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| County Court<br>Jefferson County, Colorado<br>Court Address:<br>100 Jefferson County Parkway<br>Golden, CO 80401-1070 | |
| **PEOPLE OF THE STATE OF COLORADO**<br>v.<br>**ANDREW KNIGHT**<br>Defendant | **COURT USE ONLY** |
| Scott W. Storey, District Attorney<br>Jennifer Dill, DDA, #41812<br>Katharine Decker, DDA, #42876<br>Celeste Rangel, DDA, #40431<br>Jessica J. Radke, DDA, #40248<br>Kate Knowles, DDA, #43724<br>Amanda L. Gall, DDA, #43448<br>500 Jefferson County Parkway<br>Golden, CO 80401-6020<br><br>Phone Number: (303)271-6800<br>FAX Number: (303)271-6888 | Case No.<br>11M06626<br><br>Div: B<br><br>Ctrm: 3B |

**MEMORANDUM OF LAW ON THE REQUIREMENT OF PROSECUTORIAL DISCOVERY PRODUCTION IN DRIVING UNDER THE INFLUENCE CASES**

SCOTT W. STOREY, District Attorney in and for the First Judicial District, County of Jefferson, State of Colorado, by and through the undersigned Deputy District Attorneys, respectfully submits this, the People's Memorandum of Law on the Requirement of Prosecutorial Discovery Production in Driving Under the Influence Cases, in support of the People's Response to Defendant's Motion to Compel Discovery, or in the Alternative, to Dismiss the Charges, filed on even date herewith and incorporated in its entirety by reference therein.

This Memorandum addresses the permissible scope of potential pre-trial discovery requests by a defendant facing a charge of Driving Under the Influence or Driving While Ability Impaired by Drugs or Alcohol (collectively "DUI") where the prosecution seeks to introduce evidence of a defendant's Blood Alcohol Content ("BAC") or the presence and amount of drugs ("Drug Quantity") as analyzed by forensic analysis of a defendant's blood sample by personnel of a state-certified public-agency criminalistics laboratory, specifically, the Colorado Department of Public Health and Environment ("CDPHE"). For purposes of this analysis, the People utilize the recent example of discovery requests[1] made by certain defendants facing trial before the

[1] See also Defendant's Motion for Specific Discovery of Police Materials Pursuant to Crim. P. Rule 16(I)(D)(1) and (V)(B)(2) – DUI Materials and Defendant's Memorandum of Law in Support of Motion to Compel Discovery or, in the Alternative, to Dismiss the Case – Pertinent Facts, *People v. Coalmer*, 2011T11819; Defendant's Request for Specific Discovery, *People v. Ditch*, 2011T13389; Defendant's Motion for Specific Discovery and Defendant's Memorandum of Law in Support of Motion to Compel Discovery or, in the Alternative, to Dismiss the Case, *People*

Jefferson County Court, including the Defendant in the instant matter, following the departure of former laboratory technician Mitchell Fox-Rivera from the employ of CDPHE. Such matters are set forth in greater detail below.

## FACTUAL PREDICATE

CDPHE personnel tested blood samples of each of the Defendants in the cases at bar for the presence and quantity of alcohol, drugs, or both.[2] CDPHE maintains standard operating procedures designed to ensure the accuracy, to a valid scientific degree, of the results of blood analysis tests performed by its toxicology laboratory. The manner of determining the alcohol content of a blood sample is determined by gas chromatography, a method of chemical analysis. Chromatography, literally 'color writing,' began with the separation of plant pigments into their constituent colors of green, orange, and yellow and developed into a wide range of analytical techniques for separating mixtures. In gas chromatography, a sample of gas flows through a very narrow, very long tube called a column. The column can be many meters in length and looks like a bundle of wire coiled together. By flowing through this long column, the sample is stretched out and separated into its different chemical parts. These different chemical parts flow off the column are detected in two ways: 1) the time the part takes to get through the column, and 2) the amount that comes off at that time. The results appear as peaks in a graph with time on the horizontal x-axis and amount on the vertical y-axis. Each peak represents a single chemical compound. The detector is a flame-ionization detector, and thus the method is referred to as Gas Chromatography with Flame Ionization Detection, or GCFID.

Blood, however, contains a plethora of different chemical parts, and many of these (such as red blood cells or cholesterol) cannot easily become gas phase. So, instead of injecting the blood sample itself into the column, the gas chromatograph takes a gas sample from the *headspace above* the blood sample. Inside the sample vial there are two separate phases of matter, the liquid blood sample (with internal standard *n*-propanol added) and the gas phase occupying the headspace above the liquid, trapped by the tightly sealed cap. The tightly sealed cap is really a thick rubber disc called a septum which can be pierced by a needle. Once the needle withdraws, the septum reseals itself. Some chemical parts of the blood tend to escape the liquid phase and become gas, even more so when the sample is heated up inside the instrument. Alcohol (also known as ethyl alcohol or ethanol) is one such chemical part. If it is present in the blood, it will be found in the headspace because it evaporates quickly; alcohol is a volatile

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*v. Kelsey*, 2012T520; Defendant's Request for Specific Discovery, *People v. Nichols*, 2011T13391; Defendant's Request for Specific Discovery and Defendant's Addendum to Request for Specific Discovery, *People v. O'Brien*, 2011M5289; and Defendant's Memorandum of Law in support of Motion to Compel Discovery or, In the Alternative, to Dismiss the Case, *People v. Pederson*, 2011T13119.

[2] See note 1, *supra*.

organic compound. A known quantity of internal standard, *n*-propanol, is added to every blood sample tested in order to calculate the unknown quantity of ethyl alcohol. *n*-propanol has one more carbon atom than ethyl alcohol on its chain, so it stays in the column slightly longer. See Figure 1, *infra*.

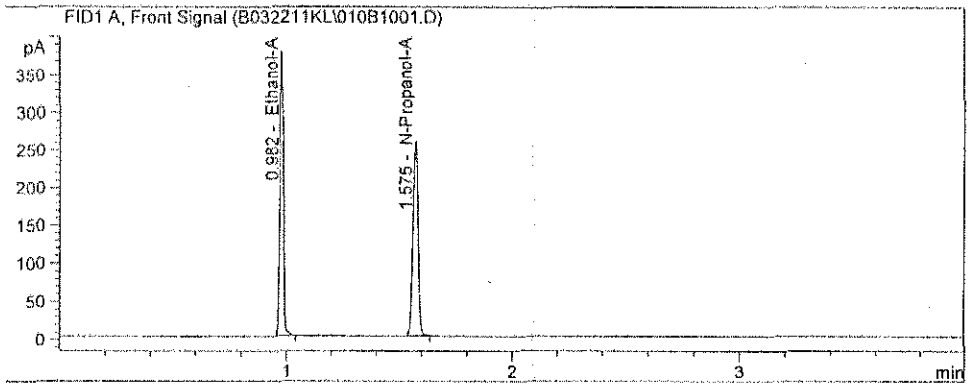


**Figure 1**. Two peaks corresponding to Ethanol and the internal standard N-propanol.

The sample vial that runs through the gas chromatograph, however, is different from the tube of blood that is drawn from a vein by a phlebotomist. The sample vials must be prepared by the laboratory analyst. Preparing the sample consists of at least the following steps: 1) warming up the refrigerated blood tubes to room temperature, 2) agitating or mixing the blood to break up any clots, 3) unsealing the blood sample, 4) pipetting a specific volume of blood from the tube into the sample vial, 5) adding the internal standard *n*-propanol, 6) capping the sample vial with a thick rubber disc, and 7) applying the metal ring to create a tight seal. Once the prepared sample vial is capped with the metal ring, the rubber septum can only be permeated by the needle which retrieves the gas sample inside the gas chromatograph. See Figure 2, *infra*.

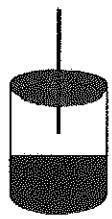

**Figure 2.** Sample vial with needle extracting gas sample. In addition to preparing each blood sample, the analyst also prepares samples with known quantities of alcohol. These are the standards and controls which are used to prepare a calibration curve and to check that calibration curve.

Most gas chromatographs actually contain two columns, an "A column" and a "B column." After the needle samples the headspace (see Figure 2, *supra*), that sample of gas splits

up between those two different lines and each line leads to a different detector. Thus, from a single sample vial two results are obtained. Because each blood sample is tested twice by preparing two separate sample vials, and each vial is tested by both A and B columns, a total of four numbers are obtained for each and every blood sample tested for alcohol content. For example:

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| Sample Vial 1 | Column A = .111 | Column B = .114 |
| Sample Vial 2 | Column A = .112 | Column B = .114 |

The results[3] of the gas chromatograph are averaged to give a reported value. In this particular example, the analysis reports a Blood Alcohol Content of .112, in grams of alcohol per deciliter of blood, and a percentage difference of 2.66%. Figure 1, *supra*, represents the detection off of Column A for a certain sample and the production of one out of the four numbers. At the CDPHE toxicology laboratory, all four numbers must be within a 5% range of acceptable error. If they are not within the acceptable error range of 5%, the sample must be retested (obtaining four new numbers) before any result is officially reported. Results are officially reported in a Blood Analysis Report authored by the testing analyst, indicating a respective defendant's BAC or Drug Quantity.

Mitchell Fox-Rivera was formerly a laboratory technician at CDPHE, charged with performing forensic analysis of blood samples. In some cases, Mr. Fox-Rivera failed to properly operate a standard piece of equipment, specifically the pipette used to transfer a specific volume of blood from the phlebotomist's blood tube to the analyst's sample vial for GCFID. Also known as an auto-pipette, it is calibrated to aspirate and then deliver a set volume of liquid. Each time it is used, a new plastic tip is attached to the bottom. See Figures 3 & 4, *infra*.

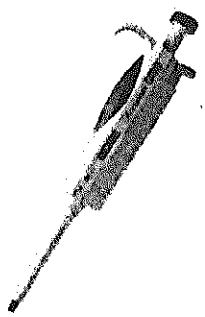

**Figure 3.** Auto-pipette.

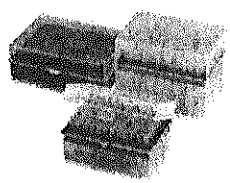

**Figure 4.** Pipette tips.

Proper pipette technique may include pre-wetting the pipette tip (rinsing the plastic tip with sample), holding up the pipette for a visual examination, cleaning off excess droplets with a

wipe, immersing the tip to the proper depth, pulling the tip out straight, and using consistent plunger pressure and speed. Failing to follow certain protocols may result in a smaller volume delivered into the sample vial than what was intended. Decreased volume therefore may lead to a lower BAC being reported. Recall that the sample vial contains only two phases, liquid and gas. If less liquid is present, then the headspace volume is greater and the ethanol present in that headspace will be more dilute.

The process of transferring a volume of blood into the sample vial and preparing it with the internal standard is not one that is automated by an instrument, like the process of extracting each gas sample from each vial. It is a step that is performed by a human and human error is never wholly eradicated from any scientific process. For instance, in pipetting samples, even body temperature can affect the volume dispensed. That is because body heat can increase the temperature of the air space inside the pipette, expanding the air and pushing out the liquid. Therefore, an analyst with exceptionally warm hands may need to hold the pipette loosely, or put it down between samples to maintain a static environmental temperature.

Because of the human element in forensic analysis of this type, a 0% error rate in testing is not scientifically possible. Thus, procedures are in place not to achieve a 0% error rate, but rather to minimize possible human errors and put in place the checks and balances necessary to ensure reliability. Therefore, measures have been put in place by CDPHE after the departure of Mitchell Fox-Rivera to ensure consistency in the volume of sample transferred by pipette. Changes to the Standard Operating Procedures include planned blood alcohol re-analysis each Monday wherein one sample from a prior run 3, 6, and 9 months ago, respectively, will be re-analyzed along with the sample batch for that day by each technician on the blood alcohol bench. Moreover, all samples that are reported outside the acceptable error range and thus require a re-analysis will be re-analyzed by an analyst other than the original analyst. These enhancements to the existing procedures will provide a check on possible systemic problems and will help minimize random errors.

Mitchell Fox-Rivera analyzed blood samples of certain of Defendants in the cases at bar[4] and generated a Blood Analysis Report in those cases. In each of those cases, other CDPHE personnel performed a second forensic analysis of each of the respective Defendants' blood, generating a second Blood Analysis Report. The People have provided to such Defendants the Blood Analysis Reports authored by Mr. Fox-Rivera and the second analyst. The People have

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[3] See, *e.g.*, Exhibit A, in relevant part, commonly referred to as a "litigation packet", which provides, among other data, results printed by the gas chromatograph instrument.

[4] See *Coalmer* Motion, 11T11819, *supra* note 1; *Ditch* Motion, 2011T13389, *supra* note 1; *Kelsey* Motion, 2012T520, *supra* note 1; *Nichols* Motion, 2011T13391, *supra* note 1; *O'Brien* Motion, 2011M5289, *supra* note 1; *Pederson* Motion, 2011T13119, *supra* note 1.

also provided to Defendants[5] a litigation packet including the gas chromatograph results, upon which the laboratory technician relied to calculate a Defendant's respective BAC or Drug Quantity, for the second analysis.[6] At trial in such cases, the People will not seek to introduce Blood Analysis Report authored by Mr. Fox-Rivera. Rather, where applicable, the People will seek to introduce the results of the second analysis performed via the Blood Analysis Report of that technician.

Defendant in the above-cited case and others similarly situated (collectively, the "Defendants") filed motions[7] requesting the Jefferson County Court to require the People to produce in advance of trial certain specifically requested materials (each a "Defense Request" and collectively the "Defense Requests") related to forensic blood analysis performed by CDPHE in these cases, pursuant to the applicable rules of discovery as found in Colorado Rule of Criminal Procedure 16. These requests are addressed collectively, *infra.*

## ARGUMENT

Colorado Rule of Criminal Procedure 16 provides criminal defendants with formal mechanisms for requesting and obtaining materials and information in the possession or control of the prosecution. Rule 16(1)(a) sets forth those materials and information that a prosecutor is obligated to disclose to a defendant. Separately, Rule 16(I)(d) provides for the discretionary disclosure of certain materials and information not contemplated by the mandatory disclosure provisions of Rule 16(1)(a), provided certain conditions are met.

The purpose of such discovery rules is to provide a criminal defendant with a fair opportunity to challenge the evidence against him. Defendants in the cases at bar cite as their chief concern the reliability of the blood analysis in their respective cases and therefore argue for the discovery of the requested materials for the primary purpose of challenging the reliability or validity of these results.[8] Defendants claim that their discovery requests are necessary in order to challenge the reliability of these blood results. However, these unduly oppressive and burdensome requests simply are not necessary nor, as discussed below, particularly useful for that purpose.

Defendants have already been provided materials and information sufficient to evaluate the reliability or validity of the results of the blood analysis that will be used as evidence against them at trial. First, each Defendant has been provided a copy of the Blood Analysis Report for

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[5]The litigation pack has been disclosed to all Defendants with the exception of Defendant Pederson. See People's Response to the *Pederson* Motion, 2011T13119, *supra* note 1. The *Pederson* litigation packet has been requested and will be timely disclosed via normal discovery mechanisms upon receipt thereof.

[6] See Exhibit A.

[7] See Defense Motions cited at note 1, *supra.*

[8] See, *e.g.*, *Pederson* Motion, 2011T13119, at 5, *supra* note 1 ("the systemic failure of the laboratory's supervising analyst to identify and correct such errors . . . strongly impeaches the reliability of the (sic) any laboratory result").

the first analysis performed of Defendant's blood as well as any subsequent analysis performed by CDPHE. Thus, certain Defendants have recourse to the comparison of two separate analyses of their respective blood samples. Furthermore, a litigation packet including the gas chromatograph results, upon which the laboratory technician relied to calculate a Defendant's respective BAC or Drug Quantity, for the specific result that will be used as evidence at trial has been provided.[9] Defendants are free to reanalyze the gas chromatographs instrument's reports. Finally, because a second sample of blood is available for testing, Defendants have a very simple way of obtaining information about the reliability of the results of the forensic analysis the People intend to introduce at trial – test this second sample. Therefore, Defendants may most easily and effectively evaluate the validity of the results to be used against them at trial by having their blood samples tested at a facility of their choosing.

Thus, Defendants have access to more than enough information and materials to adequately prepare for trial in this matter, without recourse to the materials requested pursuant to Rule 16. Nevertheless, the People evaluate the Defense Requests under each mechanism afforded by Rule 16 in turn, *infra.*

## I. Many of the Defense Requests Are Not Within the Possession or Control of the People or Are Privileged and Therefore Not Discoverable

As a threshold matter, materials are not discoverable under any provision of Rule 16, whether mandatory or discretionary, unless such materials are within the prosecution's possession or control. See Rule 16(I)(a)-(d). Materials within a prosecutor's possession or control extends to those held by "members of his or her staff and of others who have participated in the investigation or evaluation of the case and who either regularly report, or with reference to the particular case have reported, to his or her office." Rule 16(I)(a)(3). A prosecutor is additionally obligated to maintain a "flow of information between investigative personnel and his or her office sufficient to place within his or her possession or control all material and information relevant to the accused and the offense charged." Rule 16(I)(b)(4). If the requested material would be discoverable if in the possession or control of the prosecution but is held by other government agencies, the prosecuting attorney is obligated to use "diligent and good faith efforts to cause such material to be made available to the defense." Rule 16(I(c).

First, Rule 16 contemplates only those items in the possession or control of the People that pertain to a particular Defendant's case. Crim. P. Rule 16(I)(a)(1). Thus, considering the plain language of the rule, many of the materials requested by Defendants are outside of this limited scope of the rule, and as such, this Court need go no further in considering those of the Defense Requests that do not pertain to that respective Defendant's case. Courts construe rules

[9]With the exception of the relevant litigation packet in *Pederson*, 2011T13119. See note 5, *supra.*

of procedure consistent with the rules of statutory construction. *People v. Shell*, 148 P.3d 162, 178 (Colo. 2006). Where the plain language of a rule or statute is clear, a court need go no further in interpreting its provisions. *People v. Smith*, 971 P.3d 1056, 1058 (Colo. 1999). Interpretation of rules or statutes is a question of law. *People v. Golden*, 140 P.3d 1, 4 (Colo. App. 2005). The interpreting court must give effect to the intent of the legislature. *Smith*, 971 P.3d at 1058. In determining legislative intent, a court first considers the plain language of the rule or statute. *People v. Banks*, 9 P.3d 1125, 1128 (Colo. 2000). Plainness is determined by reference to the "language itself, the specific context in which that language is used, and the broader context of the statute as a whole." *Robinson v. Shell Oil Co.*, 519 U.S. 337, 341 (1997); *see also Klinger v. Adams County Sch. Dist. No. 50*, 130 P.3d 1027, 1031 (Colo. 2006). The statutory scheme must be read as a whole so as to give "consistent, harmonious and sensible effect to all of its parts," in accordance with the presumption that the legislature intended the entire rule or statute to be effective. *Colo. Water Conservation Bd. v. Upper Gunnison River Water Conservancy Dist.*, 109 P.3d 585, 593 (Colo. 2005)(quoting *Bd. of County Comm'rs v. Costilla County Conservancy Dist.*, 88 P.3d 1188, 1192 (Colo. 2004)). Where, as here, the plain language thus analyzed of the rule is clear, no further analysis is required. *Smith*, 971 P.3d at 1058.

Many of the materials sought are not "concerning the pending case." Rule 16(I)(a)(1). Chief among these are requests for the results of blood analysis performed for other Defendants over the course of years.[10] Other examples of these types of requests are requests for records documenting all purchases and use of hand sanitizer by CDPHE for the year prior to Defendant's test and lab audit reports for five years up to Defendant's test,[11] and requests for any and all communications for the years 2010, 2011, and 2012, between CDPHE and the distributer or manufacturer of unspecified blood testing equipment.[12]

Additionally, some of the requests are for privileged or confidential information that are not subject to discovery. These records, which may be either privileged or confidential, are not in the People's possession, and to obtain them, the People would be required to subpoena a third party. Privileged records include, *inter alia*, doctor-patient communications, husband-wife communications, or certain official information. See generally § 13-90-107, C.R.S. Once a privilege has attached, a defendant may not compel discovery unless the privilege has been waived. *Clark v. District Court*, 668 P.2d 3, 9 (Colo. 1983); *see also People v. District Court*, 719 P.2d 722, 727 (Colo. 1986); *People v. Tauer*, 847 P.2d 259, 261 (Colo. App. 1993). Privileged information can only be disclosed with consent of the privilege holder, and consent is deemed to waive the privilege. § 13-90-107, C.R.S.; *People v. Sisneros*, 55 P.3d 797 (Colo.

[10]See, *e.g.*, *Kelsey* Motion, 2012T520 at Attachment A, *supra* note 1 (requesting any inaccurate results for any defendant for the years 2010, 2011, and 2012).

[11] See, *e.g.*, *Nichols* Motion, 2011T13391, at 4, 6, *supra* note 1.

[12] See, *e.g.*, *Pederson* Motion, 2011T13119 at Attachment A, *supra* note 1.

2002). An evidentiary showing of waiver is required before the trial court may order the documents produced for *in camera* review. *People v. Wittrein*, 221 P.3d 1076, 1083 (Colo. 2009)(quoting *Sisneros*, 55 P.3d at 800).

Defendants have requested confidential information in their requests for personnel records. Such information is confidential pursuant to section 24-72-204(3)(a), C.R.S.[13] Additionally, Defendants are requesting certain information pertaining to Mitchell Fox-Rivera, the subject of an on-going internal investigation currently being performed by CDPHE,[14] even where he had no involvement in a respective Defendant's case.[15] Information from an on-going investigation is protected by the deliberative process privilege. The deliberative process privilege, also known as the governmental privilege, official information privilege, and the executive privilege, protects the deliberative process of government. *City of Colorado Springs v. White*, 967 P.2d 1042 (Colo. 1998). In *White*, the Colorado Supreme Court held that this "privilege rests on the ground that public disclosure of certain communications would deter the open exchange of opinions and recommendations between government officials, and it is intended to protect the government's decision-making process, its consultative functions, and the quality of its decisions. *Id.* at 1047. This privilege protects material that is both pre-decisional and deliberative. *Id.* at 1051. The People presume that all documents in the on-going investigation, generated to-date, are pre-decisional and deliberative. Releasing this information at this stage of the investigation risks substantially jeopardizing the investigation by having a chilling effect on government self-evaluation and consequent program improvement efforts.

Additionally, releasing this information would have a negative impact on the legitimate privacy interests of the individuals involved. Since the People have met the procedural requirements for asserting the deliberative process privilege, this privilege presumptively applies and *in camera* review is not mandatory or practical. *Id.* at 1054. If Defendants seek to overcome this privilege, they must demonstrate that Defendants' "interests in disclosure of the materials is greater than the government's interests in their confidentiality." *Id.* Factors to aid the trial court in balancing the competing interests in the privileged materials include: "the relevance of the evidence, whether there is reason to believe that the documents may shed light on government misconduct, whether the information sought is available from other sources and can be obtained without compromising the government's deliberative process, and the importance of the material to the discoverant's case." *Id.*

If the Court concludes that Defendants have met their respective burden of showing how the privileged materials could be relevant, and thereby orders an *in camera* review of the materials, the Court must consider the factors set forth in *Martinelli* prior to releasing any of the

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[13] See, *e.g.*, *Nichols* Motion, 2011T13391, at 7-8, *supra* note 1.

[14] See, *e.g.*, *Coalmer* Motion, 2011T11819, at Attachment A, *supra* note 1; *Pederson* Motion, 2011T13119, at Attachment A, *supra* note 1.

[15] See, *e.g.*, *Knight* Motion, 2011M6626, *supra* note 1.

privileged information. *Martinelli v. District Court*, 612 P.2d 1083, 1089 (Colo. 1980). These factors include, but are not limited to:

> 1) the extent to which disclosure will thwart governmental processes by discouraging citizens from giving the government information; 2) the impact upon persons who have given information of having their identities disclosed; 3) the degree to which governmental self-evaluation and consequent program improvement will be chilled by disclosure; 4) whether the information sought is factual data or evaluative summary; 5) whether the party seeking the discovery is an actual or potential defendant in any criminal proceeding...; 6) whether the investigation has been completed; 7) whether any intradepartmental disciplinary proceedings have arisen or may arise from the investigation; 8) whether the suit is nonfrivolous and brought in good faith; 9) whether the information sought is available through other discovery or from other sources; and 10) the importance of the information sought to the [defendant]'s case.

*Id.*

Contrary to Defense Counsel's argument,[16] the United States Supreme Court has specifically rejected a trial court's ruling that defense counsel be allowed to examine all of the confidential information in the State's possession. *Pennsylvania v. Ritchie*, 480 U.S. 39, 59 (1987). In fact, the Court makes clear that the defendant's right to exculpatory material does not give defense counsel unfettered access to the State's case file. *Id.*; *see also United States v. Bagley*, 473 U.S. 667, 675 (1985); *United States v. Agurs*, 427 U.S. 97, 111 (1976). The *Ritchie* Court addressed the defendant's argument that he should be entitled to privileged child abuse files in order to protect his right to confrontation. The Court concluded that the right to confrontation is a *trial* right, and this right should not be transformed into a constitutionally compelled rule of pretrial discovery. *Ritchie*, 480 U.S. at 52. The Court went further, stating that the right to confrontation is satisfied when the defendant has the opportunity, at trial, to effectively cross examine his accusers; as such, the Confrontation Clause only guarantees the "opportunity for effective cross-examination, not cross-examination that that is effective in whatever way, and to whatever extent, the defense might wish." *Id.* (quoting *Delaware v. Fensterer*, 474 U.S. 15, 20 (1985)); *see also Dill v. People*, 927 P.2d 1315, 1322 (Colo. 1996). In balancing the interests of the defendant in adequately preparing for trial against the People's interest in maintaining the confidentiality of its child abuse files, the *Ritchie* Court concluded that if the defendant makes "some plausible showing" that there is information in the confidential records that is material to the defense, an *in-camera* review is proper, prior to any of the records being released to the defendant. *Ritchie*, 480 U.S. at 58, *see also Agurs*, 427 U.S. at 10-110; *United States v. Valenzuela-Bernal*, 458 U.S. 858, 867 (1982). Subsequent cases have declined

[16] See, *e.g.*, *Knight* Motion, 2011M6626 at 5, *supra* note 1.

to extend *Ritchie* to require *in-camera* reviews any time the defense requests privileged information. *See Dill*, 927 P.2d at 1323; *People v. Spykstra*, 234 P.3d 662 (Colo. 2010).

As discussed, *supra* at 6, any interest of Defendants in the instant cases in adequately preparing to challenge the reliability of forensic analysis evidence introduced by the People at trial in these matters has been satisfied, given the information and materials already provided that permit them to do so. Defendants may avail themselves of the very best method of determining the validity of such evidence – by testing the second sample preserved for that very purpose. In any event, any benefit that might be derived from such privileged materials is clearly outweighed by the privilege itself.

Nonetheless, if Defendants wish to pursue the foregoing materials not in the possession or control of the People from the third parties who do control such materials, Colorado Rule of Criminal Procedure 17(c) provides Defendants with an appropriate opportunity for obtaining tangible evidence not within the prosecutor's possession or control, provided they can establish a right to such discovery pursuant to the rule. Rule 17(c) provides, in relevant part:

> In every criminal case...the defendant [has] the right to compel...the production of tangible evidence by service upon [witnesses] of a subpoena to appear for examination as a witness upon the trial or other hearing.
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> ***
>
> (c) For Production of Documentary Evidence and of Objects. A subpoena may also command the person to whom it is directed to produce the books, papers, documents, photographs, or other objects designated therein. The court may direct that books, papers, documents, photographs, or objects designated in the subpoena be produced before the court at a time prior to the trial or prior to the time when they are to be offered in evidence and may upon their production permit the books, papers, documents, photographs, or objects or portions thereof to be inspected by the parties and their attorneys.

Rule 17(c). Thus, under Rule 17(c), a defendant may by the issuance of a subpoena *duces tecum* require third parties to produce evidence for use by the defendant at trial. *Spykstra*, 234 P.3d at 668 (Colo. 2010).

This is the proper method for many of the Defense Requests. To the best of the People's information and belief,[17] Defendants have not availed themselves of this avenue of discovery. Though the consideration of the matter is therefore not currently before the Court, in response to

[17] The People respectfully base this assumption on the notice requirements of Rule 17: A defendant must provide notice to the prosecution of its issuance of a *subpoena duces tecum* for the production of evidence to a third-party. Rule 17(c)("the subpoenaing party shall forthwith provide a copy of the subpoena to opposing counsel...upon issuance"); *see also Spykstra*, 234 P.3d at 667 (Rule 17(c) "requires that notice be given to district attorneys upon issuance of a third-party subpoena").

such a filing, the prosecution may challenge the defendant's subpoena *duces tecum* before the trial court. *Id.* at 667. Upon such motion, the trial court may "quash or modify the subpoena if compliance would be unreasonable or oppressive." Rule 17(c).

Assuming, *arguendo*, that Defendants were to issue such subpoenas *duces tecum,* the People would oppose the same by filing a Motion to Quash any such subpoenas. A defendant may only survive the prosecution's motion to quash its subpoena *duces tecum* by meeting its burden of demonstrating, with respect to each and every separate evidentiary request in such subpoena *duces tecum*, each element of a five-part test:

> 1) A reasonable likelihood that the subpoenaed materials exist, by setting forth a specific factual basis;
> 2) That the materials are evidentiary and relevant;
> 3) That the materials are not otherwise procurable reasonably in advance of trial by the exercise of due diligence;
> 4) That the party cannot properly prepare for trial without such production and inspection in advance of trial and that the failure to obtain such inspection may tend unreasonably to delay the trial; and
> 5) That the application is made in good faith and is not intended as a general fishing expedition.

*Spykstra*, 234 P.3d at 669. On analogous reasoning under Rule 16 set forth below, the People assert that the Defendants, should they request the same materials under Rule 17, would be unable to meet their burden under the *Spykstra* test.

## II. Mandatory Discovery Under Rule 16(I)(a)

Colorado Rule of Criminal Procedure 16(I)(a) sets forth mandatory discovery of certain material and information which the prosecution is obligated to provide to a defendant provided that such material and information is within the possession or control, as discussed in Section I, *supra*, of the prosecuting attorney. Rule 16(I)(a) creates two categories of mandatory discovery: 1) specifically delineated materials and information pursuant to Rule 16(I)(a)(1), and 2) materials or information either potentially exculpatory to the defendant or that would tend to reduce the punishment for the alleged offense, pursuant to Rule 16(I)(a)(2).

### A. The People Have Complied with All Mandatory Discovery Required by Rule 16(I)(a)(1)

Rule 16(I)(a)(1)(I)-(VIII) enumerates specific items the prosecution must disclose to the defense, provided that such items are within the prosecuting attorney's possession or control. Such disclosures are automatic and must be made regardless of whether a defendant so requests.

*People v. District Court of El Paso County*, 790 P.2d 332, 337 (Colo. 1990). Rule 16(1)(a)(1) requires the prosecution to disclose, in relevant part[18]:

> I. Police, arrest and crime or offense reports, including statements of all witness; ***
> III. Any reports or statements of experts made in connection with the particular case, including results of physical or mental examinations and of scientific tests, experiments, or comparisons;
> IV. Any books, papers, documents, photographs, or tangible objects held as evidence in connection with the case;
> V. Any record of prior criminal convictions of the accused...or any person the prosecuting attorney intends to call as a witness in the case; ***
> VII. A written list of the names and addresses of the witnesses then known to the district attorney whom he or she intends to call at trial;
> VIII. Any written or recorded statements of the accused...made to the police or prosecution by the accused.

Rule 16(I)(a)(1)(I)-(VIII)(as applicable). The People have disclosed all such specifically enumerated items, *infra*, within its possession or control in the cases at bar. Should the People be newly in receipt of materials or information responsive to the requirements of Rule 16(I)(a)(1) with respect to any case at issue, discovery of such items shall be promptly made to the respective Defendants via normal discovery procedures.

### B. The People Have Complied with All Mandatory Discovery Required by Rule 16(I)(a)(2)

Rule 16(I)(a)(2) requires disclosure to the defense of any material or information within the possession or control of the prosecution which "tends to negate the guilt of the accused as to the offense charged or would tend to reduce the punishment therefor." This provision is simply a restatement of a prosecutor's constitutional obligation under the due process clause of the Fifth Amendment to the United States Constitution as set forth in *Brady v. Maryland*, 373 U.S. 83 (1963), and its progeny. *District Court of El Paso County*, 790 P.2d at 337 (citing *People v. Millitello*, 705 P.2d 514, 518-19 (Colo. 1985)).[19] Thus, the People's obligations pursuant to Rule 16(I)(a)(2) depend upon the standards set forth by *Brady* and its progeny with respect to due

[18] The requirement of Rule 16(I)(a)(II), requiring the disclosure under certain circumstances of transcripts and tangible evidence relating to grand jury proceedings, is inapplicable in any of the cases at bar. Rule 16(I)(a)(VI), related to electronic surveillance, is similarly inapplicable to the facts at issue. Further, references to co-defendants in Rule 16(I)(a)(V) and (VIII) have been omitted as similarly inapplicable.

[19] The due process requirement applies "equally to the comparable [due process] clause of the Fourteenth Amendment [of the United States Constitution] applicable to trials in state courts. *Agurs*, 427 U.S. at 107. The analysis is no different under the analogous due process clause of the Colorado Constitution in Article II, section 25.

process claims. *District Court of El Paso County*, 790 P.2d at 337; *see also In Re Attorney C*, 47 P.3d 1167, 1170-71 (Colo. 2002).

*Brady* creates a right to the disclosure of "evidence favorable to an accused...where the evidence is *material* either to guilt or to punishment." *Brady v. Maryland*, 373 U.S. at 86-7. Thus, *Brady* requires that discovery requests pertain to evidence that is both "favorable to the accused and material to either guilt or punishment." *Moore v. Illinois*, 408 U.S. 786, 794 (1972). A defendant must make a plausible showing that explains how a request for discovery would lead to evidence that meets both the favorability and materiality requirements. *Valenzuela-Bernal*, 458 U.S. at 867 (defendant must "at least make some plausible showing of how [the requested discovery] would [be] both material and favorable to his defense" and holding that defendant failed to establish violation of due process where he "made no effort to explain what material, favorable evidence his requests would have provided for his defense").

The right to favorable and material evidence under *Brady* is limited. *Ritchie*, 480 U.S. at 59 (quoting *Weatherford v. Bursey*, 429 U.S. 545, 559 (1977)) ("[t]here is no general constitutional right to discovery in a criminal case, and *Brady* did not create such a right"); *see also Bagley,* 473 U.S. at 675 n. 7 ("[a]n interpretation of *Brady* to create a broad, constitutionally required right of discovery 'would entirely alter the character and balance of our present systems of criminal justice'")(quoting *Giles v. Maryland*, 386 U.S. 66, 117 (1967));[20] *see also Wardius v. Oregon*, 412 U.S. 470, 474 (1973)("[t]he Due Process Clause has little to say regarding the amount of discovery which the parties must be afforded."

*Brady* requires disclosure of exculpatory evidence as well as favorable evidence bearing on the impeachment of a witness. *Bagley*, 473 U.S. at 676 (there is "no distinction between impeachment evidence and exculpatory evidence"); *see also Giglio v. United States*, 405 U.S. 150, 154 (1972). The prosecution is only required to disclose favorable evidence "that, if suppressed, would deprive the defendant of a fair trial." *Bagley*, 473 U.S. at 675 ("[a] rule that the prosecutor commits error by *any* failure to disclose evidence favorable to the accused, no matter how insignificant, would impose an impossible burden on the prosecutor and would undermine the interest in the finality of judgments").

The evidence must not only be favorable, but material. Evidence is "material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome." *Bagley,* 473 U.S. at 682. In assessing a request for

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*District Court of El Paso County*, 790 P.2d at 337 n. 6. The People therefore intend for its analysis and argument with respect to due process concerns for purposes of this memorandum to be applicable to all three clauses.

[20] *See also Bagley*, 473 U.S. at 675 (*Brady* does not require a prosecutor to "deliver his entire file to defense counsel"); *Agurs*, 427 U.S. at 106 ("[t]here is, of course, no duty to provide defense counsel with unlimited discovery of everything known by the prosecutor"); *id.* at 111 ("[w]e have rejected the suggestion that the prosecutor has a constitutional duty routinely to deliver his entire file to defense counsel.")

discovery under Rule 16(I)(a)(2), Colorado courts are guided by the *Bagley* standard of materiality. *District Court of El Paso County*, 790 P.2d at 338. "The question is...whether in [the absence of the requested evidence a defendant] received a fair trial, understood as a trial resulting in a verdict worth of confidence." *Kyles v. Whitley*, 514 U.S. 419, 434 (1995); *see also Agurs*, 427 U.S. at 109-10 ("[t]he mere possibility that an item of undisclosed information might have helped the defense or might have affected the outcome of the trial, does not establish 'materiality' in the constitutional sense"). Evidence must only be discovered if it might be expected to play a significant role in the suspect's defense. *California v. Trombetta*, 467 U.S. 479, 488 (1984); *see also Dill*, 927 P.2d at 1323.

Defendants have failed to make any plausible showing with respect to many of the Defense Requests that, if granted, the materials sought would lead to either favorable or material evidence under the foregoing analysis or that would play a significant role in their respective defenses. As discussed above, Defendants must first make a plausible showing that the requests would lead to favorable and material evidence. *Ritchie*, 480 U.S. at 1002 n.5 (defendant must establish a "basis for his claims that [the request contains] material evidence"). Defendants collectively argue that the requests made are favorable and material because "systemic failures" at CDPHE exist sufficient to undermine confidence in any results reported by any of its analysts. Defendants argue, therefore, that the requested materials are necessary to prepare to challenge such evidence at trial.

The Defense Requests are purely speculative. *See Giles*, 386 U.S. at 66 (*Brady* does not obligate the People to "communicate preliminary, challenged, or speculative information"); *see also Ritchie*, 480 U.S. at 1002 ("[a] defendant's right to discover exculpatory evidence does not include the unsupervised authority to search through the [prosecution's] files"). Defendants have made no good faith showing that test of the Defendant's blood, which the People seek to introduce at trial, is in any way inaccurate or that its reliability is in question. Rather, Defendants seek a fishing expedition of various extremely attenuated materials that *might*, theoretically, lead to information from which they *might* be able to undermine the reliability of the laboratory's practices in general. Even if that were the case, the evidence would not necessarily lead to an inference that the test of Defendant's blood in the instant case is unreliable. This is the "mere possibility" rejected by the *Agurs* Court. Furthermore, the focus of the materiality standard is not the impact such material may have on trial preparation, but rather the materiality of the evidence to "the issue of guilt or innocence". *Agurs*, 427 U.S. at 113 n. 20 (standard focusing on the "impact of the undisclosed evidence on the defendant's ability to prepare for trial...unacceptable"). As discussed *supra*, Defendants have ample information with which to challenge the forensic analysis in this case, and recourse to unduly burdensome discovery requests for materials that might only remotely bear on such evidence is specious at best.

Defendants also argue that the requests are favorable and material because they may lead to evidence that bears on the impeachment of a witness. However, the "ability to question adverse witnesses...does not include the power to require the pretrial disclosure of any and all information that might be useful in contradicting unfavorable testimony." *Ritchie*, 480 U.S. at 999 (the right to confront and impeach witnesses "does not compel the pretrial production of information that might be useful in preparing for trial"). Defendants have made no good faith or plausible showing of how, precisely, the requested materials would assist in the impeachment of any specific witness in these cases. Moreover, Defendants have recourse to cross-examination of the People's witnesses: "[T]he right to confront one's accusers is satisfied if defense counsel receives wide latitude at trial to question witnesses." *Id.* The discovery requests cannot, therefore, be sustained on this basis.

Finally, the Defendants have failed to articulate precisely how any material, favorable evidence they might obtain through such discovery would be likely to change the outcome at trial. The People have ample evidence against the Defendant absent the forensic analysis performed by CDPHE. See People's Response to Defendant's Motion to Compel Discovery, or in the Alternative, to Dismiss the Charges at 1.

Thus, Defendants have made no showing that there is a "reasonable probability" that their requests would lead to material, favorable evidence that would play a significant role in their respective defenses, and their motions, in so far as they request any additional materials not already discovered, should be denied. Furthermore, these requests should be denied as unduly burdensome and unnecessary where, as reiterated in the foregoing, Defendants have ample materials already in their possession with which to challenge the reliability of any forensic analysis results introduced at trial against them as well as recourse to independent testing of their blood samples.

**II. Discretionary Disclosures**

Rule 16(I)(d)(1) provides certain types of discovery that a court may, in its discretion, require the prosecution to disclose to the defense, where such materials are not covered by the mandatory discovery requirements of Rule 16(I)(a)(1)-(2). However, Rule 16(I)(d)(1) is not intended to provide the defense an additional opportunity to obtain material that could not be discovered under Rule 16(I)(a)(1)-(2). *District Court of El Paso County*, 790 P.2d at 338. Rather, a court may order discovery pursuant to Rule 16(I)(d)(1) only where the materials requested are 1) relevant, and 2) the defense has made a showing that such request is reasonable. Rule 16(I)(d)(1). Even where the defense requests relevant material and has made the requisite showing of reasonableness, the court may nevertheless deny disclosure if it finds a "substantial

risk of...unnecessary annoyance...resulting from such disclosure, which outweighs any usefulness of the disclosure to the defense." Rule 16(I)(d)(2).

### A. Certain Materials Requested by the Defense are Not Relevant

Rule 16(I)(d) provides for discretionary disclosure to the defense of material and information not otherwise provided for in Rule 16(I)(a)(1)-(2). Such materials must, however, be relevant to the instant case. Rule 16(1)(d)(2). The determination of whether requested material is relevant rests in the sound discretion of the trial court. *District Court of El Paso County*, 790 P.2d at 338. Evidence is relevant for purposes of Rule 16(I)(d)(1) "regardless of whether it contains information admissible at trial, as long as its contents are relevant to the conduct of the defense." *Id.* Material is relevant when it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." C.R.E. 401. As stated in *People v. Botham,* "facts which logically tend to prove or disprove the fact in issue or which afford a reasonable inference or shed light upon the matter contested are relevant. However, facts collateral to or bearing so remotely upon the issue that they afford only conjectural inference should not be admitted as evidence." 629 P.2d 589, 602 (Colo. 1981)(superseded by rule on other grounds).

Many of the Defense Requests are so remote from the facts in issue in a particular case that they are clearly irrelevant to any material fact. It is a speculative defense to say that because the CDPHE made errors in the past, it has made errors with regard to specific test of the Defendant's blood sample which the People intend to introduce at trial. In those cases where more than one analysis was performed, because the original test will not be admitted, the items requested would not prove or disprove an issue of material fact, would not afford the jury with any reasonable inference regarding the same, nor would the items shed light on the matter of the accuracy of the test in evidence. Instead, the items would provide the jury with collateral facts bearing remotely on the issue of the accuracy of such test. The materials requested would only provide a conjectural inference based on a speculative defense, and therefore, are not relevant to the cases at bar. For example, Defendants have requested materials such as blueprints for the CDPHE laboratory and HVAC plans, ostensibly for the purpose of demonstrating that such environmental factors *might* affect the analysis of blood results, which *might* have, in turn, affected the analysis of the blood result in question.[21] These are materials so remote that they hardly bear on any fact in question. These kinds of requests are simply not relevant, and should be denied.

[21] See, *e.g., Nichols* Motion, 2011T13391, at 7, *supra* note 1.

### B. Defendants Have Not, and Could Not, Demonstrate that the Materials Requested Are Reasonable

Rule 16(1)(d) requires not only that the requested material be relevant, but that the defense make a showing that the request is reasonable. In order to show that a request is reasonable, Defendants must demonstrate that the material is 1) relevant to the conduct of the defense and 2) unavailable from any source other than the prosecution. *District Court of El Paso County*, 790 P.2d at 338. Whether a request is reasonable, as with whether a request is relevant, rests in the sound discretion of the trial court. *Id.* The Defense Requests are patently unreasonable. First, as discussed above, many of these materials are simply irrelevant. Second, the production of such materials would require a substantial amount of time to procure, prepare, and deliver at substantial cost. The collective documents requested would surely number in the thousands of pages.

Furthermore, for a request to be reasonable, the requested material must be "unavailable from *any* source" other than the prosecution. *District Court of El Paso County*, 790 P.2d at 338 (emphasis added). For example, certain materials requested by Defendants are available via a request to CDPHE submitted pursuant to the Colorado Open Records Act, §§ 24-72-201 to 24-72-309, C.R.S. In fact, such requests have been made by Defense Counsel for certain of Defendants in the cases at bar. See Exhibit B. In response to the same, CDPHE has released, with respect to its personnel, curriculum vitae, resumes, applications, and performance ratings, in addition to descriptions of various employment positions. See Exhibit C. Additionally, CDPHE has released certificates of compliance with accrediting agencies and materials responsive to requests for "internal audits, logs, and reports concerning blood alcohol testing." Id. With respect to its policies and procedures, CDPHE has released, respectively, its standard operating procedures for blood testing, proficiency testing for blood analysis, a quality control policy for blood testing, a security policy for blood testing, and its procedures for sample retention and chain of custody. Id. With respect to communications, CDPHE has provided emails by and between CDPHE and third parties. Id. Thus, certain Defendants have many of these materials already in their possession, and others may similarly pursue this approach in order to receive these types of materials. Id.

As the Defense Requests are neither reasonable nor relevant, and as they create the "substantial risk of...unnecessary annoyance...resulting from such disclosure" which clearly outweighs any usefulness by their disclosure, such requests, in so far as they request materials not already disclosed, should be denied.

Respectfully submitted,

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COUNTY COURT, JEFFERSON COUNTY, COLORADO

COURT CASE NO.: 11M06626 DIVISION B

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ORDER

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The foregoing Motion is hereby (granted) (denied) this _____ day of _____, 20_____.

BY THE COURT:

_____

Judge

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CERTIFICATE OF MAILING

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I hereby certify that a true and correct copy of the above and foregoing Motion and Notice of Hearing was mailed on 07/31/12 by depositing same in the U.S. Mail, postage prepaid, and addressed as follows:

Rhidian Orr
295 Clayton St
Suite 203
Denver CO 80206

Colorado Department of Public Health and Environment
Laboratory Services Division - Toxicology Laboratory
Blood Alcohol Analysis Worksheet

Analyst: K. Stephens
Instrument: 7890

Date Prepared: 6/17/12
Date Run: 6/17/12

| Vial | Specimen ID | Column BAC-1 Result | Column BAC-2 Result | Limits |
|---|---|---|---|---|
| 1 | Mix | ok | ok | Peak Separation |
| 2 | Negative Standard | 0.000 | 0.001 | <0.010% |
| 3 | 0.010% Standard | 0.010 | 0.011 | 0.006%-0.016% |
| 4 | 0.100% Standard | 0.104 | 0.103 | 0.090%-0.110% |
| 5 | 0.200% Standard | 0.208 | 0.205 | 0.180%-0.220% |
| 6 | 0.400% Standard | 0.406 | 0.397 | 0.360%-0.440% |
| 7 | Negative Standard | 0.000 | 0.002 | <0.010% |
| 8 | 0.050% Control | 0.046 | 0.046 | 0.045%-0.055% |
| 9 | 0.150% Control | 0.141 | 0.140 | 0.135%-0.165% |
| 10 | 0.300% Control | 0.284 | 0.281 | 0.270%-0.330% |

| Vial | Specimen ID | Result VALUE | | AVG | DIFF% |
|---|---|---|---|---|---|
| 11 | 2011009285 | 0.000 | 0.000 | REDO | |
| 12 | 2011009285 | 0.213 | 0.208 | | |
| 13 | 2011009284 | 0.176 | 0.174 | REDO | |
| 14 | 2011009284 | 0.196 | 0.193 | | |
| 15 | 2011009282 | 0.208 | 0.206 | REDO | |
| 16 | 2011009282 | 0.221 | 0.217 | | |
| 17 | 2011009281 | 0.133 | 0.131 | 0.130 | 3.06% |
| 18 | 2011009281 | 0.130 | 0.129 | | |
| 19 | 2011009280 | 0.284 | 0.281 | 0.284 | 2.81% |
| 20 | 2011009280 | 0.289 | 0.285 | | |
| 21 | **QC Control Theo = 0.200%** | 0.188 | 0.185 | | |
| 22 | 2011009279 | 0.133 | 0.132 | 0.133 | 2.25% |
| 23 | 2011009279 | 0.135 | 0.134 | | |

PEOPLE'S
EXHIBIT A
CASE #

| | | | | | | |
|---|---|---|---|---|---|---|
| 55 | 2011009242 | | 0.167 | 0.165 | REDO | |
| 56 | 2011009242 | | 0.166 | 0.163 | | |
| 57 | 2011009238 | | 0.128 | 0.127 | REDO | |
| 58 | 2011009238 | | 0.131 | 0.129 | | |
| 59 | 2011009237 | | 0.216 | 0.212 | REDO | |
| 60 | 2011009237 | | 0.217 | 0.213 | | |
| 61 | 2011009236 | QNSC | 0.000 | 0.001 | REDO | |
| 62 | 2011009236 | | 0.000 | 0.001 | | |
| 63 | 2011009235 | | 0.005 | 0.007 | REDO | |
| 64 | 2011009235 | | 0.006 | 0.007 | | |
| 65 | **QC Control Theo = 0.150%** | | 0.135 | 0.134 | REDO | |
| 66 | 2011009234 | | 0.223 | 0.219 | REDO | |
| 67 | 2011009234 | | 0.225 | 0.220 | | |
| 68 | 2011009232 | | 0.158 | 0.156 | REDO | |
| 69 | 2011009232 | | 0.158 | 0.155 | | |
| 70 | 2011009231 | | 0.253 | 0.248 | REDO | |
| 71 | 2011009231 | | 0.256 | 0.252 | | |
| 72 | 2011009227 | | 0.206 | 0.202 | REDO | |
| 73 | 2011009227 | | 0.200 | 0.196 | | |
| 74 | 2011009226 | | 0.314 | 0.307 | REDO | |
| 75 | 2011009226 | | 0.317 | 0.312 | | |
| 76 | **QC Control Theo = 0.080%** | | 0.075 | 0.075 | | |
| 77 | 2011009225 | | 0.179 | 0.176 | 0.178 | 2.25% |
| 78 | 2011009225 | | 0.180 | 0.177 | | |
| 79 | 2011009224 | | 0.135 | 0.132 | 0.134 | 3.71% |
| 80 | 2011009224 | | 0.137 | 0.135 | | |
| 81 | 2011009222 | | 0.142 | 0.140 | 0.142 | 2.82% |
| 82 | 2011009222 | | 0.144 | 0.142 | | |
| 83 | 2011009221 | | 0.163 | 0.160 | 0.162 | 2.47% |
| 84 | 2011009221 | | 0.164 | 0.161 | | |

Analysis was performed according to CDPHE Standard Operating Procedures.
No problems requiring corrective action: _____
Any observed problem requiring corrective action noted below.

## Corrective Action Log

| Date | Comments/Observed Problem | Corrective Action | Tech | Supervisor |
|---|---|---|---|---|
| 6-17-12 | QC 0.090, 0.100, 0.150 | Will redo all samples | KS | |
| | all outside 10% | that fall in between | | |
| | | those controls | | |
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**QA/QC Review:** _____ **Date:** 6-19-12

**Approved By:** _____ **Date:** 6/25/12

## Calibration Table

BAC

Calib. Data Modified : Sunday, June 17, 2012 4:57:52 PM

Rel. Reference Window : 5.000 %
Abs. Reference Window : 0.000 min
Rel. Non-ref. Window : 5.000 %
Abs. Non-ref. Window : 0.000 min
Uncalibrated Peaks : not reported
Partial Calibration : Yes, identified peaks are recalibrated
Correct All Ret. Times: No, only for identified peaks

Curve Type : Average Response/Amount
Origin : Ignored
Weight : Equal

Recalibration Settings:
Average Response : Average all calibrations
Average Retention Time: Floating Average New 75%

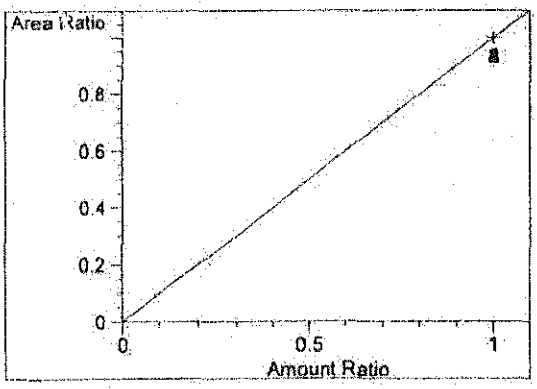
Calibration Report Options :
Printout of recalibrations within a sequence:
Calibration Table after Recalibration
Normal Report after Recalibration
If the sequence is done with bracketing:
Results of first cycle (ending previous bracket)

Default Sample ISTD Information (if not set in sample table):

| ISTD # | ISTD Amount | Name |
|---|---|---|
| 1 | 8.00000e-2 | N-Propanol-A |
| 2 | 8.00000e-2 | N-Propanol-B |

Signal 1: FID1 A, Front Signal
Signal 2: FID2 B, Back Signal

| RetTime [min] | Sig | Lvl | Amount | Area | Amt/Area | Ref | Grp | Name |
|---|---|---|---|---|---|---|---|---|
| 1.056 | 1 | 1 | 1.00000e-2 | 16.23507 | 6.15951e-4 | 1 | | Ethanol-A |
| | | 2 | 1.00000e-1 | 163.39648 | 6.12008e-4 | | | |
| | | 3 | 2.00000e-1 | 328.69980 | 6.08458e-4 | | | |
| | | 4 | 4.00000e-1 | 625.85480 | 6.39126e-4 | | | |
| 1.208 | 2 | 1 | 1.00000e-2 | 16.09927 | 6.21146e-4 | 2 | | Ethanol-B |
| | | 2 | 1.00000e-1 | 154.16678 | 6.48648e-4 | | | |
| | | 3 | 2.00000e-1 | 308.63690 | 6.48011e-4 | | | |
| | | 4 | 4.00000e-1 | 580.89978 | 6.88587e-4 | | | |
| 1.734 | 1 | 1 | 8.00000e-2 | 434.64069 | 1.84060e-4 | I1 | | N-Propanol-A |
| | | 2 | 8.00000e-2 | 420.47046 | 1.90263e-4 | | | |
| | | 3 | 8.00000e-2 | 412.34698 | 1.94011e-4 | | | |
| | | 4 | 8.00000e-2 | 396.43521 | 2.01798e-4 | | | |
| 2.114 | 2 | 1 | 8.00000e-2 | 413.22586 | 1.93599e-4 | I2 | | N-Propanol-B |
| | | 2 | 8.00000e-2 | 398.86536 | 2.00569e-4 | | | |
| | | 3 | 8.00000e-2 | 393.03595 | 2.03544e-4 | | | |



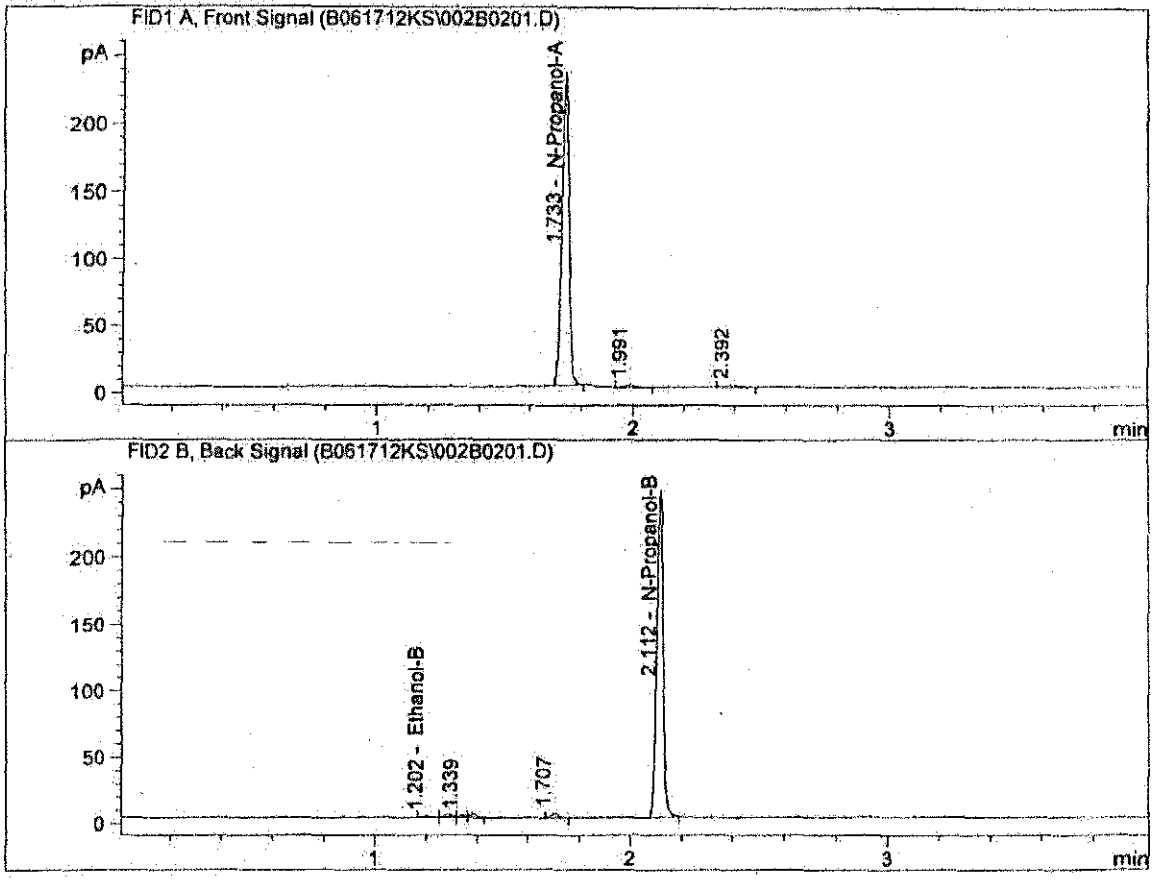

N-Propanol-B at exp. RT: 2.114
FID2 B, Back Signal
Correlation: 1.00000
Residual Std. Dev.: 0.00000
Formula: y = mx
m: 1.00000
x: Amount
y: Area

Data file : C:\CHEM32\1\DATA\B061712KS\002B0201.D
Sample Name: NEG

| | | | |
|---|---|---|---|
| Injection Date | : Sun, 17. Jun. 2012 | Seq Line | : 2 |
| Sample Name | : NEG | Location | : Vial 2 |
| Acq Operator | : Kimberly Stephens | | |

Acq. Method : C:\CHEM32\1\METHODS\BLD_DUAL.M
Analysis Method : C:\CHEM32\1\METHODS\BLD_DUAL.M

QUANTITATIVE BLOOD ETHANOL CONFIRMATION BY GC/HEADSPACE; N-PROPANOL INTERNAL STANDARD




## Calibrated Peak Report

Sorted By : Retention Time
Calib. Data Modified : Sat, 16. Jun. 2012,11:01:45 am
Multiplier : 1.000000
Dilution : 1.000000

| Name | Amount [% EtOH] | Area [pA*s] | Type | RetTime [min] |
|---|---|---|---|---|
| Ethanol-A | 0.000 | 0.000 | | 0.000 |
| Ethanol-B | 0.001 | 2.111 | BB | 1.202 |
| N-Propanol-A | 0.080 | 445.940 | BB | 1.733 |
| N-Propanol-B | 0.080 | 425.752 | BB | 2.112 |

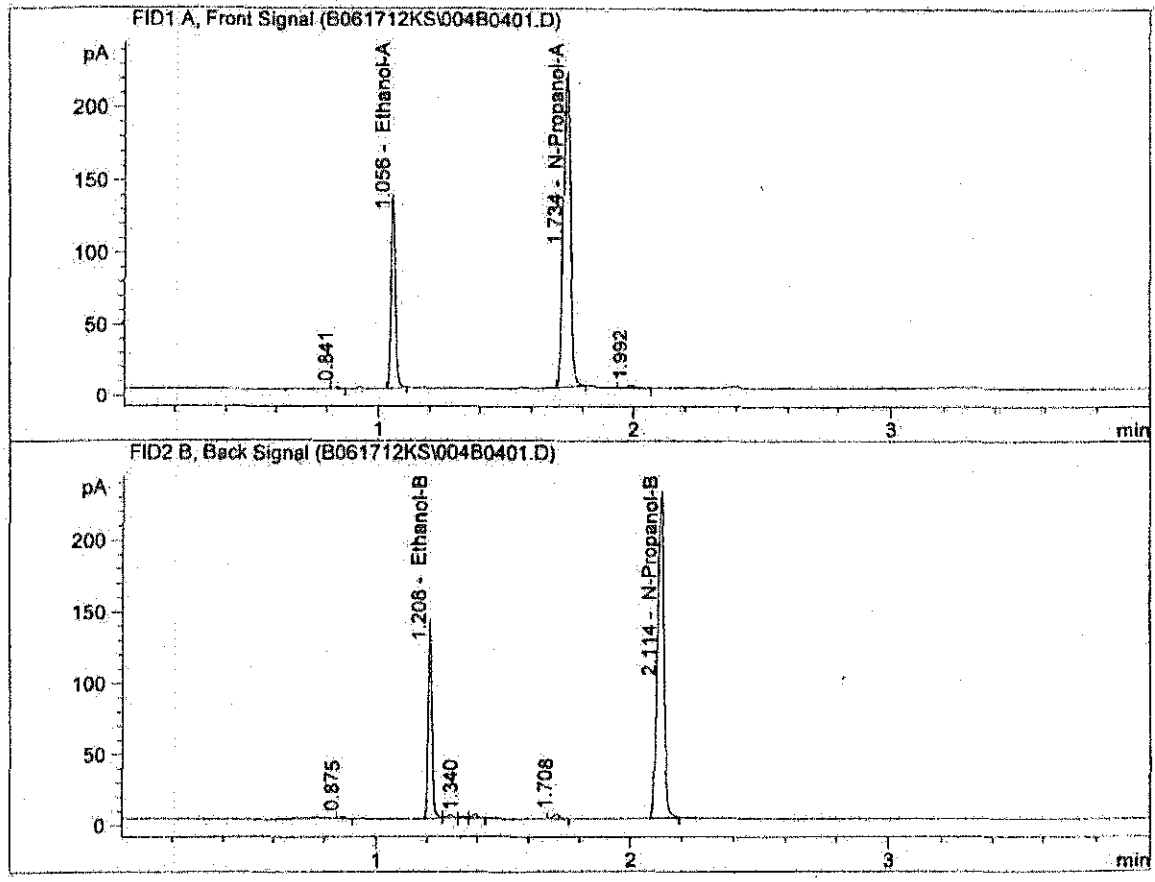
*** End of Report ***

Data file : C:\CHEM32\1\DATA\B061712KS\004B0401.D
Sample Name: 0.100

| | | | |
|---|---|---|---|
| Injection Date | : Sun, 17. Jun. 2012 | Seq Line | : 4 |
| Sample Name | : 0.100 | Location | : Vial 4 |
| Acq Operator | : Kimberly Stephens | | |

Acq. Method : C:\CHEM32\1\METHODS\BLD_DUAL.M
Analysis Method : C:\CHEM32\1\METHODS\BLD_DUAL.M

QUANTITATIVE BLOOD ETHANOL CONFIRMATION BY GC/HEADSPACE; N-PROPANOL INTERNAL STANDARD




## Calibrated Peak Report

Sorted By : Retention Time
Calib. Data Modified : Sun, 17. Jun. 2012,04:44:10 pm
Multiplier : 1.000000
Dilution : 1.000000

| Name | Amount [% EtOH] | Area [pA*s] | Type | RetTime [min] |
|---|---|---|---|---|
| Ethanol-A | 0.104 | 163.396 | BB | 1.056 |
| Ethanol-B | 0.103 | 154.167 | BB | 1.208 |
| N-Propanol-A | 0.080 | 420.470 | BB | 1.734 |
| N-Propanol-B | 0.080 | 398.865 | BB | 2.114 |

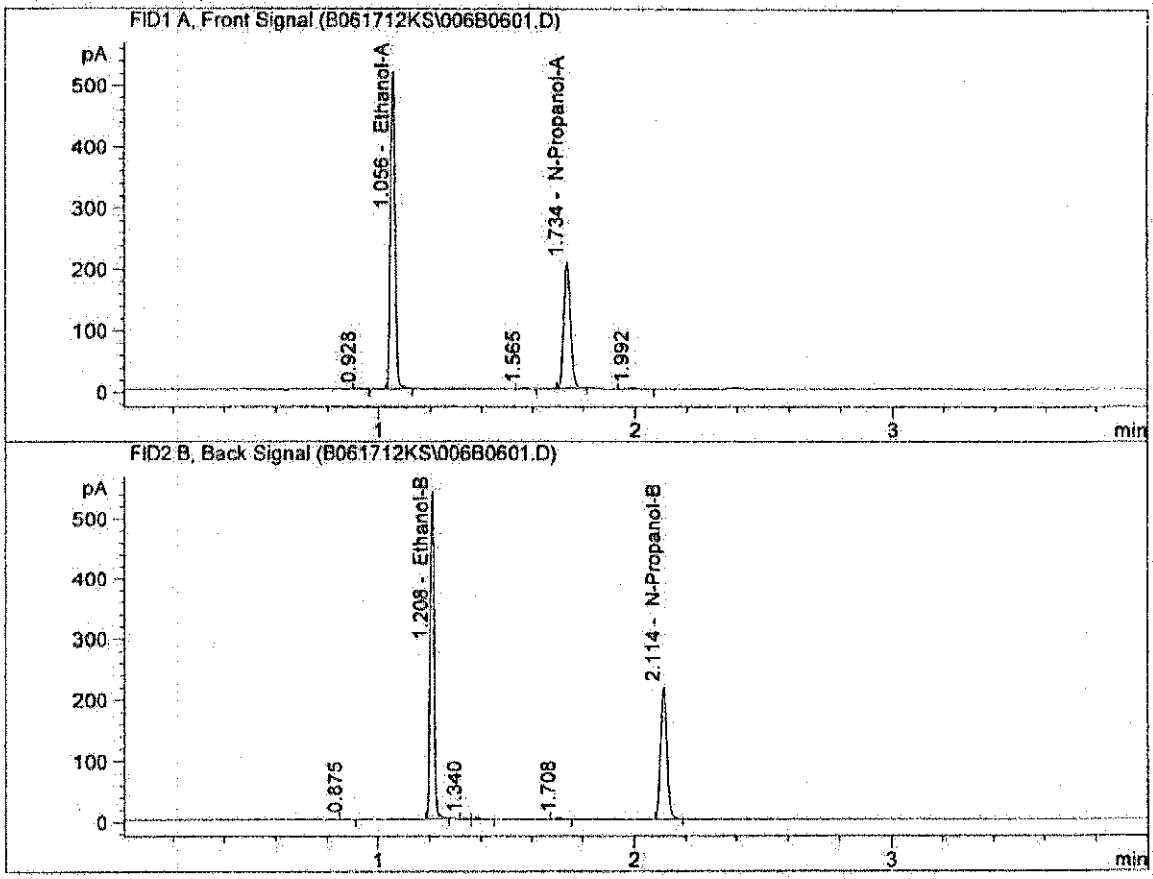
*** End of Report ***

Data File : C:\CHEM32\1\DATA\B061712KS\006B0601.D
Sample Name: 0.400

Injection Date : Sun, 17. Jun. 2012 Seq Line : 6
Sample Name : 0.400 Location : Vial 6
Acq Operator : Kimberly Stephens

Acq. Method : C:\CHEM32\1\METHODS\BLD_DUAL.M
Analysis Method : C:\CHEM32\1\METHODS\BLD_DUAL.M

QUANTITATIVE BLOOD ETHANOL CONFIRMATION BY GC/HEADSPACE; N-PROPANOL INTERNAL STANDARD




## Calibrated Peak Report

Sorted By : Retention Time
Calib. Data Modified : Sun, 17. Jun. 2012,04:57:52 pm
Multiplier : 1.000000
Dilution : 1.000000

| Name | Amount [% EtOH] | Area [pA*s] | Type | RetTime [min] |
|---|---|---|---|---|
| Ethanol-A | 0.406 | 625.855 | BB | 1.056 |
| Ethanol-B | 0.397 | 580.900 | BB | 1.208 |
| N-Propanol-A | 0.080 | 396.435 | BB | 1.734 |
| N-Propanol-B | 0.080 | 376.182 | BB | 2.114 |

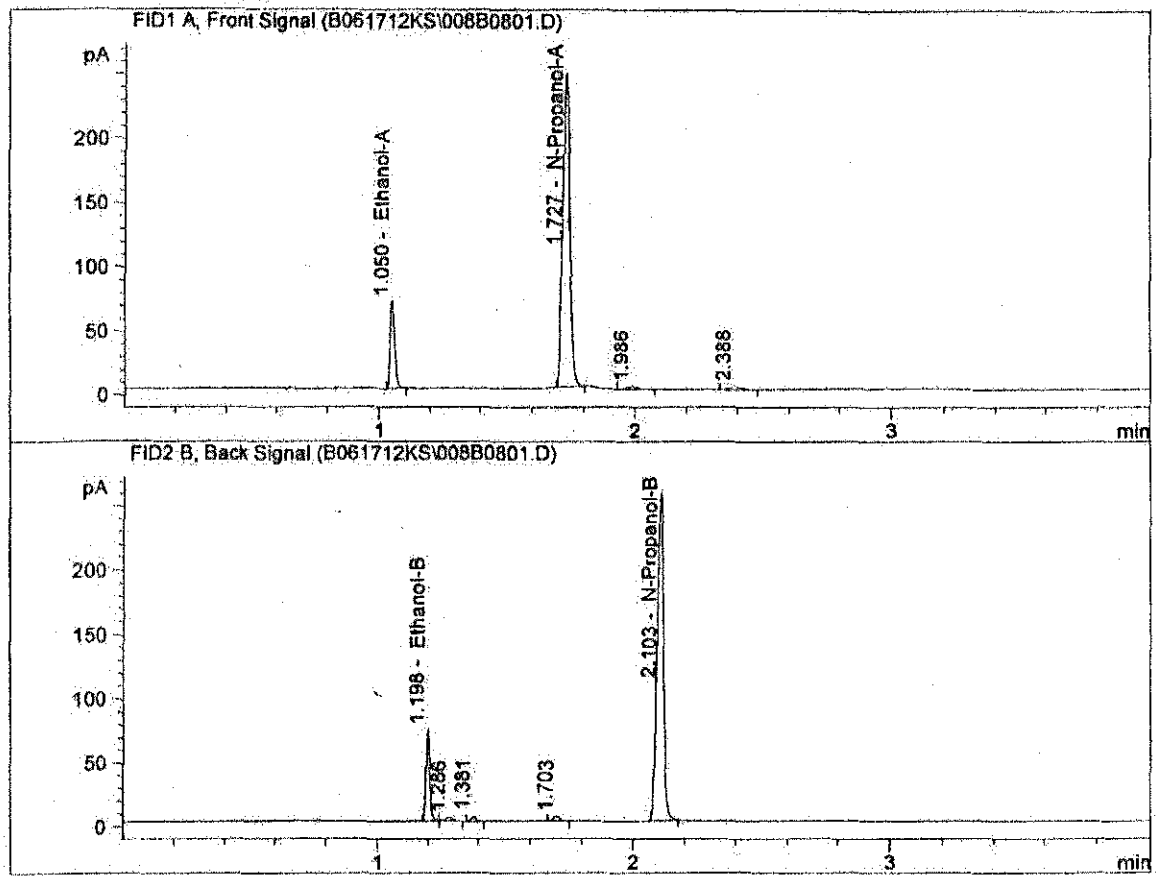
*** End of Report ***

Data file : C:\CHEM32\1\DATA\B061712KS\008B0801.D
Sample Name: 0.050

| | | | |
|---|---|---|---|
| Injection Date | : Sun, 17. Jun. 2012 | Seq Line | : 8 |
| Sample Name | : 0.050 | Location | : Vial 8 |
| Acq Operator | : Kimberly Stephens | | |

Acq. Method : C:\CHEM32\1\METHODS\BLD_DUAL.M
Analysis Method : C:\CHEM32\1\METHODS\BLD_DUAL.M

QUANTITATIVE BLOOD ETHANOL CONFIRMATION BY GC/HEADSPACE; N-PROPANOL INTERNAL STANDARD




## Calibrated Peak Report

Sorted By : Retention Time
Calib. Data Modified : Sun, 17. Jun. 2012,04:57:52 pm
Multiplier : 1.000000
Dilution : 1.000000

| Name | Amount [% EtOH] | Area [pA*s] | Type | RetTime [min] |
|---|---|---|---|---|
| Ethanol-A | 0.046 | 84.958 | BB | 1.050 |
| Ethanol-B | 0.046 | 81.228 | BB | 1.198 |
| N-Propanol-A | 0.080 | 472.373 | BB | 1.727 |
| N-Propanol-B | 0.080 | 449.588 | BB | 2.103 |

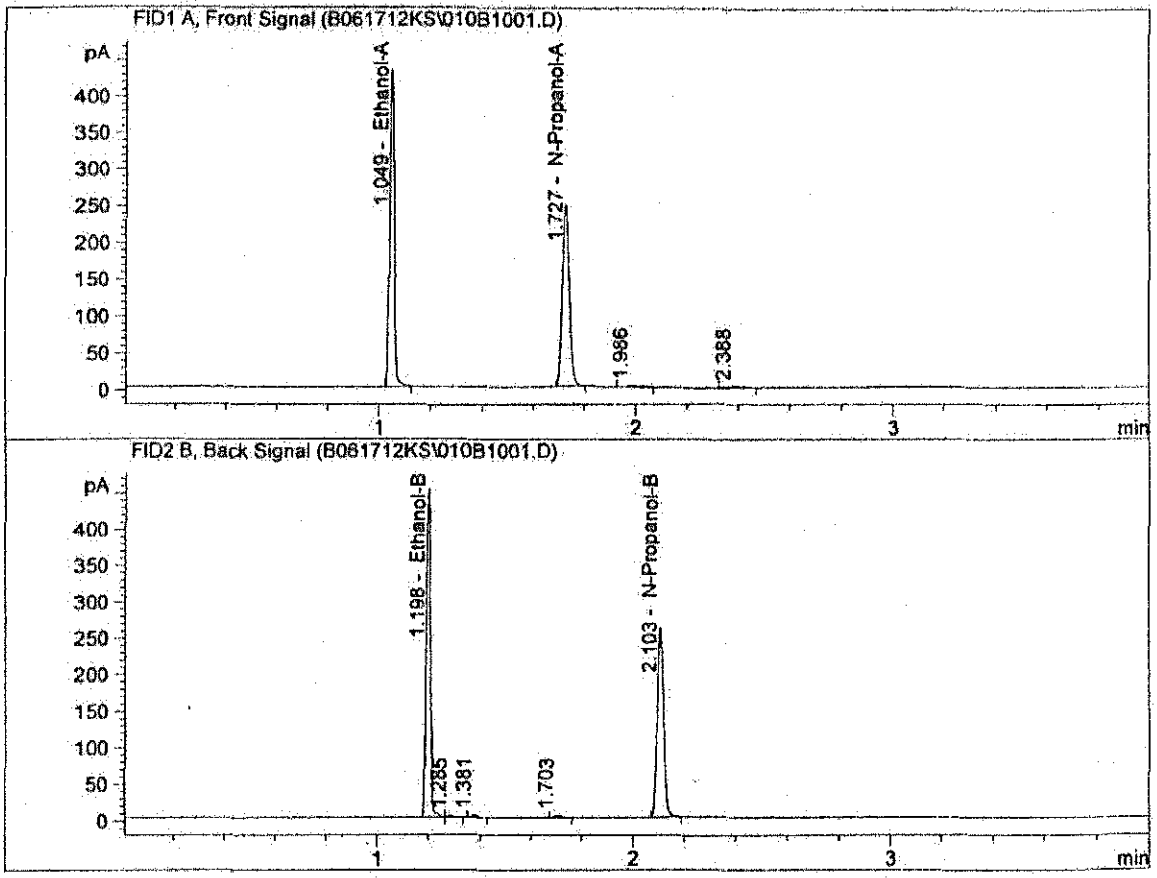
*** End of Report ***

Data file : C:\CHEM32\1\DATA\B061712KS\010B1001.D
Sample Name: 0.300

| | | | |
|---|---|---|---|
| Injection Date | : Sun, 17. Jun. 2012 | Seq Line | : 10 |
| Sample Name | : 0.300 | Location | : Vial 10 |
| Acq Operator | : Kimberly Stephens | | |

Acq. Method : C:\CHEM32\1\METHODS\BLD_DUAL.M
Analysis Method : C:\CHEM32\1\METHODS\BLD_DUAL.M

QUANTITATIVE BLOOD ETHANOL CONFIRMATION BY GC/HEADSPACE; N-PROPANOL INTERNAL STANDARD




## Calibrated Peak Report

Sorted By : Retention Time
Calib. Data Modified : Sun, 17. Jun. 2012,04:57:52 pm
Multiplier : 1.000000
Dilution : 1.000000

| Name | Amount [% EtOH] | Area [pA*s] | Type | RetTime [min] |
|---|---|---|---|---|
| Ethanol-A | 0.284 | 527.346 | BB | 1.049 |
| Ethanol-B | 0.281 | 495.886 | BB | 1.198 |
| N-Propanol-A | 0.080 | 476.911 | BB | 1.727 |
| N-Propanol-B | 0.080 | 454.024 | BB | 2.103 |

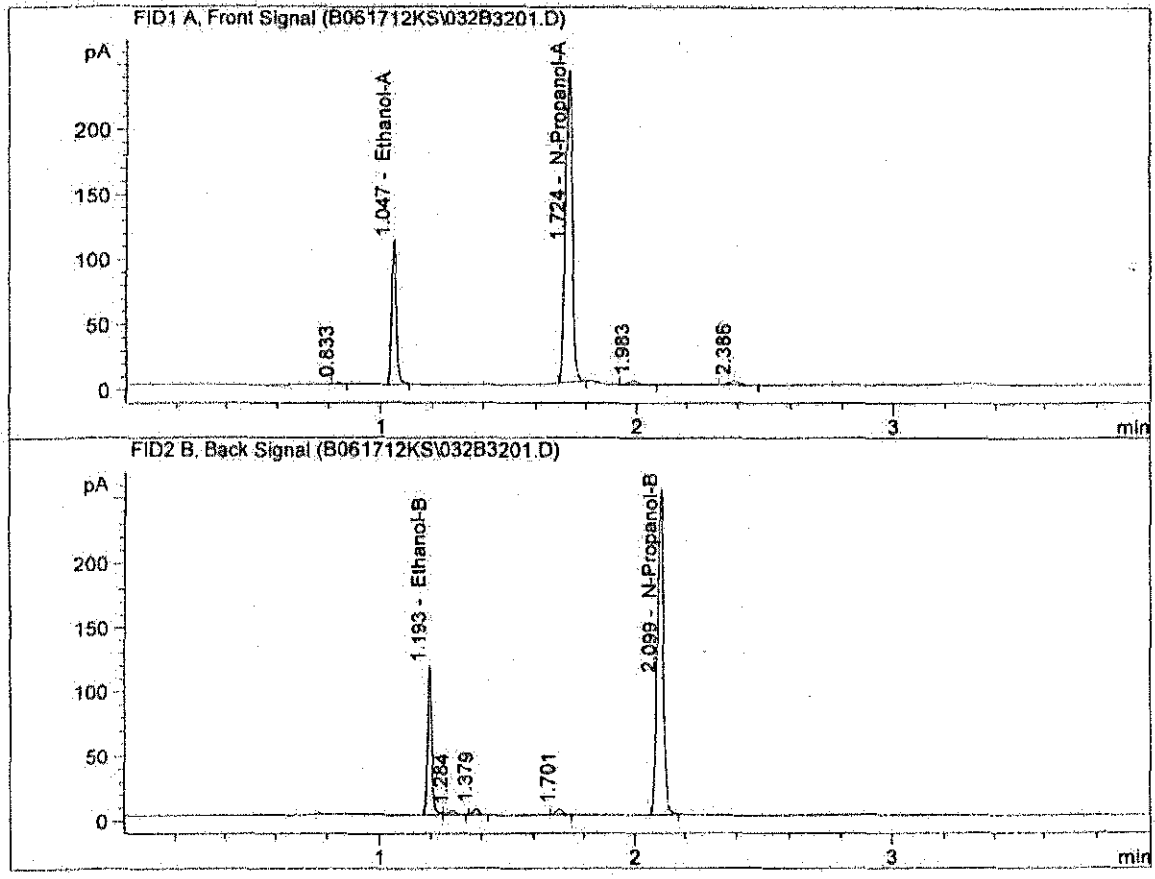
*** End of Report ***

Data file : C:\CHEM32\1\DATA\B061712KS\032B3201.D
Sample Name: QC 0.080

| | | | |
|---|---|---|---|
| Injection Date | : Sun, 17. Jun. 2012 | Seq Line | : 32 |
| Sample Name | : QC 0.080 | Location | : Vial 32 |
| Acq Operator | : Kimberly Stephens | | |

Acq. Method : C:\CHEM32\1\METHODS\BLD_DUAL.M
Analysis Method : C:\CHEM32\1\METHODS\BLD_DUAL.M

QUANTITATIVE BLOOD ETHANOL CONFIRMATION BY GC/HEADSPACE; N-PROPANOL INTERNAL STANDARD




## Calibrated Peak Report

Sorted By : Retention Time
Calib. Data Modified : Sun, 17. Jun. 2012,04:57:52 pm
Multiplier : 1.000000
Dilution : 1.000000

| Name | Amount [% EtOH] | Area [pA*s] | Type | RetTime [min] |
|---|---|---|---|---|
| Ethanol-A | 0.075 | 135.220 | BB | 1.047 |
| Ethanol-B | 0.075 | 129.059 | BB | 1.193 |
| N-Propanol-A | 0.080 | 461.450 | BB | 1.724 |
| N-Propanol-B | 0.080 | 443.535 | BB | 2.099 |

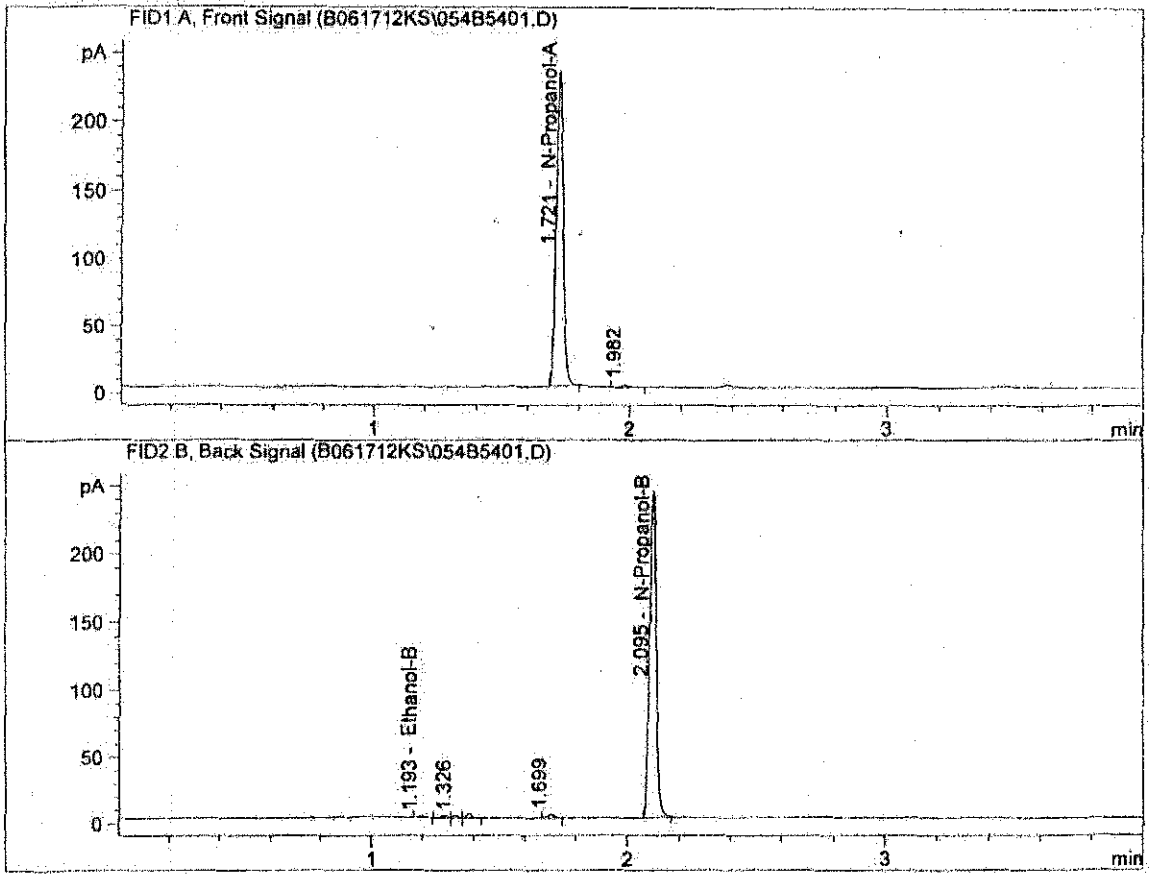
*** End of Report ***

Data file : C:\CHEM32\1\DATA\B061712KS\054B5401.D
Sample Name: QC NEG

| | | | |
|---|---|---|---|
| Injection Date | : Sun, 17. Jun. 2012 | Seq Line | : 54 |
| Sample Name | : QC NEG | Location | : Vial 54 |
| Acq Operator | : Kimberly Stephens | | |

Acq. Method : C:\CHEM32\1\METHODS\BLD_DUAL.M
Analysis Method : C:\CHEM32\1\METHODS\BLD_DUAL.M

QUANTITATIVE BLOOD ETHANOL CONFIRMATION BY GC/HEADSPACE; N-PROPANOL INTERNAL STANDARD




## Calibrated Peak Report

Sorted By : Retention Time
Calib. Data Modified : Sun, 17. Jun. 2012,04:57:52 pm
Multiplier : 1.000000
Dilution : 1.000000

| Name | Amount [% EtOH] | Area [pA*s] | Type | RetTime [min] |
|---|---|---|---|---|
| Ethanol-A | 0.000 | 0.000 | | 0.000 |
| Ethanol-B | 0.001 | 1.492 | BB | 1.193 |
| N-Propanol-A | 0.080 | 447.522 | BB | 1.721 |
| N-Propanol-B | 0.080 | 426.314 | BB | 2.095 |

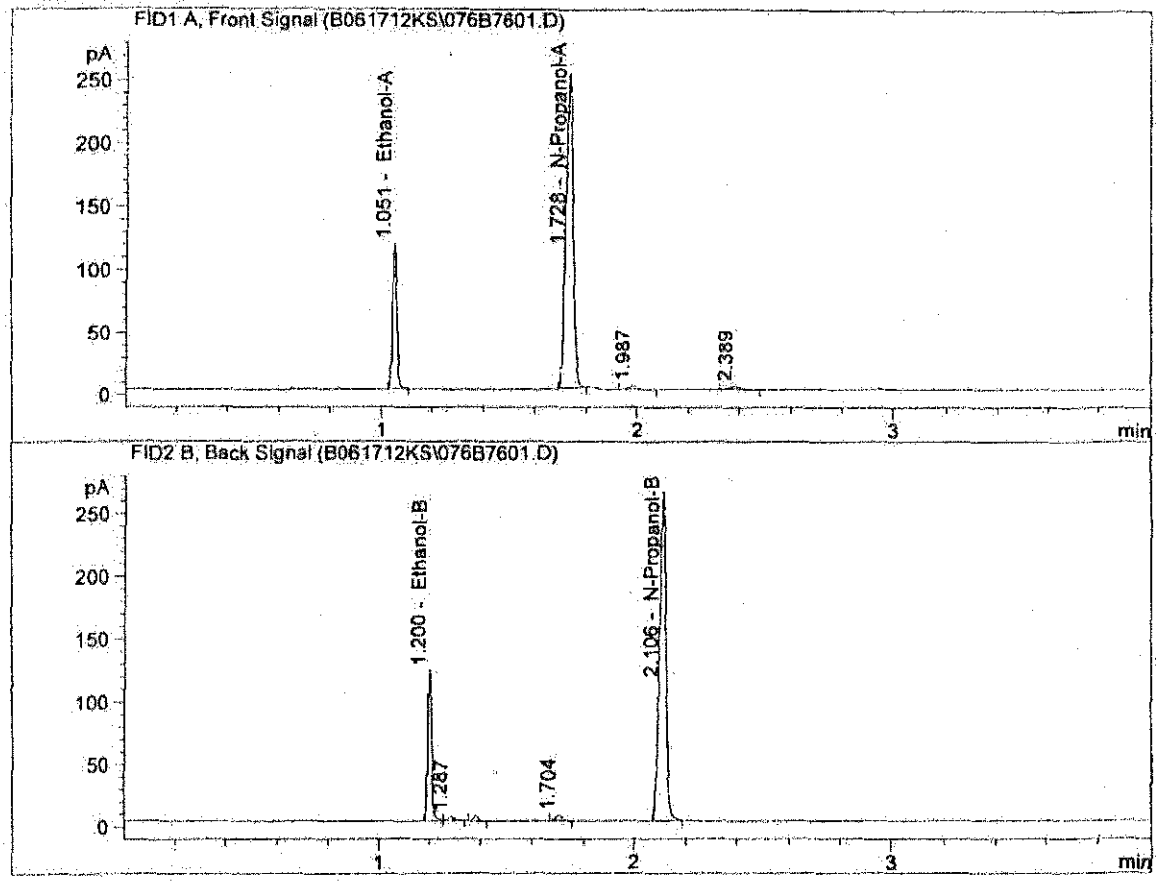
*** End of Report ***

Data File : C:\CHEM32\1\DATA\B061712KS\076B7601.D
Sample Name: QC 0.080

| | | | |
|---|---|---|---|
| Injection Date | : Mon, 18. Jun. 2012 | Seq Line | : 76 |
| Sample Name | : QC 0.080 | Location | : Vial 76 |
| Acq Operator | : Kimberly Stephens | | |

Acq. Method : C:\CHEM32\1\METHODS\BLD_DUAL.M
Analysis Method : C:\CHEM32\1\METHODS\BLD_DUAL.M

QUANTITATIVE BLOOD ETHANOL CONFIRMATION BY GC/HEADSPACE; N-PROPANOL INTERNAL STANDARD




## Calibrated Peak Report

Sorted By : Retention Time
Calib. Data Modified : Sun, 17. Jun. 2012,04:57:52 pm
Multiplier : 1.000000
Dilution : 1.000000

| Name | Amount [% EtOH] | Area [pA*s] | Type | RetTime [min] |
|---|---|---|---|---|
| Ethanol-A | 0.075 | 140.545 | BB | 1.051 |
| Ethanol-B | 0.075 | 133.583 | BB | 1.200 |
| N-Propanol-A | 0.080 | 480.037 | BB | 1.728 |
| N-Propanol-B | 0.080 | 460.290 | BB | 2.106 |

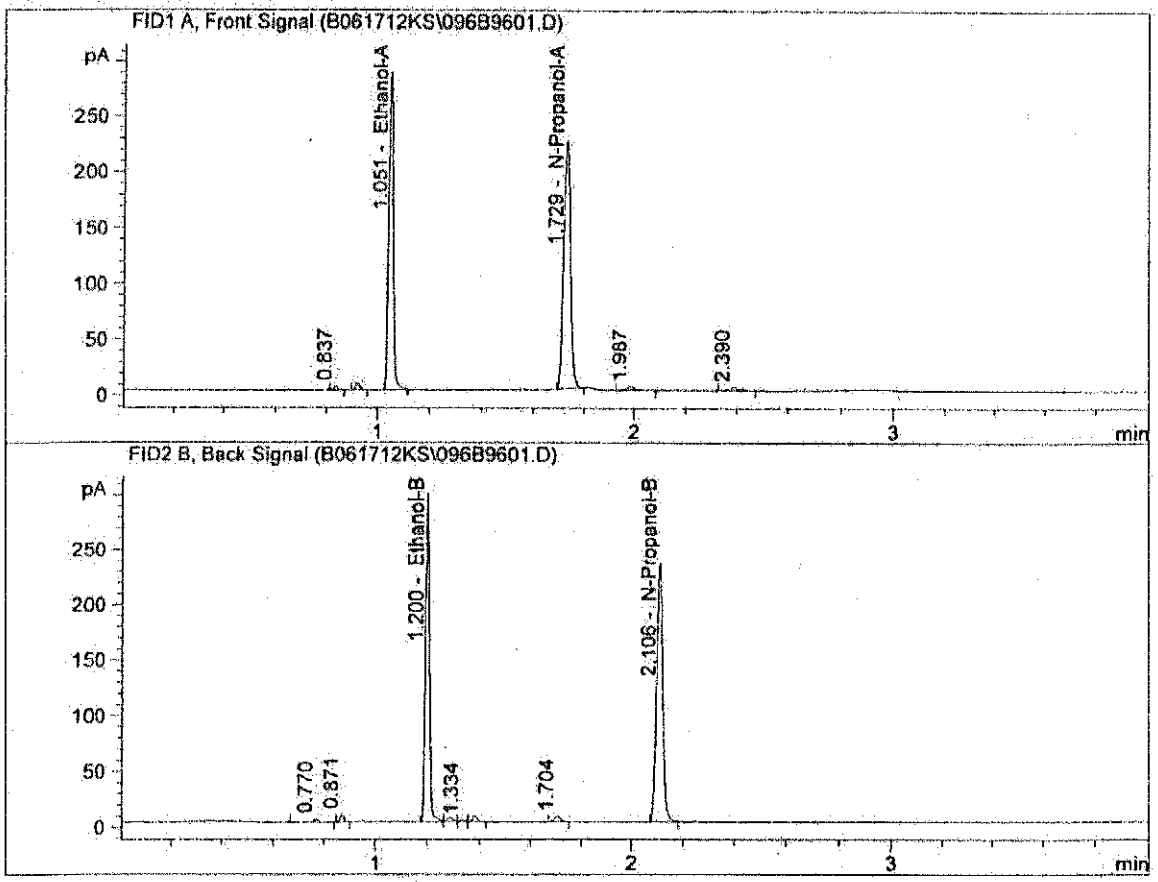
*** End of Report ***

Data file : C:\CHEM32\1\DATA\B061712KS\096B9601.D
Sample Name: 2011009120

| | | | |
|---|---|---|---|
| Injection Date | : Mon, 18. Jun. 2012 | Seq Line : | 96 |
| Sample Name | : 2011009120 | Location : | Vial 96 |
| Acq Operator | : Kimberly Stephens | | |

Acq. Method : C:\CHEM32\1\METHODS\BLD_DUAL.M
Analysis Method : C:\CHEM32\1\METHODS\BLD_DUAL.M

QUANTITATIVE BLOOD ETHANOL CONFIRMATION BY GC/HEADSPACE; N-PROPANOL INTERNAL STANDARD




Calibrated Peak Report

Sorted By : Retention Time
Calib. Data Modified : Sun, 17. Jun. 2012,04:57:52 pm
Multiplier : 1.000000
Dilution : 1.000000

| Name | Amount [% EtOH] | Area [pA*s] | Type | RetTime [min] |
|---|---|---|---|---|
| Ethanol-A | 0.209 | 344.252 | BB | 1.051 |
| Ethanol-B | 0.205 | 324.858 | BB | 1.200 |
| N-Propanol-A | 0.080 | 422.899 | BB | 1.729 |
| N-Propanol-B | 0.080 | 407.130 | BB | 2.106 |

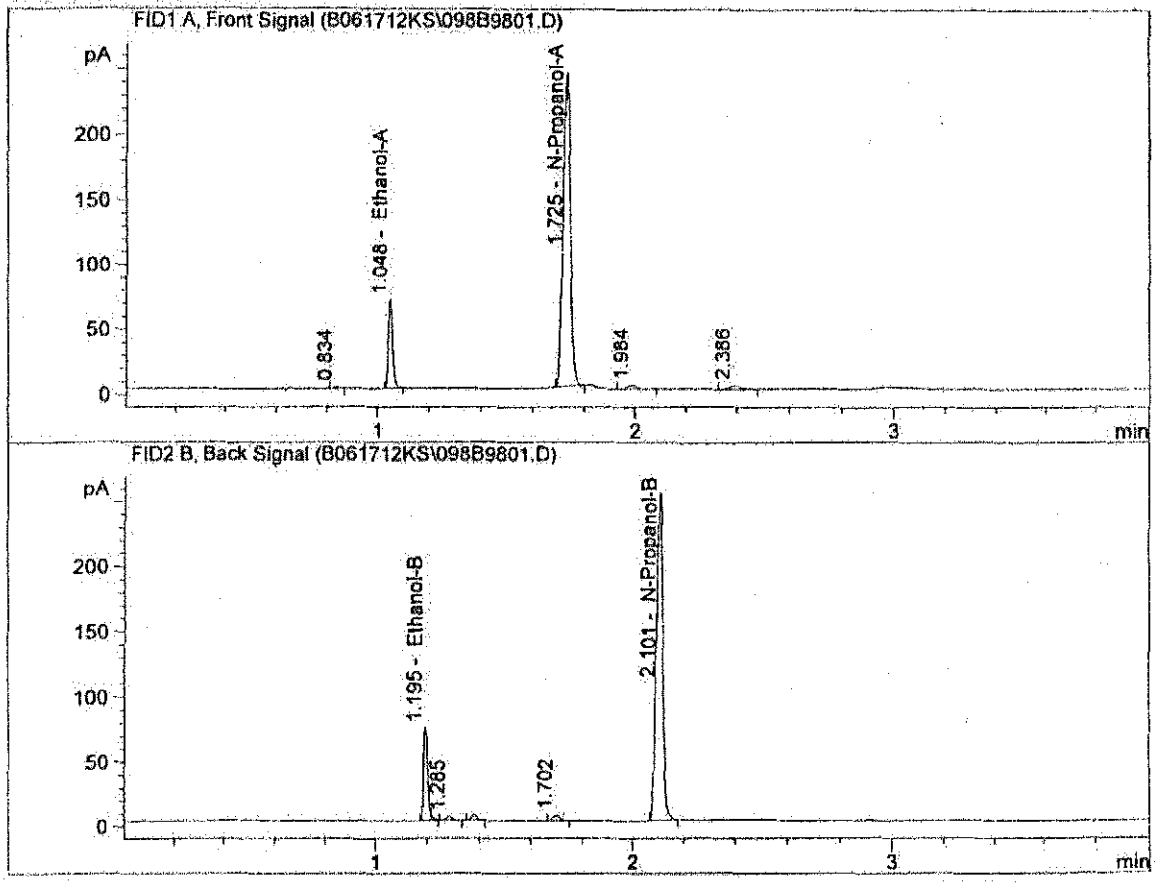
*** End of Report ***

Data file : C:\CHEM32\1\DATA\B061712KS\098B9801.D
Sample Name: END 0.050

| | | | |
|---|---|---|---|
| Injection Date | : Mon, 18. Jun. 2012 | Seq Line | : 98 |
| Sample Name | : END 0.050 | Location | : Vial 98 |
| Acq Operator | : Kimberly Stephens | | |

Acq. Method : C:\CHEM32\1\METHODS\BLD_DUAL.M
Analysis Method : C:\CHEM32\1\METHODS\BLD_DUAL.M

QUANTITATIVE BLOOD ETHANOL CONFIRMATION BY GC/HEADSPACE; N-PROPANOL INTERNAL STANDARD




## Calibrated Peak Report

Sorted By : Retention Time
Calib. Data Modified : Sun, 17. Jun. 2012,04:57:52 pm
Multiplier : 1.000000
Dilution : 1.000000

| Name | Amount [% EtOH] | Area [pA*s] | Type ----- | RetTime [min] |
|---|---|---|---|---|
| Ethanol-A | 0.047 | 83.950 | BB | 1.048 |
| Ethanol-B | 0.047 | 81.151 | BB | 1.195 |
| N-Propanol-A | 0.080 | 461.972 | BB | 1.725 |
| N-Propanol-B | 0.080 | 443.223 | BB | 2.101 |

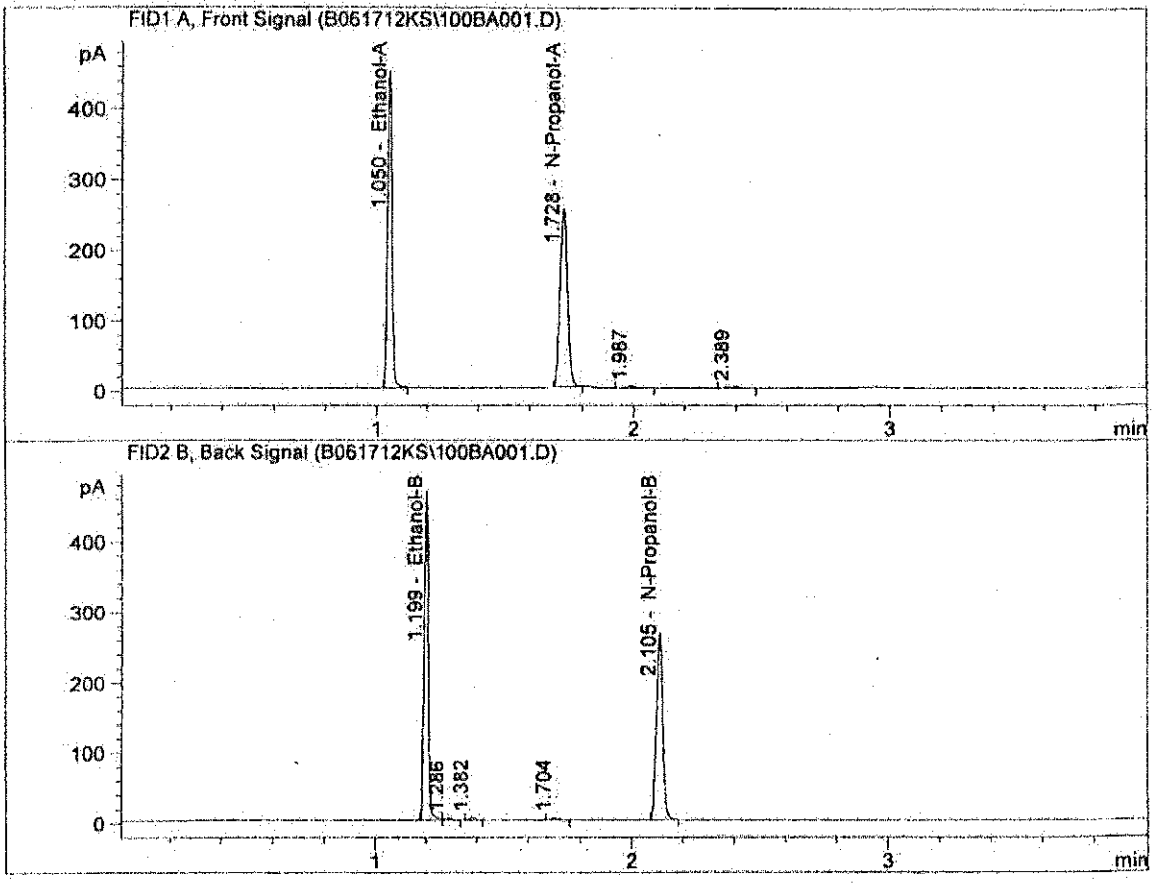
*** End of Report ***

Data file : C:\CHEM32\1\DATA\B061712KS\100BA001.D
Sample Name: END 0.300

| | | | |
|---|---|---|---|
| Injection Date | : Mon, 18. Jun. 2012 | Seq Line | : 100 |
| Sample Name | : END 0.300 | Location | : Vial 100 |
| Acq Operator | : Kimberly Stephens | | |

Acq. Method : C:\CHEM32\1\METHODS\BLD_DUAL.M
Analysis Method : C:\CHEM32\1\METHODS\BLD_DUAL.M

QUANTITATIVE BLOOD ETHANOL CONFIRMATION BY GC/HEADSPACE; N-PROPANOL INTERNAL STANDARD




## Calibrated Peak Report

Sorted By : Retention Time
Calib. Data Modified : Sun, 17. Jun. 2012,04:57:52 pm
Multiplier : 1.000000
Dilution : 1.000000

| Name | Amount [% EtOH] | Area [pA*s] | Type | RetTime [min] |
|---|---|---|---|---|
| Ethanol-A | 0.287 | 542.153 | BB | 1.050 |
| Ethanol-B | 0.282 | 509.996 | BB | 1.199 |
| N-Propanol-A | 0.080 | 485.625 | BB | 1.728 |
| N-Propanol-B | 0.080 | 465.311 | BB | 2.105 |

*** End of Report ***

THE ORR LAW FIRM, L.L.C.
Legal Counsel for DUI Defense

Office:303.818.2448
Fax: 303-845-9140
orrlaw@orrlaw.com

June 4, 2012

PEOPLE'S EXHIBIT B
CASE #

Ann Hause
Director Office Legal and Regulatory Affairs
Colorado Department of Public Health and Environment
4300 Cherry Creek Dr. South
Denver, CO 80246

**Sent via Email:**
**ann.hause@state.co.us**

Re: CORA Request

Dear Ms. Hause,

Pursuant to the Colorado Open Records Act (CORA), C.R.S. § 24-72-201, I request the following information from the Colorado Department of Public Health and Environment Toxicology Laboratory (the "Tox Lab"):

1. Produce a copy of the validation study for the blood alcohol method used to analyze evidence in the Tox Lab. Produce a copy of the complete validation file, including scope and approach of the empirical design, assumptions, raw and processed data, results, statistical analysis of data, conclusions, and uncertainty. If the Tox Lab relies on external method validation, produce a copy of all relevant references, and a copy of the laboratory's internal verification records documenting the empirically determined performance characteristics for the method.

2. Produce a copy of the validation and verification records of any laboratory-prepared or laboratory-revised software, or any data processing applications (e.g., Excel templates) used to process, summarize, or report blood alcohol data.

3. Produce a copy of the Tox Lab's approved blood alcohol Standard Operating Procedure, as well as a copy of the procedure that was superseded by the approved version used to perform the subject casework. If any aspect of the blood alcohol testing method is addressed in separate procedures (e.g., sample preparation, instrument calibration, quality control), produce copies of those procedures.

4. Produce a copy of the Tox Lab's Quality Manual (however named).

5. Produce a copy of the Tox Lab's nonconformance reports, however named, documented during the period from June 4, 2010 through the date of this request.

6. Produce the Tox Lab's internal audit schedule during the period from June 4, 2007 through the date of this request, along with the scope of each scheduled audit.

7. Produce copies of all of the Tox Lab's internal and external audit reports generated from June 4, 2007 through the date of this request, along with documentation demonstrating the closure or status of each finding.

8. Produce copy(ies) of the ASCLD-LAB standards that served as the basis for the Tox Lab's accreditation in effect from June 4, 2007 through the date of this request.

9. Produce a copy of the Tox Lab's original ASCLD-LAB application for accreditation, and copies of all subsequent correspondence between the lab and the accrediting agency or its inspectors; including: annual reports, formal or informal communication, email, and contemporaneous notes of meetings.

10. Produce a copy of any accreditation or certification received by the Tox Lab or the responsible analyst from any independent agency or organization (other than ASCLD-LAB).

11. Produce any and all documentation with respect to any Quality Control or corrective action investigations of the Tox Lab's operations conducted by the crime lab itself, state agencies, certifying organizations, ASCLD-LAB, or any other entity or agency and the results thereof.

12. Produce a drawn to scale floor plan of the entire Tox Lab facility, with areas of the laboratory relevant to blood alcohol testing identified (i.e., blood sample storage, blood sample preparation, headspace GC analysis, report preparation); include the actual staffing headcount assigned to the laboratory (numbers of technical, management, and support personnel) at the time the subject testing was performed.

13. Produce a description of the Tox Lab's HVAC (heating/ventilation/air conditioning) system, with emphasis on air flow directions, conditioning of intake air, identification of areas of positive and negative air pressure, and the total number and operating capacity of exhaust hoods.

14. Produce a copy of the Tox Lab's procurement and receipt records for gloves used by analysts from June 4, 2011 through the date of this request.

15. Produce a copy of the Tox Lab's contamination control policies and procedures applicable to blood alcohol testing. If formal procedures are not available, produce a copy of any relevant guidelines, memoranda, instructional materials, or other documentation.

16. Produce records documenting the scope, approach, and results for any environmental monitoring performed in the Tox Lab to assess volatile organic contaminants in the ambient air.

17. Produce a copy of the Tox Lab's procedure or any available written instructions or guidelines for verification and use of externally purchased controls, calibrators, or internal standards for blood alcohol testing.

18. Produce a copy of the Tox Lab's procedure or any available written instructions or guidelines for preparation and verification of internally prepared controls, calibrators, and internal standards, and samples for blood alcohol testing.

19. Produce the Tox Lab's laboratory production data for blood alcohol testing: number of blood alcohol tests received per month between January 1, 2011 through the date of this request, and the number of analysts qualified to perform blood alcohol testing during the same period.

20. Produce a list of gas chromatograph instruments (manufacturer/model/serial number/software version) and accessories (headspace autosampler) in use for blood alcohol testing at the Tox Lab from June 4, 2010 through the date of this request.

21. Produce resumes for each of the individuals responsible for receipt, storage, preparation, testing, or technical review of blood alcohol samples at the Tox Lab.

22. Produce a copy of the original and each succeeding analyst permit or certification issued pursuant to state regulations at the Tox Lab; include documentation as to whether or not the responsible analyst has ever had his or her permit or certification suspended, canceled, or revoked.

23. Produce records demonstrating the qualifications of the responsible analyst and technical reviewer at the Tox Lab; include a copy of employment applications, academic transcripts, disciplinary files, training records, and personnel files. Redaction of personal information from the requested public records is acceptable.

24. Produce a copy of all internal and external proficiency records from June 4, 2007 to the date of this request for all analysts and technical reviewers at the Tox Lab;

include sponsoring agency(ies), date(s) performed, procedure used, true values, reported results, raw data, scores, all related correspondence, and corrective action records, as appropriate.

25. Produce evidence intake and control records at the Tox Lab, including evidence receipt log (documenting sample volume, labeling, and security); field-to-lab custody transfers; intra-laboratory custody records for evidence and derived analytical samples; initial assignment of laboratory identifiers (written and/or electronic); storage locations; and documentation of temperature in sample storage locations.

26. Produce copies of bench notes, log books, and any other records pertaining to case samples at the Tox Lab, instruments used during testing, or methods used to analyze case samples.

27. Produce the Tox Lab's source, preparation and usage records documenting the traceability and shelf life of standard materials and solutions used for calibration and quality control in the laboratory, including: unique identification of stock, parent, and working solutions; external source of purchased materials; records documenting composition, preparation, concentration and origins of internally prepared solutions, including solutions prepared from purchased standards and stock; records documenting dates of use of purchased and prepared materials; certifications provided by suppliers; storage conditions of standards and controls; and shelf life of purchased and prepared solutions (provide the empirical basis for determination of shelf life for prepared solutions). Produce traceability documentation for the thermometers in the refrigerator(s) used to store samples and standards.

28. Produce documentation of the Tox Lab's storage conditions for the standards and controls used, for the period from June 4, 2011 through the date of this request; provide a procedure describing practices for storing standards and controls (if available); provide a description of the materials that are co-located under refrigerated conditions with standards and with unknown samples.

29. Produce copies of product inserts provided by manufacturers for purchased standards and controls used in the Tox Lab.

30. Produce pipettor/diluter calibration and verification records for all the Tox Lab's instruments used to prepare samples, calibrators, and controls for analytical batches; if calibration verification is performed at least monthly, provide all calibration records from June 4, 2010 through the date of this request; if calibration is performed less frequently than monthly, provide all calibration records for the instruments from the time the instruments were placed into service.

31. Produce instruments maintenance and repair logs and records for all of the Tox Lab's instruments (e.g., gas chromatograph and pipettor/diluter) used to perform in the laboratory, from June 4, 2010 through the date of this request.

32. Produce all of the Tox Lab's balance calibration verification and quality control records relevant to any balance used in support of blood alcohol testing (e.g. preparation of standards) from June 4, 2010 through the date of this request; include records for calibrated weights, documenting their ASTM class and traceability.

33. Produce instrument or equipment run logs (sometimes called injection logs or load lists) for all of the Tox Lab's instruments used on case samples on each day(s) case samples were tested, including identification of all unknown samples and controls.

34. Produce raw and processed data for each analytical batch run that Mitchell Fox-Rivera conducted at the Tox Lab; include sample and instrument specifications, and chromatograms for all calibration, quality control, and unknown samples, including all data excluded or not reported by analyst. NOTE: names of sample donors may be redacted, as long as the subject's sample(s) is(are) explicitly identified.

35. Produce an electronic copy of the raw and processed data for the batch(es) that Mithcell Fox-Rivera conducted at the Tox Lab, along with the specific version of instrument software used to process the data.

This CORA request seeks copies of the materials in pdf, excel or text files. For materials not maintained in electronic format, paper may be provided for inspection and scanning/digitizing. Electronic files may be compressed into a zip file. Files of less than 8 mb per e-mail may be sent to shawn@orrlaw.com or you may give notice of the availability of the material for inspection. If the anticipated cost is for than $50.00, please contact me in advance to discuss the expected cost.

Sincerely,

Shawn Gillum
Attorney at Law

# STATE OF COLORADO

John W. Hickenlooper, Governor
Christopher E. Urbina, MD, MPH
Executive Director and Chief Medical Officer

Dedicated to protecting and improving the health and environment of the people of Colorado

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Located in Glendale, Colorado

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Colorado Department
of Public Health
and Environment

June 18, 2012

Shawn Gillum, Esq.
The Orr Law Firm
720 S. Colorado Blvd., Suite 1110-N
Denver, Colorado 80246

*Sent via email: shawn@orrlaw.com*

RE: Colorado Open Records Act – Extension

Dear Mr. Gillum:

The Colorado Department of Public Health and Environment (department) is in receipt of your second June 4, 2012 Colorado Open Records Act request. Responses to each request are provided below, and responsive documents will be burned to a CD.

Request 1: Validation study for blood alcohol method used to analyze evidence in the Lab; complete validation file; references to any external method validation relied upon; and internal verification records documenting the empirically determined performance characteristics.

**Response:** The department is providing the validation study and supporting information.

Request 2: Validation and verification records of any laboratory prepared or laboratory-revised software.

**Response:** The department has no responsive documents.

Request 3: The Lab's approved blood alcohol Standard Operating Procedure, and any superceded procedures.

**Response:** The department is providing Standard Operating Procedure(s) dated March 2006, October 2007, and March 2010.

Request 4: The Toxicology Lab's Quality Manual.

**Response:** The department is providing the Toxicology Lab Quality Assurance Manual.

Request 5: The Toxicology Lab's nonconformance reports from June 4, 2010 to the June 4, 2012.

**Response:** The department is providing (2) letters dated March 2012.

Request 6: The Toxicology Lab's internal audit schedule from June 4, 2007 to June 4, 2012.

**Response:** See response to Request 7 below.

Request 7: Copies of the Toxicology Lab's internal and external audit reports from June 4, 2007 to June 4, 2012.

**Response:** The department is providing annual inspection reports.

Request 8: Copies of ASCLD-LAB standards that served as the basis for the Toxicology Lab's accreditation from June 4, 2007 to June 4, 2012.

**Response:** The department is not certified by ASCLD; therefore, the department has no responsive documents.

Request 9: A copy of the Toxicology Lab's original ASCLD-LAB application for accreditation.

**Response:** See response to Request 8.

Request 10: A copy of any accreditation or certification received by the Toxicology Lab or the responsible analyst from any independent agency or organization (other than ASCLD-LAB).

**Response:** The department is providing the most recent toxicology lab certificate.

Request 11: Documentation regarding any quality control or corrective action investigations of the Toxicology Lab's operations conducted by the crime lab itself, state agencies, certifying organizations, ASCLD-LAB, or any other entity or agency and the results thereof.

**Response:** See response to Request 7.

Request 12: A drawn to scale floor plan of the entire Toxicology Lab, including the actual staffing headcount assigned to the laboratory at the time the subject testing was performed.

**Response:** This request is vague and overbroad. We do not understand what is meant by "at the time the subject testing was performed" as no sample is specified. Additionally, the department is not releasing a floor plan for the Toxicology Lab, as such information is exempt from disclosure pursuant to C.R.S. § 24-72-204(2)(a)(VIII)(A) as specialized details of security arrangements.

Request 13: A description of the Toxicology Lab's HVAC system.

**Response:** The department is not releasing a description of the Toxicology Lab HVAC system, as such information is exempt from disclosure pursuant to C.R.S. § 24-72-204(2)(a)(VIII)(A) as specialized details of security arrangements.

Request 14: A copy of the Toxicology Lab's procurement and receipt records for gloves used by analysts from June 4, 2011 through June 4, 2012.

**Response:** The department has no responsive documents.

Request 15: A copy of the Toxicology Lab's contamination control policies and procedures.

**Response:** See response to Request 3.

Request 16: Records documenting the scope, approach and results for any environmental monitoring performed in the Toxicology Lab to assess volatile organic contaminant in the ambient air.

**Response:** The department has no responsive documents.

Request 17: A copy of the Toxicology Lab's procedure or any instructions/guidelines for verification and use of externally purchased controls, calibrators, or internal standards for blood alcohol testing.

**Response:** See response to Request 3.

Request 18: A copy of the Toxicology Lab's procedure or any instructions/guidelines for preparation and verification of internally prepared controls, calibrators, and internal standards, and samples for blood alcohol testing.

**Response:** See response to Request 3.

Request 19: The Toxicology Lab's laboratory production data for blood alcohol testing: number of blood alcohol tests received per month between January 1, 2011 through June 4, 2012, and the number of analysts qualified to perform blood alcohol testing through the same period.

**Response:** The department is providing the annual lab report, dated FY 2011-2012.

Request 20: A list of gas chromatograph instruments and accessories in use for blood alcohol testing at the Toxicology Lab from June 4, 2010 through June 4, 2012.

**Response:** The department is providing a list of gas chromatograph instruments/accessories from June 4, 2010 through June 4, 2012.

Request 21: Resumes for each of the individuals responsible for receipt, storage, preparation, testing, or technical review of blood alcohol samples at the Toxicology Lab.

**Response:** The department is providing resumes.

Request 22: Copies of the original and each succeeding analyst permit or certification issued pursuant to state regulations at the Toxicology Lab.

**Response:** The department does not issue permits or certifications to analysts; thus, the department has no responsive documents.

Request 23: Records demonstrating the qualifications of the responsible analyst and technical reviewer at the Toxicology Lab, including employment applications, academic transcripts, disciplinary files, training records, and personnel files.

**Response:** This request is vague and overbroad. The request does not identify a particular sample for which an analyst was assigned to perform testing, so it is unknown for whom you wish to obtain the requested records. Additionally, academic transcripts, disciplinary files, and training records constitute information maintained because of the employer-employee relationship; thus, such records are exempt from disclosure pursuant to C.R.S. § 24-72-204(3)(a)(II).

Request 24: All internal and external proficiency records from June 4, 2007 through June 4, 2012 for all analysts and technical reviewers at the Toxicology Lab.

**Response:** The department maintains assessment records for the Toxicology Lab analysts and technical reviewers. Assessment records are maintained because of the employer-employee relationship; thus, such records are exempt from disclosure pursuant to C.R.S. § 24-72-204(3)(a)(II).

Request 25: Copies of evidence intake and control records at the Toxicology Lab, including evidence receipt log, field-to-lab custody transfers, intra-laboratory custody records for evidence and derived analytical samples, initial assignment of laboratory identifiers, storage locations, and documentation of temperature in sample storage locations.

**Response:** This request is vague and overbroad, in that no specific samples are identified for which the requested documents are sought. The department will provide the blood alcohol standard operating procedure, chain of custody procedure, a blank chain of custody form and a blank temperature sheet.

Request 26: Copies of bench notes, log books, and any other records pertaining to case samples at the Toxicology Lab, instruments used during testing, or methods used to analyze case samples.

**Response:** The department has no responsive documents.

Request 27: Copies of the Toxicology Lab's source, preparation and usage records documenting the traceability and shelf life of standard materials and solutions used for calibration and quality control in the Toxicology Lab.

**Response:** The department is providing temperature logs, certificates of Cerilliant, and Cerilliant inserts.

Request 28: Copies of the Toxicology Lab's storage conditions for the standards and controls used from June 4, 2011 through June 4, 2012.

**Response:** See response to Request 3.

Request 29: Copies of product inserts provided by manufacturers for purchased standards and controls used in the Toxicology Lab.

**Response:** See response to Request 27.

Request 30: Copies of pipettor/dilutor calibration and verification records for all the Toxicology Lab's instruments used to prepare samples, calibrators, and controls for analytical batches. If done monthly, provide all records from June 4, 2010 through June 4, 2012; if done less frequently, provide all.

**Response:** The Toxicology Lab maintains pipettor calibration records, which calibration is completed approximately every six months. The question is vague in that it refers to pipettor calibration records for the instruments, and our pipettors are manual. Please clarify what records you seek.

Request 31: Copies of instruments maintenance and repair logs for all of the Toxicology Lab's instruments used in the Laboratory from June 4, 2010 through June 4, 2012.

**Response:** The department is providing toxicology lab maintenance and repair logs from June 4, 2010 through June 4, 2012.

Request 32: Copies of the Toxicology Lab's balance calibration verification and quality control records relevant to any balance used in support of blood alcohol testing from June 4, 2010 through June 4, 2012.

**Response:** The department has no responsive documents.

Request 33: Copies of instrument or equipment run logs for all of the Toxicology Lab's instruments used on case samples on each day(s) case samples were tested.

**Response:** The request is vague and overbroad, in that no specific samples are identified for which the requested documents are sought.

Request 34: Copies of raw and processed data for each analytical batch run that Mitchell Fox-Rivera conducted at the Toxicology Laboratory.

**Response:** The request is overbroad and burdensome, as Mr. Fox-Rivera ran approximately 1700 samples while employed by the department. Additionally, the documents requested contain identifying information regarding defendants in criminal cases. Such personally identifying information is confidential and exempt from disclosure pursuant to C.R.S. § 24-72-204(3)(a)(IV).

Request 35: An electronic copy of the raw and processed data for the batch(es) that Mr. Fox-Rivera conducted at the Toxicology Lab, along with the specific version of instrument software used to process data.

**Response:** The department has no responsive documents.

The responsive documents are included on a CD, the cost of which is $10. Please remit payment in accordance with the attached invoice.

This concludes the department's good faith effort to respond to your Colorado Open Records Act request. If you have further questions, I may be reached at 303-692-3472 or ann.hause@state.co.us.

Sincerely,

Ann Hause

Digitally signed by Ann Hause
DN: cn=Ann Hause, o=Colorado Department of Public Health and Environment, ou=Office of Legal and Regulatory Affairs, email=ann.hause@state.co.us, c=US
Date: 2012.06.18 14:41:42 -06'00'

Ann Hause, Director
Office of Legal & Regulatory Affairs

cc: Cynthia Burbach, Forensic Toxicologist, Laboratory Services Division, CDPHE
Jennifer Weaver, First Assistant Attorney General, State Services Section, Colorado Department of Law