

SANDRA L. MORELAN, CSR\_

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R \_%\_ E \_%\_ P \_%\_ O \_%\_ R \_%\_ T \_%\_ E \_%\_ R' \_%\_ S \_%\_ R \_%\_ E \_%\_ C \_%\_ O  
\_%\_ R \_%\_ D \_  
VOLUME \_\_\_ OF \_\_\_ VOLUME \_  
TRIAL \_%\_ COURT \_%\_ CAUSE \_%\_ NO. MB05-84880-K \_

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STATE \_%\_ OF \_%\_ TEXAS \* \_%\_ IN \_%\_ THE \_%\_ COUNTY \_%\_ CRIMINAL \_  
—  
VS \* \_%\_ COURT \_%\_ NUMBER \_%\_ NINE \_%\_ OF \_  
—  
DEFENDANT \* \_%\_ DALLAS \_%\_ COUNTY, \_%\_ TEXAS \_

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\_\_\_\_\_  
TRIAL \_%\_ BEFORE A JURY \_  
\_\_\_\_\_

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On the 29th day of January, \_%\_ A.D., 2007, the \_  
—  
above entitled and numbered cause came on to be \_  
—  
heard for trial in the said \_%\_ County \_%\_ Criminal \_%\_ Court \_  
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No. 9, with the \_%\_ Honorable Peggy Hoffman, \_%\_ Judge \_  
—  
Presiding, and the following proceedings were held, \_  
—  
to wit: \_

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—  
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: \_  
—  
DISTRICT \_%\_ ATTORNEY'S \_%\_ OFFICE \_  
MS. \_%\_ PAIGE DUNCAN \_

133 N. Industrial \_%\_ Blvd. LB19  
Dallas, \_%\_ Texas 75207\_  
(214)653-3600\_  
ATTORNEY \_%\_ FOR \_%\_ THE \_%\_ STATE\_

—  
—  
MR. \_%\_ LARRY G. BOYD\_  
5630 Yale Blvd. \_  
\_%\_ Dallas, \_%\_ Texas 75206\_  
(214)691-5630\_  
ATTORNEY \_%\_ FOR \_%\_ THE \_%\_ DEFENDANT\_

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\_ \_%\_ I \_%\_ N \_%\_ D \_%\_ E \_%\_ X \_  
JANUARY 29, 2007 PAGE \_\$ \_\$ VOL. \_  
PROCEEDINGS . . . . . 04 1\_

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STATE'S \_%\_ WITNESSES \_\$ DIRECT \_\$ CROSS \_\$ VOIR \_\$ DIRE \_\$ VOL. \_  
TERRY ROBINSON 04,31 1 \_

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\_ \$ CERTIFICATE \_ \$ PAGE . . . . . 35 1\_

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P \_%\_ R \_%\_ O \_%\_ C \_%\_ E \_%\_ E \_%\_ D \_%\_ I \_%\_ N \_%\_ G \_%\_ S \_  
March 3, 2007\_  
(Excerpt testimony)\_

TERRY ROBINSON\_  
was called as a witness by the \_%\_ State and, after having been  
first duly sworn, testified as follows: \_

CROSS-EXAMINATION\_

BY MR. BOYD: \_

\_%\_ Q All right. \_%\_ Mr. \_#\_ Robinson, \_" do you agree or disagree,  
at a .15, drivers are unmistakably drunk, all faculties  
seriously affected? \_#\_ That's a statement from the Texas  
Council of \_#\_ Drug and Alcohol \_#\_ Abuse? \_

\_%\_ A \_%\_ I don't -- \_%\_ I disagree with you, because \_%\_ I don't  
know what they mean by drunk.\_

\_ % \_ Q Okay. But you would agree that they say that on that wheel, don't they? \_

\_ % \_ A Yes, they do. \_

\_ % \_ Q Okay. Would you agree with the statement -- "\_do you agree or disagree, "\_at .30 drivers will be stuporous, according to the Texas \_#\_ Counsel of \_#\_ Alcohol and \_#\_ Drug \_#\_ Abuse? \_

\_ % \_ A \_ % \_ I think that's what it \_ % \_ says on that wheel, yes. \_

Q Okay. But you disagree with that? \_

\_ % \_ A Yes. \_

\_ % \_ Q You would agree that a .236, she's somewhere in between this .15, where according to the \_ % \_ Texas \_#\_ Counsel on \_#\_ Alcohol and \_#\_ Drug \_#\_ Abuse, she should be seriously, unmistakably drunk, all faculties seriously affected at a \_ .3, stuporous? \_

\_ % \_ A You can't -- there's no scientific definition for drunk. \_

Q Okay. No scientific definition for stuporous either, is there? \_

\_ % \_ A It's an adjective that they use. \_

Q Okay. You haven't seen the video in this case, have you? \_

\_ % \_ A No, sir, \_ % \_ I have not. \_

\_ % \_ Q Now, if you provide a breath sample, you're entitled to have your own independent blood sample taken within two hours of the time of the stop; is that correct? \_

\_ % \_ A If you provide the sample that the officer requests, it may be breath, it may be blood. \_

\_ % \_ Q Okay. \_

\_ % \_ A Yes, sir. \_

Q In this case \_ % \_ the Defendant did provide a breath test? \_

A Correct. \_

Q Would you agree that most people don't know about that law? \_

\_ % \_ A Yes, \_ % \_ I would agree with that. \_

\_ % \_ Q Okay. So a person would have to learn about that law from the arresting officer or the breath test operator; is that correct? \_

\_ % \_ A That would probably be the most likely source at that point in time. \_

\_ % \_ Q Okay. And as the technical supervisor in area 23, you could require that the breath test operators, under your supervision, provide that information, couldn't you? \_

\_ % \_ A \_ % \_ No, \_ % \_ I couldn't require that. \_

Q Ok \_#\_ ay \_ % \_ . I can't supersede the law. \_

\_%\_QOkay. But you've gone beyond what the scientific director requires in the 15-minute observation period, haven't you?\_

\_%\_ANo.\_

\_%\_QNo. Okay. You've never required your breath test operators to provide that information, did you?\_

\_%\_ANo.\_

\_%\_QOkay. Now, with regard to the \_%\_Intoxilyzer that was used to test \_%\_Ms. Thien's breath, was that a 66 or a 68 model?\_

\_%\_ASixty-eight.\_

\_%\_QOkay. Was it an EN, the latest model? \_

\_%\_ANo.\_

\_%\_QWas it one of the older \_%\_EN\_%\_s? \_

\_%\_AYes. \_%\_I'm sorry, no, it's not an EN at all. It's a 68.\_

\_%\_QOne of the old 68, 5000, is not the latest EN model; is that right? \_

A That's correct.\_

\_%\_QIs this particular Intoxilyzer still in service on a daily basis?\_

\_%\_AIt is in service. It's not in service today. The\_%\_Dallas \_%\_Police \_%\_Department has eight instruments that are rotated in and out of service. Today it's not there.\_

Q Is it a lab spare at this stage?\_

\_%\_ANo. It's a spare for the Dallas \_#\_Police \_#\_Department.\_

\_%\_QOkay. Do you know how old this \_#\_Intoxilyzer was on \_%\_October 29th, 2005?\_

\_%\_AJust a moment. It had been in service a little over six years.\_

\_%\_QOkay. True or false. Scientists disagree as to the accuracy of the \_%\_Intoxilyzer?\_

\_%\_ATrue.\_

\_%\_QAnd scientists disagree as to accuracy of breath testing in general, don't they?\_

\_%\_ATrue.\_

\_%\_QOkay. You agree, the software of this \_%\_Intoxilyzer is not available for independent inspection by you or anyone independent of \_%\_C\_%\_M\_%\_I?\_

\_%\_AThat's correct.\_

\_%\_QOkay. And \_%\_CMI is a publicly held and traded corporation, correct?\_

A \_%\_I believe so, yes, sir.\_

\_%\_QThey've manufactured several different breath

testing devices since you've been a technical supervisor, correct?\_

\_%\_A Yes, sir, they have.\_

\_%\_Q What is a toxtrap?\_

\_%\_A It's a device that's not manufactured by \_%\_CMI. It's a device that can be connected to an \_%\_Intoxilyzer instrument. It contains some \_%\_ silica, \_" \_the silica granules, and what it does is it actually can trap the breath specimen. During one of the air blanks, instead of being vented in the room, \_" \_the device can be attached so that it will vent that sample into that particular tube.\_

Q So we could independently test how much alcohol is in that silica trap?\_

\_%\_A Correct.\_

Q But we don't use those here, do we?\_

\_%\_A No, sir.\_

\_%\_Q Two people, same height, same weight, same amount of food and alcohol to drink over the same period of time, you could have a 50 percent difference in breath test scores, correct?\_

\_%\_A If the alcohol concentration was low, you could have a hundred percent difference.\_

Q Okay. So those two people could have as much as a hundred percent difference in two breath -- \_

\_%\_A Sure. A .01 to a .02, sure.\_

\_%\_Q Now, tolerance of the reference sample, that's plus or minus .01 out of .08; is that correct?\_

\_%\_A It's -- it's a .01 no matter what the predicted value is.\_

\_%\_Q Okay. But at a .08, that's a 12.5 percent difference \_" \_it could have?\_

\_%\_A \_%\_I'll take your word for your calculations. Yeah, a .01 is a twelve and a half percent difference.\_

Q Okay. And for two subject scores, a .02 out of a .08, that could be a 25 percent allowable deviation between two different scores in one person within a couple minutes, couldn't it?\_

\_%\_A Yes. Doesn't have anything to do with that, but the numbers are a 25 percent difference. \_

\_%\_Q Okay. Now, the manufacturer, \_%\_CMI, doesn't regularly release their repair manual to us for independent inspection, do they?\_

\_%\_A No.\_

\_%\_Q Okay. And as to this particular device, the 5000,

you -- did you sign a confidentiality agreement with C\_%\_M\_%\_I not to release that?\_

A Seems like when\_%\_I actually got it, when I took my training in\_%\_Austin years ago, yeah, it seems like\_%\_I did sign a piece of paper that said\_%\_I wouldn't do that, but that has since been discontinued.\_

\_%\_QOkay. So\_%\_I could get that anytime\_%\_I want to?\_

\_%\_ANo,\_"\_the signing of it.\_%\_I don't know if you can get it. I\_"\_honestly\_"\_don't know that, if you could or not.\_

Q Okay.\_

A And\_"\_if you can't get it from them, all you have to do is ask me.\_

\_%\_QOkay. The longer you blow into the machine, the higher the score, true or false? \_

\_%\_ATo a certain point, true.\_

\_%\_QOkay. Dr.\_%\_Allen\_%\_Jones, you recognize him as an expert, don't you?\_

\_%\_ASure.\_

\_%\_QOkay. \_#\_He says breathing technique alone can cause scores to be affected by as much as 30 percent, plus or minus, correct? \_

\_%\_AAgain, the percentage is at a very low alcohol concentration, but, yes, breathing -- specific type of breathing could change it.\_

\_%\_QOkay. Physiology of all people is different, correct?\_

\_%\_AYes.\_

\_%\_QOkay. Now, how many beers -- just, let's talk about the standard 12-ounce beer that\_"\_everybody can relate to. Not the real strong beers or martinis or anything like that, but just a standard 12-ounce beer, \_#\_Miller \_#\_Lite, that kind of thing. \_

How many beers would a person, five foot, five inches tall, female, a hundred seventy pounds, female, have her in her system and -- \_

MR\_%\_. BOYD: May\_%\_I approach the witness,\_%\_Your\_%\_Honor?\_

\_%\_THE\_%\_COURT: You may.\_

\_%\_Q(BY MR\_%\_. BOYD) -- I mean, not just what she had all night. Let's not talk about that. Let's talk about what she had in her body at that moment if this was an accurate \_ .236?\_

\_%\_A\_%\_I believe I testified earlier that she had the amount of alcohol of nine to ten standard drinks in her \_

\_"\_system -- \_

\_%\_Q Ten beers?\_

A -- at the time of the test.\_

Q Ten beers? And you don't know what her -- \_

\_%\_A No, \_%\_I didn't say ten beers in her system. I said the amount of alcohol contained in -- \_

Q \_#\_ Ten shots of whiskey or ten beers -- \_

A Or any combination thereof. \_

\_%\_Q -- ten, four-ounce glasses of wine?\_

\_%\_A Yes, sir.\_

Q Okay \_#\_. \_

A \_#\_ The amount of alcohol contained therein.\_

\_%\_Q And you're saying at the time of the video, out at the street it's 1\_)\_:56, she's more like 11, or was it a 12-pack at the time that she was pulled over on the toll road? \_

\_%\_A Roughly an hour earlier. Yeah, maybe one or two more, yes, sir.\_

\_%\_Q Talking about it's almost an hour, you know, little over an hour. \_%\_ Could have been as much as talking about a 12-pack she'd have on board -- \_

\_%\_A Yes, sir.\_

\_%\_Q -- on the street? Okay. All right. Now, \_%\_I want to talk to you a little bit about the test information logs and the maintenance records just for a few minutes just to make some points.\_

\_%\_A Sure.\_

\_%\_Q Okay. Now, you provided me with the test information logs and the maintenance records back on \_%\_ February 21st, 2006; is that correct?\_

\_%\_A Yes, sir.\_

\_%\_Q Okay. Now, look at 12-1-05, \_#\_ December 1st, it showed a no .02 agreement on a subject test; is that correct?\_

\_%\_A Yes, sir.\_

\_%\_Q He had a 0.194, followed by a 0.173; is that correct?\_

\_%\_A \_%\_I just have the first result. \_#\_ They're the lowest of the two on my report, but, yes, sir, \_%\_I'll agree with that.\_

MR \_%\_. BOYD: Okay. May \_%\_I approach the witness, \_%\_Your \_%\_Honor?\_

\_%\_THE \_%\_COURT: Yes, you may.\_

Q (BY MR. BOYD) \_#\_If you feel like it, you can look at

my records too, because \_%\_I have the two, and I have the old error codes on them. You've got -- now, so we can explain it to the jury, what \_%\_I've got is your recordkeeping protocol before \_%\_D\_%\_P\_%\_S made SWIFS, the agency that you're with, SWIFS, \_#\_Southwestern Institute of Forensic Sciences, DPS made you change your recordkeeping protocol somewhat, didn't they?\_

\_%\_AWell, we had to change the software program. Earlier I talked about management system. We had to -- we had to switch from what we were using to -- to what everybody in the state is using.\_

\_%\_QOkay. And so your records that you've got, that you brought with you today, differ from mine, don't they?\_

\_%\_AThey're taken -- it's taken -- all taken from the same data. It's just that the report is generated differently from the data inquiry.\_

\_%\_Q\_%\_Now, on 12-1-05, you had a .194, according to my records, followed by .173, right?\_

\_%\_AYes.\_

\_%\_QOkay. Now, that's the equivalent of the loss of a beer in a couple of minutes, isn't it?\_

\_%\_ANo, that's not the way it works.\_

Q You minus -- 194 minus 173, that's about a .2?\_

\_%\_AThat's not the reason that they're different.\_

\_%\_QOh, I know, \_%\_I know. \_%\_I'm just saying that was -- if you were taking that, and you thought that they were exactly right, \_" you'd say that it looked like somebody lost a beer in a couple of minutes?\_

\_%\_ANo, \_" that's not -- that's not the way it is. That's not -- \_%\_I will not agree to that at all.\_

\_%\_QOkay. But what you're saying -- what we're saying is, correct, that that's just the difference in those two breaths, isn't it? He didn't lose a beer?\_

\_%\_ACorrect.\_

\_%\_QWe're in agreement on that. We're just saying it in different ways, okay. If you look at that and you didn't know the basis of breath testing, it would look like the person lost a beer in a couple of minutes, right?\_

\_%\_AWell, if you didn't know the basis of the breath testing, you wouldn't know anything about elimination rate, so I would look at it and say, oh, the two numbers are different.\_

\_%\_QOkay. They are different?\_

\_%\_AYes, sir. \_

\_%\_QThey're different by a .02. Is that -- more than

a .02, .021? \_

\_%\_AYes, sir.\_

\_%\_QOkay. But that person didn't eliminate a beer in two minutes, did they?\_

\_%\_ANo.\_

\_%\_QThat's just the difference in those two breaths, isn't it?\_

\_%\_ACorrect.\_

Q Okay. And that's -- was that length, pressure, temperature, or what?\_

\_%\_ACould have been a combination of the -- the -- it was a result of the volume of the two breath samples provided.\_

Q Okay\_#\_. \_

A It "\_ could be a result of how long someone blew, and a combination of how hard they blew. \_

\_%\_QOkay. But that made that much of a difference? \_

\_%\_AYes, sir.\_

Q And the breath test machine threw it out, correct?\_

\_%\_ACorrect.\_

\_%\_QOkay. Now, look at \_%\_December 20th, '05. \_#\_Now, on my records you had error code 10, that according to my records in the old days, it said error code 10 was unstable \_%\_DV\_%\_M; is that correct?\_

\_%\_AYes. Actually it says operational messages. It doesn't say error code. It does say unstable DVM, yes.\_

Q Okay. On your records after you changed the way it reads, "\_ now it says -- and that's according to the \_%\_D\_%\_P\_%\_S recordkeeping protocol; is that correct?\_

\_%\_ANo, "\_ this is -- this was done with the same management system. The report format was changed.\_

\_%\_QOkay. But what that says now is you -- they've changed the nomenclature, the term, instead of saying unstable \_%\_D\_%\_V\_%\_M, it says improper zeros there; is that correct? \_

\_%\_AYes, sir. \_

\_%\_QOkay. Now, what does \_%\_D\_%\_VM\_%\_ stand for?\_

\_%\_ADigital voltage measurement. \_

\_%\_QOkay. And that can also -- that can result from degradation of the source lamp; is that correct? \_

\_%\_AA change in the \_%\_D\_%\_V\_%\_M, yes, sir.\_

\_%\_QWhen you start off -- when you replace the source lamp, just like an ordinary bulb in the room, it starts off at a hundred and twenty watts, something like that, correct?\_

\_%\_AIt's not that much wattage.\_

Q Well\_%, I know. But we're just talking about so that the jury can understand what we're talking about. You start off with a brand new bulb, it's letting out in a room, it's letting out a hundred and twenty watts, right?\_

\_%\_A Yes.\_

\_%\_Q Over a period of time, the wattage dims, it goes down somewhat; is that correct? \_

\_%\_A Maybe decrease a little bit, sure.\_

\_%\_Q Okay. And also about the same time you change out what's called the chopper motor, is that correct,\_"\_ sometimes when you do those -- \_

\_%\_A Yes.\_

\_%\_Q -- "\_ recall?\_

\_%\_A Yes, sir.\_

Q And you do a recall, when you replace -- those are the two most critical parts of the instrument, aren't they,\_"\_ the source lamp and the chopper motor, the things that you replace most often?\_

A #\_ They're all critical. If they're not all working correctly, the instrument won't work.\_

\_%\_Q It's measuring the absorption of light at the end of the chamber, correct?\_

\_%\_A It's measuring the difference in the amount of light that passes completely through the chamber.\_

\_%\_Q Right. Okay. But the \_%\_D\_%\_V\_%\_M problem can occur because the chopper motor is not turning at the same amount of revolutions. It's losing \_%\_R\_%\_P\_%\_M over a period of time, doesn't it?\_

\_%\_A Sure.\_

\_%\_Q Okay. So that's what DVM could mean too, right?\_

\_%\_A If it changes very, very quickly over a very short period of time, it could happen, yes.\_

Q You could also have a \_%\_D\_%\_V\_%\_M problem with that machine and somebody -- \_

MR\_%\_. BOYD: May I approach the witness again? \_

\_%\_THE\_%\_COURT: You may.\_

\_%\_Q (BY MR. BOYD) And #\_ this happens sometimes during an\_%\_ Intoxilyzer test, \_%\_ I think you've said, somebody can just kick the cabinet? \_

A Bumps the cabinet, slides the key tray in real hard, yes, sir, or anything that affects the stability of the source.\_

\_%\_Q Little vibration,\_"\_ okay,\_"\_ correct?\_

\_%\_A It has to be a pretty good vibration.\_

\_%\_QPretty good shot on it?\_

\_%\_AYes.\_

Q Now, \_%\_October 13th, 2005, let's look at that for a second. \_

MR\_%\_. BOYD\_%\_: May \_%\_I approach again, \_%\_Your Honor?\_

\_%\_THE\_%\_COURT: You may. \_

\_%\_Q(BY MR. BOYD) \_#\_This device tested positive for an interferent at about 6\_)\_:52 a.m., \_" \_is that correct, on record number 4903?\_

\_%\_ANo, sir, 4903 -- yes, sir, that was all part of an inspection. \_

\_%\_QRight. You deliberately introduced an interferent into the solution, into the simulator, is that correct, or do you do it through your mouth?\_

\_%\_AWe do it through our mouth. \_

\_%\_QOkay. What, you put a little drop of acetone --\_

\_%\_ANo, we actually blow it through a simulator that has a specific amount of acetone in it.\_

\_%\_QOkay. But, now, that was in the morning, right, 6:52 a.m.?\_

\_%\_AYes, sir.\_

Q That's when you did your scheduled check of the machine?\_

\_%\_AYes, sir.\_

\_%\_QOkay. But on that same date, \_%\_October 13, 2005, at 10\_)\_:52, was it p\_)\_.m\_)\_. \_" \_the machine tested positive again for interferent; is that correct?\_

\_%\_ANo. \_#\_The instrument didn't test positive. The person being tested did. \_

\_%\_QRight.\_

\_%\_AYeah.\_

\_%\_QOkay. Well, what was that?\_

\_%\_AUsually it's people that are drinking isopropanol. \_

Q\_%\_Or nail polish remover?\_

A Acetone is a metabolite. \_#\_An interferent is usually due to people drinking isopropanol. Acetone is an intermedial metabolite of isopropanol metabolism, or it could be someone that had a lot of protein -- excuse me, acetone in their system for other reasons.\_

\_%\_QAnd are you sure that wasn't left over from the inspection tests, somehow it got into the tubing or something?\_

\_%\_AYes, sir, \_%\_I'm positive.\_

\_%\_Q\_%\_December 11th, 2005, the machine tested positive

for interferent again; is that correct?\_

\_ % \_ A Sorry, sir, what was the date?\_

\_ % \_ Q \_ % \_ December 11th.\_

\_ % \_ A Yes, sir, there was a subject test at -- yes, sir,  
on \_ % \_ December 11th -- \_

\_ % \_ Q Testing -- \_

\_ % \_ A -- \_ " the subject -- yes, sir, the subject, again, was  
detected to have acetone or interferent in their system.\_

\_ % \_ Q All right. Where is the temperature of the  
alveolar breath of a normal human being?\_

\_ % \_ A Where? In the lungs or in the mouth?\_

\_ % \_ Q The alveolar breath as it comes up from the deep  
lungs?\_

\_ % \_ A It should -- it should be near the temperature of  
core body temperature.\_

\_ % \_ Q Okay. What is normal core body temperature? \_

\_ % \_ A Roughly 98.6 degrees Fahrenheit or 37 degrees  
Celsius, plus or minus one degree.\_

\_ % \_ Q So it's like 98.6, plus or minus a degree? \_

\_ % \_ A Yes, sir.\_

Q So \_ " a person could have 99.6 and still be normal?\_

A \_ # \_ Yes, sir, it's considered not -- not to have a  
fever at that point.\_

\_ % \_ Q Okay. What temperature do you or \_ % \_ CMI assume that  
the temperature of the alveolar breath in the defendant for  
the purposes of conducting an \_ % \_ Intoxilyzer assay of that  
person's breath?\_

\_ % \_ A Normal core body temperature.\_

\_ % \_ Q Okay. So it's not breath temperature? You know  
any difference between core body temperature and breath  
temperature or -- \_

\_ % \_ A If \_ % \_ I understood your question correctly, what do \_  
\_ % \_ I -- does the instrument assume the alveolar breath to be?

Are you talking about as it \_ % \_ leaves the mouth or -- \_

\_ % \_ Q As it \_ % \_ leaves the mouth, what is the -- \_

\_ % \_ A \_ # \_ As it \_ % \_ leaves the mouth, it's cooled to around 34  
degrees, plus or minus 0.2 degrees, Celsius. \_

Q Okay. So the principle that the machine operates  
under is that you have cooler breath coming out of your  
mouth; is that correct?\_

\_ % \_ A No. It operates on infrared spectroscopy. \_

\_ % \_ Q But what -- what assumption is it making as far as  
what your tidal of breath is? \_

\_ % \_ A The only assumption it makes is that the person is

at or near core body temperature.\_

Q All right. What mathematical formula or algorithm does the #\_Intoxilyzer 5000 use to calculate the breath alcohol concentration of a sample of breath taken from the defendant?\_

\_A\_That's something that is in the software of the instrument, which we previously discussed is not -- is not available to -- to anyone outside the manufacturer.\_

\_Q\_Okay. So the answer is, you don't -- you don't know, do you?\_

\_A\_No, sir.\_

Q Okay. And that information is proprietary; is that correct? \_

\_A\_As \_I understand it, yes, sir. \_

Q You've been trained by \_CMI, but they didn't train you how the software works, did they?\_

\_A\_Correct.\_

\_Q\_Okay. What does the manufacturer, \_CMI, tell the operator of the \_Intoxilyzer 5000 is the proper procedure for preparing a subject for a breath test?\_

\_A\_ \_I don't know.\_

\_Q\_Okay. So you've never seen the \_Intoxilyzer operator's manual?\_

\_A\_ \_I've seen it at \_CMI, but the \_State of \_Texas has their own operator's manual.\_

\_Q\_Okay. So you don't -- you don't get this \_CMI operator's manual with your instruments anymore, do you? \_

\_A\_No. \_I haven't for years.\_

Q Okay. The scientific director -- \_D\_ \_P\_ \_S told the scientific director -- like the scientific director told C\_ \_M\_ \_I not to ship any operator's manuals with the machines anymore; is that right?\_

\_A\_ \_I don't know.\_

Q How long has it \_ been since they've received any with the machine?\_

\_A\_Early 90's.\_

\_Q\_Okay. So you haven't seen an operator's manual from \_CMI since the early 90's?\_

\_A\_No.\_

\_Q\_Well, what does the state -- now, the \_ state tells the operator, the breath test operator, to be in a person's presence for at least 15 minutes immediately prior to the test; is that correct?\_

A Yes, sir. \_

Q Okay. Are you aware that the \_%\_CMI manual tells the breath test operator to closely observe the person for 15 minutes?\_

\_%\_ASemantics. \_

Q You think that there's no difference?\_

\_%\_ASure, \_%\_I don't think there's any difference. \_

Q Same thing, presences versus close observation, same thing?\_

A \_#\_Yeah.\_

\_%\_QOkay. Who is better aware of the technical limitations of the \_#\_Intoxilyzer 5000 \_" do you think, the manufacturer, \_%\_CMI, or the \_%\_State of \_%\_Texas?\_

\_%\_AThis particular instrument, the \_%\_State of \_%\_Texas.\_

\_%\_QOkay. So does the \_%\_State of \_%\_Texas have a standard procedure that's approved for use by the technical supervisors throughout the state to verify that the interferent detection feature in the \_%\_Intoxilyzer 5000 is working properly and conforms to the manufacturer's certifications? \_

\_%\_AYes, sir.\_

Q They do. Does it conform to \_%\_CMI?\_

\_%\_AYes, it does.\_

\_%\_QAll right. At \_%\_SWIFS or throughout the state?\_

\_%\_AThroughout the state.\_

Q Okay. Does the \_%\_State of \_%\_Texas have a standard procedure that's approved for use by the technical supervisors to verify that the \_%\_R\_%\_F\_%\_I indicator -- that the \_%\_R\_%\_F\_%\_I indicator is working?\_

\_%\_AIt is a procedure that follows \_%\_CMI's recommendation, and it is done statewide \_" that way. \_#\_Now, \_%\_I cannot speak for individual technical supervisors. \_%\_I do know that the information has been put out by the office of the scientific director that this is how you do this, but obviously, \_%\_I can't speak for everybody \_" if that's the way they actually do it. \_#\_That's the way we do it.\_

\_%\_QOkay. And isn't it true that the \_%\_Intoxilyzer could report by telephone modem that it's working correctly, yet still be incapable of conducting an actual breath test?\_

\_%\_AIt does not check everything, every component on it, yes, sir, that's correct. \_

\_%\_QOkay. That's possible. Isn't it true that infrared breath testing procedures have been reported in the scientific literature to have produced answers wrong by as much as 50 percent or reported value?\_

\_%\_AI don't know\_%\_. I'm not aware of that.\_

\_%\_QNow, did you watch the video in this case?\_

\_%\_ANo, sir,\_%\_I have not.\_

\_%\_QOkay. At this point in your career, what is the minimum length of time that you feel it takes for an individual to blow into the Intoxilyzer for that person to provide an adequate specimen for purposes of analysis?\_

\_%\_AThere is no minimum time. It depends on the concentration and the dosage that the person has on board, and how they provide it.\_

\_%\_QNow, you testified the -- you thought it was about six seconds?\_

\_%\_AIt used to be that. It's different now with the changes in the software. \_

\_%\_QOkay. \_

\_%\_AWith the old 66 instrument, our first brand we started using or model, it was around six seconds. It's not that way anymore.\_

\_%\_QOkay. In fact, at an earlier point in your career, you said that a person could provide a minimum breath, and it would be analyzed in as little as four seconds?\_

\_%\_AThat's true. That's still the case as well. Just depends on the alcohol concentration, and how fast that sample is provided.\_

\_%\_QOkay. So earlier -- at the earliest stages of your career, you would say as little as four seconds a person\_%\_ can blow into that machine, and let's say get one asterisk, that's how it's made -- \_

\_%\_AYou're not going to get an asterisk in four seconds.\_

Q You don't think so? No more?\_

\_%\_AOh, I'm sorry, yes,\_"\_it is possible for a person to provide a specimen that's accepted in as little as four seconds with the current instrumentation and the current software. It was not always possible for that to occur.\_

\_%\_QOkay. And the way that they measure that is the breath test operator can look at the\_%\_LED on the\_%\_Intoxilyzer, and see asterisks start to come up on the -- on the\_%\_LED; is that correct?\_

A \_#\_Yes, sir, that's one way.\_

\_%\_QYou can go with one? \_#\_That would be an adequate sample? If one asterisk comes up, you can say stop, and it will analyze that specimen?\_

A \_#\_It might. \_#\_It may not. It's strictly a timing

mechanism to help guide the operator as far as length of sample. One asterisk on\_%\_ the display may not necessarily mean that the sample has been accepted at that point.\_

\_%\_QOkay. Or a breath test operator could see one asterisk come up, and say keep blowing, keep blowing, until it just -- how many is the maximum number?\_

\_%\_AYou can clear the display.\_

\_%\_QYou can clear the display?\_

\_%\_AYes, sir.\_

\_%\_QGo one, two, three, four, five asterisks. \_#\_You can have the person blow until you can't blow anymore?\_

\_%\_ASixteen.\_

\_%\_QSixteen asterisks. Okay. And, now, at this stage though, earlier four seconds, now you're saying six?\_

\_%\_ANo, vice versa. With the old 66, it did take at least six seconds, because the sample in the system and the volume of the sample in the system is different than it is now.\_

\_%\_QOkay. On the new -- \_

\_%\_ANow it could be as little as four. \_

\_%\_QOkay. So on the 68 -- \_

\_%\_AAgain, there -- we don't train people to count so many seconds. We don't even mention a number of seconds.\_

\_%\_QOkay. So good. Now we're -- now \_%\_I understand. You're saying in the old days it was six, now it's as little as four?\_

\_%\_ASure, \_"it could happen in that time. \_#\_But, again, \_"we don't train the operators to count seconds.\_

Q And you have no idea how long \_%\_the Defendant blew into that \_%\_Intoxilyzer, do you?\_

\_%\_ANo, ma'am -- no, sir.\_

\_%\_QOkay. Now, you test the quality of your reference sample on a gas chromatograph; is that correct?\_

\_%\_AThat's -- that's one method, yes, sir.\_

Q Okay. And that's a very expensive unit, isn't it?\_

\_%\_AYeah, it is an expensive instrument.\_

\_%\_QThose things are like \$75,000 apiece, right? \_

\_%\_AAt least.\_

\_%\_QOkay. At least. Okay\_#\_. An \_#\_Intoxilyzer, on the other hand, is ten thousand, right?\_

\_%\_ALittle bit less than that.\_

\_%\_QOkay. And so, now, blood testing involves a lot of different people, it's expensive, it's very time consuming, and you don't have the sample available for knowing what the

result was right on the spot, do you?\_

\_Q\_ A To answer your first question, it involves one person \_" to do blood testing -- \_

Q \_#\_ Let --\_

\_Q\_ A-- just like the operation of the instrument.\_

And if you put a gas chromatograph next to an \_Q\_ Intoxilyzer at the same point, in other words, the sample was ready to be introduced into the \_Q\_ Intoxilyzer, and it \_Q\_ was ready to be injected into the gas chromatograph, the gas chromatograph would actually have the result faster than the Intoxilyzer instrument would.\_

\_Q\_ Q Okay.\_

A But if you include all the drawing of the sample, the storing of the sample, transportation of the sample, yes, sir, the actual analysis of a blood sample, at least in our laboratory, probably doesn't occur until -- for probably three to four days after it's drawn. \_

\_Q\_ Q Well, of course, you've got to have somebody to draw it. You got the officer who carries them up to the Lew Sterrett nurse's station, right?\_

\_Q\_ A Yes, sir.\_

\_Q\_ Q Okay. Then you've got to have the \_Q\_ R \_Q\_ N \_" or an \_Q\_ \_Q\_ L \_Q\_ V \_Q\_ N or somebody that's to draw the blood?\_

A Correct.\_

Q Then you've got to transport the blood from \_Q\_ Lew \_Q\_ Sterrett to SWIFS, correct?\_

A Yes, yes. \_

\_Q\_ Q And that usually involves at least one other person, right?\_

\_Q\_ A Yes, sir.\_

\_Q\_ Q And you've got to have a technician at \_Q\_ SWIFS, analyzes the blood then on your \_Q\_ G \_Q\_ C, your gas chromatograph, right? \_

\_Q\_ A Correct.\_

\_Q\_ Q You analyze your reference solution, the one that you put in the instrument; is that correct?\_

\_Q\_ A Yes, sir.\_

\_Q\_ Q With a \_Q\_ GC, a gas chromatograph?\_

\_Q\_ A That's one of the -- that's one of the methods, yes, sir.\_

Q Okay. That's the same thing that you use to analyze blood, correct? \_

\_Q\_ A Correct.\_

MR\_%\_. BOYD: \_%\_I'll pass the witness.\_

\_%\_THE \_%\_COURT: Redirect?\_

REXCROSS-EXAMINATION\_

BY \_%\_MR. BOYD: \_

\_%\_QAll right, Terry, now, \_%\_I think what we're seeing earlier at 1\_)\_:56, you're saying her alcohol concentration was quite a bit more, like a .266 or a .256; is that correct?\_

\_%\_ABetween a -- \_%\_I said a 0.24 and 0.26.\_

\_%\_QSo we're talking about somebody essentially -- like we said before, it's a person with a -- not a 12-pack all evening, we're talking about a person with a 12-pack on board in her system at that moment when she was pulled over?\_

A The amount of alcohol in that -- in that much beer, yes, sir.\_

\_%\_QOkay. Similar to drinking a pint of whiskey, just drinking it down, something like that?\_

\_%\_AIf it were done at one time, it would be a lot.\_

\_%\_QRight, \_" something like that. Okay. What we were talking about earlier, when a person can look normal while they're, according to that thing, extremely intoxicated, that would be a function of tolerance; is that correct?\_

\_%\_AYes, sir.\_

\_%\_QThat's a learned behavior that a person gets over a period of time drinking, essentially, all the time, every day, quite a few times a week?\_

\_%\_ALearned tolerance is one type of tolerance, yes, sir.\_

\_%\_QWhere they drink every day, get to the point where they can mask it, right?\_

\_%\_AThey may not drink every day.\_

Q But, you know, three or four times a week probably?\_

\_%\_AIt depends on how much they drink when they do it.\_

\_%\_QOver a period of years, right?\_

\_%\_AIt takes -- it would take some time, yes, sir.\_

\_%\_QOkay. But you don't know anything about \_%\_Ms. Thien's drinking habits, do you?\_

\_%\_ANo, sir.\_

\_%\_QOkay. And there are other breath testing devices out there, aren't there?\_

\_%\_AYes, there are.\_

\_%\_QAnd they have different features; is that correct?\_

\_%\_AYes.\_

\_%\_QSome of them are quite a bit more expensive than that \_%\_Intoxilyzer machine, right? \_

\_%\_APrices\_%\_, I don't know. There are different technologies that are used by different states.\_

Q In fact there is a thing called a Drager; is that correct? \_

\_%\_A#\_Excellent instrument, yes, sir.\_

Q But that's about \$25,000? \_

\_%\_A\_%\_I don't know how much it is. It's a good instrument though.\_

\_%\_QAmong other things, it has a measurement system that takes the temperature of your breath as it\_%\_ goes from tidal to alveolar breath, and it deducts the breath temperature, doesn't it?\_

\_%\_A\_%\_I've heard something about that system. I don't know enough about it to provide any testimony about it. \_

\_%\_QOkay. As you go from the first breath that you exhale all the way down to your core body breath, your alveolar breath, it gets warmer, doesn't it?\_

\_%\_AA little bit.\_

\_%\_QOkay. Have you ever participated in any experiments? \_%\_I know that you-all did a breath versus blood years ago in the Journal of the \_#\_Alcohol \_#\_Testing Alliance, but did you ever do one where you actually had somebody blow like a one asterisk sample, a very short breath, four seconds, and then blew their lungs out on the next test, and took blood at the same time? Were you doing those long versus short and blood all at the same time?\_

\_%\_AYes. \_%\_I think -- \_%\_I believe somebody from the \_#\_Department of \_#\_Public \_#\_Safety did a study like that years ago.\_

\_%\_QBut it's never been published now?\_

\_%\_A\_%\_I don't think so. \_%\_I don't think they ever got past the data collection stage of it.\_

\_%\_QBut they did publish one where you just did -- what was your protocol on the one that you did, what, in '97? How long did you have to blow or was it just random?\_

\_%\_AIt was random. There was no specific -- just so that the instrument -- long enough for the instrument to accept the sample.\_

\_%\_QOkay. So the first time you didn't really keep track how long the blow was when you took the breath, and you took blood, right?\_

\_%\_ARight.\_

\_%\_QBut on the -- on the test where you actually did do long and short breaths and took blood, that data was never published, correct?\_

\_%\_A\_%\_I believe that's what the study consisted of, yes,  
sir. \_%\_I don't remember for sure.\_

\_%\_QOkay. Are you familiar with the University of  
\_%\_Indiana?\_

\_%\_AYes, sir.\_

\_%\_QOkay. Do you think they're a college that's  
capable of producing people of high qualifications of  
alcohol testing?\_

\_%\_AAbsolutely.\_

\_%\_MR. BOYD: \_%\_ I'll pass the witness.\_

\_%\_THE \_%\_COURT: Anything further?\_

MS\_%\_. DUNCAN: Nothing further.\_

(End of excerpt testimony)\_

STATE \_%\_OF \_%\_TEXAS () \_

COUNTY \_%\_OF \_%\_DALLAS ()\_

I, \_%\_SANDRA \_%\_L. MORELAN, \_%\_Official \_%\_Court \_%\_Reporter \_  
in and for the \_%\_COUNTY \_%\_CRIMINAL \_%\_COURT \_%\_NUMBER 9, of \_%\_Dallas \_

\_%\_County, \_%\_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 the \_%\_Reporter's \_%\_Record of the  
record of the proceedings truly and correctly reflects the  
exhibits, if any, admitted by the respective parties.\_

WITNESS \_%\_MY \_%\_OFFICIAL \_%\_HAND on this the \_\_\_\_ day of  
\_\_\_\_\_, \_%\_A.D., 2007\_

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