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REPORTER'S RECORD  
VOLUME 1 OF 1 VOLUMES  
TRIAL COURT CAUSE NO. MB06-65919-B

THE STATE OF TEXAS ) IN THE COUNTY CRIMINAL COURT NO. 2  
VS. ) DALLAS COUNTY, TEXAS  
[REDACTED] ) JANUARY TERM, A.D., 2007

EXCERPT OF PROCEEDINGS

On the 29th day of March, 2007, the following proceedings came on to be heard in the above-titled and numbered cause before the Honorable LENNOX BOWER, Judge Presiding, held in Dallas, Dallas County, Texas.

Proceedings reported by computerized Stenograph machine.

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A P P E A R A N C E S

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By: [REDACTED], Assistant District Attorney  
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ON BEHALF OF THE STATE OF TEXAS

-AND-

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ON BEHALF OF THE DEFENDANT

ORIGINAL



Lori Fuller - March 29, 2007  
Cross Examination by Mr. McCollum

3

1 Q. Now, your testimony regarding the number of  
2 drinks, you're assuming that that's an accurate  
3 measurement of the alcohol concentration in the person's  
4 breath, correct?

5 A. Yes, to blow at that concentration.

6 Q. So when you say they had a .20, what you're  
7 talking about is an accurate .20, correct?

8 A. Yes, that's correct.

9 Q. I mean, you'd agree, wouldn't you, that  
10 machines or instruments, just because they say something  
11 doesn't make it so?

12 A. When they're properly calibrated and properly  
13 maintained, I would believe them, yes.

14 Q. That wasn't my question.

15 I can have a machine or instrument like a  
16 watch that says 7:30 right now and that doesn't mean it's  
17 7:30, does it?

18 A. Not necessarily.

19 Q. Not necessarily? It's about 1:27.

20 If I have a watch that says 7:30 right  
21 now, it ain't 7:30, is it?

22 A. That's right.

23 MR. CLANCY: Judge, this is completely  
24 irrelevant. Objection.

25 THE COURT: Overruled.

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Cross Examination by Mr. McCollum

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1 Q. (By Mr. McCollum) Agreed?

2 A. Agreed.

3 Q. Now, you said that if you --

4 MR. MCCOLLUM: May I approach the witness  
5 again, Your Honor?

6 THE COURT: Yes, you may.

7 Q. (By Mr. McCollum) Now, according to your  
8 testimony, if you agree that if --

9 Without knowing when someone consumes  
10 alcoholic beverages, over what periods of time they're  
11 consumed, assuming that we had an accurate alcohol  
12 concentration of 0.20, okay?

13 A. Uh-hum.

14 Q. You don't know if -- let's assume that they  
15 took that test, oh, 45 minutes after they were driving.  
16 At the time of their driving, you can't tell the jury  
17 whether that accurate alcohol concentration would be  
18 higher, lower or the same as an accurate .20, can you?

19 A. That's correct.

20 Q. And what you said, I believe, you said that  
21 it's an accurate .20 for an individual this size to be --  
22 did you say six to seven or seven to eight drinks?

23 A. Seven to eight.

24 Q. Seven to eight drinks in them, correct?

25 A. Correct.

*Lori Fuller - March 29, 2007*  
*Cross Examination by Mr. McCollum*

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1 Q. Based on the studies that you've had there, is  
2 that your understanding that alcohol, it takes time to be  
3 absorbed into the body, correct?

4 A. Correct.

5 Q. And then it has to be metabolized out, correct?

6 A. Yes.

7 Q. The rate at which alcohol is absorbed into the  
8 body can vary, can't it?

9 A. Yes, it can.

10 Q. For example, if I wanted to, if an individual  
11 wanted to, if they wanted to drink a large quantity of  
12 alcohol all at once, five minutes after they drank it  
13 they're not going to register much in the way of alcohol  
14 concentration, are they?

15 A. No, they're not.

16 Q. It's going to take, what, an hour, 45 minutes  
17 for that alcohol to be absorbed into the body?

18 A. On an empty stomach, 30 minutes to an hour.

19 Q. Now, 30 minutes to an hour. Would you agree  
20 that the other side of that would be that if someone was  
21 drinking -- let's say this individual. If this  
22 individual was drinking, say they started drinking at 8  
23 p.m -- let's make it 6:00 p.m. and this test was --  
24 again, all you can go by is -- you weren't there. All  
25 you can go by are the records, correct?

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6

1 A. That's correct.

2 Q. If this record was correct, it was -- a test  
3 was run about 11:10, something like that, correct?

4 A. That's correct.

~~5 Q. And if that individual started drinking at~~  
6 6:00 p.m., they would have had to have consumed four more  
7 drinks to have seven to eight in their body; would you  
8 agree with that?

9 A. Yes.

10 Q. So that could be eleven to twelve drinks, if  
11 drinking all night, if the drinking starts at 6:00 p.m.,  
12 right?

13 A. Yes.

14 Q. On the other hand, as we indicated, if they  
15 just had 'em immediately before leaving someplace, they'd  
16 have a very low alcohol concentration. But you'd  
17 expect -- be able to -- you'd expect to see that an hour  
18 later, wouldn't you? Somebody had seven or eight drinks,  
19 you'd expect to see that on a -- just the way they were  
20 acting, wouldn't you?

21 A. They way they're acting?

22 Q. Yes.

23 A. Again, not necessarily.

24 Q. Really? Okay.

25 A. Really.

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*Cross Examination by Mr. McCollum*

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1 Q. Oh, that's right, you don't agree with MADD and  
2 the Department of Transportation and Smart Start when  
3 they say, "a person would be unmistakably drunk, all  
4 facilities seriously affected at a .15"? You don't agree  
5 with that?

6 A. "Unmistakenly drunk," no, I don't.

7 Q. Now, you said that this instrument -- you were  
8 using some records here to check it?

9 A. Yes, sir.

10 Q. In fact, you provided me some records, didn't  
11 you?

12 A. Yes, sir, I did.

13 Q. You brought me the Breath Test On-site  
14 Inspection Report, correct?

15 A. Yes, sir.

16 Q. And then you also provided me with the test  
17 records of two months before and two months after,  
18 correct.

19 A. Yes, sir, I did.

20 Q. Are those the only two sets of documents that  
21 you used to refresh your memory?

22 A. I also have the reference result certification.

23 Q. Can I see that?

24 A. Sure.

25 Q. Any other documents?

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1           A.    I also have the instrument certification; I  
2 have the certificate of calibration for the instrument,  
3 and that's it, that I really referred to.

4           Q.    What do you mean that you "really referred to"?  
5 Is there any other documents in there?

6           A.    There are.  It's a chart of elimination rates  
7 for different people at different weights for male and  
8 female.

9           Q.    Oh.  Does it have a 140-pound, 5-foot-4 male in  
10 there?

11          A.    Yes, it does.

12          Q.    What does that thing say the average  
13 elimination rate is?

14          A.    0.026.

15          Q.    What, per hour?

16          A.    Grams per two hundred ten liters per hour.

17          Q.    That's average.  Okay.

18                         Do you need to keep those records?  You  
19 printed those things out today, didn't you, or yesterday?

20          A.    Yes, I did.

21          Q.    You printed them out on your computer?

22          A.    Yes, sir.

23          Q.    Do you need to keep those?

24          A.    If I'm going to testify from them, I do.

25          Q.    Well, I mean, I'm not going to take them down



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1 there. I want to admit them into evidence, is what I  
2 want to do.

3 A. Okay, sure.

4 MR. MCCOLLUM: Let me have these marked as  
5 defendant's exhibits.

6 Q. (By Mr. McCollum) Now, the instruments or  
7 machines that you're using right now, are they all the  
8 same model?

9 A. Yes.

10 Q. Are they all the same series?

11 A. Sixty-eight and EN, yes.

12 Q. What's the difference between a 68 and an EN?

13 A. It's an up-graded version. It's the same with  
14 just a few added internal parts.

15 Q. When did the 68 come out?

16 A. The 68 was in --

17 Q. '98?

18 A. This one was certified in '98.

19 Q. So this is a 68, correct?

20 A. Yes, it is.

21 Q. It's not one with the new added parts, it's not  
22 an EN; is that what you're saying?

23 A. No, it's not an EN.

24 Q. So, you have newer ones that you have there  
25 that you're using?

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1 A. It's the same instrument with a little bit  
2 different internals, but it's the same instrument. It  
3 produces the same results. It's just as valid.

4 Q. Surely, they're all made by the same  
5 manufacturer, right, the CMI Company in Owensburrow,  
6 Kentucky, correct?

7 A. Yes, sir.

8 Q. And the Texas Department of Public Safety, the  
9 state police, the scientific director for the state  
10 police, he's the one who certifies or decides which  
11 instruments will be used to test subjects accused of DWI  
12 in the state of Texas, correct?

13 A. That's correct.

14 Q. And he's decided it's only the model CMI,  
15 correct?

16 A. Yes.

17 Q. And I presume that he then approves upgrades  
18 from -- they used to have a series 66, correct?

19 A. Yes, sir.

20 Q. And then they came up with a 68, correct?

21 A. Yes, sir.

22 Q. Surely the state of Texas wouldn't buy a 68 if  
23 they already had 66s unless it was better, right?

24 A. That's true.

25 Q. And surely they wouldn't buy an EN over a 68

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1 unless it was better, correct?

2 A. Again, it's the same model.

3 Q. That wasn't my question.

4 Do you think EN is better than a 68?

5 A. No, I don't.

6 Q. Does it cost more?

7 A. No, it doesn't.

8 Q. Well, you also said that based on your records  
9 there hadn't been any warranty claims, correct?

10 A. No, there has not.

11 Q. That's because it doesn't have a warranty, does  
12 it?

13 A. There is a warranty with both CMI and with the  
14 Texas Department of Public Safety.

15 Q. There's not a warranty for fitness, is there?  
16 There's not a warranty that it will give proper numbers,  
17 is there?

18 A. I don't recall.

19 Q. What is the warranty for? Have you ever read  
20 the warranty?

21 A. I've skimmed over it, yes.

22 Q. Do you have it with you?

23 A. Yes, I do.

24 Q. Let me see the warranty.

25 That letter, what's the date on that

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Cross Examination by Mr. McCollum

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1 letter?

2 A. November 10th, 2000.

3 Q. That's in response to a letter from the  
4 scientific director of the state police dated back on  
5 March 31<sup>st</sup>, 2005 complaining that these instruments  
6 had -- several of these instruments had defects; isn't  
7 that correct?

8 A. No. I don't have that letter.

9 Q. You don't have that letter?

10 A. No, I don't.

11 Q. Were you aware of the fact that several EN  
12 machines and one regular 68 gave false -- they discovered  
13 they were making false reports and that was reported by  
14 the Texas Department of Public Safety to all the  
15 technical supervisors back in March of '05; were you  
16 aware of that?

17 A. Yes, I am aware of that.

18 Q. And were you aware that, at that time, the  
19 guidance was that even though there's a possibility of  
20 receiving false breath test results, the scientific  
21 director advised your scientific directors should just  
22 continue breath alcohol testing on these machines as  
23 before, correct?

24 A. Yes. They're not false results, however,  
25 they're false negatives. Not false results, false

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1 negatives.

2 Q. Have you ever heard of the word euphemism?

3 A. Yes.

4 Q. Well, if it's not an accurate result whether  
5 it's given what you say is a negative result or a  
6 positive result, those are false results, aren't they?

7 A. Yes, they are.

8 Q. Okay. Now, the warranty of --

9 MR. MCCOLLUM: Have this marked as defendant's  
10 exhibit next in order.

11 Q. (By Mr. McCollum) Defense Exhibits 1 and 2,  
12 these are exact copies of the records that you brought  
13 and provided me copies, correct?

14 A. Yes, sir.

15 Q. One is a six-page test information report and  
16 that -- what that has is it has every test record that  
17 was run on that instrument two months before and two  
18 months back; is that correct?

19 A. That's correct.

20 Q. And the other one is a five-page report, which  
21 is called the "On-site Inspection Report", correct?

22 A. Yes.

23 Q. Now, from time to time --

24 That would be Defendant's Exhibit No. 2,  
25 correct?

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Cross Examination by Mr. McCollum

14

1 A. Yes, sir.

2 Q. And what y'all do there out at SWIFS -- by the  
3 way, you're a county employee, correct?

4 A. Yes.

5 Q. An SWIFS has contracts with police departments  
6 in the surrounding metroplex area to maintain their  
7 instruments or their machines, correct?

8 A. Yes.

9 Q. And you're a county employee. You don't work  
10 on any type of a commission or anything like that.  
11 You're salaried --

12 A. No, I don't.

13 Q. -- correct?

14 A. Correct.

15 Q. But that portion of the Southwest Institute of  
16 Forensic Science, y'all are right over there at Harry  
17 Hinds and Parkland, correct?

18 A. That's correct.

19 Q. Adjacent to the medical examiner, correct?

20 A. Correct.

21 Q. Y'all are what's known as a profit center for  
22 Dallas County, correct?

23 A. We're nonprofit.

24 Q. Well, you're nonprofit, but you generate  
25 revenue for the county through these contracts with the

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15

1 surrounding police departments, correct?

2 A. That's correct.

3 Q. And what these contracts are for is for y'all  
4 maintaining their machines. You charge them for it,  
5 correct?

6 A. Yes.

7 Q. Not you, but Southwest Institute of Forensic  
8 Science, correct?

9 A. Yes.

10 Q. So those machines better be working properly,  
11 right?

12 A. Right.

13 Q. Loose your contract, right?

14 A. Yes.

15 Q. You'd be out of this job. You'd have to go  
16 back over there on the other side, wouldn't you?

17 A. Yes.

18 Q. So it's important that these machines be  
19 accurate and fair to individuals accused of DWI, correct?

20 A. Yes.

21 Q. Okay. Now, what y'all can do, and you may not  
22 have been there when this happened, but you technical  
23 supervisors, just as you indicate, you printed these  
24 things up yesterday, correct?

25 A. Yes.

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1 Q. You can get on there and you can print up the  
2 reports, you can change the format of those reports any  
3 way you want, can't you?

4 A. Yes.

5 Q. And, in fact, y'all have done that, haven't  
6 you?

7 A. In order to provide the report, yes.

8 Q. Well, let me show you Defendant's Exhibits 3  
9 and 4. These are examples -- Defendant's Exhibits 3 and  
10 4 are examples of -- Defendant's Exhibit 3, that's an  
11 example of how the test information report -- it's called  
12 test information report now, back then it was called a  
13 test information log. That's the format y'all were using  
14 back in October of 2003, correct?

15 A. It appears to be that way; I don't know.

16 Q. And then it was changed by November 3rd of  
17 2003. We've got the Breath Alcohol Testing, and now it's  
18 called Breath Test Run Instrument -- same instrument --  
19 different instrument than we're talking about today, but  
20 the same, you know, model 5,000, series 68, correct?

21 A. Yes.

22 Q. And that format's changed, correct?

23 A. It appears to be, yes.

24 Q. And now today, y'all have changed it again,  
25 haven't you?



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1 A. Yes.

2 Q. And isn't it true that back the way you used to  
3 do the Inspection Reports, the Inspection Reports you  
4 used to have -- you used to report the daily -- you  
5 talked about these daily modem checks. Those used to be  
6 reported also, didn't they?

7 A. I don't know.

8 Q. Since you've been there they only do these,  
9 right?

10 A. Yes, sir.

11 Q. And what this is, this is a record that you  
12 printed out just showing when those periodic maintenance  
13 checks were made on the instrument, correct?

14 A. That's correct.

15 Q. So when you told the jury it was in proper  
16 working order -- or the test -- the check that was done  
17 on scene prior to this one, on the 24th of March of 2006,  
18 you were looking at these records, correct?

19 A. That's correct.

20 Q. Because you didn't make that check, did you?

21 A. No, I didn't.

22 Q. It was made by Robinson. Do you know Robinson?

23 A. Yes, I do.

24 Q. You know that to be Terry Robinson, correct?

25 A. Yes, sir.

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*Cross Examination by Mr. McCollum*

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1 Q. Terry Robinson is like you; he's a peer, and  
2 he's a technical supervisor, correct?

3 A. Correct.

4 Q. And he testifies just as you do, has the same  
5 duties as you do; is that fair?

6 A. That's correct.

7 Q. So, you didn't do that inspection, did you?

8 A. No, I did not.

9 Q. And then the inspection you testified to,  
10 according to these reports again, on March the 31st of  
11 2006, the on-site, that was done by Finkley, correct?

12 A. That's correct.

13 Q. You know that to be Alvin Finkley, correct?

14 A. Yes.

15 Q. Now -- so, you're relying on these reports,  
16 that based on these reports they must have been good  
17 checks done. You didn't see it, but that's what the  
18 report says, right?

19 A. That's correct.

20 Q. Show me the reports, the maintenance logs, that  
21 you keep on this instrument to show when this instrument  
22 is maintained, when it's modified, when it's repaired.  
23 You don't have any records of that?

24 A. No. We do have notations, however, when there  
25 is repairs done that we know to go back to our records

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1 and find out what happened.

2 Q. Are you telling the jury y'all don't keep a  
3 maintenance log along with the test (inaudible)  
4 information report and the inspection report? You don't  
5 keep a maintenance report, a hard copy of it?

6 A. Yes, we do.

7 Q. Where is it?

8 A. It's in my office.

9 Q. You didn't bring that today?

10 A. No, because there was nothing wrong with the  
11 instrument.

12 Q. Well, then, you did refresh your memory from  
13 that maintenance log, didn't you?

14 A. No, because I looked at the documentation that  
15 we have on here that says everything was in good working  
16 order.

17 Q. Where does it say everything's in good working  
18 order?

19 A. The instrument was placed into service in  
20 February 28th of 2006, and SPBD stands for simulator,  
21 power, breath tube and display; all those things were in  
22 proper working condition.

23 Q. It doesn't say that. It just says "SP --

24 A. SP -- that's our notation, yes. All the checks  
25 from then on out show that very same thing, that

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Cross Examination by Mr. McCollum

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1 everything was in proper working condition. We have  
2 valid test records, all of the specific interferent (sic)  
3 checks and RFI checks that we did worked out properly.

4 Q. So, are you saying because you looked at this  
5 and didn't see anything on it untoward, you didn't bother  
6 to look at the maintenance logs that you have; is that  
7 your testimony?

8 A. Yes, that's right.

9 Q. So, you did not look -- you do have hard copies  
10 of maintenance records, but you did not look at them; is  
11 that fair?

12 A. No, I didn't.

13 Q. And you also said in response to his questions  
14 that --

15 MR. MCCOLLUM: By the way, I request the  
16 admission of Defense Exhibits 1 through 4.

17 MR. CLANCY: No objection.

18 THE COURT: To avoid confusion, may we know  
19 what each one is?

20 MR. MCCOLLUM: Yes, Your Honor. Defense  
21 Exhibit No. 1 is the Test Information Record for the  
22 instrument that was used in this case. It covers  
23 tests -- all tests done on the instrument 60 days  
24 prior to and 60 days after the test in question  
25 today.

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Cross Examination by Mr. McCollum

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1 Q. (By Mr. McCollum) Correct?

2 A. That's correct.

3 Q. Defendant's Exhibit No. 2 are maintenance  
4 records -- no, excuse me. I'm sorry. They're not  
5 maintenance records, they're on-site inspection reports  
6 that show the periodic on-site inspections of the  
7 instrument in question here from the 28th of February of  
8 2006 to the 25th of May, 2006. Fair?

9 A. Yes.

10 Q. Defendant's Exhibit No. 3 is an example of the  
11 format that was used as of November the 3rd, 2003, to  
12 report test -- the test information report.

13 A. Yes.

14 Q. In other words, it shows how they used to  
15 record the tests that were administered sequentially.

16 And Exhibit No. 4 is another example of  
17 how those tests are reported out on a different format  
18 earlier, like October of 2003, correct?

19 A. Yes.

20 THE COURT: The four exhibits will be admitted.  
21 *(Defendant's Exhibit Nos. 1 through 4 were admitted.)*

22 Q. (By Mr. McCollum) Now, Defendant's Exhibit 5,  
23 that's the warranty, correct?

24 A. Yes, sir.

25 MR. MCCOLLUM: Request the admission of

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Cross Examination by Mr. McCollum

22

1 Defendant's Exhibit No. 5.

2 MR. CLANCY: No objection.

3 THE COURT: Defendant's Exhibit No. 5 will be  
4 admitted.

5 *(Defendant's Exhibit No. 5 was admitted into evidence.)*

6 Q. (By Mr. McCollum) What does the first sentence  
7 of the Statement of Warranty say? Read it out loud.

8 A. "CMI, Incorporated, a subsidiary of Federal  
9 Signal Corporation, warrants that each new product will  
10 be free from defects and material and workmanship under  
11 normal use and service for a period of one year from the  
12 date of delivery to the first user purchase."

13 Q. And the one year is in bold type, isn't it?

14 A. Yes, sir, it is.

15 Q. Who was the first -- from your records can you  
16 tell if y'all were the first user purchaser, or do you  
17 know if this was purchased used?

18 A. I didn't bring those records with me.

19 Q. Well, in any event, you're certainly outside  
20 the one-year frame based on your certificate of  
21 calibration of when y'all got the machine, correct?

22 A. That's correct.

23 Q. So it would be pretty hard for 'em to be making  
24 a -- you making a warranty claim at least based on  
25 materials and workmanship, because your records indicate

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1 that you got the machine April of '98, and you don't even  
2 know if you got it new or used, right?

3 A. That's correct.

4 Q. Second sentence, CMI's obligation.

5 A. "CMI's obligation is limited to repairing or  
6 replacing, as CMI may elect, any part or parts of such  
7 product which CMI's examination discloses to be  
8 defective, immaterial or workmanship.

9 Q. And that applies to that one-year time, doesn't  
10 it?

11 A. Yes, it does.

12 Q. Now, down here --

13 MR. CLANCY: Judge, I object to any further

14 ~~questions about the warranty as it relates to legal~~

15 terms. She's an expert on the Intoxilyzer. I don't  
16 think she should have to answer legal questions  
17 about a warranty.

18 THE COURT: Overruled.

19 Q. (By Mr. McCollum) Would you read that  
20 paragraph right there?

21 A. "During the warranty period --

22 Q. Stop. That's that one-year period, right?

23 A. Yes, sir.

24 Q. Okay.

25 A. " -- CMI will pay the shipping charges to

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24

1 return a repaired product to the customer if the product  
2 was covered by this warranty. Repaired components are  
3 warranted for a period of 90-days from the date of repair  
4 and that warranty is subject to the same limitations as  
5 this warranty. Components not repaired do not receive an  
6 extended 90-day warranty."

7 Q. So you might have had some warranty work on  
8 materials -- workmanship and material for," looks like,  
9 "first fifteen months after it's purchased new," right?

10 A. Yes.

11 Q. Okay. Now, what' that next paragraph say?

12 A. "Warranty coverage extends only to the original  
13 purchaser and does not cover placement of parts that are,  
14 by their nature, expendable. This warranty is voided if  
15 the product is adversely effected by attaching any  
16 feature or device to it or is in any way tampered with or  
17 modified without express written permission by CMI  
18 Management."

19 Q. And that last paragraph, that one's in big bold  
20 type, isn't it?

21 A. Yes, it is.

22 Q. Would you read that to the jury, please?

23 A. "There are no other warranties expressed or  
24 implied including but not limited to any implied  
25 warranties of merchantability or fitness for a particular



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1 purpose. In no event shall CMI be liable for any loss of  
2 profits or indirect or consequential damages arising out  
3 of any such defect in material or workmanship."

4 Q. Now, when was it -- you've worked with the  
5 county for how long?

6 A. For the county since 2002.

7 Q. And when was it that you became a technical  
8 supervisor?

9 A. December of 2005.

10 Q. So that would be after -- you have in there the  
11 letter from CMI about -- the November letter?

12 A. It's a different letter.

13 Q. I know. That's November 10th, 2005, correct?

14 A. Yes, sir.

15 Q. Are you aware that it's in response to this  
16 March 31st, 2005 letter from the Department of Public  
17 Safety to all supervisors?

18 A. I don't know if it's in response to that or  
19 not.

20 Q. Okay, that's fine.

21 Y'all can -- one of the checks that you  
22 make on that instrument during the regular maintenance is  
23 called interferent (sic) check, correct?

24 A. Yes, sir.

25 Q. And this instrument, as you've described to the

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1 jury, it measures loss of infrared energy at certain  
2 wavelengths on the infrared scale, correct?

3 A. That's correct.

4 Q. It's what they call a -- it's not a scientific  
5 grade infrared spectroscopy, is it?

6 A. No, it's not.

7 Q. Because scientific grade infrared  
8 spectrophotometer measures the loss of infrared energy on  
9 every wavelength on the infrared spectrum, does it?

10 A. I'm sorry, I guess I'm just a little confused  
11 as to what you mean, "scientific grade," because this is  
12 -- this instrument is very scientific and it's specific  
13 to certain wavelengths that make it scientific. Just  
14 because it's scientific doesn't mean it has to --

15 Q. Okay.

16 A. -- all of the wavelengths.

17 Q. Okay. Depends on how you define scientific,  
18 right?

19 A. Yes, sir.

20 Q. Well, let's put it this way. When you were on  
21 the other side of the law over there at Southwest  
22 Institute of Forensic Science, did you use other infrared  
23 spectrophotometers for some of the work that you did over  
24 there?

25 A. Yes, we did.

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1 Q. And did those infrared spectrophotometers  
2 measure the loss of infrared energy along the entire  
3 infrared spectrum?

4 A. Yes, it did.

5 Q. And that infrared spectrum is, what,  
6 ten-thousand wavelengths, something like that?

7 A. Around there, yes.

8 Q. This one measures the loss of infrared energy  
9 on how many wavelengths?

10 A. Five.

11 Q. Because of the filter wheel, right?

12 A. Yes, sir.

13 Q. Now, the original series 68 only had a three  
14 wheel filter wheel, didn't it?

15 A. Yes, it did.

16 Q. The EN's have the five hole.

17 A. As well as the 68's have five wheel.

18 Q. So they went back and put a five wheel on it?

19 A. Yes.

20 Q. When did they do that on this machine?

21 A. I'm not sure.

22 Q. And infrared -- full range infrared  
23 spectrophotometry can measure unknown substances to the  
24 exclusion of all other substances in a -- if that's what  
25 you're trying to find out, can't it?

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1 A. Yes.

2 Q. This one measures loss of infrared energy on  
3 five wavelengths, and those happen to be wavelengths  
4 involving alcohol molecules, correct?

5 A. That's correct.

6 Q. There are many types of alcohol, aren't there?

7 A. Yes, there are.

8 Q. There are also substances called ketones,  
9 right?

10 A. Yes.

11 Q. Ketones are given off by individuals if their  
12 body's in what's known as a state of ketosis, correct?

13 A. That's correct.

14 Q. That's a fairly common state for people to be  
15 in, isn't it?

16 A. Common? Depends. But it is a state that  
17 people go through, yes.

18 Q. And one of the things that you check when you  
19 do these periodic checks is you check to see if it  
20 measures an interferent (sic) ketone, correct?

21 A. Yes.

22 Q. Ketones what's used as acetone, correct, that's  
23 the substance?

24 A. Yes, sir.

25 Q. And isn't it true that all individuals also

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1 produce -- they have alcohol in their body and they're  
2 metabolizing it through their liver, the first substance  
3 they produce -- it's broken down into a substance called  
4 acetyl alcohol?

5 A. Yes.

6 Q. Acetyl alcohol can be measured and reported as  
7 ethyl alcohol, can't it?

8 A. No.

9 Q. No?

10 A. No.

11 Q. Okay. On the interferent (sic) check, isn't it  
12 true that with that particular instrument you can set a  
13 gap as to how much acetone it takes to interfere with it?  
14 Kind of adjust it like a carburetor.

15 You know what a carburetor is?

16 A. I'm familiar with the term. I'm not a  
17 mechanic, so I don't know.

18 Q. Well, but you can -- the amount of acetone that  
19 gets into it to cause interference, to register  
20 interference, that can be adjusted, can't it?

21 A. No, it can't.

22 Q. Oh, it can't?

23 A. No.

24 Q. You said that on this instrument that the  
25 instrument measures the reference solution. That's a way

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1 to check how accurate it is. Is that what that reference  
2 solution's for?

3 A. It provides a quality check, yes.

4 Q. Quality check, right.

5 MR. MCCOLLUM: May I approach the witness, Your  
6 Honor?

7 THE COURT: Yes.

8 Q. (By Mr. McCollum) Now -- by the way, it's  
9 true, isn't it, that all these instruments, the longer  
10 you blow the higher the score?

11 A. No.

12 Q. That's not true?

13 A. No.

14 Q. Do you consider Alvin Finkley being  
15 authoritative in regard to this?

16 A. Authoritative, no.

17 Q. You don't?

18 A. No.

19 Q. Are you authoritative on this?

20 A. He is my peer; he is my co-worker, and I  
21 respect this opinions and decisions.

22 MR. CLANCY: I'm going to object to any  
23 testimony -- of reference to any testimony outside  
24 of the courtroom today.

25 MR. MCCOLLUM: Well, I've got --

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1 Q. (By Mr. McCollum) Mr. Robinson, do you  
2 consider him to be authoritative?

3 A. No, I don't.

4 Q. So, you all disagree about certain things; is  
5 that fair?

6 A. We all disagree, though we are individuals.

7 Q. Well, they believe the longer you blow the  
8 higher the score, don't they?

9 A. No, they don't.

10 Q. They haven't testified to that?

11 A. Not that I know of, but I don't want to -- I  
12 don't know.

13 Q. Well, if they did you wouldn't agree with it,  
14 would you? You wouldn't agree if they did testify to  
15 that; is that correct?

16 A. No, I wouldn't agree.

17 MR. CLANCY: Judge, I object to the reference  
18 to testimony of someone who's not here and not  
19 available and wasn't called -- I object to this  
20 testimony in reference to someone who's not even on  
21 the stand. This isn't her prior testimony.

22 THE COURT: Do you have a response?

23 MR. MCCOLLUM: Yes, Your Honor. This is the  
24 sworn testimony of Alvin Finkley that was  
25 transcribed from this court by Miss Laura Weed in

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1 another DWI trial back on August the 10th of 2006,  
2 and, I understand it, he is a peer.

3 MR. CLANCY: We don't have any testimony -- we  
4 don't -- sworn testimony from her, plus we don't  
5 have any evidence of what he is or what he does;  
6 there's no predicate as to that. And it's just  
7 improper to reference his testimony.

8 MR. MCCOLLUM: Your Honor, they listed him as a  
9 witness; that's who I thought they would call.

10 MR. CLANCY: We listed a couple people as  
11 witnesses.

12 THE COURT: I'll overrule the objection.

13 Q. (By Mr. McCollum) I'll represent to you that  
14 this is a transcript of a portion of his -- the cross  
15 examination at a trial in here on the 10th of August of  
16 2006 that was taken by Miss Weed here, okay?

17 A. Yes, sir.

18 Q. If I'm wrong about that, I'd lose my law  
19 license. Okay?

20 MR. CLANCY: Objection, side bar comment.

21 THE COURT: Sustained.

22 Q. (By Mr. McCollum) He says that -- if he was  
23 asked a question: 'Now, it's true, isn't it, sir, the  
24 longer you blow the higher the score?' His response:  
25 'Generally, that's true when an individual does have



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1 alcohol present in his or her system.' If he  
2 testified to that, you disagree?

3 A. I would disagree with that in it's exact  
4 content. I would need to read the whole thing to  
5 understand what he was saying.

6 Q. Okay.

7 A. But that exact statement, I disagree with.

8 Q. Would you also disagree with him if he  
9 testified that thousands of substances exist with a  
10 hydroxyl molecule and that any substance that has a  
11 hydroxyl molecule will be reported as ethyl alcohol by  
12 this instrument? Would you disagree with that?

13 A. Let me repeat and make sure I understand what  
14 you said. That there are thousands --

15 Q. Let me -- here we go. And you'd agree that,  
16 'any substance with a hydroxyl molecule that enters that  
17 instrument will be measured and reported as ethyl  
18 alcohol, correct?'

19 'As alcohol -- yes, as alcohol.'

20 'Question: There are thousands of sub-  
21 stances like that, aren't there?'

22 'That have a hydroxyl molecule in them?'

23 'Sure.'

24 'And this is not a full-range infrared  
25 spectrophotometer, is it?'

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1 'No, it's not.'

2 Do you agree or disagree with Mr. Finkley  
3 when he says that?

4 A. I disagree that it reads alcohol as ethyl  
5 alcohol.

6 Q. Okay.

7 A. There are thousands of alcohol molecules, but  
8 it will not read -- it will only read ethanol. It will  
9 only quantitate ethanol, ethyl alcohol.

10 Q. That's your opinion.

11 A. Yes, that's my opinion.

12 Q. Okay, that's fine.

13 You say you also -- part of your job is  
14 also to train the operators; is that correct?

15 A. Yes, sir.

16 Q. If -- and you know Jackie Cork, of course,  
17 correct?

18 A. Yes, I do.

19 Q. If Jackie Cork testified --

20 MR. MCCOLLUM: May I approach, Your Honor?

21 THE COURT: Yes.

22 Q. (By Mr. McCollum) If Jackie Cork testified  
23 that the simulator solution, as long as it's within plus  
24 or minus point 02 that it's within tolerance; is that  
25 your understanding of the regulations of this instrument?

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1 A. I'm sorry, repeat the question. Zero point 02  
2 of the reference result?

3 Q. Yes. Reference result, 'if it's within plus or  
4 minus 0.02,' is what he testified to; would you agree or  
5 disagree?

6 A. I disagree with that.

7 Q. It's plus or minus 0.01, isn't it?

8 A. That's correct.

9 Q. Are you surprised that he would make a mistake  
10 like that?

11 A. I don't know him personally, so I don't know.

12 Q. That's fine.

13 Now, it's true, isn't it, in order for  
14 this instrument to be valid that the difference between  
15 the two breath tests could be as much as a third off --  
16 thirty-three percent difference between one breath test  
17 or another and still be considered valid and a person  
18 would be considered intoxicated, correct?

19 A. Sure.

20 Q. And you'd agree, wouldn't you --

21 And would you also agree valid doesn't  
22 mean accurate, does it? Valid means that it complies  
23 with DPS rules and regulations, right?

24 A. That's correct.

25 Q. And would you also agree that two people can

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1 weigh the same, consume the same amount of ethyl alcohol  
2 over the same period of time, both of 'em be offered a  
3 breath test on these Intoxilyzer machines and they're  
4 proper working order, according to the state police, at  
5 times -- scientific director of the state police, get a  
6 valid test result from both of them?

7 A. Yes, sir.

8 Q. One person's breath test score could be a  
9 hundred percent higher, twice as high as the other's?

10 A. It's possible.

11 Q. And still be considered valid, right?

12 A. That's correct.

13 Q. Would you agree that you gave -- you were asked  
14 the definition of alcohol concentration. There's  
15 actually three different definitions, aren't there, three  
16 different ways it can be measured?

17 A. Yes, sir.

18 Q. It can be measured -- it's defined -- you have  
19 to know what the Penal Code is with regards, at least, to  
20 the DWI laws, correct?

21 A. Yes, sir.

22 Q. And you have to know what the rules and  
23 regulations of the state -- of the Department of Public  
24 Safety, scientific director, don't you?

25 A. Yes.

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1 Q. Because if those rules and regulations are not  
2 complied with, then they're not even considered valid or  
3 admissible tests, correct?

4 A. That's correct.

5 Q. In order for 'em even to be admissible they  
6 have to be valid, don't they?

7 A. That's correct.

8 Q. And the scientific director, he has his minimum  
9 standards, doesn't he?

10 A. Yes.

11 Q. Okay.

12 Now, the definition -- a person is  
13 considered intoxicated if they have an actual alcohol  
14 concentration of --

15 MR. MCCOLLUM: Approach the chart again, Your  
16 Honor?

17 THE COURT: You may.

18 Q. (By Mr. McCollum) -- actual alcohol  
19 concentration of point 08 grams of alcohol per  
20 two-hundred ten liters of breath, correct?

21 A. That's correct.

22 Q. That's the definition in the law, isn't it?

23 A. Yes, it is.

24 Q. But this instru -- and it's the scientific  
25 director of the state police who decides what instrument

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1 will be used to measure that, correct?

2 A. Yes, it is.

3 Q. So, he's kind of like the mighty Poobah; he  
4 sits on the mountain, and he says, I deem this is going  
5 to be the one I'm going to use.

6 He deemed certain characteristics that had  
7 to apply to theses instruments, correct?

8 A. Yes, he did.

9 Q. And one of those was that the instrument has to  
10 be capable of capturing and reporting essentially  
11 alveolar breath, correct?

12 A. The instrument doesn't capture anything,  
13 doesn't hold anything. But, yes, it has to be  
14 essentially alveolar breath, deep lung breath.

15 Q. And the alveolar breath is going to have a  
16 higher concentration of alcohol in it than just the  
17 breath in the rest of your lungs, isn't it?

18 A. It's the deepest part of your body, but it --  
19 you can't produce any more alcohol than is already in  
20 your system.

21 Q. That wasn't my question.

22 My question was, the ethyl alcohol  
23 contained in alveolar breath is going to be at a higher  
24 concentration than the amount of ethyl alcohol contained  
25 in the rest of the breath in your lung.

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1 A. Slightly, because it's right next to the  
2 capillaries.

3 Q. So that answer is yes?

4 A. Yes.

5 Q. The law doesn't say that a person is  
6 intoxicated if they have point 08 grams of ethyl alcohol  
7 per two-hundred ten liter of essentially alveolar breath;  
8 it says "of breath," doesn't it?

9 A. Yes, it does.

10 Q. It's the scientific director that added in that  
11 alveolar breath part, isn't it?

12 A. I'm not sure, but, yes.

13 Q. And so the jury may understand, the amount of  
14 ethyl alcohol that's actually being measured at any given  
15 point in time -- let's say -- let's assume that we have  
16 an accurate alcohol concentration of point 20 reported.  
17 In order for it to be an accurate alcohol concentration  
18 of point 20, it's reported in terms of grams per ounce --  
19 or grams per two-hundred ten liters.

20 A. Yes.

21 Q. But that's not really how much is being  
22 measured, is it?

23 A. No, sir, it's not.

24 Q. It's about one twenty-five hundredths; isn't  
25 that correct?

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1 A. About, yes.

2 Q. Because two-hundred ten liters of breath is the  
3 volume that's found in about a fifty-five gallon drum,  
4 correct?

5 A. That's correct.

6 Q. And the sample chamber is about, what,  
7 eighty-two --

8 A. Eighty-one milliliters.

9 Q. And that's about, what, one twenty-five  
10 hundredths of it?

11 A. Approximately. I'm not sure.

12 Q. So what happens is the instrument measures this  
13 loss of infrared energy, and you say only on ethyl  
14 alcohol, not hydroxyl molecules or any of these other  
15 substances?

16 A. That's correct.

17 Q. And then it reports it out through a piece of  
18 software -- through its software, reports it out in terms  
19 of two-hundred ten liters of breath, right?

20 A. That's correct.

21 Q. And, of course, nobody in the state of Texas,  
22 including the scientific director and certainly not  
23 y'all, have ever seen the software to this instrument,  
24 have you?

25 A. No, we have not.



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1 Q. It's considered proprietary for CMI, isn't it?

2 A. That's right.

3 Q. And, now, so the jury may understand, would you  
4 agree the amount of ethyl alcohol being measured, say you  
5 get an accurate point 20 grams, would you agree that  
6 would be, in lay terms so we can kind of understand it,  
7 approximately, oh, I don't know, twenty-six, twenty-seven  
8 ten millionths of an ounce of ethyl alcohol?

9 A. That's approximately, yes.

10 MR. MCCOLLUM: May I approach, Your Honor?

11 THE COURT: Yes, you may.

12 Q. (By Mr. McCollum) For us lay people, that's a  
13 small amount of ethyl alcohol, isn't it?

14 A. Yes, it is.

15 Q. And we know this instrument reports -- receives  
16 and reports alcohol from sources other than the human  
17 breath, doesn't it?

18 A. The reference sample, yes.

19 Q. It doesn't know where the alcohol came from  
20 that's in the chamber which measures it, it's going to be  
21 measuring the loss of infrared energy hopefully on ethyl  
22 alcohol in the chamber?

23 A. That's correct.

24 Q. So it's really important, isn't it, that we  
25 don't get alcohol from any other source in that chamber,

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1 because it doesn't take very much to get a false high,  
2 does it? We're talking molecules.

3 A. Right.

4 Q. Okay. Now, would you agree that it's not  
5 unusual for these instruments to have anywhere from a ten  
6 to twenty-five percent invalid test rate among people  
7 accused of DWI?

8 A. On any given instrument for any amount of time,  
9 it depends.

10 Q. So, it could be ten to twenty-five percent  
11 invalid test records?

12 A. It could be.

13 MR. MCCOLLUM: May I approach again, Your  
14 Honor.

15 THE COURT: Yes, you may.

16 Q. (By Mr. McCollum) Not unusual?

17 A. No, it's not.

18 Q. Now, you talked about these certifications, you  
19 know, you're certified and Officer Cork, he's certified,  
20 everybody's certified. That certification comes from the  
21 Texas Department of Public Safety, doesn't it?

22 A. That's correct.

23 Q. The state police, correct?

24 A. Yes, sir.

25 Q. And I'm not going to be able to get that

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1 certification, am I?

2 A. If you go through the proper procedures, you  
3 can.

4 Q. One of those procedures is you get hired by the  
5 county or become a police officer, right?

6 A. No, not necessarily. Police officer, yes, but  
7 you don't have to be hired by the county.

8 Q. If you were -- and you'd agree, this is the  
9 only machine that's being used for breath testing, right,  
10 of subjects accused of DWI, right?

11 A. Yes, it is.

12 Q. And you test the simulator solution by using  
13 gas chromatography, correct?

14 A. Yes, sir, it is.

15 Q. That scientific method is the method that's  
16 used to test alcohol concentration in blood tests; isn't  
17 that correct?

18 A. Yes, it is.

19 Q. Now, if you ran a blood test on two different  
20 individuals, could their breath -- and they consume the  
21 same amount of alcohol over the same period of time,  
22 weigh the same are their blood tests results going to be  
23 -- one person's blood test result is --

24 MR. CLANCY: Object, irrelevant, there's no  
25 blood test in this case.

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1 THE COURT: (Inaudible) can you tie it in?

2 MR. MCCOLLUM: Yeah, I think, depending on what  
3 her answer is.

4 THE COURT: Go ahead and answer.

5 MR. MCCOLLUM: I didn't quite finish the  
6 question. Let me be fair to her.

7 THE COURT: All right. Finish your question.

8 Q. (By Mr. McCollum) Would you agree or disagree,  
9 do you believe that two people weigh the same, consume  
10 the same amount of ethyl alcohol over the same period of  
11 time, be the same sex, same size, if they're given blood  
12 tests to measure the accurate amount of ethyl alcohol in  
13 their blood .08 grams per one-hundred milliliters is  
14 called intoxication, correct?

15 A. Yes.

16 Q. Do you believe that it's possible for them to  
17 have -- one person to have a blood test score a hundred  
18 percent higher than the others?

19 A. I know that there is variance, but I can't  
20 attest to how much variance because I don't do blood  
21 testing. I just don't know.

22 Q. Okay. That's fair.

23 If you were going to have a custom made  
24 door built for your eight-foot frame at your house and  
25 the best the guy could do was anywhere from six to ten

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1 feet, would you allow that contractor to build you that  
2 door?

3 A. There would have to be compromise. I mean --  
4 it doesn't matter to me.

5 MR. CLANCY: Objection, irrelevant.

6 THE COURT: Sustained.

7 MR. MCCOLLUM: Pass the witness.

8 (The following took place after further redirect from the  
9 State.)

10 **FURTHER RECROSS-EXAMINATION**

11 By Mr. McCollum:

12 Q. It does produce a result, it just doesn't  
13 report it in that form, correct?

14 A. No, it doesn't produce a result. It says  
15 "invalid test" and gives an operational message as to  
16 what exactly happened.

17 Q. Isn't it true that one of the reasons for the  
18 invalid test is point .02 agreement that the instrument  
19 stores, reports and stores within it, the test score?

20 A. That's true, but --

21 Q. Just doesn't report it, does it?

22 A. That's true, yes.

23 Q. And is it also true that if a person blows into  
24 the instrument the first time and there's a test score  
25 obtained, it's not going to be reported yet, is it?

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1 A. That's true.

2 Q. Have you seen the videotape in this case?

3 A. No, I have not.

4 Q. Isn't it also true that if a person blows the  
5 first time and gets a test score and the second time  
6 let's say they've got emphysema or they're asthmatic,  
7 they just can't blow the second time to get a sufficient  
8 sample, that's not going to report a test score, is it?

9 A. No, it won't.

10 Q. But it keeps -- it does have the test score the  
11 first time they blew, doesn't it?

12 A. Yes, in order to compare it to the second one.

13 Q. It's in the instrument and it can be found by  
14 y'all, can't it -- can't you?

15 A. If you can, I don't know how.

16 Q. Okay. That's fine. That's fair.

17 So, you're telling the jury that, oh, gee,  
18 these instruments, they give false negatives, and we're  
19 not going to do anything about it.

20 Who's going to report a false positive?

21 MR. CLANCY: Objection, that's a  
22 mischaracterization of the testimony.

23 THE COURT: Sustained.

24 Q. (By Mr. McCollum) Well, these instruments that  
25 have these -- where reports were made on these

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1 instruments, was it determined by the scientific director  
2 that all of these instruments have a manufacturer's  
3 defect, don't they?

4 A. Manufacturer's defect.

5 Q. Yes, a part that must be replaced?

6 A. I don't recall.

7 Q. You don't recall that?

8 A. I don't know.

9 Q. Has this particular instrument that was used  
10 today -- back in March of 2006, has it had its valve  
11 replaced, the intake valve replaced on it?

12 A. I'm not sure.

13 Q. You're familiar with the replacement of intake  
14 valves, aren't you?

15 A. I've heard about them. But, again, this all  
16 happened before I was part of the office, and I wasn't  
17 certified, so I don't know.

18 Q. Well, what did you hear about them?

19 A. When?

20 Q. What?

21 A. What did I hear about them?

22 Q. Yeah.

23 A. Is, as I testified earlier, that this was a  
24 certain situation and it was remedied by -- the  
25 scientific director and CMI worked together to remedy it.

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1 Q. Well, did you know that as of August 10th,  
2 2006, none of the machines had been modified, according  
3 to Alvin Finkley?

4 MR. CLANCY: Objection. There's no evidence in  
5 the record as to that.

6 Q. (By Mr. McCollum) First of all, did you know  
7 that?

8 A. No, I didn't.

9 MR. MCCOLLUM: May I approach the witness, Your  
10 Honor?

11 MR. CLANCY: Judge, objection.

12 THE COURT: Sustained.

13 MR. MCCOLLUM: Pass the witness.

14 MR. CLANCY: No more questions by the State.

15 THE COURT: You may stand down.

16 *(End of Excerpt of Proceedings)*

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1 STATE OF TEXAS

2 COUNTY OF DALLAS

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4 I, Laura Weed, Official Court Reporter in and  
5 for the County Criminal Court No. 2 of Dallas County,  
6 State of Texas, do hereby certify that the above and  
7 foregoing contains a true and correct transcription of  
8 all portions of evidence and other proceedings  
9 requested in writing by counsel for the parties to be  
10 included in this volume of the Reporter's Record in the  
11 above-styled and numbered cause, all of which occurred  
12 in open court or in chambers and were reported by me.

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

16 DATED this 24th day of April, A.D., 2007.

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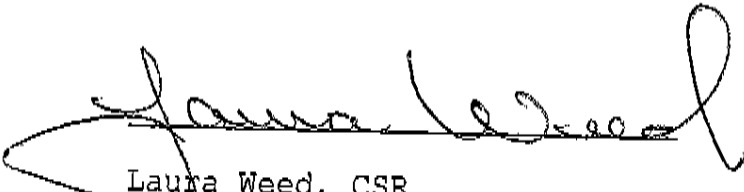
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Laura Weed, CSR  
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Expiration: 12/31/08