



Grays Harbor County District Court

Stephen E. Brown, Judge, Dept. 1
Thomas A. Copland, Judge, Dept. 2
102 W. Broadway, Room 202A
Montesano, Washington 98563
www.co.grays-harbor.wa.us

Mallin Shelton
Court Administrator

Phone 360-249-3441
Fax 360-249-6382

January 13, 2009

Grays Harbor Prosecutor
102 W Broadway, Room 102
Montesano, WA 98563

Mr. David Mistachkin
PO Box 1106
Aberdeen, WA 98520

Mr. Diego J. Vargas
1621 114th Ave SE Ste 210
Bellevue, WA 98004

Mr. Erik Kupka
PO Box 1106
Aberdeen, WA 98520

Mr. Wayne Hagen
PO Box 2016
Aberdeen, WA 98520

Re: State of Washington vs. Orona et al Case No C604294

Dear Counsel:

We have now had the opportunity to review the thousands of pages of testimony, exhibits, and briefs submitted in these consolidated cases.

Various defense attorneys have moved to dismiss these cases or, alternatively, to suppress the results of the breath tests herein. For the reasons set forth hereafter, we deny the defense motions and order that these cases be set for trial.

The facts pertinent to this motion appear to be essentially undisputed. What appears to be disputed is the inference to be drawn from those facts and the effectiveness of the various methodologies used by the Washington State Toxicology laboratory at pertinent times herein.

The State Toxicology laboratory is a part of the Washington State Patrol. The Patrol also has a breath testing section. For many years, the Patrol has used the BAC Datamaster Verifier to measure breath alcohol content. The Datamaster has been approved for use in this state by the state toxicologist, who at all pertinent times herein was Dr. Barry Logan. Logan approved the Datamaster pursuant to authority granted by the state legislature. Logan was also the head of the state crime laboratory and the impaired driving section of the State Patrol.

The State Patrol has apparently had a "comment line" in place for some time. A citizen can call this comment line with complaints or kudos regarding the agency or its employees. In March 2007, someone called this comment line and reported that simulator solution certificates were being falsified at the state toxicology laboratory. Simulator solutions are an integral part of the breath testing process.

Ultimately, the call was brought to the attention of Dr. Logan, who in turn contacted the manager of the toxicology lab (Anne Marie Gordon) and told her he wanted the complaint investigated. At the time, Logan suspected that the caller was referring to a process called "dry-labbing", where test results themselves are falsified. He didn't know that the caller was referring to Anne Marie Gordon, who had been

having other people test simulator solutions for her and then signing certificates stating that she herself had done the testing and that the solution fell within a certain prescribed range.

Solutions that are prepared and tested by the toxicology lab play an important part in the operation of the Datamaster. The Datamaster is calibrated through the use of solutions of varying strengths prepared by the toxicology lab. If the solution values are off, it can cause the Datamaster to read high or low, depending on the error. These solutions are called QAP solutions, as they are used for calibration during the Datamaster's annual Quality Assurance Procedure. QAP solutions are different than simulator or "field" solutions. A simulator or "field" solution is one that is actually placed in the Datamaster for up to 60 days. The Datamaster is to "read" the alcohol content of the simulator solution prior to "reading" a breath sample. Since the simulator solution is presumably a known quantity, the Datamaster must "read" the solution within a particular range, or the subsequent breath test is invalid. The "read" that the Datamaster gives on the simulator solution is called the "external standard", which must read between .072 and .088 for a subsequent breath test to be valid.

The simulator solutions and QAP solutions are prepared and tested according to protocols approved by the state toxicologist. First, they are mixed according to specific formulas and procedures. They are then tested for alcohol content by a minimum of three analysts (in practice the actual number has been twelve or more) who each take five samples of the mixed liquid (called aliquots). These aliquots are then each tested by Headspace Gas Chromatography. The results of all analysts are then combined and an arithmetic mean solution value is determined. The standard deviation, range, and coefficient of variation (CV) is then computed and all measurements must fall within a set range before a solution is certified. During the calibration process, the BAC Datamaster must "read" a QAP solution within 5% of its previously determined content. The simulator solutions are actually placed in the Datamaster, which must "read" a proper external standard for the solution during each breath test. A valid breath test is further defined in Washington to require two separate samples, each of which the Datamaster must read within 10% of their mean. As this discussion demonstrates, falsification of solution values can affect the breath testing process and the citizen's complaint was something to be taken seriously.

In July of 2007, a second complaint was made to the Patrol's comment line. This time the complaint was much more specific. This time the complainant specifically mentioned Anne Marie Gordon and stated that she had been certifying solutions that she had never personally tested. As indicated earlier, this complaint turned out to be true. In the interim, Dr. Logan had referred the matter to the Patrol's Internal Affairs division for investigation. Gordon resigned shortly thereafter.

After the second complaint, Logan decided that he had best become more familiar with the documentation process of solution certificates. During his review of this process, other "issues" regarding the policies and procedures of the toxicology lab began to emerge. It came to light that some analysts had discarded aliquot data, rather than entering it into the mean value for a solution batch. (These analysts later testified as to their reasons for doing so, stating generally, that they didn't think that the data was valid or was what is called an "outlier") Then a calibration error was discovered in Spokane County, which apparently caused the resulting breath tests of at least eight defendants to falsely read above a critical statutory limit. Due to the nature of the Spokane error, random spot checks of data were then done which revealed some errors in data entry. At this point, Logan decided that the best course of action would be to have a thorough review of all previous testing data which had been generated by the toxicology lab. Logan assigned this task to Rod Gullberg and Ken Denton, two qualified people who had a long history with the breath testing program. Gullberg and Denton then began a painstaking review of all analyst's calculations on all solution batches; starting with the 2007 solutions and working backwards to the 2005 solutions. Their review encompassed solutions prior to solution batch 07025.

Gullberg and Denton reviewed the gas chromatography results (the "chromatographs") and checked all the numbers to insure correct data entry. They also checked calculations to insure correct solution mean value, standard deviation, range and CV. On the occasions where corrections were necessary, they made them by striking through old numbers and inserting new ones. There was also from ten to twenty corrections made as to the dates that solutions were actually tested by a particular analyst. Most of the numerical corrections made by Gullberg and Denton were quite minor, involving changes

made at a third or fourth decimal place, and many were due to the limitations of computing software and the effects of truncating and/or rounding numbers. Gullberg and Denton also found some "discarded data" situations referred to above, as well as some instances in which simulator solutions were used for Quality Assurance Procedures. Overall, Gullberg testified that he thought that there was carelessness and a lack of attention to detail in the work of the toxicology lab. As a result of the problems found, Logan promulgated new protocols with tighter review and documentation procedures, which started with solution batch 07025. Predictably, these new protocols added a requirement that the analyst signing a solution certificate must have personally performed an analysis, rather than delegating that task to someone else.

Because of the problems found at the lab, various challenges to breath test results have been made throughout the state. This court appears to be at the "tail end" of the "chain of challenges", so to speak. Accordingly, we have kindly been provided with the transcripts and exhibits associated with all prior hearings, which we have reviewed at length. The evidence in prior hearings focused not only on the errors made by the toxicology lab (as set forth earlier herein) but upon the "science" and procedures employed by the lab. The defense challenges to the "science" and procedures of the lab can be summarized into the following "bullet points":

1. The lab should use a "weighted means" rather than "arithmetic means" analysis in computing mean values;
2. The lab lacked a consistent policy for determining "outliers" in computing solution mean values;
3. The standards used by the lab in the certification of solutions are forensically indefensible;
4. The BAC Datamaster itself displays an unreported bias in its readings of breath (technically this is not a lab issue, but is part of the defense motion)
5. The lab misapplies "Henry's Law" in the ratio of alcohol vapor to alcohol solution
6. The lab doesn't follow the advisory standards of international organizations regarding standards for measurements
7. The potential bias of gas chromatography instruments
8. The lab's review and documentation procedures
9. The lab's accreditation status

In addition, in order to properly rule on this motion, we must consider the evidence specific to each Datamaster and simulator solution at issue in the cases currently at bar. This information is set forth below:

Name	Datamaster #	Violation		SS Batch#	BAC	Ext. Stnd.
		Date				
Orona	140018	9/1/2006		#06019	.220/.208	0.082
Exendine	140012	9/20/2006		#06019	.199/.190	0.082
Renville	140018	10/27/2006		#06019	.164/.157	0.082
Tiemeyer	140018	2/2/2007		#06036	.149/.149	0.085
Bruner	140012	2/4/2007		#06049	.237/.268	0.081
Urquhart	140012	3/24/2007		#06049	.148/.158	0.081
Greene	140018	4/27/2007		#06049	.212/.202	0.084
Shay	140018	5/12/2007		#06049	.172/.150	0.084
Kuebler	140012	8/29/2007		#07027	.128/.125	0.081
Lukowski	140012	9/1/2007		#07027	.153/.143	0.081
Colean	949090	9/14/2007		#07027	.336/.324	0.082
Benedict	949135	10/2/2007		#07027	.116/.130	0.081
Ferrier	140012	12/4/2007		#07027	.116/.119	0.080
Karamatic	140018	12/8/2007		#07031	.290/.286	0.081

Tadios	140018	12/15/2007	#07031	.162/.154	0.082
Wilson	140018	12/24/2007	#07031	.099/.099	0.082

All of the Datamasters at issue here passed their respective QAP's well within the standards set by the state toxicologist. All did read high or low in varying amounts at varying times ranging from 3.97% high (#140018 at the .04 test on 12/5/06 QAP) to 3.48% low. (Again #14008 at the .015 level on the 11/29/07 QAP) None of the simulator solution external standards are even close to either edge of the acceptable range.

All simulator solutions at issue met the toxicologists certification criteria, both originally and as recalculated by Gullberg and Denton. Solution 06019 had 15 analysts, one of whom allegedly was Anne Marie Gordon. We now know that this was most probably Mr. Formoso (or Ms. Pemberton) doing the analysis for her. Analyst number 5 (Chris Johnson) on this batch mis-entered the date he tested the solution (tested 5/9/06 instead of 5/8/06) and Analyst 13 (Nazihu Nuwayhid) excluded some data for what she thought was a valid reason but didn't line out the data on the chromatogram. Gullberg and Denton made standard deviation, range and CV corrections that affected the fourth decimal place (ten thousandths of one percent).

Solution 06036 had computational errors, which affected the mean, standard deviation and range at the fourth decimal place. The recalculated CV changed from 1.2018 to 1.1792%. Solution 06049 showed Anne Marie Gordon as analyst number eight. In addition, there was an incorrectly entered control value for one analyst, Asa Louis, (0.100 instead of 0.099) and Nazihu Nuwayhid apparently again excluded some data and didn't line it out on the chromatograms (she apparently thought the chromatograph was detecting something from a previous post-mortem sample and reinjected the vial). Recalculated mean and standard deviation changed at the fourth decimal place with the range affected by 7/10,000ths of one percent. The CV (precision) changed from 2.5581 to 2.4137%. Solution 07027 was one of the first to pass through the new review and documentation procedures promulgated by Logan and appeared to have no problems or recalculations needed. An expiration date was changed from "3/11" to "3/2011". Batch 07031 had one analyst who neglected to date his solution certificate. No correction or recalculations were made. Solution Batches 06019 and 06049 were recalculated both with and without the data attributable to Anne Marie Gordon (See State's Exhibit #10). Either way, the solution complied with the certification criteria of the State Toxicologist. For Solution batch 06019, the solution mean changed at the fourth decimal place, the standard deviation remained exactly the same and the CV changed from 1.0395 to 1.0428%. For Solution batch 06049 the mean changed from 0.1023 to 0.1019; The standard deviation from 0.00246 to 0.00200 and the CV from 2.4137 to 1.9670% when Ms. Gordon's results were excluded. Rod Gullberg testified to this court that in his opinion, neither Anne Marie Gordon's results or any of the recalculations made would have any effect on the resulting breath test tickets of individual defendants. Ruth Kramer, a breath test technician for the State Patrol, testified that the simulator solution issues raised in the cases currently at bar would have no quantifiable impact on the test results pertinent herein.

ANALYTICAL FRAMEWORK

RCW 46.61.506(4)(a), which sets forth the statutory foundation for breath test results, was most probably a legislative response to City of Seattle v Clark-Munoz 152 Wn.2d. 39 (2004), which held that compliance with State Toxicology regulations was a condition precedent to test result admissibility. The amended statute withstood a constitutional challenge in City of Fircrest v Jensen 158 Wn.2d 384 (2006). The Jensen court rejected a separation-of-powers challenge, stating that the legislative intent is to be followed but that "There is nothing in the bill, either implicit or explicit, indicating a trial court could not use its discretion to exclude the test results under the rules of evidence". (Jensen, supra at p399). We follow this directive in deciding whether to reject the breath test results herein.

ER 702/703

These two rules of evidence give the trial court a kind of “gatekeeper” function in deciding whether to admit expert testimony or other scientific evidence. Although the reliability of the evidence is not specifically mentioned in the rules, a requirement that the testimony be helpful to the trier of fact necessarily excludes unreliable evidence. See ER 403. See also State v Maule 35 Wn.App. 287 (1983) and State v Huynh 49 Wn.App.192 (1987). Laboratory error, however, does not necessarily make evidence “unreliable” for purposes of ER 702. Instead, the focus is upon the seriousness of the error:

“Under ER 702, if the lab error or error rates are so serious that results are not helpful to the jury, the trial court may, in its discretion, rule the evidence inadmissible”. (State v Kalakosky 121 Wn.2d 525 (1993) at p.541). See also State v Cauthron 120 Wn.2d 879 (1993)

In turn, the seriousness of the error is determined by its impact on the results sought to be submitted to the jury. See State v Copeland 130 Wn 2d 2244 (1996):

“While a completely independent audit may be ideal, there was no evidence that the FBI procedures compromised the test results in the case.... Having reviewed the record, we hold that the trial judge did not abuse his discretion in admitting the DNA evidence despite complaints about quality assurance and error rates. The defense was able to present its evidence to the trier of fact, and there is not suggestion in this case of procedures so poor that the results of the typing would not be helpful to the trier of fact.” (Copeland supra at p.271)

Once a certain type of evidence is determined to be generally acceptable within a scientific community, then the issue of laboratory error generally goes to the weight, not the admissibility of the evidence:

“The criticisms of the test in this particular case, such as whether the proper procedures were carried out, whether the lab notes were adequate, whether the number of amplifications conformed to the laboratory protocol, are questions regarding whether this particular test was properly conducted and hence go to the issue of weight, not admissibility. They were therefore properly submitted to the jury. As we have previously explained, human error in the forensic laboratory will continue to be a relevant inquiry. However, the trial court is best suited to address such factual matters. Once PCR evidence is determined to be generally accepted, as is has been, then both proponents and opponents of a particular test should be able to garner the necessary information to present both sides of the issue of whether errors were committed in a given test to the factfinder when there is a challenge to the validity of a laboratory procedure..... We find no error in the trial court’s decision to allow the evidence concerning the PCR method of testing DNA to go the jury.” (State v Gentry 125 Wn. 2d. 570 (1995) at p.588-589) See also, generally, State v Kalakosky. supra. and State v Cauthon. supra.

In short, we are to look at the seriousness of the error and whether it compromises the test results. If so, we should exclude the evidence. If not, we should admit the evidence subject to cross-examination and other challenge. In the cases at bar, we take the latter approach, as we find no “errors” serious enough to warrant exclusion of the breath test results, either on a “wholesale” or individual basis.

On the “wholesale” level, we are not able to find that the entire work of the state toxicology lab should be disregarded. The errors referred to earlier were of a minor nature and effect and were generally errors in documentation, computation or data entry. No evidence was presented that these errors had any significant affect on any breath test results other than the eight in Spokane County, previously mentioned, and the effect on those was only because the tests themselves were so close to a statutory limit. True, any error anywhere can have an effect on something, but this court cannot mandate an error free world. Human beings make mistakes and machines designed by them are flawed. There is inherent variability in all forms of attempted measurement – something that even the tightest controls cannot eliminate. The fact that there are mistakes made at the toxicology lab should surprise no one, as they are made everywhere else in society, whether

we wish to admit it or not. In this context, these things go to the weight of the evidence, not its admissibility.

The defense challenges to the general "science" and procedure of the toxicology lab leads us to a similar conclusion, as they essentially boil down to a dispute over "best practices". Testimony established that virtually every lab in the country uses "arithmetic means" computations, yet a defense expert in effect said that everyone else was wrong. Analysts who discarded solution data were challenged but their reasons were never discredited, at least in the eye of this court. Much was made of NIST, ISO and SOFT standards, but testimony established that Washington's lab is a "reference" lab for other states. It has been accredited (and re-accredited) by the American Board of Forensic Toxicologists since 2005 and the labs forensic standards meet or exceed those of the relevant scientific community in every respect. True, scientists, like others, can and do differ on both theory and methodology. The fact that there is disagreement, however, does not mean that the court must "throw out the baby with the bathwater", so to speak, and declare the entire lab a "bad science" area. Whether or not the issue of "outliers" should be left to the discretion of individual scientists or whether the Henry's Law Vapor equivalent should really be rounded to 1.23% for computational purposes are really beyond the scope of an ER 702 analysis. We must remember that we are dealing with a process whose end result is to obtain 2 breath samples that each read within 10% of their mean – not within .001 of their mean. Testimony was undisputed that even a 20% error factor is acceptable for certain types of blood and tissue analysis. Testimony was also undisputed that the degree of precision required in measurement is dependent upon the purpose for which the results are used. One expert (Dr. Polissar) testified that to find precision of less than 1% (variance) in biological samples is, in his words, "phenomenal". There is simply no reason to discard all laboratory work.

To be sure, there were two issues raised in these hearings which did give this court some pause. The first of these is the issue of actual bias in the Datamasters themselves and possibly in the gas chromatographs as well. Apparently, there is a true bias in the breath test readings reported by the Datamaster. (See the "specifics" on the machines used in the cases at bar, set forth earlier.) Apparently, this bias varies from machine to machine, can be either high or low, and will vary over time. The bias is apparently not corrected for on breath test tickets in any jurisdiction in the country.

Perhaps the reason this issue gave us pause is the fact that we had never heard of this. One would think that two full-time District Court Judges having a combined 35 years of judicial experience would have run across this issue before. Perhaps another reason is that it would seem to be something that the state could remedy at a not-exorbitant cost. Thankfully, the bias of a machine appears to be something that can be calculated and known, thus putting it in the realm of cross-examination and other defense testimony, if applicable. This then goes to the weight, and not admissibility, of the evidence. See Gentry, Copeland, and Kalakosky supra.

The other, and perhaps most troubling issue that gave us pause is the issue of Anne Marie Gordon and her certificates. The court is aware from the testimony that having analyst "B" running tests for analyst "A" is something that occurred even when the lab was under the supervision of David Predmore. We are also aware that the issue wasn't specifically covered by the protocols and that Gordon may have thought it was within her discretion as manager to delegate tasks. This court believes, however, that her signature on certificates was at best, careless and at worst, dishonest. Whether she knew it or not, she was setting the stage for possible false testimony in the courts of this state. The unacceptability of this is obvious and if we were asked to admit a Gordon CrRLJ 6.13 certificate under these circumstances, we would most readily decline. We are not being asked to do this, however. We are asked instead to determine whether the state can lay a proper foundation for the admission of breath test results. The evidence is the results themselves – not the question of which analyst personally participated in the testing of a solution that is placed in the Datamaster prior to testing. Gordon's actions (or inactions) were several steps removed from the breath test results and there is no showing that the data itself was affected in any way. This was not a "dry-labbing" situation where the data itself was false. (See State v Roche 14

Wn.App 424 (2002). The data, not the analyst, is what is computed for the simulator solution mean. And it must be remembered that Gordon was just one analyst out of many. To say that this situation makes "bad science" out of the Datamaster involves multiple layers of assumption and speculation that we are unwilling to make. We make our ruling based upon the evidence presented – not on "maybes" or "what ifs". Although we clearly disapprove of Gordon's practices, we cannot say that the breath test results should be suppressed as a result thereof.

Most of the testimony that this court reviewed in this matter (and consequently discussed herein) involved other cases in different courts with different machines and different solutions. The "issues", if any, with the simulator solution in the cases actually at bar are set forth earlier and need not be repeated here. Sufficient to say that we think these "issues" go to the weight and not the admissibility of these test results. The "science" errors are miniscule and nothing falls outside the protocols. (We note parenthetically that we are dealing with a science that allows plus or minus 10% of the mean for the actual test results) The external standards are not even close to the respective edges of the range and the testimony is clear that there is no real impact in any of the breath tests in the cases at bar. Solution batches 07027 and 07031, having gone through the new review and documentation procedures are effectually error-free. We exercise our discretion under ER 702/703 to allow for admission of tests results, upon proper statutory foundation, subject to cross-examination regarding the weight to be given to the tests. (See State v Gentry 125 Wn.2d 570 (1995.) To be clear, we have considered all of the evidence submitted to this court for purposes of this motion, as there was a general challenge to the work and "science" of the state's toxicology lab. At trial, cross-examination or other testing regarding Datamaster or Toxicology issues will be limited to the machine and solution actually at issue in a particular case. This testimony is relevant and will be helpful to a jury. Delving into other cases, machines or solutions is not, and will consentually not be permitted.

ER 403

Curiously, the defense has not really briefed this issue, perhaps because the ER 702/703 analysis encompasses many of the same issues. Briefly, ER 403 requires the court to balance the probative value of the evidence against the prejudicial or misleading value of it and exclude the evidence if the prejudice outweighs the relevance. Clearly, the breath tests are relevant evidence in alcohol-related cases. In DUI cases in particular, they are highly relevant on either "prong" of the DUI statute that is at issue in a particular case. The defense does not appear to dispute this; arguing instead that the "errors" set forth earlier create an unfair prejudicial impact that outweighs the relevance. For the reasons set forth in the ER 702/703 analysis above, we reject this contention and will allow the breath test results if the state can lay the statutory foundation set forth in RCW 46.61.506.

DUE PROCESS

The defense has moved to suppress the breath test results based on the "false evidence" of Anne Marie Gordon and on the "unreliability" of the breath test results. It is claimed that these things also result in a denial of due process to individual defendants. Both of these issues have been discussed earlier. Gordon's actions are not the evidence and there are no errors serious enough to render the breath test results unreliable. This motion is denied. We also find that an attempt by the state to admit these results does not constitute prosecutorial misconduct.

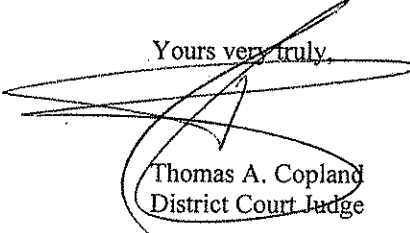
CrRLJ 8.3

This court rule authorizes a court to dismiss a criminal prosecution in the furtherance of justice upon a showing of governmental misconduct that has materially affected a defendant's right to a fair trial. We need not decide whether Anne Marie Gordon's actions (or the conduct of other lab personnel for that matter) constitute "misconduct" for purposes of the rule as we find that the other elements of the rule have not been met as per the above discussion. We find the remainder of the defense contention unpersuasive.

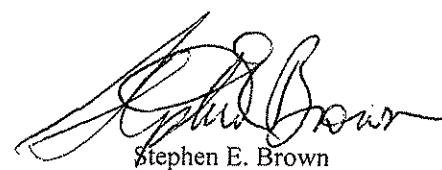
CONCLUSION

The legislature has clearly indicated how the trial courts of this state are to handle questions regarding the admissibility of breath tests. The statute has withstood a constitutional challenge and as far as this court is concerned, is the law of the state. The central theme of the defense argument is that it is unfair to impose a law with rigid standards upon a process, which at least in our state, is riddled with error, variability, and bias. We have dealt with the issues earlier. We are not, however, totally unsympathetic to the defense arguments. There clearly is/was room for improvement in the overall day-to-day procedures in the toxicology lab. And there is no question in the court's mind that, in rare cases, a number of factors could converge to make a difference in a very close case. The defense has proven these things to us and the situation in Spokane is a reminder of that. But while we conclude that nothing resembling that situation appears to exist in the cases at bar, we must state that these same criticisms could be applied to virtually any sort of measurement process done by any lab anywhere. Lab error and variability issues are not unique to DUI cases and DUI cases are not the only criminal cases prosecuted with the assistance of laboratory science. The cases at bar are simply a subset of a much larger issue. The defense is, in effect, asking us to address these issues by judicially rewriting standards for forensic science. This, however, we cannot do. This would be a matter for the legislature, not the courts. It is not even within the court's expertise. Even if it were a judicial "policy" issue, it would not be within the province of a court of limited jurisdiction. The legislature could, if it desired, set scientific standards instead of delegating that task to others. We will not go through the "back door" of the evidence rules to invade a province that is not ours. Our task is simply to determine whether, within generally accepted scientific standards, there are problems, errors, or prejudice so serious that a piece of scientific evidence needs to be excluded. We have done so in these cases and can find nothing that rises to that level. The motions to suppress and/or dismiss are denied.

Yours very truly,



Thomas A. Copland
District Court Judge



Stephen E. Brown
District Court Judge