

TO: The Honorable Patricia Lykos, Harris County District Attorney
FROM: Rachel Ann Palmer, Misdemeanor Division Section A Deputy Chief
RE: Houston Police Department Issues
DATE: April 26, 2011 Amended on May 4, 2011

BLOOD TEST DRIVING WHILE INTOXICATED CASES

Current Alcohol Analysis Turnaround

- Six weeks

Current Toxicology Analysis Turnaround (SWIFS)

- Three Months

This time period is in direct conflict with the protocol developed after a meeting in late 2010 between the Harris County District Attorney's Office and the Houston Police Department (HPD) Crime Laboratory. At that time, the HPD Crime Laboratory promised to have the testing completed after a maximum of thirty days.

On Friday, April 15, 2011, I met with Ms. Joni Vollman regarding the HPD Crime Laboratory. She indicated that an intern in her bureau spoke with a representative of the laboratory who indicated that *all* blood evidence from HPD will now be collected and sent to the Southwestern Institute of Forensic Sciences (SWIFS) laboratory in Dallas, Texas.

On Monday, April 18, 2011, I sent an e-mail message to Ms. Irma Rios regarding the crime laboratory and the status of blood evidence. She indicated that they are currently "sending more cases" to SWIFS and the Texas Department of Public Safety (DPS) due to a staffing shortage. Presently, Ms. Amanda Culbertson is the only Technical Supervisor at the Houston Police Department laboratory. She is charged with operating all of the intoxilyzer equipment and testing blood samples for alcohol. Ms. Rios indicated that she has an individual scheduled for technical supervisor training in May. It will take about three to six months for the individual to become certified.

Currently, no refusal program agencies are directed to send blood samples to their respective labs rather than the Houston Police Department handling all samples.

According to Ms. Rios, SWIFS recently turned around blood cases in thirty days. My experience with SWIFS suggests this is not an accurate statement. The DPS laboratory actually has a thirty day turnaround time. The exception involves drug cases because DPS requires these samples to be sent to the Austin laboratory.

The statement from Ms. Rios is that SWIFS provides the best pricing, which is why the Houston Police Department uses them for testing. She claims to be looking at other labs but I have not found this to be the case.

I spoke with Dr. Ashraf Mozayani from the Harris County Institute of Forensic Sciences and she indicated that her office could handle the outsourcing from the Houston Police Department. All of her analysts are board certified and the Institute actually quantifies the drug screen, which allows the prosecutor to draw a more solid conclusion of impairment. The fact that the laboratories are inconsistent in their protocol and courtroom testimony (particularly on quantification) has bothered her for years. She indicated further that the Institute could handle more toxicology cases with more staff.

Dr. Mozayani provided a fee schedule; however, it is important to note that the Institute would not charge for testimony in these cases. Purportedly, SWIFS is around \$20.00 less expensive than the Institute; but, this does not account for transportation of the samples and the simple fact that SWIFS is located in another city. I believe that, especially going forward, the quantification issue will be extremely relevant and important. Today, I received word that a chemist from SWIFS would charge a \$90.00 fee to print out the reports needed for him to testify in a blood test case.

Ms. Vollman said that she visited with Ms. Rios on another project and Ms. Rios indicated that HPD will pay one day of transportation and fees for a witness from SWIFS to testify in our courts. Any payment of a witness would, of course, need to be disclosed to the defense during trial. Currently, the roundtrip refundable airfare from Houston to Dallas is \$423.90.

BREATH ALCOHOL TESTING VAN ISSUES

At the beginning of March, Channel Thirteen aired two stories on the breath alcohol testing (BAT) vans. It is my understanding that HPD provided documents to Channel Thirteen. I requested and received all of the documents provided to Wayne Dolcefino in relation to this story. I have reviewed all of the provided documentation from HPD regarding the BAT vans and have found the majority of the information to be quite benign. For example, a few of the daily log sheets refer to interior light problems. The most disconcerting material deals with a few e-mail messages sent from Lieutenant Paul Follis regarding the van circuitry, which was not properly handled by the maintenance division. Lieutenant Follis states that the problems are serious and, if not attended to, they may have "a very negative effect on the four \$6,000 Intox instruments in those vans." In researching the situation, it is clear to me that Lieutenant Follis was simply trying to get a task accomplished rather than sounding a true alarm. None of the material suggests anything that could cause a false test result from an intoxilyzer instrument.

The BAT van issues center around a case in Court One, State v. Reinaldo Ruiz, Cause Number 1655253. The defense attorney, Mr. Brent Mayr, was involved in setting up the BAT vans when he was a prosecutor. The primary individuals involved were Mr. Mayr, Mr. Jano Chu, one of the HPD Technical Supervisors, and Officer Paul LaSalle, an HPD officer heavily involved in the HPD DWI Task Force. It came to my attention during the preparation of State v. Ruiz that HPD Lieutenant Jay Chase was complaining about the BAT vans. I contacted him and he indicated that the vans did not work and he hated them. In particular, Lieutenant Chase referenced a problem where the items inside the van (e.g., a printer) would prevent a valid test by the intoxilyzer instrument. For example, if an officer turned on the printer, the instrument would register an interference and the instrument would not provide a valid test. The Chief Prosecutor of Court One at the time, Mr. Aaron Burdette, and I went to the HPD Crime Lab and met with Mr. Chu in relation to the State v. Ruiz and the BAT vans, in general. We evaluated the instrument in the Ruiz case ninety days before and after the Ruiz test and found no unidentifiable "interferant" detections. The case was tried and the defendant was convicted. It is my conclusion that Lt. Chase, a friend of Mr. Mayr, purposefully sabotaged the BAT vans out of jealousy of Officer LaSalle. Prior to this instance, Lt. Chase indicated to me that he wanted to be used as an expert in intoxication cases and did not understand why the DA's Office always used Officer LaSalle or Officer Don Egdorf as experts. Mr. Mayr has now filed a writ in this case and is seeking a new trial.

Currently, this issue is being litigated in Court Seven, State v. Donald Andrews, Cause Number 1682012. The defense attorney, Mr. Dane Johnson, has requested all *Brady* material while also submitting an extremely overbroad open records request to HPD. I have been in communication with HPD and will provide all of the relevant information regarding the BAT van used in this case (BAT van five) to the defense. Additionally, I have

been in communication with Mr. Mack Cowan, Scientific Director for the Texas Department of Public Safety and he agrees with my assessment of the situation that no problems exist with these mobile vans that would create a false intoxilyzer result.

Six BAT vans were purchased by HPD from General Truck Body Manufacturing Company. The prototype was delivered at the end of August 2008. This vehicle was purchased with money from the Harris County District Attorney's Office. The next two vehicles were purchased with HPD asset forfeiture funds. The final three vehicles were purchased with money obtained through the red light camera program.

OFFICER J.L. AGUILAR

Officer Aguilar was subpoenaed to Court Seven on April 19, 2011 in Cause Number 1730106. In the past, we have dealt with numerous situations where Officer Aguilar failed to submit a videotape in a driving while intoxicated case to the Harris County District Attorney's Office.

In this case, the prosecutors repeatedly attempted to contact Officer Aguilar to no avail. They filed a subpoena for him to appear and court and he failed to do so. This particular defendant provided a breath sample that registered a .142.

After a Westside supervisor was contacted by the prosecutors, Officer Aguilar called the prosecutors in Court Seven to report that the videotape was "purged" and unavailable. The prosecutors are currently evaluating the case without the videotaped evidence.

The section below was added on Wednesday, May 4, 2011.

AMANDA CULBERTSON

On Wednesday, May 4, I received an e-mail message from Assistant District Attorney Allison Baimbridge regarding Ms. Amanda Culbertson. Ms. Baimbridge indicated that Ms. Culbertson, the lone Houston Police Department Technical Supervisor, submitted her resignation and her last day will be May 13. I immediately contacted Ms. Irma Rios and she indicated that the Texas Department of Public Safety will now handle Technical Supervisor duties at the Houston Police Department; however, Ms. Rios could not articulate a plan for DPS to cover the BAT van testimony or any other handling of a technical supervisor's duties. I told Ms. Rios that we must have contact information for Ms. Culbertson as she is a crucial witness in many important intoxication-related cases in Harris County. Even though Ms. Rios told me a few weeks ago that all blood cases are not being outsourced, that is clearly the situation.

We must obtain a valid forwarding address for Ms. Culbertson because subpoenas should still issue for the analyst who handled the case. If they refuse or become otherwise unavailable, then any qualified analyst/expert may interpret their raw data; however, that is a *Crawford/Confrontation* Clause issue and the Supreme Court of the United States has not issued their opinion in *Bullcoming*, the case relevant to these issues. It is crucial to have the testifying analyst/expert explain that she is reaching her expert opinion on her analysis of the previously obtained data rather than merely repeating a past analysis of the not-present analyst.