REPORTER'S RECORD

VOLUME 1 of 1 VOLUME

Trial Court Cause No. MB05-51616-G

THE STATE OF TEXAS	:	IN THE COUNTY CRIMINAL
VS.	:	COURT NUMBER 6
THE DEFENDANT	:	DALLAS COUNTY, TEXAS

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TESTIMONY OF TERRY ROBINSON FROM TRIAL BEFORE JURY

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On the 11th day of April, 2006, the following proceedings came on to be heard in the above-entitled and numbered cause before the Honorable Phil Barker, Judge presiding, held in Dallas, Dallas County, Texas:

Proceedings reported by computerized stenotype machine; Reporter's Record produced by computer-assisted transcription.

A P P E A R A N C E S:

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I N D E X

(Partial Proceedings held April 12, 2006.)
THE COURT: This is outside the presence of the jury. Give your name to the court reporter --
Wait a minute, Jack. We have a juror out there.
(Pause in proceedings.)
THE COURT: Give your name to the court reporter, and spell your last name.
THE WITNESS: Yes, sir. My name is Terry Robinson, T-E-R-R-Y, R-O-B-I-N-S-O-N.
(Witness sworn.)
THE COURT: Have a seat on the witness stand, please, sir.

TERRY ROBINSON,

having been first duly sworn, testified as follows:

SUB ROSA EXAMINATION

BY MR. ANAGNOSTIS:
Q. How are you presently employed, Mr. Robinson?
A. I'm employed as a breath alcohol technical supervisor by the Dallas County Medical Examiner's Office.
Q. And what is your educational background?
A. I have a Bachelor of Science degree with a major in zoology and a minor in chemistry. I completed breath test operators' courses instructed by the Texas Department of Public Safety and CMI, Incorporated. I --
Q. Are you -- I'm sorry.
THE COURT: Hang on just a minute.
THE WITNESS: I completed Intoxilyzer 5000 maintenance calibration.
THE COURT: Will you waive his qualifications?
I'm sorry, Judge, for sure.
THE COURT: Okay. For this hearing?
For this hearing, whatever hearing, sure.
Q. Are you familiar with retrograde extrapolation?
A. Yes, I am.
Q. And what information do you need to make that calculation?
A. Retrograde extrapolation is a process by which a trained individual, given certain factors, can render an opinion based on those factors of what an alcohol concentration may have been at a time prior to the test that was offered.
Q. And are you qualified to make those calculations?
A. Yes, sir.
Q. Now, what information do you need to make those calculations?
A. I need to know the person's gender, their weight, body weight. The time of their first drink is helpful, not mandatory to know, the time of their last drink, the time of the stop, their -- whether or not they had any food to eat, and if so, what time, and

the type of beverage they were consuming. We already have the test result and the time of the test on the test record.
Q. So a female, are you able to do a calculation now?
A. Yes.
Q. A female weighing 125 pounds standing 5'4". Time of the first drink, say, 6. Last drink 8:30, 9:00. Time of the stop, 9:30. Food, noon, roast beef sandwich. 4:00, dessert. Nothing after that, and the beverage being wine, red wine. Are you able to make that calculation?
A. Yes, sir.
Q. And what is that calculation?
A. Given that information and assuming that food is not affecting the absorption, and that all the alcohol that was consumed had been absorbed, my opinion is that person would have been between a 0.18 and 0.20 at the time of the stop at 9:34 p.m.
Q. And has retrograde extrapolation been accepted in the scientific community?
A. Yes, it has.
Pass the witness.

CROSS-EXAMINATION

BY MR. ISENBERG:
Q. You don't know the -- you don't know the individual's rate of absorption or elimination, do you?
A. No, sir, not for absorption. And for elimination, I use a range of rates of elimination in which I believe that all people are included.
Q. And with regard to the metabolism, in other words how the food is absorbed and metabolized and intermixes with the alcohol, that's really a variable that you don't -- there is no way for you to know without performing fairly sophisticated tests, right?
A. Based on the times that were given in the hypothetical, it's my opinion that the food that was consumed was having no effect on the absorption of the alcohol that was consumed. And, again, based on those times in the entire hypothetical, it's my opinion that all that alcohol, even though food had been consumed, had been absorbed.
Q. If she had consumed two glasses of wine over a period of two and a half hours, at the time of the test, what would or should be the result of the test?
A. If that were the case, and just to reiterate for the record that all things being the same, with the exception of the number of drinks consumed, and that being two standard-size glasses of wine, four or five ounces, my opinion would be that not only at the time of the test but at the time of driving the alcohol concentration would have been 0.000 grams per 210 liters.

Q. Right. So under the scenario that the prosecutor has given you, consuming two drinks sort of got an impossible result, right?
A. If that were true, yes, sir, there would be -- that would not be the correct alcohol concentration if, indeed, that was how much alcohol was consumed.
Q. And so without the correct alcohol concentration, it would be impossible to do an accurate retrograde extrapolation, right?
A. Yes, sir. It's definitely necessary to have an alcohol concentration to go on.
Q. I'm sorry. Without knowing the exact quantity of alcohol consumed, you couldn't do a retrograde extrapolation either, could you?
A. Yes, sir, I can. I can do it without knowing exactly how much was consumed. I can calculate that amount as well. I don't know exactly how much was consumed.
Q. Well, let me do it a different way. There are different hypotheticals that we could give you. If all the alcohol was consumed immediately prior to being stopped, then at the time of driving, the alcohol score, if you start backwards from a .17 with the same set of facts, could be under an .08?
A. If all the -- the number of drinks that I calculated that this person in the hypothetical had in their system at the time of the test were consumed within 15 to 30 minutes prior to the stop, it would most definitely be possible that that person could be ~~blow~~below a 0.08.
Q. Okay.
All right. We would -- based on these answers and the hypotheticals brought to you, Your Honor, we would object under Stewart. There is not really sufficient information in accordance with the ruling of the Court of Criminal Appeals to be able to do this extrapolation.
THE COURT: That's overruled. It will be admitted.
Ready to go?
: Yes, Your Honor.
THE COURT: Jack, get me the jury.
(Jury enters courtroom.)
THE COURT: Everybody be seated. It's 9:56. The jury is all present in the Defendant case.
Call your next witness, State.
State calls Terry Robinson.
THE COURT: Ladies and gentlemen of the jury, this witness has already been sworn.
Go ahead, please.

TERRY ROBINSON,

having been first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. ANAGNOSTIS:

Q. Please state your name for the jury, sir.

A. Yes. My name is Terry Robinson.

Q. How are you presently employed?

A. I'm employed as a breath alcohol technical supervisor by the Dallas County Medical Examiner's Office.

Q. Could you explain to the jury what that means to be a technical supervisor?

A. A technical supervisor's primary duty is to maintain and safeguard the scientific integrity of the Texas Breath Alcohol Testing Program in an assigned geographic area. Myself and my coworkers supervise all of the certified breath alcohol testing programs in Dallas County, and a majority of the programs in Collin, Denton and a small portion of Ellis County. And more specifically what that means is that it's our duty to maintain the breath alcohol testing instruments, to supervise the activities of the certified breath test operators at the law enforcement agencies in those counties. And when requested to do so, appear in court to discuss the analysis, the instrument, interpret the results and offer any testimony requested concerning the Texas Breath Alcohol Testing Program.

Q. And how long have you been employed as a technical supervisor?

A. I've been a technical supervisor for a little over 17 years.

Q. And, Mr. Robinson, will you please tell the jury a little about your educational background?

A. I have a Bachelor of Science degree with a major in zoology and a minor in chemistry. I've completed breath test operator's courses instructed by the Texas Department of Public Safety and CMI, Incorporated. I've completed Intoxilyzer 5000 maintenance and calibration and troubleshooting schools, also given by CMI and DPS. And I have on two occasions completed course of instruction at the University of Indiana. The course dealt with many different topics, including how ethanol alcohol gets in the body, what it does when it is in the body, how it gets out of the body. How ethyl alcohol, when it is in the body, affects an individual's ability to safely operate a motor vehicle. And the program also dealt with forensic research in the fields of forensic breath and blood alcohol testing as well as local program management.

Q. Mr. Robinson, are you presently certified by the Texas Department of Public Safety as a technical supervisor?

A. Yes, I am.

Q. Now, what must one do before receiving that certification?

A. You have to have the necessary educational background. We have to complete the courses of instruction, which I previously described, again, the University of Indiana school. You have to become and be certified as a breath test operator. You have to monitor a breath test operator initial certification course and assist with the instruction. I have instructed at one of the certified schools for initial certification for the last 17 years. And then that fulfills your formal requirements for certification, but it's also incumbent upon us to keep up with any scientific literature having to do with our field to maintain our expertise in the area.
Q. Mr. Robinson, were you certified on March 8th, 2005?
A. Yes, sir, I was.
Q. And based upon your studies and your own experience, do you have a personal opinion as to the alcohol concentration that a person does not have the normal use of their mental or physical faculties?
A. Yes, sir, I do.
Q. And what is that opinion?
A. By the time any person reaches an alcohol concentration of 0.08 grams per 210 liters, they no longer have the normal use of their mental faculties or their physical faculties that are necessary to perform a very complicated divided-attention task, and that is safely operating a motor vehicle.
Q. Now, Mr. Robinson, are you familiar with retrograde extrapolation?
A. Yes, I am.
Q. And could you explain for the jury what that is?
A. Retrograde extrapolation is a process that involves some calculations and some knowledge of certain aspects of ethanol in the human body.
Given certain factors and utilizing that knowledge, a trained individual can render an opinion based on those factors of what a range of alcohol concentrations may have been at a time prior to the test result and the time of the test being attained.
Q. Now, are you qualified to give such an opinion as to retrograde extrapolation?
A. Yes, sir, I am.
Q. Now, what factors do you need to know to do that calculation?
A. I would need to know an individual's gender. I would need to know their body weight, the time that they had their first drink -- although that is not mandatory, it is helpful -- the time they had their last drink; the time of the stop or the time of driving; the type of beverage they were drinking; food that they had consumed, if any, in relation to the time they were drinking. And we have

the time of the test and the test result.
Q. So if I were to give you the hypothetical with those factors, would you be able to make a calculation as to alcohol concentration at the time of driving?
A. Yes, sir. Again, I can't give a specific concentration. I can give a range of concentrations.
Q. Are you prepared to make such a calculation?
A. Yes, sir.
Q. Hypothetical with a female weighing 125 pounds; time of the first drink being 6:00; time of last drink being between 8:30 and 9:00; time of stop being 9:30; food at noon, a roast beef sandwich; 4:00, desert, nothing after that. And beverage, we have red wine. Now, based on those factors, what is the calculation?
A. Assuming the factors given and also assuming that the individual in this hypothetical, that the food that they had consumed was not affecting the absorption of alcohol at the time of driving and also that all of the alcohol consumed had been absorbed into the body and was in the person's system, it's my opinion that given these factors, that individual would have been between a 0.18 and a 0.20 grams per 210 liters at the time of driving at 9:34 p.m.
Q. Mr. Robinson, there was some talk yesterday about the Texas Alcohol Commission and .15 saying that's unmistakably drunk. Is that a legal or scientific definition?
A. No. Drunk is an adjective that you can use to talk about the way someone appears. It has no legal meaning, and it has no scientific meaning.
Q. Now, are you familiar with the underlying scientific theory that the Intoxilyzer 5000 instrument is based on?
A. Yes, I am.
Q. And could you explain to the jury just how the Intoxilyzer 5000 instrument works?
A. Sure. The intoxilyzer instrument uses an analytical technique called infrared spectroscopy. Every organic molecule is made up of the basic atoms of carbon, oxygen and hydrogen. And depending upon the way that those atoms are bound together by chemical bonds to form a molecule gives that molecule a very unique characteristic. And that is, when that molecule is exposed to specific wavelengths of infrared light, that molecule will scatter or absorb some of that infrared light at those wavelengths.
When that happens, what we see as a result of that phenomena is that molecule basically eliciting a fingerprint of absorption. In other words, every time we do it, every time it's done at those wavelengths, it elicits the same pattern. So basically it's a fingerprint of identification.
So the instrument not only can identify what that compound is, or

more specifically what it's not, it can also identify, using that same technique, how much of that compound is present in that sample chamber.
If we take that technique and apply it to this instrument and in the instrument we have a source lamp, which is the source of the infrared light, a sample chamber, which is approximately a foot long and has an inside volume of a little over 81 milliliters. And at the opposite end of that sample chamber from the source is a device called a photo detector. And the photo detector changes the light which strikes it into an electrical current. In the intoxilyzer instrument, when it's turned on, that source lamp is illuminated, and it's passing infrared light through the sample chamber and striking the photo detector.
The first step in the analysis sequence is called an air blank. It does two things. It purges the sample chamber and makes sure there are no contaminants present in the instrument or in its environment. And the other thing it does is at that point it takes a reading, and it establishes that as what we call a zero reference point or an alcohol-free reading. The next step in the sequence is the introduction of a subject's breath sample. If there are any alcohol molecules present in that sample, those molecules will scatter or absorb some of that infrared light so that not all of it being emitted by the source lamp reaches the photo detector at the opposite end of the chamber.
It's this difference between the amount of light that reaches the photo detector during the sample delivery step and the amount that passed through and struck the photo detector during the alcohol-free step, it's that difference that is calculated by the instrument as a concentration of the sample. It's shown to the operator on the display of the instrument, and it's also printed on a paper document called a test record.
Q. Now, there was also some talk yesterday about the longer someone blows, the higher concentration result it might show. Could you explain to the jury the correlation between the longer you blow and the alcohol concentration that it will calculate?
A. Operatorsare instructed to have the subjects that they are testing to deliver a sample into the mouthpiece of the breath tube for as long as they possibly can. And it is true, at least initially, that the longer someone blows, the higher the concentration will go. But at some point during that sample delivery -- and I can't tell you when; I can't tell you after how many seconds; it depends upon the volume of the sample that's being provided by the subject -- there is a point at which that alcohol concentration stops changing or nearly stops changing. That may be three seconds into the delivery of the sample. It may be five

seconds. It may be eight seconds. It just depends on the volume that they are providing. But the point is that you cannot increase your alcohol concentration in your system by blowing longer. It's physiologically impossible to do that.
Q. Now, do you know intoxilyzer operator Officer Arevalo?
A. Yes, sir, I do.
Q. Was Officer Arevalo certified on May 8th, 2005, by the Texas Department of Public Safety?
A. Yes, he was.
Q. And are you familiar with intoxilyzer instrument number model 5000, serial number 68-028 -- 68-012830?
A. Yes, I am.
Q. And how are you familiar with this instrument?
A. It's one of the 47 certified intoxilyzer instruments that we supervise from our office.
Q. And is intoxilyzer instrument 5000, serial number 68-012830, was it certified by the scientific director of the Texas Department of Public Safety on May 8th, 2005?
A. Yes, sir, it was.
Q. Now, as part of your duties, are you responsible for the maintenance and monitoring of this particular instrument?
A. Yes, we are.
Q. And could you please describe to the jury what type of -- what that involves? What do you do to check on this instrument?
A. Yes, sir. The first type of inspection that we do is called an on-site inspection, and that is exactly what it is. We have to go physically to the location where the intoxilyzer instrument is located. When we do that, we perform a series of diagnostic checks on the instrument. We will change the external standard that is used in conjunction with the analysis. We will make sure that there are sufficient supplies there for the operators to conduct the analyses. And usually the last thing that we do is we provide a specimen or a sample of our own breath. We have to do those on-site inspections at least once each calendar month.
The other type of inspection that we do involves a management system using a remote connection to the instruments in the field. And we can do that in our office using a personal computer with that management system loaded on it, and we can do several of the same things from our office remotely that we can do when we go on site.
What we do in our office is, on a daily basis we will have this management system call our instruments and perform a diagnostic check on the instrument and perform a calibration check on the instrument. When it's done that, it reports back to us and gives us several windows that we can look at. And what we use it for is

a diagnostic tool to be able to look at the instrument's performance and see that it is operating correctly or if there is a potential problem developing or has developed that wasn't reported to us by the operators, and we can respond appropriately to that.
Q. Now, what was the closest date before March 8, 2005, that you checked this particular intoxilyzer instrument?
A. The instrument was checked on March the 4th of 2005.
Q. And what was the closest date after March 8, 2005, that you checked this particular instrument?
A. The instrument was checked on March the 9th of 2005.
Q. And what happened with this instrument on March 9th, 2005?
A. The instrument was taken out of service on March the 9th of 2005.
Q. And why was that?
A. Four days earlier, we experienced a very unique issue with this instrument in that after some investigation, we discovered that the instrument actually gave a false negative result. And what that means is that there is actually -- and in regards to the breath testing instrument that there was alcohol present in the sample of a subject's breath, but this instrument reported that there was no alcohol present.
Q. Now, is there any possibility of a person receiving a false positive breath test --
A. No, sir.
Q. -- in this case, from this instrument?
A. No, sir.
Q. So what you're saying is this instrument was removed because it was only giving false negatives. It was reading zeros?
A. Correct.
Q. Now, do you have an opinion, based on your experience and training, as to the operational condition of Intoxilyzer instrument 5000, serial number -018230 on March 8th, 2005?
A. Yes, sir, I do.
Q. And what is that opinion?
A. It is my opinion that Intoxilyzer 5000, serial number 68-012830, located at the Lew Sterrett Justice Center on March the 8th of 2005 was operating correctly.
Q. Now, if you see on the board there right to your left what has been previously marked as State's Exhibit 3. Do you recognize that?
A. Yes, sir, I do.
Q. And what is it?
A. That is an enlargement and a copy of one page of the intoxilyzer test record.
Q. Now, as a part of the subject test, is the intoxilyzer

operator required to have the subject continuously in their presence for a 15-minute period?
A. They are required to have them in their presence and exercise reasonable care that they do not place anything into their mouth. And that continuous observation under the current regulations or at the time that this was run was not necessary. In other words, they do not have to sit and stare at them during this period of time.
Q. Now, does the test record indicate that proper operational methods were followed during the administration of this test?
A. With the exception of that waiting period having been done, I cannot testify about that. I was not there when this test was run. It's the duty of the certified breath test operator to perform that waiting period and perform it according to the Texas Breath Alcohol Testing regulations at the time necessary, and that would be immediately prior to the test being done.
But other than that, yes, sir, I can look at this document and determine if it is a complete and valid analysis.
Q. So having heard testimony -- if you heard testimony yesterday from Officer Arevalo saying that he completed the 15-minute requirement period, based on that record, does it show that operational methods were followed?
A. Yes, sir.
Q. Now, could you explain to the jury what the reference analysis solution is?
A. The reference analysis solution is a solution which consists of 100 percent ethyl alcohol that has been diluted to a known concentration using distilled water.
Q. And who prepares these solutions?
A. The technical supervisors that maintain that instrument will prepare the solutions.
Q. Now, are these reference samples, are they periodically checked?
A. Yes, sir. Every time we make a batch of solutions, we verify that it's been done correctly.
Q. And how is that? How is that verified?
A. We make very large batches of these solutions. We make it 52 liters at a time. And when we are finished mixing them, we'll let them sit overnight. And then we will take three samples the following morning, and we'll hand deliver those three samples to our toxicology laboratory. The chemist in the tox. lab will split our samples into duplicates and take those six samples and analyze them on an instrument called a gas chromatograph.
At the same time that is being done, we will take a 500 milliliter sample from that large batch and run a series of verifications on a certified breath testing instrument in our laboratory. So we are

using gas chromatography and infrared spectroscopy to verify that we've made these solutions correctly. If we find that we haven't, in other words, if one of these methods shows us that we have a result we're not expecting to see, we'll discard the entire batch and start all over again.
If we see results from both those verifications, then we'll proceed and bottle the solutions in 500 milliliter portions. And we use those when we go to the field to change out the standards.
Q. Now, on each of these test records, there is both a predicted reference sample and a reference analysis; is that correct?
A. Yes, sir.
Q. Okay. Now, what is the predicted reference sample?
A. The reference predicted value is the concentration that we expect to see, plus or minus 0.01 grams per 210 liters, when the instrument analyzes a vapor sample from that solution.
Q. And that plus or minus, that's referring to what the reference analysis on the actual instrument is supposed to show; is that correct?
A. Correct, plus or minus 0.01.
Q. Now, does this test record reflect that the reference analysis was within the tolerance of the predicted reference value?
A. Yes, sir, it does.
Q. Now, what happens if that reference sample is out of tolerance?
A. The operator will hear a high/low tone being emitted by the instrument, that will show the words "out of tolerance" on the display of the instrument. And when the test record prints, it will not print any results. It will instead print "invalid test; reference check out of residence."
Q. Is that something the operator actually has to do or is that an automatic --
A. That is something that will automatically occur if that reference result is outside that plus or minus 0.01 grams per 210 liters of the predicted value.
Your Honor, at this time we move to admit State's Exhibit 3, the unredacted portion.
And we object. Your Honor, may I take the witness on voir dire?
THE COURT: Yes.

VOIR DIRE EXAMINATION

BY MR. ISENBERG:
Q. The machine you're trying to sponsor this breath test through, Mr. Robinson, is no longer in service; is that correct?
A. That's correct. It was taken out of service on the 9th of March of 2005, and it has not been placed back into service since that time.

Q. Okay. And my client took her breath test score on this machine when?
A. On the 8th of March of 2005.
Q. And the first time that this machine gave a result that was false that you detected was on March the 5th; is that correct?
A. Yes, sir, that's correct.
Q. And the result on March the 5th is the reason the machine was taken out of service. It took you a few days to catch up to it, but the reason it was taken out of service was on the 9th; is that correct?
A. Correct.
Q. The 5th result.
Judge, based on that --
Q. (By Mr. Isenberg) Let me just ask you. So you no longer are certifying this machine for the Texas Breath Testing Program here in Dallas County, correct?
A. The instrument is still certified.
Q. Right, but you're not sponsoring the machine or using the machine?
A. We are not using it until we've gotten the upgrade package from the manufacturer to place in the instrument, recalibrate it and reverify that it is operating correctly.
Q. And fix the defect, whatever that is?
A. That would be what the upgrade package is for.
Judge, we would object based on that.
THE COURT: That's denied. Overruled; admitted. You can take them off.
May I approach, Your Honor --
THE COURT: Yeah.
-- the witness?

DIRECT EXAMINATION (CONTINUED)
BY MR. ANAGNOSTIS:
Q. I'm going to remove the blacked-out portions here to reveal. Would you tell the jury the two values of the subject test there from March 8th, 2005?
A. The result of the first analysis is 0.176 alcohol concentration, and the second analysis result is a 0.172 alcohol concentration.
Q. Now, what -- is there a tolerance allowed between the two different subject samples there?
A. Yes, sir. It's called subject test agreement.
Q. And could you explain what that means to the jury?
A. Subject test agreement is defined in the regulations as the two subject test results on a test having to be within a 0.020

grams per 210 liters of one another.
Q. Now, we talked about this machine, how it's given these false negatives. Is that the only problem ever discovered with this instrument?
A. Yes, that would affect the results, absolutely.
Q. Now, if it were your opinion otherwise, would you come testify today about the validity of this test?
A. No, sir. What we did after we took the instrument out of service, since the instrument had -- there have been some tests run from the date of the incident until the date we took it out of service, is we evaluated the tests that were run in conjunction with the investigation that was done and what was discovered as to what the problem was. And it was very easy to realize that what had happened in that one instance did not happen in this case.
Q. And what happened in that one instance was a reading of zero. Could you explain exactly what that one instance was, what happened?
A. Sure. There were a couple of different things that all had to come together in order for this to happen, and the biggest thing that there was was in the breath tube, in other words, the portion that the subject blows into, that's the external breath tube, and that tube continues on the inside of the instrument, which is called the internal breath tube, which goes to the sample chamber. And in this particular model of instrument, that tube goes directly into the sample chamber. And in between where the -- there is a little connector that connects the breath tube to the sample chamber, there is a one-way valve. And in this case, what was discovered was that that one-way valve was stuck in the closed position, and that the subject providing the sample in this case was blowing very, very lightly, so lightly, in fact, that the sample being delivered did not push the valve open but the sample never got to the sample chamber. That's why the results were zero. The instrument indeed, in fact, as far as the analysis portion was correct; however, the incorrect portion was that that valve was defective and didn't allow the sample to get to the sample chamber.
Q. Now, are the results of the Defendant's breath analysis greater than an alcohol concentration of .08?
A. Yes, sir, they are.
Q. And in your opinion, would a person with an alcohol concentration of .17 have lost the normal use of her mental or physical faculties?
A. Yes, sir, that would be my opinion.
Pass the witness.
THE COURT: Mr. Isenberg.

CROSS-EXAMINATION

BY MR. ISENBERG:
Q. The valve that you're talking about is in the entrance portion of the sample chamber, right?
A. Correct.
Q. On the exit portion of the sample chamber, there is another valve, too, isn't there?
A. No, sir. Well, there is actually a couple of different exits. One does have a one-way valve, the other one doesn't.
Q. And that one-way valve was not checked by you, was it?
A. Yes, sir, it was. When we were doing the investigation, we didn't know what it was.
Q. You know who Mr. Miller is, don't you?
A. Yes, sir.
Q. He says that it's the same valve, in other words, it's the same part, the same one-way valve in the front as it is in the back; isn't that right?
A. No, it's not. They're different.
Q. They are different?
A. Yes, sir.
Q. But that valve could be possible in terms of failing as well, the exit valve, couldn't it?
A. It's possible for it to stop up, yes, sir, I guess.
Q. Okay.
A. It could do that.
Q. And if it does stop up, then what's going to happen is that your sample chamber is going to be full of more concentration. It's going to be reading scores high. In other words, instead of false negatives, it will be giving you false positives if that back valve blocks up, right?
A. No, sir. There is another valve that goes out of that sample chamber besides that one.
Q. Right.
A. So if that one did plug up, it wouldn't pressurize the sample chamber.
Q. You don't think so?
A. No.
Q. In any event, the reason that you detected this particular inconsistency had to do with an observation of the subject giving the sample, right? In other words, the person that was giving the sample was clearly intoxicated, and then they were reading a sample -- I mean, reading a test score of 0. That's how it got detected, right?
A. Yes, sir, in the opinion of the operator, yes, sir.
Q. Okay. Now, you're here sponsoring this very same machine that was deemed to be so defective it's been taken off line since March

the 9th of 2005, over a year ago, and has never been taken back. Have you looked at the videotape in this case?
A. No, sir, I have not.
Q. So if you had videotapes that showed people to not be intoxicated, wouldn't that also cause you to look for the same types of defects or errors in the machine? In other words, that it would be giving false positives instead of false negatives, if you were trying to be neutral and objective?
Object to speculation.
THE COURT: Overruled.
A. I'm not sure what or how much emphasis to put on a videotape, because if it's in an intoxilyzer room, there is -- obviously, there is some validity to be put on it. But the other thing is is that there is more to the case than just that person being on that video.
Q. And that's a good answer, but --
A. In other words, I can't -- I'm not good enough to look at a video and tell whether somebody is intoxicated or not.
Q. Fair enough. But the reason that this error got detected was someone was just using their plain observation skills, right? I mean, it was videotaped?
A. And the operator's a very extraordinary individual. He sees about 1500 a year.
Q. Well, you saw the tape on that individual?
A. Yes, I did.
Q. There wasn't any question. It didn't take an extraordinary individual to know that the person was sloshed. That's why they caught the zeros being inconsistent.
A. There were some signs that I would attribute to somebody being intoxicated on the tape.
Q. Right. In other words, it depends on whose axe is being ground. If you're looking for something wrong with the machine because the tape is good, y'all don't do that. If you see a score that is bad for you or zero for you but the tape is bad, showing a person is intoxicated, that's when you sort of look into it?
A. No. I don't understand what you mean.
Q. In this case, that's what happened.
A. In this particular instance, the operator observed some things along with speaking with the officer that made the arrest, and there were definitely some definite driving facts which could have been attributed to the intoxication by alcohol. They also conducted another test in the hall, once they finished the first test, to corroborate their suspicions that this person was indeed, in their opinion, intoxicated.
Q. Okay. Fair enough. Let's go back to some other things.

You're the technical supervisor for area 23, right.
A. I'm one of three.
Q. But you're the chief enchilada, aren't you?
A. No. We're all peers.
Q. You are all called equal.
A. Yes.
Q. I thought they made you the head?
A. I wish. No.
Q. Let me ask you this: The law says that if you provide a breath test sample, that within two hours of the time of your detention, you have a legal right to have a blood draw so that you have a basis of independent comparison between whatever the breath test machine says and whatever the blood sample says, right?
A. Well, I don't mean to play word games or anything, but it doesn't say anything about a legal right. It says that a person has an opportunity, if they provide the specimen that the officer requests and at their own taking, to have a sample of their blood drawn for independent analysis. It also goes on to say that the officer only has to provide reasonable opportunity for that person to do so. And, yes, sir, it has to be done within two hours of the time of arrest.
Q. Okay. Well, it's the law, it's Section 724.019, isn't it?
A. Yes, sir.
Q. And that's in the statute, isn't it?
A. Transportation Code, yes, sir.
Q. In fact, under the statute headed "Implied consent."
A. I believe so, yes, sir.
Q. And, in fact, it's contained in the Texas Breath Alcohol Testing Program Operator Manual, isn't it?
A. Yes, it's in the legal annex.
Q. Okay. So let me ask you this: The average citizen in the State of Texas, how many of them, percentage wise, do you think know they have this right?
Objection, Your Honor, speculation.
THE COURT: I'll sustain the objection.
Okay.
Q. You don't inform them; is that right?
A. I don't inform?
Q. The citizen accused if they provide a breath test sample that they've got the right to have a blood sample?
A. The operators normally will not, that's correct.
Q. I asked you this question I think about six years ago. I said, Now that you're here, couldn't you instruct all of your operators to do so? And you said, yes, I could. There is nothing that would prevent me from doing so.

A. And that's true I could, but --
Q. And six years --
A. But it's not up to me.
Q. Six years later, you still haven't done that. You haven't written a letter, haven't called them all up on the phone and said, hey, guys just tell them the implied consent law. After they have agreed, after they have gone through the 38:22 warning, so it's not influencing whether they take it or not, after they've gone through all that, provided a sample, tell them, hey, you now have your right to have an independent blood draw, right?
A. The operators are instructed that that is available. No, they are not specifically instructed to tell every subject that they test of that availability. And, no, I have not written letters or told anyone to start doing that.
Q. How many breath tests are given annually in Area 23?
A. Between 6 and 7,000.
Q. And they are inexpensive to provide, relatively speaking, right?
A. The reason I hesitate is there is a lot more that goes into them than just --
Q. I understand.
A. But, yes, sir, relatively they are inexpensive.
Q. Okay. And they are efficient because they are very time sensitive?
A. They are noninvasive. Results are obtained very quickly.
Q. Okay. Blood tests are, on the alternative, more expensive because of the instruments used and the personnel required to give them?
A. Yes, sir, I would agree with that.
Q. And there is additional personnel required to store the blood samples, right?
A. Not really additional personnel to store them.
Q. Well, additional facilities to store them?
A. Just need a refrigerator.
Q. Right. And the results take a long time, relatively, to a breath test to get?
A. If you --
Q. If you did --
A. The reason I'm hesitating is because if you put a sample on a GC and ran it, it would take approximately -- if you put one sample on a GC and ran it, it would take about 10 minutes to -- 10 to 15 minutes to obtain the result for one sample.
Q. Correct, but the problem is you couldn't set a GC up in every police station or in the sheriff's department and have a -- the samples have to be transported from where ever they are collected

by whomever they are collected to the lab?
A. Correct.
Q. And then they have to be tested, and then they are done en masse?
A. Exactly.
Q. And then they have to be preserved after that so that the citizen accused has a right for independent analysis to cross-check it, right?
A. Absolutely.
Q. So we sort of get to the -- we get to the nuts and bolts of why we're doing breath testing in Texas instead of blood testing, for the most part.
A. I'm not sure exactly what the exact reason is, but I'm sure the timeliness and obtaining the result immediately or nearly immediately are considered factors.
Q. But isn't it fair, isn't it just fair, I mean, this is Texas, the United States of America, land of the free. Isn't it fair that if you are going to test somebody on some machine, that they have a right to have their own independent analysis done?
A. And they do.
Q. But they don't have it de facto because they don't know about it. No one knows about it.
THE COURT: Is that a question or a statement?
MR. ISENBERG: It's a question. I'll do it this way.
Q. How many citizens accused of the 6,000 or 7,000 last year that took a breath test, how many of them asked in our region, Area 23, for their own independent blood draw?
A. I don't have -- I don't have the answer to that. I couldn't give you an exact number.
Q. Four or five?
A. I would say it would probably be a low number.
Q. Four or five?
A. I don't know.
Q. It would be in that range, wouldn't it?
Objection, Your Honor, asked and answered.
THE COURT: Sustain the objection.
Q. Now, scientists disagree as to the accuracy of the breath test machine; true or false?
A. True.
Judge, may I approach? I need to get my easel.
Q. (By Mr. Isenberg) And when we're talking about scientists, we're not talking about guys sitting in the back of some garage and stuff like that. We're talking about people with Ph.D.'s that are on staffs at, you know, medical schools and universities around the country and things like that, aren't we?

A. Well, I'm just familiar with people that have written --
Q. Articles?
A. Written articles, not necessarily peer review scientific articles, but written articles concerning the instrument and how it works.
Q. Sure. And I understand your position is you disagree with some of what they write. But the point is, they are not necessarily crackpots or charlatans or phonies or anything like that?
Objection, speculation.
THE COURT: Overruled.
Q. Okay. Well, I'll withdraw the question. I don't want you to speculate. Fair enough.
You know who they are. Dr. Alan Jones, Dr. Kevin Hystala.
A. I don't believe I have ever read an article where Dr. Jones says that infrared spectroscopy is a poor method of analyzing a breath sample, especially when his country uses the intoxilyzer instrument.
Q. He's written an article about how much breathing techniques can alter the scores up to 30 or 40 percent, right?
A. He has written that article, yes, sir.
Q. Okay. And then Dr. Hystala who's at the University of Washington. And he's actually in the medical school, but he doesn't have an MD. He has a Ph.D. in physiology or something like that. His article has to do with the fact that the point of deep lung, alveolar air collection vapor, all the way from the mouth and into the sample chamber is really not the starting point. The point should be higher up in the lungs and in the throat. And as a result, breathing patterns when we breathe in and out, you collect alcohol in the esophagus, in the throat, in the mouth, and so you have increased scores. That's his component in his article, right?
A. He's entitled to his opinion.
Q. I understand. But I mean, that's what his paper says?
A. I'm not familiar with that paper.
Q. Okay. And then, of course, there is Dr. Dubowsky, Department of Medicine, toxicology laboratories, University of Oklahoma?
A. Yes, sir.
Q. He has also written and published papers on this subject as well?
A. Hundreds, yes, sir.
Q. Okay. Now, back to where I was. I was setting this stuff up. You agree, don't you, with me and the members of the jury that everyone's physiology is different, don't you?
A. Sure.
Q. The rate that we absorb, eliminate, the rate that we learn and

process things, our physical memory, our mental memory; it's all different, right?
A. Somewhat, yes, sir.
Q. So scientists disagree as to the accuracy of breath testing and the breath test machine; true or false? And you said true?
A. True.
Q. So we'll put that chart up there. "At .15 percent, unmistakably affected, all faculties seriously affected." Do you agree with that?
A. I don't understand what that means. Scientifically speaking, I don't understand what that means.
Q. Okay. Well, you know, my chart used to say, "At .15 percent, unmistakably drunk" because I was going off of what the publications say. And so then I changed it to "affected" because both Mr. Miller and Mr. Finkley say they agree with "affected." So my question is, do you agree with this that at .15 percent, a person would be noticeably affected?
A. That's not what that says.
Q. Okay.
A. To me that does not mean noticeably or outwardly affected. That does not -- that's not my interpretation of that.
Q. Okay.
A. My interpretation is --
Q. I want to fix it. I want to fix it because we, in fact, have not done this in a long time.
A. I don't necessarily disagree with your wording. But this does not say to me that at that concentration that a person is -- that a layperson could look at this person and say that person is intoxicated. That is not what that means to me.
Q. Okay.
A. Okay. I will agree with your wording that if you say, in my opinion, all persons' faculties are affected. I would agree with that. But that is not to imply that every person at this concentration is outwardly, noticeably impaired.
Q. Would most be?
Objection, Your Honor, speculation.
THE COURT: Overruled.
A. It would depend on their tolerance. It would depend on their experience with the drug in question.
Q. Well, if they are so young that they haven't had a large opportunity to become experienced with alcohol -- I mean, we're not in a vacuum here. We're talking about her, and she's not a 50-year-old wino, you know, on Main Street?
A. I agree with you. She's a very young person. But in my experience, I have seen people younger than her that could consume

large amounts of alcohol and not outwardly appear as if they were intoxicated but were at very high concentrations.
Q. Sure. I mean, for every hypothetical we can give, we can take all the -- extract the abnormal ones. But the usual person like her would be noticeably affected, right?
A. But all I could say is that she could appear unmistakably intoxicated. She may not. That's as far as I can go.
Q. Well, that's fair enough. That's about what we can say about the score at the time of the driving. With the appropriate manipulation of the facts at the time of driving like your manual says, the score can be higher, it can be lower or the same?
A. Exactly.
Q. Of .08, right?
A. Exactly.
Q. And you stand by that. In this particular case, with scientific certainty, you really can't say what her score was at the time of the driving?
A. All I can do is base my calculations on the information that I'm given.
Q. Okay.
A. How accurate that information is in regard to what really happened, I don't know.
Q. Okay. And I think that's fair enough.
"The intoxilyzer self-checking circuitry can read that the machine is okay but the machine is not okay." We know that's true because it happened with this particular machine, didn't it? It accepted a score that was zero and said that it's self-checking was okay.
A. It did pass the circuitry check, but the circuitry check doesn't check everything. So, yes, I would agree with your statement that the instrument can pass the circuitry check and indicate that the circuitry check was okay, but there could be something potentially wrong with the instrument.
Q. And, in fact, that happens. Y'all send letters -- when you check the data the next morning, the next day, the next week or whatever, you check the data. If you see anomalies, you frequently send letters to the D.A.'s office and say, well, even though we got an acceptable test, blah blah blah, we're invalidating the score?
A. Correct, and I wouldn't say that that's a frequent occurrence, but we have done that, yes, sir.
Q. Okay. "The manufacturer will not release the repair manual to anyone independent of the State for independent inspection."
A. That I don't know. I can't speak for the manufacturer. I don't know if they will.
Q. "The longer you blow into the instrument, the higher the score." True or false?

A. Just that statement by itself, it's true. But there is more to it.
Q. Dr. Alan Jones says, "breathing technique alone can cause scores to be affected by up to 30 percent."
A. I don't recall the percentage exactly. I don't dispute that. I just don't recall that.
Q. Fair enough.
A. But technique can affect it, yes, sir.
Q. Okay. "Physiology of all people is different." We agree with that, right?
A. Yes, sir.
Q. "The toxy trap preserves a sample for independent testing, but it's not put on the Texas machines"; is that right?
A. Yes, sir.
Q. And so there is no independent testing of the citizen's -- when I say sample, I mean breath sample.
A. That's correct.
Q. Okay. Blood test samples are preserved for independent testing though in Texas.
A. They can be.
Q. And "The defendant has a right to have blood within two hours of arrest if giving a breath sample by law."
A. Or blood, either/or. Whatever the sample is that the officer requested, if they provide it, then they have that opportunity, yes, sir.
Q. And it is the officer's choice to inform the citizens of this right?
A. Yes, it is.
Q. But if the citizens don't know the right, they can't exercise it, right?
A. I would say that's a fair statement.
Q. And percentage-wise, or statistics-wise, we know that very, very few people know about it because very few people ask for it?
THE COURT: We've covered that. Let's move to something else.
Q. Now, this particular machine is the fourth generation by CMI since you've been involved with the Texas Breath Testing Program both here in Dallas and in --
A. San Antonio.
Q. -- San Antonio, right?
A. Yes, sir, correct.
Q. Fourth. And each time they have this machine, they ask y'all to come in and say it's the best thing since whole wheat sliced bread, right?
A. No, sir, they don't ask us to say that.
Q. Okay. Well, they ask you to come in and say it works?

A. Come in to court and say it works? I wouldn't be sitting up here if I didn't believe that and I hadn't proven it to myself.
Q. Okay. "The software for the intoxilyzer machine is not available for independent inspection by the State's witnesses or anyone independent of the manufacturer, CMI." True or false?
A. True.
Q. "No warranty for fitness of a particular purpose." Still no warranty for fitness of a particular purpose, although they did switch around the wording on this warranty, did they not?
A. Yes.
Q. Okay. This particular machine -- when I say "this machine," the latest, the EN Intoxilyzer 5000 68 model has a warranty for parts and labor for two years?
A. Correct.
Q. But that's really all, parts and labor?
A. Yes, sir.
Q. Two people the same height and weight, food, drink over the same period of time can have as much as 42 percent difference in breath test scores?
A. Probably have higher than that at low alcohol concentrations.
Q. And the margin of error for the machine as it relates to the reference sample is plus or minus 01; is that right?
A. That's a range within which the result must be in relation to the predicted value. That doesn't have anything to do with the range of accuracy of the instrument itself.
Q. And I understand that, but if it -- if the reference sample says .08, and the reference sample you get after they test -- after the machine tests the reference sample is .07, that's within the margin of error; is that the right term, margin of error?
A. I call it reference range.
Q. Reference range. It's within the reference range of your testing program, right?
A. Correct.
Q. But if it were .069, it would not accept the reference sample?
A. That is correct.
Q. Okay. So that's a reference range that is roughly -- I'm just going to take a guess -- 12 percent?
A. Yes, sir. I believe I've done that before, yes, sir.
Q. And the acceptable tolerance or -- I don't know how to phrase it. But on a breath test sample itself, if it's within .02 agreement, .02 agreement, that's about 25 percent of a .08?
A. At a .08, yes, sir.
Q. Sure, okay. I'll put those charts up there. And if you'll give me just a half second. I think I've covered everything. The reason that this machine has been taken off line and not been

put back in line is because CMI hasn't done anything about it, or the people in Austin haven't done anything about it?
A. They've done something about it, and what they are trying to do is come up with an upgrade package to prevent this from even being possible to happen. And it's -- I'm not privy to the process or what's been involved with it, but it's been a -- it's kind of a back-and-forth thing, the manufacturer and DPS talking with each other, with the engineers and trying to come up with something that they are happy and satisfied with is going to work so that this doesn't happen again.
Q. You are really not comfortable with what's happened. This year lapse is really -- it's not something you're real comfortable with, are you?
A. Well, I'm not going to say I'm uncomfortable, but the reason that we chose -- that is myself and my coworkers -- not to put this instrument back into service was to wait until this package was done. And it keeps getting pushed back and pushed back for reasons that we're not -- again, we're not privy too. We're just told that it's not ready yet. It's not ready yet. So it's just simply a decision on our part to keep those two instruments aside until they are ready, that they are done, that we can install them and recalibrate and reverify that the instrument is operating correctly.
Q. And there is no question that before my client took her test on this machine, that it was giving false readings?
A. It was giving a false negative I believe 12 -- I counted 12 tests before your client had been tested.
Q. Okay. And I guess the best way to describe the real problem is, it is a CMI design defect in the machine?
A. Under the circumstances that this occurred, I would say that's true.
That's all.
Briefly, Your Honor.

REDIRECT EXAMINATION

BY MR. ANAGNOSTIS:
Q. Mr. Robinson, a false negative, would that be characterized by showing an alcohol concentration of zero?
A. Yes. In this instance, yes. It means that, again, there was alcohol present in the sample, but the instrument showed there to be none.
Q. And that's the reason why this instrument was taken off, because of false negatives?
A. Correct.

Q. Did you send any letters to the D.A.'s office about this particular test result being invalid?
A. We sent a letter, but we also had a conference with the administrative folks in the D.A.'s office about what happened and what we recommended that they recommend to the law enforcement agencies in the county, and what our response was going to be.
Q. And was that response to invalidate this test result, this test result?
A. This test result, no, sir.
Q. In your opinion, is this a valid and accurate test result?
A. Yes, it is.
No further questions.

RECROSS-EXAMINATION

BY MR. ISENBERG:
Q. One other thing on the retrograde extrapolation stuff.
A. Yes.
Q. I kind of overlooked that, but don't you also have to know the drinking patterns and/or tolerance of an individual in order to do a good retrograde?
A. You don't have to know the tolerance, but the drinking pattern, again, that would come definitely into play concerning whether it was higher, lower or the same at the time of driving in relation to the time of the test.
Q. In this case, it's unknown?
A. What is unknown?
Q. The drinking pattern.
A. Again, that is true. All I can do is use what I've been given.
Q. Okay. Fair enough.
Nothing further.
No questions.
THE COURT: May he be excused?
We have no objection.
THE WITNESS: Thank you, Judge.
(End of requested proceedings.)

THE STATE OF TEXAS: COUNTY OF DALLAS:

I, Trisha L. Phillips, Official Court Reporter in and for the County Criminal Court Number 6 of Dallas County, State of Texas, do hereby certify that the above and foregoing contains a true and correct transcription of all portions of evidence and other proceedings requested in writing by counsel for the parties to be included in this volume of the Reporter's Record, in the above-styled and numbered cause, all of which occurred in open court or in chambers and were reported by me.

I further certify that this Reporter's Record of the proceedings truly and correctly reflects the exhibits, if any, admitted by the respective parties.

I further certify that the total cost for the preparation of this Reporter's Record is $240.50 and ~~was paid~~will be paid by Mr. Arch McColl.

WITNESS MY OFFICIAL HAND this the 24th day of April, 2006.

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