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May 2, 2013

SUPREME COURT  
FILED

MAY - 3 2013

Frank A. McGuire, Clerk of the Supreme Court  
Supreme Court of California  
350 McAllister Street  
San Francisco, CA 94102

Frank A. McGuire Clerk  
CFM  
Deputy

*People v. Terry Lee Vangelder*  
*Supreme Court Case No. S195423*  
*Fourth Appellate District, Division One, Case No. D059012*  
*San Diego County Superior Court, Case No. M039138*

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MAY - 3 2013

Dear Mr. McGuire:

CLERK SUPREME COURT

Respondent's Supplemental Brief, filed in response to the Court's April 17, 2013, order, illuminates the glaring flaw in Respondent's argument. Respondent argues that the breath test is unreliable because the regulations and statutes require the breath test instrument to measure "deep lung air" or "alveolar air," and the instrument tests neither. (Respondent's Supplemental Brief at 2 and 10.) This argument is arrantly wrong.

Respondent's argument conflates (1) the mechanical function of the machine (2) the presumed physiological basis by which the breath test instrument estimates the alcohol level in the blood. Respondent has repeatedly argued that the breath test instrument does not measure deep lung air. Of course it does. The instrument measures the last expired breath, and thus measures the air coming from deep in the lung, from the farthest reaches of the lung, the alveoli. Respondent's statement that the instrument does not measure deep lung air obfuscates the issue and hides the fact that his proffered evidence is partition ratio evidence in disguise.

Respondent's true argument is that the presumed physiological basis of the breath test is an incorrect one. Respondent cites the article, "Breath Alcohol Sampling Simulator (BASS) for Qualification Testing of Breath Alcohol Measurement Devices," NBS Special Publication 480-41 (U.S. Department of Commerce National Bureau of Standards) for the assumption that "the alveoli-blood interface is the primary locus for active exchange between blood and breath." That assumption is the basis for requirement


that the breath test instrument measure deep lung or alveolar air. The instrument samples that deep lung air and, using a partition ratio of 2100 to 1, correlates the air to the alcohol level in the blood.

Respondent argues that the assumption in the BASS article is incorrect, and that alcohol migrates from the mucus to the breath air in areas of the lung other than the alveoli. Therefore, he argues, the breath test result, obtained using the partition ratio of 2100 to 1, does not reflect the true blood alcohol level. This argument necessarily implicates partition ratio evidence.

Respondent's argument can be distilled to this: notwithstanding this Court's holding in *People v. Bransford*, 8 Cal. 4th 885, 888 (1994), he should be allowed to present expert testimony that his breath alcohol level, obtained by measuring the alcohol in deep lung air and converted to a blood-alcohol level via a partition ratio of 2100 to 1, results in an inaccurate blood alcohol level. Respondent contends that his proffered evidence does not implicate partition ration because he is not attacking the mandated 2100 to 1 ratio, but rather, the theoretical basis of the breath testing. However, the theoretical basis is irrelevant to the admissibility of the evidence. The statutes, rules, and case law prohibit driving with a specified blood alcohol level, based on a breath test result correlated to blood via a 2100 to 1 partition ratio, using a reliable instrument testing deep lung air. *Bransford* does not allow evidence that such a result does not accurately reflect the subject's blood alcohol level. That is precisely what Respondent tried to do, and that is precisely why the trial court properly excluded it.

Sincerely yours,

JAN I. GOLDSMITH, City Attorney

By   
Jonathan Lapin  
Deputy City Attorney

JL:jam

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IN THE SUPREME COURT OF CALIFORNIA

DECLARATION OF  
SERVICE BY MAIL

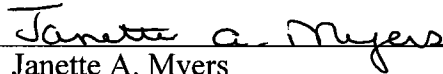
Supreme Ct. No. S195423  
Court of Appeal No. D059012  
*People v. Terry Vangelder*

I, Janette A. Myers, declare that I am, and was at the time of service of the papers herein referred to, over the age of eighteen years and not a party to the action; and I am employed in the County of San Diego, California, in which county the within-mentioned mailing occurred. My business address is 1200 Third Avenue, Suite 700, San Diego, California, 92101-4103. I served the following document(s): **SUPPLEMENTAL REPLY BRIEFING**, by placing a copy thereof in a separate envelope for each addressee named hereafter, addressed to each such addressee respectively as follows:

Charles M. Sevilla  
1010 Second Avenue, Suite 1825  
San Diego, CA 92101

I then sealed each envelope and with the postage thereon fully prepaid, deposited each in the United States mail at San Diego, California on May 2, 2013.

I declare under penalty of perjury that the foregoing is true and correct. Executed on May 2, 2013, at San Diego, California.

  
\_\_\_\_\_  
Janette A. Myers

**PROOF OF SERVICE BY MAIL**  
C.C.P. §§ 1013(a); 2015.5