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April 26, 2013

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

SUPREME COURT
FILED

APR 29 2013

Frank A. McGuire Clerk
Deputy

People v. Terry Lee Vangelder
Supreme Court Case No. S1945423
Fourth Appellate District, Division One, Case No. D059012
San Diego County Superior Court, Case No. M039138

Dear Mr. McGuire:

The Court has requested supplemental briefing addressing the effect, if any, of several state and federal statutes and regulations regarding evidential breath testing. Following is Respondent's response.

I

PROVISIONS OF THE STATE AND FEDERAL STATUTES AND
REGULATIONS

A. HEALTH AND SAFETY CODE SECTIONS 100700 AND 100701

Health and Safety Code section 100700 requires that laboratories engaged in forensic alcohol analysis must comply with Group 8 of Subchapter 1 of Chapter 2 of Division 1 of Title 17 of the California Code of Regulations. These regulations set forth, inter alia, requirements for the administration of breath tests. Among those requirements, Title 17, section 1219.3, requires that breath samples "be expired breath which is essentially alveolar in composition." Pursuant to Section 1215.1(m), "alveolar" refers to the smallest air sacs in the lungs. Section 1220.4(f) requires that a breath alcohol concentration shall be converted to an equivalent blood alcohol concentration by a calculation based on the relationship: the amount of alcohol in 2,100 milliliters of alveolar breath is equivalent to the amount of alcohol in 1 milliliter of blood.

Health and Safety Code section 100701 restricts all law enforcement forensic alcohol test instruments to those listed in the Federal Register by the National Highway Traffic Safety Administration of the United States Department of Transportation.

B. TITLE 17, SECTIONS 1221.2 AND 1221.3

The restriction of Health and Safety Code section 100701 is incorporated into the California Code of Regulations via Title 17, sections 1221.2 and 1221.3. Section 1221.2 requires breath alcohol instruments to conform with the “‘Model Specifications for Evidential Breath Testing Devices’ of the National Highway Traffic Safety Administration of the U.S. Department of Transportation, which were published in the Federal Register, Vol. 49, Pages 48854-48872, December 14, 1984.”

California Code of Regulations 1221.3 restricts the instruments used in breath alcohol analysis to only those specified in the “Conforming Products List” published by the National Highway Traffic and Safety Administration in the Federal Register.

C. FEDERAL REGISTER REGULATIONS

The Department of Transportation amended the Model Specifications for evidential breath tests and updated the list of conforming products in 58 Federal Register 48707 (September 17, 1993). These specifications ensure that evidential breath tests measure the alcohol content of deep lung breath samples with sufficient accuracy for evidential purposes. The accuracy of the instruments may be shown by the accurate measurement of known alcohol samples at various specified levels or by comparing breath test results to blood test results in human subjects following ingestion of various specified amounts of alcohol.

The list of conforming breath test instruments was formerly set forth in 72 Federal Register 71480, 71481-71483 (December 17, 2007), and currently in 77 Federal Register 35747, 35748-35751 (June 14, 2012). The breath alcohol test device in this case, the Intoximeter EC/IR, is one of the specified breath alcohol test devices approved by the National Highway Traffic Safety Administration. (Transcript at 291, lines 15–20; at 354, lines 9–11.)

II

EFFECT OF THESE STATE AND FEDERAL STATUTES AND
REGULATIONS ON THE ADMISSIBILITY OF PARTITION RATIO
EVIDENCE

The above state and federal statutes and regulations have the combined effect of ensuring the accurate testing of deep lung, or alveolar, air. The breath test instrument must test deep lung air, which is the air from the alveoli, the smallest area of the lung. The instrument must have sufficient accuracy for evidential purposes, and that accuracy must be demonstrated either by the accurate measurement of known alcohol samples at various specified levels or by comparing breath test results to blood test results in human subjects following ingestion of various specified amounts of alcohol. Finally, the breath test result is correlated to the blood alcohol level based on the regulatory and statutory specification that the amount of alcohol in 2,100 milliliters of deep lung breath is equivalent to the amount of alcohol in 1 milliliter of blood.


However, that statutory scheme does not significantly assist in the determination of the issue presented in this case. Appellant does not dispute that the breath test instrument used is on the list of conforming products, or that the instrument accurately measures the sample of breath it captures. Rather, Appellant disputes the basic science of breath testing, arguing that the breath sample captured by the machine does not accurately reflect the true blood alcohol level when the 2100 to 1 partition ratio is used to calculate the blood alcohol level, because the breath sample is affected by alcohol in non-alveolar regions of the lung.

Here the issue turns upon the legal, as opposed to the scientific, definition of "partition ratio." It is Respondent's position that partition ratio has the broad legal definition of a conversion factor legislatively used to calculate the amount of alcohol in blood based upon alcohol from an accurate breath test of deep lung air. *People v. Bransford*, 8 Cal. 4th 885, 888 (1994). Respondent acknowledges that there is a narrow scientific definition of partition ratio, preferred by the defense expert, which is based upon direct proportionality that exists in a state of equilibrium where factors such as pressure and temperature are fixed. While the broad legal definition of partition ratio is related to this narrow definition, it cannot be limited to that because breath testing necessarily involves calculating the level of alcohol in blood based upon breath sampling from a living human. That sampling involves the capture of breath that travels both to and from the deep lung alveoli, and therefore will never capture a one hundred percent pure alveolar sample.

Notwithstanding the inability to obtain a pure alveolar sample, the Legislature has declared that it is illegal to drive with a blood alcohol level, as measured by a breath test at a ratio of 2100 to 1, of .08% or above. And the courts have declared that it is prohibited to introduce evidence that this partition ratio of 2100 to 1 is an inaccurate reflection of the blood alcohol level. Respondent attempted to introduce evidence that application of the 2100 to 1 partition ratio to his test would not reflect his true blood alcohol level. That is precisely what *Bransford* forbids. Accordingly, the trial court was right to exclude the evidence and the court of appeal was wrong to declare it admissible.

Sincerely yours,

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By 
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JL:cw

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IN THE SUPREME COURT OF CALIFORNIA

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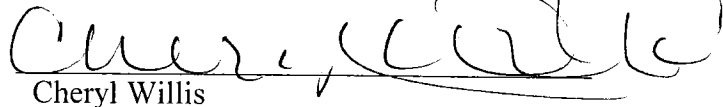
Supreme Ct. No. S195423
Court of Appeal No. D059012
People v. Terry Vangelder

I, Cheryl Willis, 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 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 Apr. 26, 2013.

I declare under penalty of perjury that the foregoing is true and correct. Executed on Apr. 26 2013, at San Diego, California.


Cheryl Willis

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