

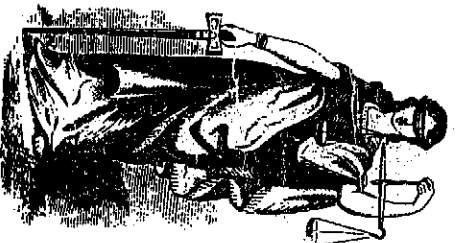
*CONTINUING LEGAL EDUCATION
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MAN VS MACHINE:

CROSS EXAMINATION OF THE INTOXILYZER 5000 OPERATOR

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SPONSORED BY:

APPELLATE DIVISION, FIRST AND SECOND JUDICIAL DEPARTMENTS
IN CONJUNCTION WITH THE ASSIGNED COUNSEL PLAN OF THE CITY OF NEW YORK

MAN VS. MACHINE

CROSS EXAMINATION OF
THE INTOXILYZER 5000 OPERATOR

WHAT IS A TRIAL? CONFLICT RESOLUTION

YOU ARE ASKING THE JURY TO RESOLVE A CONFLICT
BETWEEN YOU AND THE DISTRICT ATTORNEY.

PEOPLE DO NOT LIKE CONFLICT, WE LIKE RESOLUTION.

"WHEN I HAD MY FIRST CHILD I BECAME A PARENT,
WHEN I HAD MY SECOND I BECAME A REFEREE"

HOW DO YOU HELP THEM RESOLVE THE
CONFLICT...GIVE THEM TOOLS.

HERE IS A TOOL IN A BREATH TEST CASE...LOOK AT THE
EVIDENCE IN ITS CONTEXT.

CONTEXT IS DEFINED AS THE SET OF CIRCUMSTANCES
OR FACTS THAT SURROUND A PARTICULAR SITUATION.

ASKING SOMEONE TO RESOLVE A DISPUTE BY PLACING
THINGS IN CONTEXT LENDS IMMEDIATE CREDIBILITY TO
YOUR POSITION.

STORY TIME..."7 BLIND MICE"

WHY DO WE WANT TO PLACE THINGS IN CONTEXT IN A
DWI CASE WITH A BREATH TEST?

ASK SOMEONE WHAT THEY THINK OFF YOUR CASE AND
SIMPLY TELL THEM THE BREATH TEST RESULT WAS .20!

WHO IS THE WITNESS?

NOT AN EXPERT WITNESS

NOT A CHEMICAL TECHNICIAN...CALL HIM AN
OPERATOR. WORD CHOICE IS VITAL.

OPERATOR NOT TECHNICIAN

MACHINE NOT INTOXILYZER

READING NOT BAC LEVEL

OPINION NOT CONCLUSION

SYMPTOMS OF SOBRIETY NOT JUST INTOXICATION

OPERATOR HAS A LIMITED UNDERSTANDING OF MACHINE
AND SCIENCE OF BREATH TESTING.

BE CAREFUL HOW YOU HANDLE THIS: YOU WANT TO BE
ABLE TO CONDUCT A MEANINGFUL CROSS
EXAMINATION AND THE MORE HE KNOWS THE MORE
YOU CAN ASK. (SEE SAMPLE CROSS)

HE HAS A DISTINCT BIAS. (SEE SAMPLE CROSS)

DON'T JUST ACCEPT HIS EXPERIENCE BLINDLY. OFTEN HE
WILL OVERSTATE IT.

OF TESTS BEFORE THIS ONE NOT JUST TOTAL NUMBER

DO THE MATH TO SEE IF IT MAKES SENSE.

WHAT HE HAS OBSERVED IS LIMITED. HE WAS NOT AT THE
SCENE.

THE OPERATOR WILL TESTIFY TO HIS OPINION THAT YOUR CLIENT WAS INTOXICATED...SHOCKING ISN'T IT?

THIS OPINION IS BASED ON OBSERVATIONS MADE AND COORDINATION TESTS.

SYMPTOMS OF INTOXICATION.

BREAK EACH DOWN AND CROSS ON EACH.

(SEE SAMPLE CROSS)

BE SURE TO PUT THIS IN CONTEXT AND POINT TO SIGNS OF SOBRIETY

TOOK TESTS

APPEARANCE

ALL THAT WAS GOOD ON VIDEO, BREAK IT DOWN
FRAME BY FRAME

WITH RESPECT TO COORDINATION TESTS, EXAMINE THE CONTEXT.

WHAT ARE HIS QUALIFICATIONS TO DO THE TEST. IS HE
NHTSA QUALIFIED

GET THE MANUAL. ONLY 2 OF THE 3 TESTS ARE NHTSA
CERTIFIED

WERE THE INSTRUCTIONS GIVEN CORRECTLY? WERE
THEY CLEAR.

THIS IS AN AREA YOU CAN BRING OUT THE FACT THAT
THE CLIENT HAS NEVER BEEN ARRESTED BEFORE.

WHAT ARE THE CUES FOR EACH TEST AND DID CLIENT
PASS OR FAIL? OFTEN THE TEST RESULTS DO NOT
MATCH CRITERIA.

OFTEN THE IDE WILL HAVE HIM FAILING BUT VIDEO SHOWS TEST NOT DONE OR DONE WELL.

CONSIDER THE VALUE OF AN EXPERT FOR THIS TESTIMONY.

MOST IMPORTANT BREAK EVERY TEST DOWN TO DEMONSTRATE ALL THE CLIENT DID WELL.

(SEE SAMPLE CROSS)

THE MACHINE

IN ORDER TO SUCCESSFULLY DEFEND A DWI CASE WITH A BREATH SAMPLE YOU MUST HAVE AN UNDERSTANDING OF THE SCIENCE BEHIND BREATH TESTING AND OF HOW THE MACHINE WORKS.

THE GOOD NEWS IS WITH SOME STUDY YOU WILL KNOW AS MUCH IF NOT MORE THEN THE OPERATOR.

THIS FACT ALONE PROVIDES A DEFENSE.

YOU KNOW MORE THEN THEM.

YOU BELIVE THE MACHINE CANNOT BE TRUSTED.

YOU BELIEVE YOUR CLIENT IS NOT GUILTY.

YOUR COMAMND OF THE SUBJECT CONVINCES THE JURY TO BELIEVE YOU.

THE BEER-LAMBERT LAW (OR BEER'S LAW)

THE LINEAR RELATIONSHIP BETWEEN ABSORBANCE AND CONCENTRATION OF AN ABSORBING SPECIES.

MOLECULES ABSORB ENERGY, BUT ONLY ENERGY OF A CERTAIN WAVE LENGTH WILL BE ABSORBED BY A MOLECULE OF ANY GIVEN COMPOUND. THEREFORE COMPOUNDS CAN BE IDENTIFIED BY THE DIFFERENT WAVE LENGTHS AT WHICH THEY ABSORB ENERGY. THE INTOXILYZER 5000 UTILIZES INFARED SPECTROSCOPY TO ESTABLISH "ABSORPTION FINGERPRINTS" FOR ANY GIVEN CHEMICAL COMPOUND.

HENRY'S LAW

HENRY'S LAW, FORMULATED BY WILLIAM HENRY IN 1803, STATES THAT:

AT A CONSTANT TEMPERATURE, THE AMOUNT OF A GIVEN GAS DISSOLVED IN A GIVEN TYPE AND VOLUME OF LIQUID IS DIRECTLY PROPORTIONAL TO THE PARTIAL PRESSURE OF THAT GAS IN EQUILIBRIUM WITH THAT LIQUID.

SIMPLY STATED, THE FOLLOWING LANGUAGE APPEARS IN THE OPERATOR'S MANUAL FOR THE INTOXILYZER 5000EN...THE CONCENTRATION OF A VOLATILE SUBSTANCE IN THE AIR ABOVE A FLUID IS PROPORTIONAL TO THE CONCENTRATION OF THE VOLITALE SUBSTANCE IN THE FLUID.

AN EVERYDAY EXAMPLE OF HENRY'S LAW IS GIVEN BY CARBONATED SOFT DRINKS. BEFORE THE BOTTLE OR CAN IS OPENED, THE GAS ABOVE THE DRINK IS ALMOST PURE CARBON DIOXIDE.. THE DRINK ITSELF CONTAINS DISSOLVED CARBON DIOXIDE. WHEN THE BOTTLE OR CAN IS OPENED, SOME OF THIS GAS ESCAPES, GIVING THE CHARACTERISTIC HISS (OR "POP" IN THE CASE OF

A CHAMPAGNE BOTTLE). BECAUSE THE PRESSURE ABOVE THE LIQUID IS NOW LOWER, SOME OF THE DISSOLVED CARBON DIOXIDE COMES OUT OF SOLUTION AS BUBBLES. IF A GLASS OF THE DRINK IS LEFT IN THE OPEN, THE CONCENTRATION OF CARBON DIOXIDE IN SOLUTION WILL COME INTO EQUILIBRIUM WITH THE CARBON DIOXIDE IN THE AIR, AND THE DRINK WILL GO "FLAT".

THIS REQUIRES:

1. A CLOSED ENVIRONMENT;
2. A CONSTANT PRESSURE; AND
3. A CONSTANT TEMPERATURE.

THE SIMULATOR IS AN EXAMPLE OF HENRY'S LAW AT WORK.

THE SIMULATOR SIMULATES A BREATH SAMPLE.

THE SIMULATOR IS VITAL TO THE RELIABILITY OF THE MACHINE. THIS IS AN IMPORTANT PART OF THE CROSS EXAMINATION. IF THE SIMULATOR IS OFF BY MORE THEN .01 THEN THE RESULTS CANNOT BE USED. NYS DEPT. OF HEALTH RULES AND REGULATIONS SECTION 59.5.

THAT IS A 10% MARGIN OF ERROR – WOULD YOU USE A THERMOMETER THAT WAS OFF 10%?

HOW IT WORKS:

INJECTS MOLECULES OF ETHYL ALCOHOL THAT HAVE BEEN CAPTURED IN THE HEAD SPACE OF A CLOSED ENVIRONMENT (SIMILAR TO A MASON JAR)

CONTAINING A LIQUID SOLUTION THAT HAS BEEN HEATED TO 34 DEGREES CELSIUS.

THAT LIQUID SOLUTION HAS BEEN TESTED USING GAS CHROMOGRAPHY MASS SPECTROMETRY (GCMS) IN A LAB

CONTAINS ENOUGH ETHYL ALCOHOL THAT WHEN INTRODUCED INTO A PROPERLY WORKING BREATH TESTING DEVICE SHOULD READ .10.

NOTICE SOME POINTS:

TEMPERATURE MUST BE 34 DEGREES – DID THEY TAKE YOUR CLIENTS TEMPATURE

WHEN IT IS IMPORTANT THEY USE GCMS – THE GOLD STANDARD

THE SOLUTION DOES NOT ACTUALLY CONTAIN .10, THEY HAVE TO ACCOUNT FOR THE PARTITION RATIO OF LIQUID TO GAS.

THIS IS A CLOSED SYSTEM

ARE THE LUNGS AN EXAMPLE OF HENRY'S LAW AT WORK?

WHY NOT?

NOT A CLOSED SYSTEM

NOT A CONSTANT TEMPATURE

NPT A CONSTANT PRESSURE

TO BORROW A LINE FROM THE X-FILES...

DO YOU BELIEVE???

THE SECRET TO WINNING THESE
CASES STARTS WITH YOUR BELIEF
THAT THE MACHINE CANNOT BE
TRUSTED

THE BEST ANSWERS ARE DERIVED FROM KNOWLEDGE
NOT NUMBERS

IS 7 X 13 = 28?

HOW DOES THE INTOXILYZER WORK?

THE INTOXILYZER PASSES INFRARED LIGHT (USING A LIGHT BULB SIMILAR TO YOUR MICROWAVE OVEN)

THROUGH A SAMPLE CHAMBER IN WHICH THE CLIENT'S BREATH IS INSERTED.

ANY ALCOHOL PRESENT IN THE SUBJECT'S BREATH WILL ABSORB THE INFRARED ENERGY.

THE MORE ALCOHOL VAPOR IN THE CHAMBER, THE MORE INFRARED ENERGY WILL BE ABSORBED BY THAT VAPOR WHICH WILL RESULT IN A CORRESPONDING DROP IN THE AMOUNT OF ENERGY REACHING THE DETECTOR CELL.

THE DIFFERENCE BETWEEN THE INTERNAL STANDARD AND THE AMOUNT OF ENERGY THE DETECTOR MEASURES IS ELECTRONICALLY PROCESSED AND THE PERCENT OF BLOOD ALCOHOL IS DISPLAYED ON THE INSTRUMENT.

THERE ARE MANY AREAS OF POTENTIAL CROSS EXAMINATION. EACH CASE WILL BE DIFFERENT

ABSORPTION

THE OFFENSE CHARGED IS PROVEN ONLY IF THE DEFENDANT WAS INTOXICATED WHILE OPERATING, YET THE BREATH SAMPLE IS ROUTINELY TAKEN IN EXCESS OF ONE HOUR AFTER OPERATION.

NOT A SIMPATHTIC DEFENSE

(SEE CROSS NOTES)

DIAGNOSTICS

WHEN THE MACHINE IS FIRST TURNED ON AT THE BEGINNING OF A DAY OR TOUR IT WILL GO THROUGH A SERIES OF DIAGNOSTIC CHECKS. THESE ARE VITAL. THE OFFICER DOING YOUR EXAM MAY NOT HAVE ANY KNOWLEDGE OF THESE DIAGNOSTIC CHECKS.

YOU CAN TAKE THE ARM OFF, AND IT IS STILL OK. LIKE MONTY PYTHON...ITS MERELY A FLESH WOUND (SEE CROSS NOTES)

2100:1 RATIO

THE INTOXILYZER GIVES A BLOOD ALCOHOL RESULT BUT IT MEASURES BREATH NOT BLOOD

AND THAT RESULT IS OBTAINED AFTER THE INTOXILYZER CONDUCTS A MATHEMATICAL CONVERSION IN ITS SOFTWARE

PARTITION RATIO

PARTITION RATIO DESCRIBES THE RELATIONSHIP BETWEEN THE AMOUNT OF ALCOHOL MOLECULES IN ONE'S BLOOD STREAM IN RELATION TO THE AMOUNT OF ALCOHOL MOLECULES IN ONE'S BREATH
THE INTOXILYZER RELIES ON A PARTITION RATION OF

2100 TO 1

IN OTHER WORDS, THE INTOXILYZER IS PROGRAMMED TO RECOGNIZE THAT FOR EVERY ONE PART OF ALCOHOL IN ONE'S BLOOD, THERE ARE 2100 PARTS OF ALCOHOL IN ONE'S BREATH,

PEOPLE DON'T NECESSARILY HAVE PARTITION RATIOS IN THEIR BODIES AT 2100 TO 1

THIS IS A ONE SIZE FITS ALL

THIS INTOXILYZER 5000 DOES NOT ACCOUNT IN ITS CALCULATIONS FOR VARIABLE PARTITION RATIOS FROM PERSON TO PERSON

IF CLIENT HAS A TRUE PARTITION RATIO OF LESS THAN 2100 TO ONE, THIS INTOXILYZER WILL ACTUALLY ARTIFICIALLY INFLATE HIS TRUE BLOOD ALCOHOL LEVEL,

THERE IS NO WAY FOR YOU TO KNOW WHAT THE DEFENDANTS TRUE PARTITION RATIO WAS ON THE NIGHT HE WAS ARRESTED.

MARGIN OF ERROR

THE GOVERNMENT CALLS THIS TOLERANCE

CMI SAYS 5% - MARGIN OF ERROR AND A 2 PERCENT MANUFACTURER PRECISION ERROR RATE.

(SEE CROSS NOTES)

CONTAMINATION??? PROBABLY NOT BUT IT IS HARD TO
CLEAN UP.

THE OPERATOR IS LIKELY NOT THE PERSON WHO IS
RESPONSIBLE FOR THE DAILY MAINTENANCE OF THE
MACHINE.

BREATH TUBE IS THE SAME BREATH TUBE IS USED FOR
EACH MOTORIST

AND THEY USED THIS MACHINE FOR OTHER PEOPLE
BESIDES YOUR CLIENT

CALIBRATION CURVE

THIS IS ONE OF THE BEST SCIENTIFIC ATTACKS

THE SAMPLES TESTED BY THE SIMULATOR WERE ONLY
.10

IN A TRUE LAB ENVIRONMENT A MACHINE WOULD BE
CALIBRATED ON A CURVE USING ALL POINTS OF
ANALYSIS

WE ONLY KNOW IT IS RELIABLE AT .10

(SEE CROSS NOTES)

RFI

THE MACHINE HAS A RFI DETECTOR, THE QUESTION IS DOES IT WORK?

(SEE CROSS NOTES)

ONLY ONE SAMPLE TESTED

MOST STATES TAKE 2 SAMPLES

MEASURE TWICE CUT ONCE

WHAT WE DON'T SEE CAN'T HELP US

CLIENT IS USUALLY IN THE ROOM LONGER THEN WE SEE ON TAPE, WHY NOT TAPE HIM THE WHOLE TIME?

MIRANDA AND QUESTIONS NOT ALWAYS RECORDED, IT IS UP TO OPERATOR

SELF CHECK IS NOT TRUSTWORTHY

THE MACHINE CHECKS ITSELF?

HOW DO WE KNOW IS SELF CHECK FAILED?...WE DONT

SAMPLE CROSS

LIMIT KNOWLEDGE

WHAT IS YOUR EDUCATIONAL BACKGROUND

DO YOU HAVE ANY ADVANCED DEGREES IN TOXICOLOGY

ARE YOU A MEMBER OF THE AMERICAN ACADEMY OF FORENSIC SCIENCES

ARE YOU A MEMBER OF THE SOCIETY OF FORENSIC TOXICOLOGISTS

HOW MANY HOUR WAS THE COURSE FOR YOUR SCHOOLING TO COME A BREATH TECHNICIAN?(24)

HOW MANY OF THOSE WERE DEVOTED TO SCIENTIFIC THEORIES AND OPERATIONS OF BREATH TESTING MACHINES?

TAUGHT IN YOUR OPERATORS COURSE ABOUT ABSORPTION AND ELIMINATION OF ALCOHOL?

TAUGHT ABOUT THE EFFECTS OF RESIDUAL MOUTH ALCOHOL ON BREATH TESTS?

BIAS

YOU WORK FOR NYPD

YOUR JOB IS TO GATHER EVIDENCE AGAINST PEOPLE CHARGED WITH DUI

THE OTHER MAJOR PART OF YOUR JOB IS TO TESTIFY AGAINST PEOPLE CHARGED WITH DUI

WHEN QUESTIONED BY THE DA ABOUT HOW MR. SMITH APPEARED, THOSE QUESTIONS WERE ABOUT YOUR OBSERVATIONS THAT LEAD YOU TO THE OPINION THAT MR SMITH WAS IMPAIRED

YOU WERE NOT ASKED QUESTIONS ABOUT THINGS THAT MIGHT NOT BE INDICATIVE OF IMPAIRMENT

AND YOU DIDN'T VOLUNTEER THAT INFORMATION

YOU ARE TESTIFYING AS AN AGENT FOR THE NYPD AND YOUR OPINION, OF COURSE, IS THAT MR SMITH WAS INTOXICATED

YOU'VE TESTIFIED FOR THE PROSECUTION BEFORE HOW MANY TIMES

HAVE YOU EVER TESTIFIED THAT YOUR OPINION WAS THAT A DEF WAS NOT INTOXICATED OR IMPAIRED

EVERY TIME YOU TESTIFY YOU HAVE THE SAME OPINION, THAT DEF WAS INTOXICATED OR IMPAIRED

AND IF YOU CAME IN AND SAID THAT DEF WAS NOT INTOXICATED IT WOULD MEAN THEM ARRESTING OFFICER WAS WRONG

ODOR OF ALCOHOL

YOU TESTIFIED THAT YOU DETECTED THE ODOR OF ALCOHOL

EVER DETECTED THE ODOR OF ALCOHOL ON SOMEONE THAT WAS NOT INTOXICATED

BECAUSE ODORS OF ALCOHOL MEAN CONSUMPTION,
NOT NECESSARILY INTOXICATION

YOU CANNOT TELL HOW MUCH ALCOHOL SOMEONE
HAD JUST BY THE ODOR.

WATERY OR BLOODSHOT EYES

YOU TESTIFIED THAT MR SMITH'S EYES WERE WATERY
AND BLOODSHOT

IN YOUR TRAINING AND EXPERIENCE YOU HAVE
NOTICED THAT CONDITION OF EYES IS A FACTOR IN
DETERMINING ALCOHOL CONSUMPTION, IMPAIRMENT
OR INTOXICATION

DO YOU KNOW HOW IT IS THAT ALCOHOL CAN CAUSE
EYES TO APPEAR WATERY

AND EVEN IF YOU DID WOULD IT BE THE ALCOHOL OR
INTOXICATION

CAN YOU THINK OF THINGS OTHER THAN ALCOHOL
THAT CAN CAUSE EYES TO BECOME WATERY

SOME PEOPLE'S ARE NORMALLY THAT WAY

DO YOU KNOW WHETHER HE HAS ANY EYE CONDITION
THAT CAUSES THAT PROBLEM, SUCH AS
CONJUNCTIVITIS

SOME PEOPLE SUFFER FROM ALLERGIES OR COLDS

THIS CAN CAUSE WATERY EYES CAN'T IT?

DO YOU KNOW WHETHER MR SMITH HAS ANY
ALLERGIES THAT MAY CAUSE THIS

WHAT TIME WAS THIS

SLURRED SPEECH

YOU TESTIFIED THAT MR SMITH HAD SLURRED SPEECH

DOES HE NORMALLY SPEAK WITH SLURRED SPEECH
(DOES NOT KNOW)

YOU DON'T KNOW BECAUSE YOU HAVE NEVER MET
BEFORE

IF SOMEONE HAD A SPEECH DEFECT SUCH AS A
STUTTER OR IF SOMEONE NORMALLY SLURS THERE
WORDS THAT WOULD NOT BE AN INDICATION OF
INTOXICATION

MANY THINGS CAN CAUSE SPEECH PROBLEMS
DENTURES, RECENT DENTAL WORK, PHYSICAL
AILMENTS (I.E. STROKE)

SOME NATURALLY SLUR THERE WORDS
AFTER ARRESTING MR SMITH YOU QUESTIONED HIM
AND YOU GOT SOME GENERAL INFORMATION
NO TROUBLE UNDERSTANDING HIM

COORDINATION TESTS

I UNDERSTAND THAT YOU HAVE BEEN TRAINED IN
GIVING FIELD SOBRIETY TESTS?

PLEASE TELL ME WHERE AND WHEN.

DO YOU KNOW WHAT NHSTA STANDS FOR?

NATIONAL HIGHWAY TRAFFIC AND SAFETY
ADMINISTRATION

THEY PROMULGATE RULES AND REGULATIONS FOR HOW
FIELD SOBRIETY TESTS SHOULD
BE DONE IN DWI STOPS.

WERE YOU TRAINED BY NHTSA?

YOU USED A BATTERY OF THREE TESTS.

ONLY TWO ARE ENDORSED BY NHTSA.

THESE TESTS WERE ADOPTED BY NHTSA AFTER
VALIDATION TESTS IN 1981, IS THAT
CORRECT?

THOSE VALIDATION STUDIES SHOWED THAT THE WALK
AND TURN TEST IS 68% ACCURATE
WHEN PERFORMED CORRECTLY ON POSTABSORBATIVE,
HEALTHY PEOPLE, IS THAT CORRECT?

YOU UNDERSTAND THAT ONE LEG STAND IS 64%
ACCURATE WHEN PERFORMED CORRECTLY
ON POSTABSORBATIVE HEALTHY PEOPLE, IS THAT
CORRECT?

THAT LEAVES HEALTHY ROOM FOR ERROR WHEN 32 TO
36% OF THE SUBJECTS WILL BE
JUDGED INCORRECTLY, DOESN'T IT?

LETS GO OVER EACH TEST

NONE DONE IN THE FIELD

YOU HAVE A REPORT THAT THE RESULTS GO ON

IDTU TECH TEST REPORT

FIRST TEST IS SPEECH

YOU TEST USING A SPECIFIC QUESTION AND ANSWER TO ASSESS SPEECH

RECITE NAME ADDRESS AND AGE

YOU DETERMINE GRADES

SUBJECTIVE

BUT YOU KNOW AT THIS POINT YOUR FELLOW OFFICER ALREADY MADE AN ARREST

YOU GRADED THE SPEECH TESTS, OPTIONS WERE, CLEAR, SLURRED, INCOHERENT, OTHER OR REFUSED

YOU INDICATED SLURRED

PLAY TAPE

NEXT TEST IS BALANCE TEST

YOU ARE TO INSTRUCT SUBJECT TO STAND ERECT, HEELS TOGETHER, HEAD BACK AND EYES CLOSED

THIS IS THE RHOMBERG BALANCE TEST

YOU INDICATED SWAYING

BUT YOU NEVER ADMINISTERED THIS TEST

IF HE SAYS YES BUT NOT ON VIDEO ATTACK PROCEDURES, AND IF YOU HAD TAPED THAT WE WOULD NOT JUST HAVE TO RELY ON YOUR WORD

DID MR. SMITH APPEAR TO UNDERSTAND YOUR INSTRUCTIONS? (THE OFFICER MUST SAY

YES. IF NOT, THEN THE RESULTS ARE NOT RELEVANT SINCE A FAILURE TO UNDERSTAND THE INSTRUCTIONS MEANS THE SCORING IS IRRELEVANT. OFFICERS WILL ALWAYS SAY YES TO THIS.)

HE STOOD WHERE YOU ASKED?

HE LISTENED?

MR. SMITH DID IN FACT ATTEMPT TO WALK HEEL TO TOE UP A STRAIGHT LINE, TURN AND COME BACK.

IF I ASKED YOU TO WALK DOWN A 4 X 4 BEAM ON THE GROUND, YOU COULD DO THAT?

IF I TOOK THAT SAME BEAM, AND LIFTED IT 50 STORIES IN THE AIR, THAT WOULD BE A CHALLENGE?

THE BOARD DOES NOT CHANGE.

YOU DO NOT CHANGE? BUT THE GRAVITY OF THE SITUATION CHANGES, THEREBY MAKING YOU NERVOUS?

WAS MR. SMITH WAS AWARE OF THE GRAVITY OF HIS SITUATION?

HERE AGAIN YOU CAN ASK ABOUT NO PRIOR DWI ARRESTS.

ABSORPTION

REATH TEST WAS ADMINISTERED AT 6:17 AM

OPERATION WAS AT 4:50AM

1 HOUR 27 MINUTES PRIOR

WOULD YOU ACKNOWLEDGE THAT BREATH READING AT

6:17 AM DOESN'T REFLECT LEVEL AT 4:50 AM

THAT IS BECAUSE OF ABSORPTION

USUALLY TAKES 30-90 MINUTES TO ABSORB

STUDIES HAVE SAID UP TO 3 HOURS

DIAGNOSTICS

MACHINE GOES THRU A DIAGNOSTIC WHEN WARMING
UP

DESCRIBE WHAT CHECKS THE DEVICE IS SUPPOSE TO
GO THRU?

(IF HE/SHE CANNOT SAY THEN THERE IS DOUBT ON
THEIR ABILITY TO OPERATE THE MACHINE)

PROM CHECKS(5)

TEMPERATURE CHECKS

PROCESSOR CHECKS

RAM CHECKS

PRINTER CHECKS

WERE YOU THERE WHEN THE MACHINE WAS TURNED

ANY PROOF MACHINE WENT THRU ITS DIAGNOSTICS ON
(DATE) WHEN IT WAS TURNED ON?

DO YOU KNOW IF THE DEVICE CHECKED THE PROMS?

DO YOU KNOW IF IT DID ITS TEMPERATURE CHECK?

DO YOU KNOW IF IT DID ITS RAM CHECK?

DO YOU KNOW IF IT DID ITS PROCESSOR CHECK?

MARGIN OF ERROR

PRIOR TO TESTING THE DEFENDANTS BREATH YOU RAN
A CHECK ON THE MACHINE USING A
SIMULATOR.

WHEN YOU DO THE CALIBRATION YOU ARE LOOKING
FOR THE MACHINE TO GIVE YOU A READING OF .10 .

YOU KNOW SIMULATOR CONTAINS .10 BECAUSE IT IS
MEASURED AT STEIFEL RESEARCH
INSTITUTE USING GAS CHROMOGRAPHY MASS
SPECTROMETRY

NOT IN FARED SPECTROMETRY

SO WHEN THE SOLUTION THAT IS BEING SENT
THROUGHOUT THE STATE IS TESTED YOU
USE ONE METHOD

FOR MY CLIENT A DIFFERENT METHOD

ARE YOU FAMILIAR WITH THE DIFFERENCES BETWEEN
THE TWO

THAT GCMS IS CON SIDED THE GOLD STANDARD

DID I THE CALIBRATION CHECK READ .10

IT IS ACCEPTABLE TO YOU AND OK TO USE THE
MACHINE IF THERE IS A RANGE OF
READINGS IN THE CALIBRATION TEST OF +/- 10% OR .01

5 CALIBRATION TESTS WERE DONE

5 TESTS

AND 3 OF THE 5 REGISTERED .10

FIELD TESTS WERE DONE

3 TESTS

ONE WAS .10

YOU DID NOT DO ANY OF THESE CALIBRATION TESTS

THE ACCURACY OF THE CALIBRATION REPORTS
DEPENDS UPON THE RELIABILITY OF THOSE
WHO PERFORMED THEM.

YOU ARE NOT IN A POSITION TO VOUCH FOR THOSE
PERSONS.

YOU CAN'T SAY HOW ACCURATE THOSE REPORTS ARE?

YOUR MACHINE IS NOT RELIABLE UNLESS IT IS
PROPERLY CALIBRATED AND YOU DON'T KNOW
IF IT WAS.

CALIBRATION CURVE

THE SAMPLES THAT WERE TESTED FROM THE
SIMULATOR FOR CALIBRATION WAS ALWAYS .10

HAVE YOU EVER HEARD THE TERM CALIBRATION
CURVE

DID NYPD EVER RUN A SAMPLE TO DETERMINE IF THE
MACHINE WAS OPERATING CORRECTLY
FOR OTHER AMOUNTS OF ALCOHOL, LIKE .19

WERE YOU AWARE THAT THE SOCIETY OF FORENSIC
TOXICOLOGISTS IN ITS LABORATORY
GUIDELINES DID NOT APPROVE ANALYSIS OF BREATH
ALCOHOL AS BEING FORENSICALLY RELIABLE

OTHER TESTING AVAILABLE

THE LAW ALLOWS YOU TO REQUEST A SAMPLE FROM
THE DEFENDANT OF BREATH, BLOOD,
URINE OR SALIVA

YOU REQUESTED A BREATH SAMPLE

HAD YOU HAD A BLOOD TEST DONE THAT WOULD HAVE
BEEN DIRECT EVIDENCE OF BAC

YOU DID NOT REQUEST BLOOD

OR URINE

JUST BREATH

RFI

DID YOU ASK ANYONE IN THE ROOM IF THEY HAD A
CELL PHONE ON THEIR PERSON

WHAT IS RFI

THIS MACHINE HAS A RFI DETECTOR

IS THAT EVER CALIBRATED

WERE YOU AWARE THAT THE PATENT FOR THIS
MACHINE DATES BACK TO 1983

PRIOR TO CELL PHONES

ARE YOU AWARE THAT TODAY'S CELL PHONES EMIT RFI
EVEN WHEN OFF

AND THAT THE MHZ THE PHONES OPERATE ON ARE
DIFFERENT THEN WHEN THE RFI DETECTOR
WAS MADE

ONLY ONE SAMPLE TAKEN

HOW MANY TIMES DID YOU TEST MR SMITH'S BREATH
WHEN CALIBRATING THE NYPD RAN MULTIPLE TESTS

BUT ONLY 1 TEST WAS DONE OF MR SMITH'S

ARE YOU AWARE THAT IN OTHER STATES SUCH AS
FLORIDA WHERE THIS MACHINE IS USED
LAW ENFORCEMENTS TAKES 2 SAMPLES TO ENSURE
RELIABILITY

ARE YOU FAMILIAR WITH DR. KURT DUBOWSKI'S
STUDIES?

HE SUGGESTS TESTS BE DONE TWICE BECAUSE OF
ANORMAL BIOLOGICAL VARIABILITY.