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REPORTER'S RECORD
TRIAL COURT CAUSE NO. MB07-50656-H

THE STATE OF TEXAS * IN THE COUNTY CRIMINAL
*
VS. * COURT NUMBER SEVEN
*
THE DEFENDANT* DALLAS COUNTY, TEXAS

EXCERPT TESTIMONY
OF
GARY WISMBISH

On the 17th day of August, 2007, the following
proceedings came on to be heard in the above-entitled
and numbered cause before the Honorable Elizabeth
Crowder, Judge presiding, held in Dallas, Dallas
County, Texas:

Proceedings reported by machine shorthand.

ANGELICA TAYLOR, CSR, RPR
Official Court Reporter
County Criminal Court No. 7
Dallas, Texas 75207

ANGIE TAYLOR, CSR, RPR
OFFICIAL COURT REPORTER (214) 653-5666

1 APPEARANCES

2

3 HONORABLE JENNIFER KECHEL - SBOT NO. 24049557
4 HONORABLE RASHEE RAJ - SBOT NO. 24043543
5 Assistant District Attorneys
6 133 N. Industrial Blvd, LB19
7 Dallas, Texas 75207
8 Phone: 214-653-3600

9

10 Attorney(s) for the State of Texas.

11

12

13 HONORABLE DAVID BURROWS - SBOT NO. 03471950
14 Attorney at Law
15 6116 N. Central Expressway, Suite 515
16 Dallas, Texas 75206
17 Phone: 214-755-0738

18

19

20 Attorney(s) for the Defendant.

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1 PROCEEDINGS

2 (August 17, 2007 - 3:08)

3 (Open court, defendant and jury present)

4 THE COURT: Sir, would you please raise

5 your right hand?

6 (Witness sworn)

7 THE COURT: You may have a seat.

8 GARY WISMBISH,

9 having been first duly sworn, testified as follows:

10 DIRECT EXAMINATION

11 BY MR. BURROWS:

12 Q. Would you state your name for the record,

13 please?

14 A. I'm Gary Harold Wismbish.

15 Q. And let's talk about your education

16 background. Where did you go to undergrad?

17 A. I graduated from Texas A&M University with a

18 degree in chemistry.

19 Q. And a master's degree?

20 A. I was able to skip to master's and go directly

21 for the doctorate.

22 Q. What's your doctorate in?

- 23 A. It's in toxicology and pharmacology. That was
24 from Indiana University at the medical center.
25 Q. And I'm going to skip around.

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1 But have you taught at the Fort Worth

2 Medical School in your career?

3 A. Yes, sir. I taught for 13 years at the

4 College of Osteopathic Medicine in Fort Worth, Texas,

5 in two departments. The first department was

6 pathology and the second department was pharmacology.

7 Q. Did your education with the students include

8 recognition of intoxication in individuals?

9 A. Yes. Both the medical students and the

10 graduate students studied under my direction. We went

11 through what's called dose response studies. We

12 taught the young physicians and the young doctors how

13 to recognize signs of intoxication related to the

14 concentrations in the blood and the dose of alcohol

15 received.

16 Q. Back in Indiana University for your Ph.D.,

17 what were your studies there?

18 A. Those were -- my particular studies was on

19 drug interaction, of course, with alcohol; however,

20 the -- we taught the Indiana state police officers

21 the -- how to recognize intoxication by using field

22 sobriety tests and also dose response studies so they

23 would have an understanding of how much alcohol it

24 took to produce an effect.

25 Q. Are you certified in Texas to give the

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1 standardized field test?

2 A. Yes, sir. I'm certified to administer the
3 field sobriety test and also certified to teach the
4 field sobriety test to officers or other
5 professionals.

6 Q. Okay. Did I ask you to come to court today
7 and look at this videotape --

8 A. Yes, sir, you did.

9 Q. -- this DVD? And you were in the courtroom
10 and evaluated it?

11 A. Yes, sir.

12 Q. I'm going to -- first off, are these tests
13 subject to interpretation, how they're even graded
14 or...

15 A. Well, there's a very strict protocol
16 established by NHTSA, National Highway Traffic &
17 Safety Administration, on how an officer is to
18 administer the test so that he can form an opinion as
19 to whether that test will go -- will contribute to his
20 decision to arrest for further investigation of
21 intoxication.

22 Q. Okay. What was your evaluation to the one-leg

23 stand test?

24 A. One-leg stand, I gave him a one. See, the

25 officer didn't give him that one, or he didn't mark it

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1 there. I gave him one because he slightly raised his
2 arms. I was very critical.

3 Q. So explain to the jury how you graded it --

4 A. All right. I --

5 Q. -- how it's supposed to be.

6 A. All right. The grading system is -- the
7 one-leg stand has four possible clues that you can use
8 to grade the individuals with how they perform a
9 particular test. One of them is raising the arms to
10 maintain balance; the other is sway, that particular
11 occurs; putting down the foot; fourth, is hopping on
12 those. I only saw one that I wanted to be critical
13 about. He raised his arms just slightly.

14 Q. Okay. When you -- when a person says they're
15 going to mark off because a person is swaying, can it
16 be -- how much swaying does the manual say there's
17 supposed to be to --

18 A. Well, the sway has to go -- goes hand in hand
19 with raising the arms for balance. The raising the
20 arm for balance should be a six-inch difference from
21 the side of the person, raising at least six inches
22 away from the body as a definition of raising the

23 arms.

24 Q. And the sway, how would you -- how do you

25 grade sway?

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1 A. Sway has to be -- has to be -- as any of these
2 field sobriety tests, has to be clear and distinct.
3 If it is subtle or you're having to -- try to decide
4 whether it was really a sway, it doesn't count. It
5 has to be clear and distinct.

6 Q. So if you are grading the one-leg stand, you
7 would give one out of four clues?

8 A. That's correct.

9 Q. And what would that mean?

10 A. That means that he's still within normal
11 range. It requires two clues to meet the threshold
12 for the officer to include that information in his
13 decision. One clue is insufficient, that is, an
14 average person could do that.

15 Q. And with the walk-and-turn test, what was your
16 evaluation of that test?

17 A. There are eight possible clues -- let me get
18 my notes.

19 Oh, I can tell you. There was one -- one
20 clue that I gave him, and that's he broke -- broke
21 stance. During the instruction phase, the person is
22 standing with their feet in tandem, with their right

23 foot on the line and the left foot directly in front

24 of that. And during that stance, the individual is

25 listening to the instructions of the officer. It's

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1 called the instruction phase.

2 There are two clues that could be
3 assigned with that particular portion of the test.
4 One of them is breaking stance and the second is
5 starting too soon. And in this case, he broke stance.
6 He didn't lose his balance. Wasn't the cause of the
7 loss of -- of breaking stance. It was -- he would
8 have a conversation with the officer. But, again, I'm
9 being critical. I gave him one clue because he broke
10 stance.

11 And I did not see -- he touched heel to
12 toe. I didn't see him not touch heel to toe, and he
13 did not use his arms for balance. He met those
14 criteria of six inches.

15 Q. Okay. Now, in the initial phase where he's
16 got one foot in front of the other and giving
17 instructions, he raises his arms at that point. Does
18 that count as raising arms?

19 A. No, sir. That -- the only two things you can
20 count during that phase is breaking stance and
21 starting too soon. If he sways, raises his arms,
22 those don't count during that phase.

- 23 Q. The raising of arms has to be during the walk?
- 24 A. During the walk -- during the -- turning --
- 25 walk-and-turn portion.

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1 Q. Obviously, we don't have a level on that
2 ground out there, but did there appear to be some
3 slope to you?

4 A. There was. It -- it marginally meets the
5 reasonable levels of smooth surface.

6 Q. Okay. So just the slope, but not -- should
7 not affect the test in this case --

8 A. It's still within reason.

9 Q. Okay. The eye test, what do the studies say
10 about the eye test when a person is un -- maybe --
11 under the legal limit -- or is it -- or touching the
12 legal limit? What does it say about that?

13 A. At or about the value of a .08 grams percent
14 in the regression analysis that we've done with blood
15 concentrations and the -- the occurrence of clues that
16 we have with the horizontal gaze and nystagmus test.
17 When it reaches about .08, at that decision point, the
18 margin of error of measurement, at that level, is plus
19 or minus 32 percent.

20 So the margin of error at the decision
21 point is very high, that is, 32 percent of the time
22 the decisions that are made are wrong in the process.

23 Q. How are these tests -- in other words, can
24 you -- can you say someone's intoxicated by one test
25 alone, or how does the manual say to grade the test?

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1 A. The manual states the test is graded on all
2 three tests. It has a gradation (sic) of what it
3 thinks the best test. The best test is the horizontal
4 gaze and nystagmus, that is, as far predictability
5 with the other two being supported, but not -- the HGN
6 test cannot surplant (sic) the other two.

7 We have three tests in this particular
8 case. The two of the tests are within perfectly
9 normal -- normal range.

10 The third, I can't see the person's eyes,
11 so I don't know how they responded. But to have a
12 full six clues -- six clues with this particular test,
13 I wouldn't expect that at all.

14 Q. What does the manual say about an individual
15 that can keep their foot up for 30 seconds?

16 A. The manual states that an individual keeps
17 their foot up for 30 seconds is normal, with a normal
18 range.

19 Q. Now, he counted to 22, then the officer asked
20 him to put his foot down.

21 A. Right.

22 Q. Can you interpret that for us?

23 A. Yes, sir. On the one-leg stand, the officer
24 estimates the 30-second period of time, not the
25 individual. It's called a divided-attention task,

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1 that is, he's using the physical faculty of holding
2 his foot up while counting aloud, as a mental
3 faculties is divided attention. Whether he counts to
4 15 or he counts to 45 is irrelevant. The officer
5 times the 30 seconds and he calls the start and stop.

6 Q. Okay. I forgot to ask you to do this: Would
7 you explain to the jury, in a nutshell, what
8 toxicology -- what your -- you know, we see CMI (sic)
9 and all that on the TV. Tell the jury what you do as
10 a --

11 A. Toxicology is the study of the effects of
12 drugs and chemicals on biological systems -- that
13 certainly includes humans -- with particular emphasis
14 on how those effects occur, that is, the conditions
15 under which they occur.

16 And I was able to study under two world
17 experts concerning alcohol and its effects upon man,
18 and did lots of work and studies.

19 Q. You testified today, obviously, for the
20 Defense. I'm paying you with a check. But in the
21 past, have you testified for the Government --

22 A. I have.

23 Q. -- and the Defense?

24 A. I have.

25 Q. The State of Texas?

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1 A. The State pays me the same thing.

2 Q. Okay. And when you're called by the State,
3 does your evaluation change?

4 A. No, sir.

5 Q. Have you been called by military tribunals to
6 testify?

7 A. Yes, I have.

8 Q. Across the United States?

9 A. Across the United States.

10 Q. Recently, I think, you had a case in Colorado?

11 A. The most recent was in Georgia.

12 Q. And that's where the military pays you a
13 check?

14 A. Yes, they do.

15 Q. One other issue. A 150-pound male will
16 eliminate about how much alcohol per hour?

17 A. About one drink. About one light beer an hour
18 would be a reasonable -- what a reasonable -- the
19 amount of alcohol that that person would eliminate in
20 an hour's time.

21 Q. And equate, like, a 12-ounce beer to how much
22 wine are we talking about?

23 A. A four-ounce glass of 12 percent wine would be

24 the same amount of alcohol.

25 MS. KECHEL: Your Honor, I'm going to

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1 object to this testimony. We don't have testimony
2 about the Defendant and his size, and I would object
3 to counsel asking the witness to make any kind of
4 correlation between this particular individual and his
5 alcohol concentration.

6 THE COURT: I'll overrule the objection.

7 Q. (BY MR. BURROWS) A 150-pound male,
8 scientifically, is accepted. How much do they
9 eliminate per hour?

10 A. About one drink per hour.

11 Q. Okay. What -- obviously, females eliminate
12 faster than males?

13 A. Slightly -- eliminate slightly faster, but
14 because of the distribution of water in their body,
15 the same amount of alcohol in a female will have a
16 higher blood alcohol concentration.

17 MR. BURROWS: Pass the witness.

18 MS. KECHER: Just one moment, Your Honor.

19 CROSS-EXAMINATION

20 BY MS. KECHER:

21 Q. Sir, just a few questions for you. My name is
22 Jennifer Kechel. I'm one of the prosecutors.

23 You were not there at the scene of this

24 on March 1st, 2007, were you?

25 A. That's correct.

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1 Q. Okay. So the information that you have today
2 to base your opinion on, that's information that you
3 got from defense counsel or the Defendant?

4 A. And the videotape.

5 Q. And the video. Okay. Did you ever talk to
6 Officer Cathcart, the officer that made the arrest in
7 the case?

8 A. I did not.

9 Q. Okay. And you were not present to hear his
10 testimony about this case, were you?

11 A. No. I came in right after that, I think.

12 Q. Okay. And as defense counsel brought up,
13 you're being paid to be here; is that right?

14 A. That's the intention.

15 Q. Okay. And how much do you make an hour to be
16 here?

17 A. I charge \$200 an hour.

18 Q. How many hours have you spent on this case?

19 A. It'll be about five.

20 Q. And when's the last time that you testified
21 for the State?

22 A. In a DWI case, the last time I testified for

23 the State was in 1998, I believe.

24 Q. Okay. And just so I'm clear, when did you say

25 you were certified in field sobriety tests?

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1 A. The original certification for administering
2 the test was 2003.

3 Q. Okay.

4 A. And as an instructor it was in 2005.

5 Q. 2005. And, sir, your experience is in the
6 field of toxicology and pharmacology, correct?

7 A. That's my doctorate degree, yes.

8 Q. So you're not a police officer?

9 A. That's correct, I am not.

10 Q. And are you out on the streets performing this
11 test every day?

12 A. No, I'm not.

13 Q. Okay. And do you ever have the opportunity to
14 perform them in the field when police -- like police
15 officers do?

16 A. Not in the field, but I perform them during
17 what we call dose response studies on a large number
18 of people.

19 Q. Okay. But you've not had the experience like
20 the police officers has in this --

21 A. No. I'm not allowed to get into the field.

22 They won't let me do that.

23 Q. Okay. And are you familiar with Dr. Burns'

24 study, the Florida study?

25 A. Marcelline Burns, uh-huh.

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1 Q. Okay. And so you would agree with me that
2 study said that an officer with an average of nine and
3 a half years experience, giving the three standardized
4 field sobriety tests, following the guidelines, that
5 95 percent of the officers' decision to arrest drivers
6 were correct using .08 as a --

7 A. Yes. I --

8 Q. -- level?

9 A. -- read that study and dissected in great
10 detail. The way they get to 95 percent is they throw
11 out some data. I hate to tell you that, but they
12 throw out data to get their 95 percent. If you
13 include the entire database as they should, it comes
14 in with all other studies at about 85 percent
15 probability, based on all three studies having clues.

16 Q. Okay. Your testimony is that these three
17 standardized field sobriety tests used together are 85
18 percent accurate?

19 A. Yes.

20 Q. Okay. But you are aware that study that study
21 that says 95 percent. What about --

22 A. Yes. I'm aware --

23 Q. -- the Colorado study that shows --

24 A. Colorado --

25 Q. -- 93 percent; is that correct?

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1 A. 93 percent, that study -- okay. I'll just
2 accept that.

3 Q. Okay. So that one's saying that officers were
4 correct 93 percent of the time.

5 And in that Florida study that we talked
6 about, that was officers with an average of nine and a
7 half years experience.

8 Are you aware the officer in this case
9 has 18 years experience in performing the test --

10 A. I -- I have not asked that question.

11 Q. Would that make a difference to you in
12 evaluating someone's performance knowing they were
13 doing it for twice the amount of time looked at and --
14 in this Florida study?

15 A. Passed -- there's a plateau stage you reach.
16 You don't get any better after a number of years.

17 Q. So the fact that he has substantial experience
18 in testifying to this 10,000 times, that doesn't
19 affect your opinion in this case at all?

20 A. No, it doesn't.

21 Q. Okay. Sir, you agree -- and I think you've
22 testified before in other cases -- that if you do have

23 an experience, well-trained police officer, using
24 these three field sobriety tests, that they should be
25 able to use in their training and experience, be able

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1 to make a determination as to whether someone's
2 impaired; is that correct?

3 A. Yes, that's right. When we have significant
4 clues in all three areas, yes.

5 Q. Okay. And just a few questions on your
6 testimony on each of these tests.

7 You've testified that on the one-leg
8 stand you did not see the Defendant sway; is that
9 correct?

10 A. That's correct.

11 Q. But you also testified you weren't there and
12 the video -- you can see, but it is dark. Do you
13 agree with me?

14 A. It's dark, but you could see sway.

15 Q. Okay. So it's your testimony that he did not
16 have any sway and the officer is wrong?

17 A. I can only testify to what I see, and I didn't
18 see any sway.

19 Q. Okay. But you agree with me the officer was
20 there and you were not?

21 A. Certainly.

22 Q. Okay. And kind of the same question on the

23 walk-and-turn, sir.

24 You testified that you did not see on the

25 video the Defendant did not touch heel to toe; is that

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1 right?

2 A. My observation was he touched heel to toe.
3 The criteria for touching heel to toe is you can be
4 within a half inch of heel and toe. You don't have to
5 click each one, but within a half-inch variance. And
6 that's what it appeared to be with -- what I saw.

7 Q. In your opinion, who was in a better position
8 to tell us if the Defendant touched heel to toe, you
9 observing the video or the officer who's standing
10 right next to the Defendant and have the luxury of
11 actually being there and observing it take place?

12 A. Well, in this particular case, we had good
13 view of his feet. I thought it was excellent. I'm
14 not uncomfortable with saying he did touch heel to
15 toe.

16 Q. Okay. And I believe you testified that you
17 really can't testify about the accuracy of the HGN
18 test in this case; is that right?

19 A. No. I couldn't see his eyes.

20 MS. KECHER: Just one moment, Your Honor.

21 Q. (BY MS. KECHER) Sir, you said the last time
22 you testified for the State was 1998; is that right?

23 A. That's correct.

24 Q. Isn't it true that you've been a speaker at

25 quite a few Dallas defense attorneys --

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1 A. I've been invited --

2 Q. -- meetings?

3 A. -- to be a speaker there, I think -- yes. And
4 thank you.

5 Q. So you're primarily a defense witness; is that
6 fair to say?

7 A. No. I'll testify for the State in a case any
8 time they ask me.

9 Q. Okay. And, sir, if someone's intoxicated and
10 they're driving, accidents are more likely to occur.

11 Do you agree with that?

12 A. Say that again.

13 Q. Do you agree with me that if someone's
14 intoxicated and driving, that an accident is more
15 likely to occur?

16 A. Yes.

17 Q. And wouldn't you say that if someone smelled
18 like alcohol, they had bloodshot eyes, the horizontal
19 gaze and nystagmus, six out of six clues, it's more
20 probable than not they're intoxicated?

21 A. Well, first of all, the bloodshot eyes and
22 odor of alcohol are not signs of intoxication.

- 23 They're signs of exposure of use of alcohol. The six
24 clues, by themselves (sic) is not sufficient. It has to
25 have some other supporting data.

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1 Q. And, sir, you're not here to testify what the
2 Defendant ate or what he drank or how that might have
3 affected him, are you?

4 A. I have no information about that.

5 Q. Are you aware that the Defendant denied
6 drinking that evening?

7 A. Well, that's not uncommon.

8 MS. KECHER: I'll pass the witness.

9 MR. BURROWS: Just a couple of questions.

10 REDIRECT EXAMINATION

11 BY MR. BURROWS:

12 Q. You reviewed lots of DVD's and VHS's of
13 intoxicated people?

14 A. Yes, sir, I do.

15 Q. Okay. And would you say you agree to testify
16 on the majority, the minority, how many would you say?

17 A. 80 percent of the DVDs and the DWI videos that
18 I review, 80 percent of those I agree with the
19 officer, that there's sufficient signs of intoxication
20 through the field sobriety tests that that person
21 should be arrested.

22 Q. And today, I did something a little unusual.

- 23 I called you to the courtroom and had not shown you
24 the DVD; isn't that true?
25 A. Yes. And you know you run a chance when you

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1 do that.

2 Q. I called you into the courtroom and I said,
3 what's it going to be. I didn't know, did I?

4 A. No, sir, you didn't.

5 Q. But your honest opinion is this man did not
6 show signs of intoxication?

7 A. That's correct. There's insufficient
8 information on the standardized field sobriety tests
9 to form a conclusion of intoxication.

10 MR. BURROWS: Pass the witness.

11 RECROSS-EXAMINATION

12 BY MS. KECHER:

13 Q. Sir, you are basing your opinion today on
14 viewing that video once; is that correct?

15 A. That's correct.

16 Q. Okay. So you -- you're telling this jury that
17 from one viewing you are able to tell every single
18 detail that you've testified to?

19 A. Yes, absolutely.

20 Q. Okay. And, sir, are you aware of the NHTSA,
21 National Highway Traffic & Safety Administration,
22 findings that the horizontal gaze nystagmus test, in

23 and of itself, is 88 percent accurate?

24 A. No. The true data on that is 77 percent, and

25 the data really becomes elevated by 20 percent bias,

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1 it values less than .1.

2 Q. Are you -- so are you aware that 77 percent
3 figure you're giving me is related to a blood alcohol
4 concentration of .10, and that the blood alcohol
5 concentration in Texas is a .08, and that that 88
6 percent study was related to the blood alcohol level,
7 .08 --

8 A. The criteria they were using to evaluate the
9 horizontal gaze and nystagmus and its prediction at
10 that particular time of an alcohol concentration going
11 to -- going into intoxication, the line was
12 extrapolated all the way to the Y intercept, which
13 allowed you to go passed a .1 percent. And that's
14 when the data really falls apart is around .08. So
15 the HGN test in low concentrations are those of
16 (unintelligible) .08 is not accurate.

17 Q. So those studies that are saying that it is
18 accurate, you disagree with those?

19 A. I disagree with the 88 percent. I've seen no
20 data to support that.

21 Q. Just one last question, sir.

22 Just so we're clear, you were not present

- 23 when that happened and you've only had the opportunity
- 24 to view this video once; is that correct?
- 25 A. That's correct.

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1 MS. KECHEL: Nothing further, Your Honor.

2 MR. BURROWS: Just --

3 FURTHER REDIRECT EXAMINATION

4 BY MR. BURROWS:

5 Q. How many videos in your career have you
6 evaluated?

7 A. I'm approaching 5,000.

8 Q. Okay. You know what to look for?

9 A. Yes, sir, I do.

10 Q. Regarding this data supporting the numbers
11 that they threw out in court, have you ever been
12 presented by the State any supporting data to support
13 those numbers?

14 A. No, I've not.

15 MR. BURROWS: Pass the witness.

16 MS. KECHEL: Nothing further, Your Honor.

17 THE COURT: Is there any objection to the
18 witness being released?

19 MR. BURROWS: No objection.

20 MS. KECHEL: No objection.

21 THE COURT: Sir, you're free to go.

22 THE WITNESS: Thank you.

23 (Testimony concluded at 3:29 p.m.)

24

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OFFICIAL COURT REPORTER (214) 653-5666