NO. 04-52872

THE STATE OF TEXAS,	**)**	**IN THE COUNTY COURT NO. 4**
	)	
Plaintiff,	**)**	
	)	**DALLAS COUNTY, TEXAS**
v.	**)**	
	)	
YYY D. ZZZ,	**)**	
	)	
Defendant .	**)**	
	)	

DEFENDANT'S MOTION *IN LIMINE*

Defendant, YYY D. ZZZ, hereby moves this Court, *in limine*, to exclude any evidence related to the subjects set forth below and, in support of this motion, she sets forth the following facts and argument:

1. Any evidence of Field Sobriety "Tests" Whose Validity is Not Established in Relation to Persons suffering Ear Damage

Prior to trial, YYY ZZZ filed medical records, pursuant to Tex. R. Evid. 902(10)(a) indicating that she suffers from vertigo as well as intermittent problems with disequilibrium and sensation of imbalance. Likewise, she suffers from non-alcohol related nystagmus. It is presumed that the state will offer evidence that Ms. ZZZ' showed "clues" of intoxication while preforming the one leg stand "test" and the walk and turn "test." Likewise, it is presumed that it will offer evidence that Ms. ZZZ' showed several clues of suffering from nystagmus while being given a Horizontal Gaze Nystagmus ("HGN") test.

With regard to the HGN test, the Court of Criminal Appeals has held that evidence concerning the administration of that test is admissible in DWI trials provided that it is

performed in accordance with the DWI Detection Manual. *Emerson v. State*, 880 S.W. 2d 759, 769 (Tx. Crim. App. 1994). A similar result with regard to the one leg stand "test" and the walk and turn "test" is compelled by the rationale of *Kumho Tire* v. *Carmichael*, 526 U.S. 137 (1999) and *Kelly v. State*, 824 S.W.2d 568 (Tx. Crim. App. 1992).

Nevertheless, it is undisputed that the DWI Detection Manual notes that some persons suffer from non-alcohol related nystagmus. Likewise, the DWI Detection Manual notes that vertical nystagmus can be caused by certain pathological disorders, such as diseases of the inner ear, and that sober individuals with middle ear problems will have difficulty preforming the one leg stand "test" and the walk and turn "test."

In short, the HGN test, the one leg stand "test" and the walk and turn "test" are scientifically invalid when administered to persons with Ms. ZZZ' medical condition and, therefore, evidence of any "clues" Ms. ZZZ allegedly demonstrated on such tests should be excluded under Tex. R. Evid. 702 and 403.

2. References to "test(s)," "clue(s)," "pass," and/or "fail"

Assuming that the Court allows the state to adduce testimony regarding the administration of the one leg stand "test" and the walk and turn "test," Ms. ZZZ submits that under Tex. R. Evid. 702 and 403 that the state's witnesses should be precluded from using scientific terminology while describing her performance on the "tests." *See, e.g. United States v. Horn*, 185 F. Supp. 2d 530, 559 (D. Md. 2002) ("If offered as circumstantial evidence of alcohol intoxication or impairment, the probative value of the SFSTs derives from their basic nature as observations of human behavior, which is not scientific, technical or specialized knowledge. To

interject into this essentially descriptive process technical terminology regarding the number of standardized clues" that should be looked for or opinions of the officer that the subject 'failed' the 'test,' especially when such testimony cannot be shown to have resulted from reliable methodology, unfairly cloaks it with unearned credibility. Any probative value these terms may have is substantially outweighed by the danger of unfair prejudice resulting from words that imply reliability. I therefore hold that when testifying about the SFSTs a police officer must be limited to describing the procedure administered and the observations of how the defendant performed it, without resort to terms such as 'test,' 'standardized clues,' 'pass' or "'fail,' unless the government first has established a foundation that satisfies Rule 702 and the *Daubert/Kumho* Tire factors regarding the reliability and validity of the scientific or technical underpinnings of the NHTSA assertions that there are a stated number of clues that support an opinion that the suspect has 'failed' the test.")

3. Hearsay Related to Field Sobriety Tests

While a State's witness can testify as to what was observed while conducting field sobriety "tests" and can testify that such tests helped inform the witness' decision to arrest a defendant, even assuming that the Court allows the state to adduce testimony regarding the administration of the HGN test, the one leg stand "test" and/o the walk and turn "test" in this case, a witness should not be allowed to testify that such tests establish intoxication. Likewise, a witness should not be allowed to testify as to hearsay related to such tests, for example, that such tests correctly identify intoxicated individuals a specific percentage of times. *See* Tex. R. Evid. 705(d).

4. Portable Breath Test

It is well established that the state may not introduce any evidence of a portable breath test (a "PBT") to establish a "quantitative alcohol concentration." *See. ,e.g., Fernandez v. State*, 915 S.W.2d 572, 576 (Tx. Ct. App.--San Antonio 1996). Nevertheless, in this case, Ms. ZZZ hesitated when she was asked to voluntarily preform a PBT. She only consented to perform such a test when told that it "cannot be used in court." *See* Video at 2:36:50. Had Ms. ZZZ been told that the PBT was admissible, for any purpose, to help marshall evidence against her and as an indicator of intoxication, she would not have submitted to the test. Indeed, in *Henry v. Kernan*, 197 F.3d 1021, 1027 (9th Cir. 1999) a defendant confessed after being told that "'what you say can't be used against you right now.'" The United States Court of Appeals for the Ninth Circuit suppressed the defendant's statements that followed that invitation. *Id*. at 1027-28 ("Such misleading comments were intended to convey the impression that anything said by the defendant would not be used against him for any purposes.") Here too, the officers convinced Ms. ZZZ to preform the PBT after conveying the impression that it could not be used against her for *any* purpose.

5. Vertical Nystagmus Test

Any evidence that Ms. ZZZ displayed vertical nystagmus at the time of his arrest without laying the proper foundation under *Kelly*, 824 S.W.2d 568. *See Stovall v. State*, 140 S.W.3d 712 (Tex. Ct. App.--Tyler 2004); *Quiney v. State*, 99 S.W.2d 853 (Tex. Ct. App.--Houston [14th] 2003).

6. Any References that Could be Construed as Evidencing a Prior Arrest or Conviction

At 2:53:04 of the tape, Ms. ZZZ displays her familiarity with the book in procedure at the Dallas County Jail by stating she knows that a birth date is required to locate an arrested person. Similarly at 2:56:30 she makes reference to a previous DWI conviction. This evidence should be excluded under Tex. R. App. P. 403

WHEREFORE, YYY ZZZ respectfully requests this Court to grant her Motion *In Limine* in all parts and instruct the State not to introduce evidence, **including portions of any video**, regarding the subjects set forth above and to instruct its witnesses not to mention such subjects during their testimony.

Respectfully submitted,

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YYY D. ZZZ

CERTIFICATE OF SERVICE

I, F. Clinton Broden, do hereby certify that, on this 15th day of March, 2005, I caused a copy of the foregoing document to be served on the Dallas County District Attorney's Office 133 N. Industrial Blvd., Dallas, Texas by hand delivery.

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F. Clinton Broden