checked at each analysis run. Any foreign material present in this, as a result of improper distillation procedures, could be oxidized by the dichromate solution giving rise to a high or false positive alcohol reading. Due to many factors, including

time considerations and low caseload priority, blood alcohol specimens are typically collected at an individual laboratory until many specimens can be analyzed at once.

This procedure can lead to prolonged storage of these samples in variable environmental conditions (which may produce putrefaction volatiles in some samples), long delays in reporting results and the opportunity for increased error while manipulating several specimens at once. Caution should be exercised by the analyst to protect against specimen contamination and switching. Ideally, only one specimen of evidentiary blood should be opened at one time. This would obviously retard the analysis time, but would in fact preserve the integrity of each sample. Considering the legal implications which may result from this procedure, such a safeguard is imperative.

Spectrophotometers used in this procedure are readily available from a number of sources. Whatever spectrophotometer is utilized by the examining laboratory, it should be inspected on a regular basis to insure proper functioning and proper results.¹⁹ This inspection should be performed and documented by an authorized/recognized instrument specialist willing to certify its instrumental accuracy. Any necessary repairs should be documented, and should also be available for inspection. The results from these properly maintained photometers can generally be considered accurate, providing the results of a distilled water blank and a known alcohol solution fall within acceptable ranges.

Although not commonly encountered, the possibility of interfering substances present in the blood of living subjects does exist. These possible contaminants can produce erroneous false positives, and should therefore be screened for their presence. Additionally, contaminants may be introduced by virtue of the collection of these blood specimens in both living and deceased subjects and should likewise be screened. Five common contaminants are acetaldehyde, acetone, isopropyl alcohol and methyl alcohol.²⁰

Gas Chromatography

Some of the possible errors mentioned above may be eliminated by employing other analysis procedures. One such pro-

cedure is gas chromatography, which offers a reduction of many of the problems inherent in the above procedure. It, however, like most procedures has both strengths and weaknesses which we will attempt to explore.

Gas chromatography is not new in its theory or its research applications. However, only within recent memory has the design of the instrumentation and practical procedural applications thrust the gas chromatograph into the mainstream of accepted and required crime laboratory instrumentation. This advance in usage has resulted largely in design advances, which have produced reliable and rugged instruments capable of handling the rigors of a high volume laboratory setting. Previous to this advance, gas chromatographs presented the chromatographer with an alternate method of analysis, with questionable instrumental reliability. With new advances in design came advances and discoveries as to its wide range of practical laboratory applications.

As laboratory instrumentation goes, the gas chromatograph is relatively simple both in operation and design. Basically, the gas chromatograph is a temperature controllable oven, containing either glass or metal coiled columns ranging in length from 1 meter to 30 meters. Samples of either vapors or liquid samples are injected into these columns, which may cause the individual components to separate and exit the columns at different times. The degree of separation varies according to many factors such as the packing material contained in the columns, the rate of flow of gases which push the samples through the columns, the nature of the sample composition and the temperature parameters used in each individual analysis.

Upon exiting these columns, the various components of each sample are passed through a detector which causes a signal to be relayed to a strip chart recorder. The resultant chart is referred to as a chromatogram. This chromatogram may contain few or many peaks or spikes, depending on all of the separation parameters listed above, which by location represent the time required to pass through the column (retention time) and by the height of each peak represent the strength of the signal produced. This peak height is translatable into the respective amount of each component present.

Samples presented to the gas chromatograph may either be introduced as vapors or liquids, as mixtures or single component samples.

In the specific application of blood alcohol analysis by gas chromatography, direct analysis of the blood presents possible damage to the column material and precise measurement problems. As a result, the common procedural technique involves the precise measurement of 1 ml of blood to be placed in a septum capped container with a known quantity of an internal standard (usually N-propanol) and a small amount of NaCl (common table salt) to reduce surface tension. This septum capped container is either heated or allowed to equilibrate to room temperature. Vapors of the volatile N-propanol and alcohol (ethyl) form a layer of a vapor above the liquid sample (headspace) in the same proportions that exist in the liquid itself. Therefore, by withdrawing a sample of this headspace and injecting it into the gas chromatograph, we will produce a chromatogram containing a peak representing N-propanol and a peak representing ethyl alcohol. By measuring the relative ratio of the two peaks and correlating their value to a known .10% N-propanol and a known .10% ethyl alcohol, the alcohol content of the unknown blood specimen may be determined.

Advantages Over the Dubowski Method and Possible Sources of Error

As a working methodology, this procedure provides an acceptable and rapid method of alcohol measurement, if done correctly. This procedure's advantages over the Dubowski procedure include less opportunity for operator error involving the manipulation of measuring devices, length of analysis time and less cleanup.

Additionally, calibration curves are not required as the gas chromatographic technique is assumed to be linear, i.e., to produce ratios of N-propanol/ethyl alcohol response factors which are correlatable to the standard, regardless of the amount measured. This linearity does not, however, strictly hold and the relative response of these components may change as does their concentrations. It is these response changes which may produce erroneous results. Another error inherent in this method

is the actual measurements of the blood to be tested, the standard sample, and the N-propanol internal standard, which is added to each unknown blood specimen. Each of these measurements is critical to the precision of this procedure. Viscosity of the blood to be examined should also be considered as a possible source of error, as its accurate measurement is related to its viscosity. This factor may also contribute to differences in the vapor phase concentrations of volatile components when compared to standard alcohol solutions which do not contain blood.

Aside from typical error sources encountered in any physical measurement, the gas chromatographic blood alcohol procedures, as used in most crime labs, employs only a single column identification. Current scientific opinion agrees that such a single column run is not specific and should be considered presumptive at best. To produce a positive and complete identification of any substance utilizing gas chromatographic procedure it is necessary to employ a dual column procedure. Although this procedure is capable of isolating specific volatile components in a given mixture, correct analysis parameters have to be established in order to do so. Further, in a single column procedure there is the distinct possibility that volatile contaminants or other substances can produce falsely high readings or false positives.

Conclusion

Any attempt to precisely measure alcohol in blood demands rigid attention to detail on the part of the analyst and specific quality control guidelines in the laboratory system. Without adherence to these guidelines, there can be no assurance as to the reliability of any result.

In light of this need for quality control in the analysis of blood alcohol specimens and other analytical procedures, it has become, or at least it should be, a major consideration for all laboratories conducting forensic examinations. Both internal and external monitoring of results should be employed. Indeed, the legislature should establish certification of testing apparatus, procedure and personnel as it has in breath testing. Some laboratories conduct multiple analyses and report any deviations that

occur if they exceed $\pm 10\%$. Quality assurance in the laboratory should be explored in detail by the court, the prosecutor and by the defense attorney. Otherwise they have no guarantee as to the validity of results that may ultimately decide the citizen accused's guilt or innocence.²¹

1. Federal statistics show there were 38,000 fatal auto accidents in 1983 resulting in the deaths of 42,600 people. "About 65 percent of the fatal accidents were alcohol related." *Houston Chronicle*, p. 6, col. 1-3, October 17, 1984.
2. Mothers Against Drunk Drivers (MADD) have compiled a summary of statistics on Alcohol-Related Crashes. Their figures, which are based upon reports of the National Highway Traffic Safety Administration and the National Safety Council provide:
 - 250,000 people have died during the past decade
 - presently over 25,000 people are killed each year
 - about 500 people are killed each week
 - nearly 70 people are killed every day
 - one person dies every 21 minutes
 - 650,000 persons are injured each year
 - 125,000 persons are permanently injured each year
 - 1,000,000 collisions occur each year
 - over 50% of all fatal highway crashes involve two or more cars
 - over 65% of all fatal single car crashes
 - leading cause of death for Americans between 16 and 24 years of age
 - persons between 16 and 24 years old cause 44% of all nighttime fatal crashes, even though they comprise only 22% of the total licensed population and 24% of the total vehicle miles travelled by all-aged licensed drivers
 - 36% of all adult pedestrian accidents involve an intoxicated pedestrian
 - for Americans up to 35 years of age, the motor vehicle crash is the number one cause of death (over 50% are alcohol-related)
 - 30% of all fatal crashes between 8 p.m. and 8 a.m.
 - on an average weekend night, one out of every ten drivers is legally impaired or drunk
 - of every 2,000 drunk drivers, only one is arrested (and the chance of receiving a serious penalty is statistically insignificant)
 - create economic costs to the American taxpayer of about \$24 billion yearly
 - when drinkers are at the presumed level of intoxication, the risk of causing an accident is six times greater than non-drinkers
 - drunk driving is the most frequently committed violent crime in the nation
3. National anti-intoxicated driver efforts have turned into a genuine grassroots movement. "In most states, organizations such as Mothers Against Drunk Drivers (MADD), Students Against Drunk Drivers (SADD) and Remove Intoxicated Drivers (RID) have effectively lobbied for stricter DWI legislation. *Time*

Magazine, (Sept. 1983). This information distributed by the Rosenberg, Texas, Chapter of MADD in a leaflet entitled "Face Facts" (1984).

4. "Intoxication" is defined by statute at article 67011-1(a)(2), Tex. Rev. Civ. St. as:

(A) not having the normal use of mental or physical faculties by reason of the introduction of alcohol, a controlled substance, a drug, or a combination of two or more of those substances into the body; or
(B) having an alcohol concentration of 0.10 percent or more.

5. "Alcohol concentration" is defined by statute at article 67011-1(a)(1), Tex. Rev. Civ. St. as:

(A) the number of grams of alcohol per 100 milliliters of blood;
(B) the number of grams of alcohol per 210 liters of breath; or
(C) the number of grams of alcohol per 67 milliliters of urine.

6. MOSES, SCIENTIFIC EVIDENCE IN CRIMINAL CASES (1973) 239. MOSES also states at p. 239 and 294, that:

The most reliable chemical test for intoxication is a direct analysis of the brain tissue; but its use is obviously confined to corpses, before decay and putrefaction. So is the analysis of spinal fluid. The other tests suitable for use on living persons are limited to analysis of the blood, urine, and the breath. Of these practical methods, a direct analysis of the blood is considered the most reliable. The main limitations to this testing method are the necessity of having a doctor or qualified medical technician obtain the sample under sterile conditions, the evidentiary requirement of preserving the chain of evidence, and the fact that many persons are hesitant to consent to having a needle stuck in their veins. Because of these and other limitations, blood analysis as a test for intoxication has not been as widely used in the United States as, for example, breath tests.

- 6a. See generally SAFERSTEIN, FORENSIC SCIENCE HANDBOOK (1982) [hereinafter cited as SAFERSTEIN].

7. MOSES at 239 states:

The purpose of chemical tests for intoxication is not to determine how much alcohol a subject has drunk but rather to determine how much alcohol has reached the body fluid (blood) which carries it to the brain where it disrupts the brain's normal function. Taking into account the numerous laboratory methods for analysis of blood and urine to determine the presence of alcohol and to determine its concentration, no test has gone unquestioned with regard to its accuracy and specificity.

Chemical determination of blood alcohol levels by analysis of blood or urine is quite complicated. Even when the test is valid and accurate in principle, error is possible whenever the analyst is careless or incompetent, or if the specimen was contaminated at the time it was taken, or subsequently.

8. Art. 67011-5, Sec. 3(e) provides the only statutory guidelines for blood specimen withdrawal. The law states:

When a person gives a specimen of blood at the request or order of a peace officer under the provisions of this Act, *only a physician, qualified technician, chemist, registered professional nurse, or licensed vocational nurse under the supervision or direction of a licensed physician may withdraw a blood specimen* for the purpose of determining the alcohol concentration or presence of a controlled substance or drug therein. The sample must be taken by a physician or in a physician's office or a hospital licensed by the Texas Department of Health. This limitation shall not apply to the taking of specimens of breath, urine, or bodily substances other than blood. The person drawing the blood specimen at the request or order of a peace officer under the provisions of this Act, or the hospital where that person is taken for the purpose of securing the blood specimen, shall not be held liable for damages arising from the request or order of the peace officer to take the blood specimen as provided herein, provided the blood specimen was withdrawn according to recognized medical procedures, and provided further that the foregoing shall not relieve any such person from liability for negligence in the withdrawing of any blood specimen. Breath specimens taken at the request or order of a peace officer must be taken and analysis made under such conditions as may be prescribed by the Texas Department of Public Safety, and by such persons as the Texas Department of Public Safety has certified to be qualified. (Emphasis is the author's.)

The author finds it puzzling that there are strict Department of Public Safety regulations for the admissibility of breath testing but there are none whatsoever with regard to blood testing. This seems particularly odd when one considers breath testing is a non-invasive body procedure and blood testing is invasive. Moreover, all breath test personnel must be trained and cer-

tified by the Texas Department of Public Safety but blood test personnel do not. Of all five persons the statute authorizes to withdraw blood, only "qualified technician" is incapable of being defined by the average person. As such, it is vague and overly broad and must be stricken from the remainder of the statute as it is constitutionally infirm.

1. "Physician" can be defined as per the Medical Practice Act, Art. 4495b. See also §1.03(7) and (8) [definitions]; §3.01 [licensure]; and, §3.04 [qualification of licensee, e.g., (4) graduate of medical school].
2. "Chemist" can be defined as per WEBSTER'S NEW COLLEGIATE DICTIONARY (1979) at 189, as "one trained in chemistry." Moreover, college graduation with a degree in chemistry requires completion of a minimum of 43 college credit hours in chemistry. (See attached Exhibit A: University of Houston B.S. and B.A. Degree requirements; See also Exhibit B: University of Houston Advanced Degree requirements).
3. "Registered professional nurse" can be defined as per Art. 4518. See also §1 which requires a minimum of two years of academic training.
4. "Licensed vocational nurse" can be defined as per Art. 4528(C) as "person who is licensed by the Board of Vocational Nurse Examiners."

The statutory designations of "physician, chemist, registered professional nurse, and licensed vocational nurse" are all capable of being either statutorily or academically defined, or both. All such definitions guarantee a minimum standard of education and training and offer some degree of protection to the public in assuring there will not be any injury or great risk to a person submitting to a blood specimen withdrawal. Moreover, all persons have a right to refuse requests

continued on page 14

Harris County Officers and Directors

The Harris County Criminal Lawyers Association has recently held its annual election of Officers and Directors for 1986-87. The results are as follows:

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DWI Practice Gems

by J. Gary Trichter

Driving while intoxicated criminal cases are ripe with numerous legal issues for the innovative practitioner. Accordingly, the following is offered as food for thought in your practice. In this regard, the author also invites your inquiries, suggestions and comments.

Introduction

Our Texas Code of Criminal Procedure has specific rules for the drafting of charging instruments. These rules, when used creatively, can possibly give rise to fruitful issues on appeal. Indeed, this is especially true where, like the new DWI .10 "per se" offense, the issue has not been the subject of extensive appellate review.

NO. _____
THE STATE OF TEXAS § IN THE COUNTY CRIMINAL
vs. _____ § COURT AT LAW NO. _____
_____ COUNTY, TEXAS

MOTION TO COMPEL ELECTION BETWEEN CHARGING PARAGRAPHS

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW the Defendant, by and through his counsel, in the above-styled and numbered cause, and respectfully requests this Honorable Court to require the State to make an election as to which paragraph it intends to offer evidence on in its case in-chief. In support hereof, counsel for the Defendant would show:

I.

Article 21.23, Tex. Code Crim. Pro., provides that "the Rules with respect to allegations in an indictment and the certainty required apply also to an information."

II.

The Defendant herein is charged by information with the offense of driving while

intoxicated (DWI). Specifically, the first paragraph provides the Defendant was intoxicated because his normal mental and physical faculties were impaired (impairment). Further, the second paragraph of the information alleges the Defendant was intoxicated because he had an alcohol concentration greater than .10 in his body (per se).

III.

Accordingly, the State as per Article 21.24, Tex. Code Crim. Pro., has joined and pled two offenses in the information with each offense stated in a separate count. The offenses herein arose out of the same criminal episode.

IV.

The two separate charging paragraphs in the information allege two separate and distinct offenses even though they are both named DWI. Specifically, it is clear that proof of the impairment prosecution is different from the proof in a .10 per se prosecution and vice versa. See Attorney General Opinion No. 68 (Tex. 8/16/83) and *Scherlie v. State*, 689 S.W.2d 294 (Tex.Ct.App.—Houston [1st Dist.] 1985) (providing that the new "per se" provisions define a new offense which is a separate, independent, and additional way in which DWI may be committed).

V.

Only one conviction can be had where the single charging instrument alleges two offenses arising from the same transaction, regardless of the validity of the joinder of the two offenses into one information. *Ex parte Ellison*, 699 S.W.2d 218 (Tex.Crim.App. 1985) and *Ex Parte Siller*, 686 S.W.2d 617 (Tex.Crim. App. 1985). Indeed, the trial court is without legal authority to enter judgment and pass sentence for more than one offense when two or more offenses are charged in an information. *Drake v. State*, 686 S.W. 2d 935 (Tex.Crim.App. 1985).

VI.

When separate and distinct offenses are alleged in one information which arise from the same criminal transaction, at the request of a defendant the State should be forced to elect upon which count or transaction it will prosecute. *Drake*, 686 S.W. 2d at 944-945, and, *Ex parte Siller*, 686 S.W.2d at 621.

WHEREFORE, PREMISES CONSIDERED, the Defendant respectfully prays that this Honorable Court require the State to elect on which paragraph it will proceed to the jury.

Respectfully submitted,

ATTORNEY

POST SCRIPT: What do you do after the Court overrules your Motion? Request a jury verdict form which requires conditional and specific findings of guilt/innocence. This request, coupled with the aforementioned motion builds a double jeopardy issue into your client's case.

Step 1: Request the following verdict form:

NO. _____
THE STATE OF TEXAS § IN THE COUNTY CRIMINAL
vs. _____ § COURT OF LAW NO. _____
(Defendant's name) § _____ COUNTY, TEXAS

1. Mental Faculties

We, the Jury, find the defendant "not guilty" of driving a motor vehicle while the normal use of his mental faculties were impaired.

Foreman

We, the Jury, find the defendant "guilty" of driving a motor vehicle while the normal use of his mental faculties were impaired.

Foreman

II. Physical Faculties

We, the Jury, find the defendant "not

guilty" of driving a motor vehicle while the normal use of his physical faculties were impaired.

Foreman

We, the Jury, find the defendant "guilty" of driving a motor vehicle while the normal use of his physical faculties were impaired.

Foreman

III. .10

We, the Jury, find the defendant "not guilty" of driving a motor vehicle while having an alcohol concentration of .10 or more.

Foreman

We, the Jury, find the defendant "guilty" of driving a motor vehicle while having an alcohol concentration of .10 or more.

Foreman

Step 2: Submit the following Memorandum:

NO. _____

THE STATE OF TEXAS § IN THE COUNTY CRIMINAL
vs. § COURT AT LAW NO. _____
§ _____ COUNTY, TEXAS

MEMORANDUM IN SUPPORT OF DEFENDANTS
REQUESTED *CONDITIONAL AND SPECIFIC*
VERDICT FORM

The Defendant requests the trial court to submit his requested conditional and specific verdict form which allows the jurors to specifically designate, as to each of the DWI offenses charged, whether the defendant is found innocent as to the particular offenses charged or guilty as to one of the particular offenses charged but not as to the others.

If the trial court submits a general jury verdict form, it creates for itself a scenario wherein a defendant can be silently found "not guilty" as to one of the offenses charged or the jury could render a

nonunanimous verdict on the issue of intoxication. For example, with regard to the "impairment" DWI offense, the jury could find the defendant innocent of not having his "mental" faculties impaired, but guilty of his "physical" faculties being impaired, or, *vice versa*.

In addition, with regard to the "impairment" and "per se" DWI offenses, the jury could find the defendant innocent of the "impairment" offense but guilty of the "per se" offense, or, *vice versa*. Further, with regard to the element of "intoxication," the jurors could split their decision as to whether the defendant was intoxicated by "impairment" or "per se." Indeed, were this to occur the verdict would be a nonunanimous decision on the proof of facts but a unanimous decision on the elements, e.g., 3 jurors could vote "per se" and 3 jurors could vote "impairment."

In a case where the trial court does not submit the defendant's requested conditional and specific jury verdict form, there will be an ambiguity created by the trial court's nonspecific verdict form. Such an ambiguity will make it impossible to determine just how the jury actually voted. Moreover, a general verdict unconstitutionally allows a nonunanimous verdict on the specific manner and means of intoxication and impairment.

With regard to the "impairment" DWI offense, it must be noted that different proof is required for the State to prove beyond a reasonable doubt impairment of *mental* faculties versus impairment of *physical* faculties. Indeed, proof of one is insufficient to show proof of the other.

Moreover, it must be remembered the defendant's focus herein is not solely on the element of "impairment," but rather, is on the *sub-elements* of "mental" and "physical." Accordingly, the double jeopardy provisions of the State and Federal Constitutions, and the collateral estoppel provisions implied therein require such specificity.

In addition, with respect to the "impairment" and "per se" DWI offenses, it is clear that there exist under Texas law two separate and independent DWI offenses. See, Tex. Attorney General Opinion No. 68 (8-16-83); *Forte v. State*, 707 S.W.2d 89 (Tex. Cr. App. 1986), *Scherlie v. State*, 689 S.W.2d 294 (Tex. Ct. App. [1st Dist.-Houston] 1983) (reviewed denied 1984), and *Reinsmith v. State*, 703 S.W.2d

315 (Tex. Ct. App. [14th Dist.-Houston] 1985). Again, because there are at least two separate and distinct DWI offenses, the double jeopardy provisions of the State and Federal Constitutions require jury verdict specificity in order that a defendant not be placed in jeopardy again for an offense he received an acquittal. Moreover, with respect to the issue of "intoxication," it is clear there must be jury unanimity on the manner and means of intoxication. Clearly, there must be unanimity on either impairment or per se and not simply a split vote on intoxication, e.g., not three jurors for impairment and three jurors for per se. *Burch v. Louisiana*, ___ U.S. ___, 99 S.Ct. 1623 (1979).

The defendant believes there is a more important question than "of which crime he was convicted." It is of what element or of what crime was he *not* convicted. See *cf.*, *Ashe v. Swenson*, 397 U.S. 436, 90 S.Ct. 1189 (1970) (double jeopardy clause incorporates collateral estoppel as a constitutional requirement—doctrine of collateral estoppel precludes relitigation of issues (or elements) already determined). The answer to this question becomes of critical importance once the State and Federal Constitutional guarantees against double jeopardy and due process are brought into play. Unquestionably, both constitutional double jeopardy privileges and due process guarantees promise that a citizen, once acquitted, need never face the same charge again and that if convicted, that it be by an unanimous verdict of the jury.

However, in this case, should the Court fail to give the jury a conditional and specific verdict form and the defendant is found guilty of DWI, the Accused might then be unable to assert the privilege against double jeopardy on the elements (mental or physical) or offenses (impairment or per se) he was acquitted of because of the ambiguity in the trial court's nonspecific verdict form. *Ferguson v. State*, 314 S.W.2d 601 (Tex. Cr. App. 1958). See also, *State v. Thompson*, 674 P.2d 895, 900 (Ariz. App. Div. 2, 1983)

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(Rev. denied 1/10/84).

Indeed, it might be the case where the trial court submits a nonspecific verdict form, that any verdict by the jury would be void. Accordingly, because of the aforementioned problems involved in a retrial of this case the defendant, on double jeopardy and under due process/due course of law grounds, the Defendant respectfully requests this Honorable Court

to submit to the jury his requested conditional and specific jury verdict form.

Respectfully submitted,

ATTORNEY

CERTIFICATE OF SERVICE

I hereby certify that a true and correct

copy of the above and foregoing Memorandum has been furnished to the Assistant District Attorney presently assigned to this case by hand delivery on this the ____ day of _____ 1986.

ATTORNEY

Review of Procedures

continued from page 11

for blood alcohol specimens wherein the specimen is going to be drawn by an individual acting without statutory authority. Therefore, it is reasonable that a person could refuse a specimen request where said blood withdrawal might or would present a danger or risk to his health. In these circumstances a "refusal" to give a blood specimen, as per Article 67011 §3(g), would ostensibly not be admissible. Accordingly, absent a clear definition of the term "qualified technician" an average person would not know he could legally refuse a blood specimen request and not be penalized.

The term "qualified technician" is not capable of either statutory or academic definition. It offers no minimum standard of protection for the public with regard to blood specimen withdrawal. Accordingly, the term "qualified technician" is overly broad and vague and is offensive to the due process/due course of law provisions of the federal and state constitutions.

9. This expense disadvantage is shared not only by the State, but also by the citizen accused. As per Art. 67011-5, Sec. 3(d) a defendant, under a broad reading of the statute, has a right to a subsequent laboratory analysis of the blood specimen taken by the State. The statute provides: The person who gave a specimen of breath, blood, urine, or other bodily substances in connection with this Act may, upon request and within a reasonable time not to exceed two hours after the arrest, have a physician, qualified technician, chemist, or registered professional nurse of his own choosing draw a specimen and have an analysis made of his blood in addition to any specimen taken and analyzed at the direction of a peace officer. The failure or inability to obtain an additional specimen or analysis by a person shall not preclude the admission of evidence relating to the analysis of the specimen taken at the direction of the peace officer under this Act.
10. See generally, Bradford, "Concepts and Standards of Performance in the Technique of Alcohol Analysis of Physiological Specimens" from the Proceedings of the Symposium on Alcohol and Road Traffic, Indiana Center for Police Training, Indianapolis, Indiana (1958) [hereinafter cited as Bradford]. See generally also, SAFERSTEIN.
11. See Kaufman v. State, 632 S.W.2d 685 (Tex. App.—Eastland 1982) (Use of a solution containing alcohol to cleanse skin before blood test administered to motorist did not make result of

test inadmissible as a matter of law in prosecution for misdemeanor offense of driving while intoxicated, but merely affected weight to be given result obtained).

12. The degree of error which would result through use of alcohol sterilization is dependant on: the strength of the alcohol used; the wetness of the area sterilized at the time of blood withdrawal; and, the time elapsed between the sterilization and the taking of the blood.
13. See generally Fitzgerald and Hume, *Erroneous Expert Opinions in the Civil and Criminal Trial of Intoxication Cases: Widmark Revisited*, — *the Champion* 6, (198) (official Journal of the National Association of Criminal Defense Lawyers).
14. See generally ERWIN, DEFENSE OF DRUNK DRIVING CASES (1984), chapters 15 and 17.
15. *Mersiovsky v. State*, 638 S.W.2d 527, 529 (Tex. App.—Tyler 1982) and *Gomez v. State*, 352 S.W.2d 732, 735 (Tex. Cr. App. 1961).
16. Dubowski and Withrow, *A Photometric Micro-determination for Ethyl Alcohol in Biological Materials*, 63 Proceedings of Iowa Academy of Science 364 (1956).
17. The Dubowski Method may be found in the text by the National Safety Counsel entitled *ALCOHOL AND THE IMPAIRED DRIVER* (1970).
18. The calibration curve and laboratory notes ought be discoverable as per Art. 39.14, Tex. C. Cr. Pro. and Art. 67011-5, Sec. 3(e). The latter provides:
Upon the request of a person who has given a specimen at the request of a peace officer, full information concerning the analytical results of the test or tests of the specimen shall be made available to him or his attorney.
19. It should again be noted that alcohol breath testing equipment, to be valid for evidentiary purposes, as per Texas Department of Safety Regulations, must be not only certified for testing, but also periodically inspected. No such certification or periodic inspection of blood alcohol testing equipment is required for admissibility of blood analysis results. In the author's opinion, blood alcohol analysis ought be treated the same as breath alcohol analysis and have required certification and periodic inspection.
20. See also generally, Harger, *A Simple Micromethod for the Determination of Alcohol in Biological Material*, J. Laboratory & Clinical Medicine, 746 (1934). See also, Friedman and Brook, *The Identification and Determination of Volatile Alcohols and Acids*, J. Biological Chem. 161 (1938).
21. Consideration should be given to several specific areas when inspecting or establishing a quality

assurance program. The following outline details the general areas of consideration.

- I. Laboratory Staff
 - A. Basic qualifications
 - B. Additional Training
 - C. Proficiency continuance for individual analyst
 - 1) Continuing education
 - 2) Minimum caseload to maintain proficiency in analytical procedures
 - 3) Documentation of training and analytical proficiency
- II. Procedures
 - A. Environmental Conditions
 - 1) Radio frequency interference
 - 2) Temperature, humidity and ventilation control
 - 3) Noise levels
 - 4) Adequate electrical current for instrumentation to insure proper line voltage
 - 5) Proper storage for required reagents
 - 6) Proper documentation of the above conditions
 - B. Laboratory Integrity and Security
 - 1) Evidence storage
 - 2) Chemical standards
 - 3) Access to lab
 - 4) Chain of custody
 - 5) Proper documentation of the above items
 - C. Laboratory Equipment
 - 1) Calibration of instrumentation
 - 2) Suitability/reliability
 - 3) Materials used in analysis
 - a) Standards
 - b) Chemicals
 - c) Supplies
 - 4) Proper documentation of above items
- III. Methods
 - A. Analysis Procedures
 - 1) General guidelines
 - 2) Individual method guidelines
 - 3) Documentation of analysis procedures
 - B. Evaluation and Consideration by Outside Party
- IV. Report Writing
 - A. Format
 - B. Opinions
 - C. Review
- V. Proficiency Evaluation: Sample Checks
 - A. In house
 - B. External sources
 - C. Evaluation and documentation of these results

Forensic Science News

Sampling: Systematic and Random Errors Part I



by Craig Tannahill and Pat H. Donley
Forensic Associates—Lubbock, Texas

The next three columns in this space will be devoted to discussing concepts that are basic to any chemical analysis. It is hoped that the discussion of these concepts on a basic level will assist in the understanding of the underlying principles on which much of the literature used to assist in the preparation of cases involving chemical tests is based. Although some specific examples will be used to illustrate important points, the concepts of sampling, systematic and random error apply to any chemical analysis. Also, where applicable, generally accepted techniques to eliminate or correct these errors will be given.

A chemical analysis begins with the collection of the sample to be tested. The interpretation of all subsequent procedures hangs upon the sample quality. Some basic questions regarding the sample must be asked and answered before the test results become fully meaningful. Is the sample representative of the whole? Is the sample stable and under what conditions is stability maintained? What techniques are required to maintain sample integrity?

In an analysis where the amount of a substance is an important issue, the question of how representative the sample is becomes critical. In many analyses, the quantity used for testing is a small portion of the total sample used for analysis. It is important to know if the total sample is homogenous or if the chemical of interest can be absent in some areas of the whole sample and highly concentrated in others. The final results of the analysis in this case is highly dependent on where the portion for analysis was taken from the whole sample. A generally accepted technique to illuminate this problem is to take three to five portions from different areas of the whole sample and to analyze each portion. This technique will give a cross-sectional view of the entire sample.

Another extension of this same question is often encountered in preparing and trying a case involving a breath test. It is not unusual for time to be spent inquiring if the breath sample adequately represents the alcohol concentrations in the blood. Current law does not require that breath samples be reported in terms of blood alcohol concentrations; the fact that the blood in the source of alveolar breath alcohol does not make questions regarding blood-breath correlation unimportant. A breath sample that does not accurately reflect the blood alcohol concentrations is, in its essential nature, in error. The only definite method to determine the blood-breath relationship, as it applies to a single individual, is to take a breath and blood sample as nearly together as possible for analysis.

Another important factor regarding the sample involves its stability. It is essential that the sample does not undergo any adverse changes between collection and analysis. If adverse changes are possible, appropriate steps must be taken to prevent or minimize the changes. Using a blood alcohol analysis as an example, the blood must not be allowed to coagulate or purify.

If either is allowed to happen, the results of the analysis will be adversely affected.

Finally, the sampling techniques used are an important consideration. The techniques and methods used to collect the sample may have far-reaching effects on the final results of the analysis. Questions involving issues such as sources of contamination from the same or similar compounds, introduction of reactive compounds in multiple exhibit cases and proper techniques for sample preservation must be satisfactorily answered.

The issue of sampling and sampling errors is extremely important in interpreting the results of a chemical analysis. Given a perfect analysis, the results of the chemical test are only as good as the sample. Accepting the results of any analysis without any thought for the sample is like accepting the results of a survey without giving any thought to the sample from which the survey was drawn. ■

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