

[CAPTION]

MOTION IN LIMINE REGARDING PORTABLE BREATH TEST (PBT)

The Defendant, by counsel, respectfully requests that the State be prohibited from mentioning to the jury the offering of, taking of and the results of any portable breath test (PBT).

In support of the Motion, the Defendant states the following:

1. Machine PBT results are hearsay. For results of a breath test to be admissible, the test operator, the test equipment, the chemicals used in the test, and the techniques used in the test must have been approved by the Department of Toxicology. Mullins v. State, 646 N.E.2d 20 (Ind. 1995); Thurman v. State, 661 N.E.2d 900 (Ind.Ct.App. 1996).
2. Appellate courts have specifically ruled in Indiana that PBT results are inadmissible. Smith v. State, 751 N.E.2d 280 (Ind.Ct.App. 2001); Curly v. State, 777 N.E.2d 58 (Ind.Ct.app. 2002).
3. The party offering PBT results into evidence has the burden of laying the foundation for admitting those results. State v. Johnson, 503 N.E.2d 431 (Ind.Ct.App. 1987); Smith v. State, 71 N.E.2d 280 (Ind.Ct.App. 2001).
4. It has been held appropriate to prohibit counsel and witnesses from mentioning to the jury the offering of, taking of and the results of any PBT. In Curly v. State, 777 N.E.2d 58 (Ind.Ct.App. 2002), a trial court properly ordered the accused, his counsel and any witness testifying to refrain from mentioning or questioning about, in the presence of the jury, the results of or the actual taking of a PBT due to the fact that the results of such a test have not yet been proven scientifically reliable.

5. Unless a proper foundation has been laid that PBT's are scientifically reliable and approved by the Department of Toxicology, such evidence is not relevant. Additionally, the probative value of unscientific evidence is substantially outweighed by the danger of unfair prejudice, confusion of the issues, and/or is misleading to the jury. Therefore, any mention of the offering of, the taking of, or the results of PBT's is additionally prohibited by Indiana Rule of Evidence 403.

WHEREFORE, the Defendant, by counsel, respectfully requests that the State be prohibited from mentioning to the jury the offering of, taking or and the results of any PBT, and for all other relief just and proper in the premises.

(Signature)