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CAUSE NO. MB04-64557-A

2

THE STATE OF TEXAS ) IN THE COUNTY CRIMINAL

3

)

VS. ) COURT NO. 1 OF

4

)

THE DEFENDANT ) DALLAS COUNTY, TEXAS

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12 REPORTER'S RECORD OF PROCEEDINGS

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(Excerpt of Testimony of Alvin Finkley)

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20 On the 7th day of February 2006, the following  
21 proceedings came on to be heard in the above-entitled  
22 and -numbered cause before the Honorable Ada E. Brown,  
23 Judge of County Criminal Court No. 1 of Dallas, County,  
24 Texas, at which time the following proceedings were  
25 held:

VICKI L. TUCK, OFFICIAL REPORTER  
COUNTY CRIMINAL COURT NO. 1  
TEL.FAX 214-653-5606

1 APPEARANCES

2

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6 APPEARING FOR THE STATE,

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MR. LAWRENCE G. BOYD  
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13 APPEARING FOR THE DEFENSE.

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2 (February 7, 2006)

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1 PROCEEDINGS

2 (February 7, 2006)

3

4 ALVIN FINKLEY,

5 having previously been sworn by the Court to tell the

6 truth testified, under oath, as follows:

7

8 (The following proceedings  
9 beginning with the requested testimony on  
10 cross-examination was held, to-wit.)

11

12 MR. EDWARDS: Pass the witness, Judge.

13 MR. BOYD: Thank you, Your Honor.

14

15 CROSS-EXAMINATION

16 BY MR. BOYD:

17 Q. Now, Mr. Finkley, your duties as a Technical  
18 Supervisor require you to inspect this machine at least  
19 once a month, is that correct?

20 A. Once a calendar month. That's correct.

21 Q. Okay. Now, this intoxilyzer, it's not an  
22 infallible thing, is it?

23 A. There is nothing that is infallible.

24 Q. Okay. It makes mistakes just like all other  
25 instruments, is that correct?

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1 A. Mistakes? I will say the instrument requires  
2 maintenance from time to time.

3 Q. How long have you had this machine?

4 A. I'll tell you exactly when. This has been a  
5 certified instrument in our area since 2003.

6 Q. Now, have you replaced parts of this  
7 instrument since you've had it in 2003?

8 A. Sure, that's regular maintenance. Yes.

9 Q. Okay. About once a year you replace almost  
10 all of the guts of it completely, don't you?

11 A. Replace them? No.

12 Q. But you at least upgrade them, is that  
13 right? Repair solenoids, rebuild them and all of that  
14 kind of thing?

15 A. Rebuild the solenoids, if necessary,  
16 absolutely.

17 Q. And replace the chopper motor?

18 A. When necessary.

19 Q. Okay. Is this one of the instruments that  
20 you replaced the software in at the request of DPS, the  
21 Scientific Director?

22 A. If, in fact, there was a software upgrade  
23 from the Department of Public Safety, then, yes.

24 Q. Okay. And this machine, it's had numerous  
25 problems over the last couple of years, hasn't it?

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1 A. Problems?

2 Q. Some.

3 A. I disagree.

4 Q. As far as some spurious, some interesting --  
5 Have you seen the Maintenance Records and the  
6 Test Information Logs for the couple of months prior to  
7 and after this test?

8 A. Absolutely. I've generated them.

9 Q. Okay. Now, a breath test isn't the only way  
10 to test a person's alcohol level, is it?

11 A. No, there's several ways to do that.

12 Q. Okay. You could have blood drawn, is that  
13 correct?

14 A. That's one.

15 Q. And at Lew Sterret, a registered nurse would  
16 probably withdraw that blood, wouldn't they?

17 A. I'm not sure about that. I'm not sure who  
18 would be drawing the blood there.

19 Q. Okay. An LVN, RN, or a Phlebotomist,  
20 somebody that is qualified to draw blood, is that  
21 correct?

22 A. I'm sure if there is someone available.  
23 That's correct.

24 Q. Okay. And that blood would be sent to a  
25 laboratory, maybe even SWIFS, is that correct?

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1 A. Yes, that's correct.

2 Q. And a qualified person would test that blood,  
3 is that right?

4 A. That is correct.

5 Q. Now, this is a very accurate way of testing a  
6 person's blood alcohol concentration is a blood check.

7 MR. EDWARDS: Objection, Your Honor.  
8 Relevance. We're dealing with a breath test in this  
9 instance, not a blood test.

10 MR. BOYD: But I think we've gone into  
11 that earlier, Your Honor, with the Police Officer. That  
12 it was his choice to choose a breath test or a blood  
13 test.

14 THE COURT: I'll overrule.

15 Q. (BY MR. BOYD) Okay. Now, testing that blood  
16 with your GC and your other instruments over there is  
17 the only way to accurately test a person's blood  
18 alcohol concentration, isn't it?

19 A. There are other ways to test blood. By a GC  
20 is not the only way to accurately test blood.

21 Q. Okay, but a blood test isn't cheap, is it?

22 A. I'm not sure of the actual individual cost of  
23 a blood test.

24 Q. Okay. But it's more expensive than a breath  
25 test, isn't it?

1 A. Again, I'm not exactly sure on the very  
2 breakdown of one individual test on either a breath  
3 instrument or a gas chromatograph.

4 Q. Okay. But a blood test isn't quick, is it?

5 A. It takes time. It does take more time than a  
6 breath test.

7 Q. Right. When you get a result with the breath  
8 test, you get it right then and there, is that correct?

9 A. That is correct.

10 Q. The subject blows into the machine. Right?

11 A. That's correct.

12 Q. And the machine gives a result.

13 A. That is correct.

14 Q. And that's a lot quicker than a blood test,  
15 isn't it?

16 MR. EDWARDS: Objection. Asked and  
17 answered.

18 THE COURT: Overruled.

19 Q. (BY MR. BOYD) Which test do you think is the  
20 cheapest to administer between a breath test and a  
21 blood test?

22 MR. EDWARDS: Again, Your Honor, I'm  
23 going to object. We're going into the specifics  
24 regarding a breath versus a blood test and we're  
25 dealing with a breath test here.



1 MR. BOYD: And we did earlier with the  
2 Officer, Your Honor. They did.

3 THE COURT: Well, if you know the answer  
4 to that you may answer, if you don't --

5 THE WITNESS: I answered that question  
6 before. I don't know the breakdown per individual  
7 test.

8 Q. (BY MR. BOYD) Okay. But an alcohol specimen  
9 in blood can be preserved for re-analysis, is that  
10 correct?

11 A. That's correct.

12 Q. We can actually check it again.

13 A. That is correct.

14 Q. If we ask you for blood at SWIFS we get it  
15 and we can retest it through another lab, is that  
16 correct?

17 A. Sure.

18 Q. Okay. Now, true or false. Some scientists  
19 disagree as to the accuracy of this intoxilyzer  
20 machine. Is that correct?

21 A. Who are you calling scientists?

22 Q. Well, let's see. Do you know Dr. Booker?

23 A. Dr. Booker? Yeah, I'm familiar with him.

24 Q. Okay. And he disagrees about the accuracy of  
25 the intoxilyzer, doesn't he?

1 A. Yes, he does.

2 Q. Okay.

3 A. Do I agree with him? No.

4 Q. I understand. Now, the intoxilyzer software  
5 is not available for independent inspection, is it?

6 A. No, that's proprietary. That's how CMI stays  
7 in business.

8 Q. So we can't check that software for its  
9 accuracy, can we?

10 A. No, that's how CMI stays in business.

11 Q. Okay. And the company that manufacturers  
12 this intoxilyzer, the CMI, they provide no warranty for  
13 a particular purpose, do they?

14 A. Yes, they do.

15 Q. What's that? Is it in the warranty?

16 A. Yes, it is --

17 Q. Doesn't it say that it excludes --

18 THE COURT: Gentlemen. Gentlemen. One  
19 at a time. The court reporter has got to take this  
20 down.

21 MR. BOYD: Yes, Your Honor.

22 Q. Doesn't the warranty that's provided by CMI  
23 say it provides no warranty for fitness for a

24 particular purpose?

25 A. May I answer?

26

1 THE COURT: You may answer.

2 THE WITNESS: The actual warranty says  
3 that the instrument shall be used for its intended  
4 purpose. Its intended purpose is for testing breath  
5 specimens for the presence of alcohol. That's exactly  
6 what the warranty says.

7 Q. (BY MR. BOYD) Now, the difference between two  
8 breath test scores for two people the same height,  
9 weight, and alcohol consumption can be over forty-two  
10 percent, can't it?

11 A. Yes, it can depending on the individuals own  
12 weight and their height and the metabolism for alcohol.

13 Q. Is it true or false. The manufacturer of the  
14 intoxilyzer will not release the Technical Repair  
15 Manual to anyone outside of the government.

16 A. I'm not sure of that.

17 Q. That Technical Manual?

18 A. I'm not sure of that.

19 Q. Okay. Would you agree or disagree. The  
20 longer you blow, the higher the score?

21 A. And that's generally true.

22 Q. Okay. Now, would you agree or disagree.  
23 Breathing technique alone can affect a score by 30%.

24 A. That's true. It can affect it by 100%  
25 whether they blow properly or improperly, so you have

1 the difference between a valid and an invalid test.

2 Q. Okay. Do you agree that the physiology of  
3 all people are different?

4 A. Yes, I agree.

5 Q. Now, can this -- this instrument, this  
6 intoxilyzer, is it capable of preserving a breath  
7 sample for retesting?

8 A. No, sir, we don't capture the samples for the  
9 State of Texas.

10 Q. I know that you don't, but is the instrument  
11 itself capable of doing that?

12 A. Our instruments aren't fitted for capturing  
13 samples.

14 Q. But it can be, is that correct?

15 A. If the instrument had a fitting that was put  
16 on by the manufacturer, sure, it's possible.

17 Q. So you can order this instrument with a  
18 fitting that you can put a thing called a tox-trap on  
19 it and capture the alcohol for retesting, is that  
20 correct?

21 A. That's correct.

22 Q. Okay. But Texas doesn't chose to do that, is  
23 that correct?

24 A. That is correct.

25 Q. Toxi-traps and the fittings for them are not

1 put on Texas machines by Texas' choice, is that  
2 correct?

3 A. That is correct.

4 Q. Okay. Now, is it true or false. Officers  
5 don't have to inform citizens of their right to have an  
6 independent blood test taken within two hours.

7 A. Yes, that's correct.

8 Q. Okay. Is it also true that a breath test in  
9 the jail doesn't prove what the person's alcohol  
10 concentration was at the time of driving, does it?

11 A. No, it's the time that the test was

12 conducted.

13 Q. Okay. And this intoxilyzer will accept a  
14 subject-to-subject test score within a .02 of each  
15 other, but the reference sample value has to be within  
16 a plus or minus .01 of the predicted value, is that  
17 correct?

18 A. Absolutely.

19 Q. And that just recognizes the reality two  
20 breaths can be that different, is that correct?

21 A. There is a variance in the way an individual  
22 presents the breath sample to the instrument. Sure.

23 Q. And they don't know that in advance. They  
24 don't know how to breath, how to either take a short,  
25 shallow inhalation and then blow shallow; or then take

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1 a heavy one, a deep one and hold it for a long time and  
2 blow and blow, do they?

3 A. Well, I will say this much. They are  
4 instructed by the operators as to how to deliver the  
5 sample to the instrument.

6 Q. Okay. Now, the intoxilyzer self-checking  
7 registry can report it's operating correctly and when  
8 it's actually not completely operating correctly. Is  
9 that correct?

10 A. Sure, and that's the purpose of us looking at  
11 the numbers every morning.

12 Q. Now, the Defendant blew -- according to that record --  
13 he blew a .134 and a .148. Okay. But at a .15, which  
14 would be two thousandths more than that 148, you would  
15 agree in the past that a person would be unmistakably  
16 intoxicated with all of their systems affected.

17 A. And I disagree.

18 Q. Oh, you've never said that?

19 A. No, I have not. Never.

20 Q. You've never agreed that under 1.5 people are  
21 unmistakably intoxicated?

22 A. Never.

23 Q. Now, the Defendant weighs let's say about 170 pounds.  
24 If the intoxilyzer is operating correctly, and this  
25 test was correct and the fifteen-minute observation

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1 period was performed properly, then how many beers did  
2 he have equivalent at that moment when he blew into the  
3 intoxilyzer and blew that 148?

4 A. Oh, at 148? Let's see. A male weighing 170  
5 pounds has an alcohol concentration of .148, has  
6 approximately 6.7 plus or minus one standard drinks in  
7 his system.

8 Q. Okay. So when he blew -- if that's accurate  
9 and correct and the fifteen-minute observation period  
10 was correctly observed, then he had almost seven beers  
11 in his system at that moment in the intoxilyzer room,  
12 is that correct?

13 A. Approximately, yes.

14 Q. Okay. Now, what is the purpose of the  
15 fifteen-minute presence requirement again?

16 A. Sure. Again, the purpose of the  
17 fifteen-minute waiting period or deprivation period is  
18 to insure that the individual doesn't place anything --  
19 oh, number one, to insure they don't have residual  
20 alcohol in their mouth. Number two, to insure that  
21 they don't have anything in their mouth which could  
22 harm them or the instrument if whatever is in their  
23 mouth is delivered to the instrument.

24 Q. And according to SWIFS' procedures in effect  
25 right now, how is the breath test operator supposed to

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1 comply with the fifteen-minute presence requirement in  
2 these situations?

3 A. At this time we ask our operators to be in  
4 the presence. They don't have to necessarily be  
5 staring them down for the fifteen-minute waiting  
6 period, but be in the presence of the individual for  
7 fifteen continuous minutes.

8 Q. Okay. Now, you would agree with me, wouldn't  
9 you, that in the old days you would allow the breath  
10 test operator, who was also the arresting officer, to  
11 do the fifteen-minute presence while they are in the  
12 car driving them to Lew Sterrett, is that correct?

13 A. Sure.

14 Q. But SWIFS doesn't allow them to do that  
15 anymore, do they?

16 A. I'm not going to say not allow, we just  
17 discourage the operator -- which is also the arresting  
18 officer -- we discourage them from doing the

19 fifteen-minute waiting period in the car.

20 Q. Okay. Now, when you're training -- when  
21 you re-certify breath test operators as of like October  
22 of '05, you're telling them don't do the fifteen-minute  
23 observation period while you're driving somebody to Lew  
24 Sterret, is that correct?

25 A. True. We strongly suggest that. That's

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1 correct.

2 Q. Okay. Do you also tell them not to do the  
3 fifteen-minute book-in -- the fifteen-minute presence  
4 requirement while they are filling in book-in papers?

5 A. No, I've never testified to that or never  
6 taught that either.

7 Q. Okay. So how would a breath test operator  
8 exercise reasonable diligence to make sure the person  
9 didn't burp or something like that while they were  
10 doing the book-in papers?

11 A. Again, for an individual to be -- or an  
12 operator to be in the presence of an individual that's  
13 something that a trained eye can take notice of, and  
14 that's okay if the individual is filing paperwork or  
15 doing sobriety testing in the intoxilyzer room for that  
16 matter.

17 Q. Okay. Now, Mr. Finkley, did you bring your  
18 Test Information Logs for the period from 10-21 --  
19 that's what I got from Terry Robinson -- from 10-21  
20 through 2-14 of '05?

21 A. My test log is inclusive from 11-19 of '04  
22 through 1-6 of '05.

23 MR. BOYD: May I approach the witness,  
24 Your Honor?

25 THE COURT: You may.

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1 Q. (BY MR. BOYD) I think I have a more thorough  
2 copy. I got it from 10-21 from Terry Robinson. Would  
3 you like to look those over at all?

4 A. No, they are the same.

5 Q. Okay. You would agree with me that this was  
6 provided by your associate over at SWIFS, is that  
7 correct?

8 A. My co-worker. That's correct.

9 Q. And he's also a Technical Supervisor?

10 A. That's correct.

11 Q. Now, would you agree this intoxilyzer that  
12 was used to test the Defendant was what's called a lab  
13 spare, is that correct?

14 A. A lab spare? No, there's nothing that's  
15 called a lab spare. We have a spare instrument that's  
16 available when one of our twenty-four instruments is  
17 down. This is an instrument that we can put into  
18 service while the other instrument is out for repairs  
19 or maintenance.

20 Q. Okay. But this particular instrument -- you  
21 want to call it 12535 -- was actually in Grand Prairie  
22 in October, is that correct?

23 A. Possibly, yes.

24 Q. Okay. Would you like to look at that?

25 A. No.

1 Q. Okay. But you would agree that this

2 instrument was one of those spares, is that correct?

3 A. It is a spare instrument, sure.

4 Q. Okay. And it was in Grand Prairie in October  
5 and it actually came back to Dallas on November 11th,  
6 2004. Was that what it appears to you?

7 A. Again, I don't have -- I have starting 11-19.

8 Q. Okay. Let me show you -- actually, I think  
9 your maintenance records, your inspection --

10 May I approach the witness, Your Honor?

11 THE COURT: You may.

12 Q. (BY MR. BOYD) Here's your maintenance  
13 records. On 10-25, you tested the machine or the  
14 instrument, if you want to call it that, in Grand  
15 Prairie on 10-25. Is that correct?

16 A. That's correct.

17 Q. Okay. Then it went back to Dallas on  
18 November 11th, 2004, is that correct?

19 A. That's correct.

20 Q. Okay. And then actually -- according to your  
21 daily modem check, this instrument -- or machine, or  
22 whatever, this intoxilyzer -- was removed from service  
23 and returned to spare status on January 6, 2005. Is  
24 that correct?

25 A. That's correct.

1 Q. Okay. So this wasn't a regular machine  
2 that's used in Room Number 4 at Lew Sterret, is that  
3 correct?

4 A. No.

5 Q. That one was down for repairs, is that  
6 correct?

7 A. Repairs and maintenance. Sure.

8 Q. Okay. Now, on November 15th, 2004, if you  
9 will look at your Test Information Logs, this

10 intoxilyzer read "ambient failure," is that correct?

11 A. You said November 15th?

12 Q. Yes, November 15th, 2004.

13 A. Again, I'm starting on the 19th with my  
14 records.

15 Q. Okay. Would you like to look at mine for a  
16 second?

17 A. Sure.

18 MR. BOYD: May I approach the witness?

19 THE COURT: You may.

20 Q. (BY MR. BOYD) Okay. November 15th, 2004.

21 Ambient and an Operational Message 8. Is that correct?

22 A. Yes.

23 Q. Okay. So this machine, this instrument,  
24 thought that it was detecting alcohol in the room air,  
25 is that right?

1 A. That is correct. There was something that  
2 the instrument did not agree with. That's absolutely  
3 correct.

4 Q. Okay. Where did the alcohol in Room 4 come  
5 from? Do you have any idea?

6 A. Sure. It comes from a number of things  
7 whether it be the individual standing too close to the  
8 breath tube, okay, or cleaning solvents that are used  
9 in the room that have high concentrations of ethanol in  
10 them.

11 Q. Okay. We've also had times where that was  
12 caused by jet fuel vapors at DFW Airport, is that  
13 correct?

14 A. I've never heard of that.

15 Q. Okay. How about that's been caused by paint  
16 fumes when somebody had just painted a room that the  
17 intoxilyzer was in?

18 A. Absolutely. Sure.

19 Q. So this machine can read different things as  
20 being alcohol that are sometimes present in a room that  
21 aren't coming from the subject, is that correct?

22 MR. EDWARDS: Objection, Your Honor.  
23 The question has already been answered.

24 THE COURT: Overruled.

25 THE WITNESS: If, in fact, they do

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1 contain alcohol, the instrument will try to read them.  
2 That is correct.

3 Q. (BY MR. BOYD) Okay. And sometimes we even  
4 have things like vinyl. You've probably studied these  
5 kinds of things. That vinyl in rooms can actually emit  
6 molecules that contain -- I think you call them  
7 hydroxyls, is that correct?

8 A. Anything that has a hydroxyle molecule is an  
9 alcohol. And with vinyl, if the room -- if you're  
10 making vinyl or the vinyl is being treated, sure, but I  
11 have never come across that instance where we have a  
12 room that has vinyl in it, that vinyl is being prepared  
13 in an intoxilyzer room.

14 Q. Okay. But you have had instances where the  
15 room was being painted, is that correct?

16 A. Yes.

17 Q. Okay. So did you ever go out to Room Number  
18 4, or anyone at SWIFS go out there, with any kind of  
19 instrument to find out what it was in the room that the  
20 machine was reading as being alcohol that night?

21 A. No.

22 Q. Okay. Then on 11-17-04 -- okay, do you have  
23 11-17 or do you just have the --

24 A. My records begin at the 19th of November.

25 MR. BOYD: Okay. May I approach the

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1 witness, Your Honor?

2 THE COURT: You may.

3 Q. (BY MR. BOYD) Okay. I note 11-17-04, you had  
4 a no .02 agreement, is that correct?

5 A. Yes.

6 Q. Okay. And that's when the subject blew  
7 two samples less than two minutes apart that disagreed  
8 by .026. Is that correct?

9 A. That's correct.

10 Q. And that's more than the .02 subject matter  
11 agreement that the machine allows, is that correct?

12 A. That is correct.

13 Q. Okay. Now, a person can't absorb or

14 eliminate the equivalent -- that's equivalent to a  
15 drink, isn't it?

16 A. 02? Yes.

17 Q. Okay. That would be like me absorbing or  
18 eliminating -- the person that blew that would be like  
19 them absorbing or eliminating a drink in less than a  
20 minute or so, isn't it?

21 A. That's not what the message operator -- the  
22 message indicates. It just indicates that there are  
23 two different breathing patterns from the first breath  
24 to the second breath sample. Not in this test, but on  
25 whatever test that you're looking at on the test record

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1 log.

2 Q. Okay. But the point is two breaths can be  
3 that different, is that correct?

4 A. The way the individual delivers a sample,  
5 sure.

6 Q. Okay. But a person can't absorb or eliminate  
7 the equivalent of a drink in two minutes, can they?

8 A. No.

9 Q. So the only way you can explain that is the  
10 fact that this was two breaths that are that different,  
11 that they can add or eliminate equivalent of a drink,  
12 isn't it?

13 A. No, they cannot add or eliminate. Again,  
14 it's just the difference in the breathing patterns from  
15 one breath to the second breath sample. Again, not  
16 like in the test we have today, but in a test that's on  
17 the test log that the individual is looking at.

18 Q. Okay. Then on 11-20-04, the intoxilyzer read  
19 "ambient failure" again. Is that correct?

20 A. Yes.

21 Q. Okay. It was apparently detecting alcohol in  
22 Room Number 4, again, after it did it on 11-15-04, is  
23 that correct?

24 A. Okay.

25 Q. Is that correct?

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1 A. Yes, we do have an entry on 11-20 for ambient  
2 fail. That is correct.

3 Q. Did you find the source of that?

4 A. Again, that's the purpose of the operator  
5 being down there. Now, whether it was the individual  
6 standing too close to the breath tube in-between the  
7 breath samples, or something in the room nearby was  
8 being cleaned with that contained alcohol. Again, I'm  
9 not present for all the tests that are conducted and  
10 I'm sure the operator rectified the problem prior to  
11 the next test.

12 Q. But on that same day, on 11-20-04, you had  
13 another .02 disagreement on that day, is that correct?

14 A. Yes, that's correct.

15 Q. Okay. So you had another individual that  
16 blew twice and they were so far apart that the machine  
17 rejected them, is that correct?

18 A. Sure, a difference in breathing patterns.  
19 Absolutely.

20 Q. Then, again, on December 13th, 2004, we had  
21 another .02 agreement disagreement, is that correct?

22 A. Yes, that's correct.

23 Q. Okay. Now, those two scores differed  
24 by .038, is that correct?

25 A. Approximately.

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1 Q. Okay. That's almost a difference of two  
2 drinks between breaths in two minutes, is that correct?

3 A. Sure. Again, the difference in breathing  
4 patterns.

5 Q. And that's like a ten percent difference,  
6 isn't it, or more?

7 A. Roughly.

8 Q. Okay. That would not be based on a process  
9 of absorption or elimination, was it?

10 A. No. Again, it's the way the individual or  
11 the subject is presenting the breath samples at the  
12 time the test is conducted.

13 Q. Have you watched the video in this case?

14 A. No, sir, it's outside the scope of my job.

15 Q. Okay. Now, the intoxilyzer machine doesn't  
16 know the source of the alcohol that it's measuring,  
17 does it?

18 A. No.

19 Q. And we know that this intoxilyzer was  
20 measuring alcohol and the room air on November 15th and  
21 November 20th, 2004 from a source other than a person's  
22 breath, don't we?

23 A. If, in fact, the instrument was doing an air  
24 blank and the individual was standing too close, yes,  
25 it's going to pull in whatever is in the room air and

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1 try to measure it; and obviously, it did not agree  
2 because it could not establish a zero baseline.  
3 Q. Okay. In fact, in March of 2005, you had a  
4 valid test on one of these types of machines. This  
5 five-digit intoxilyzer --

6 May I approach the witness again, Your  
7 Honor?

8 THE COURT: You may.

9 Q. (BY MR. BOYD) -- okay, with this Serial  
10 Number 68-012535, that's a five-digit intoxilyzer, is  
11 that correct?

12 A. Those are five numbers.

13 Q. Okay. And that's what you call the EN model,  
14 is that correct?

15 A. It's an EN or an Enhance Model.

16 Q. That's one of the newest machines that you  
17 have, is that correct?

18 A. Yes, that's correct.

19 Q. Okay. In March of last year you had a valid  
20 test on one of these EN machines showing all zeros that  
21 was absolutely false, is that correct?

22 A. Yes, it was a false negative. That's  
23 correct.

24 Q. Okay. But it was completely false, is that  
25 correct?

1 A. Yes, meaning that the individual actually had  
2 alcohol in his system.

3 Q. Okay. And this was caused by a faulty part,  
4 a checkvalve in the EN machine, is that correct?

5 A. I would not go that far as to say it was a  
6 faulty part. I will say the individual or the subject  
7 was instructed to blow into the intoxilyzer when, in  
8 fact, the individual sucked from the breath tube, okay,  
9 which would cause the checkvalve to lodge. So it was  
10 the way the individual was presenting his sample.

11 Q. Okay. But all of those EN machines have that  
12 same part, don't they?

13 A. That's correct.

14 Q. And you and the manufacturer of CMI put  
15 together a list of replacement parts to fix that  
16 problem, is that correct?

17 A. Not me. But, again, the manufacturer. Not  
18 me, but the manufacturer.

19 Q. Okay. They devised a list, a list of  
20 replacement upgrade parts or something -- better parts  
21 to put into that machine to make it function better,  
22 didn't they?

23 A. Better parts? The instrument was upgraded to  
24 try and alleviate this issue with individuals sucking  
25 in the breath tube instead of blowing into it.

1 Q. Okay, but sometimes people suck when they are  
2 actually breathing in, they're inhaling when they put  
3 the mouthpiece up to their mouth, is that correct?

4 A. No, that doesn't even sound right. You're  
5 saying that an individual is sucking and blowing at the  
6 same time?

7 Q. No, they are inhaling and then they exhale.

8 A. Yes, they pull the tube back, inhale, exhale,  
9 or blow into the intoxilyzer breath tube.

10 Q. Okay. Now, CMI put together a list of these  
11 parts to replace with this EN machine, is that correct?

12 A. Sure. That's correct.

13 Q. Did you ever put them in there?

14 A. Some of our instruments have been upgraded as  
15 far as software is concerned, but the actual hardware  
16 has not been sent out and put into our instruments as  
17 of yet.

18 Q. Okay. Now, this intoxilyzer will measure any  
19 hydroxyl molecule that gets into it as alcohol, is that  
20 correct?

21 A. Yes, that's a fact, because it is an alcohol  
22 molecule. That's correct.

23 Q. That means these cleaning solvents and all of  
24 this kind of thing, is that correct?

25 A. Sure. The instrument is trying to test or do

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1 a modem check in the morning and there's something that  
2 has a hydroxyl molecule in it -- and that cleaning  
3 solvent, the instrument will try and measure it.

4 Q. Okay. This intoxilyzer, this is not a full  
5 range infrared-spectrometer, is it?

6 A. No, it's very finite to very specific alcohol  
7 molecules, and alcohol only.

8 Q. But your office has a full-range

9 infrared-spectrometer, doesn't it?

10 A. Spectrophotometer. Yes, it does.

11 Q. Okay. Did you use that device to try to find  
12 out why you had these ambient failures on 11-15-04 and  
13 11-20-04?

14 A. No, sir, I did not.

15 Q. Now, full range spectrophotometers can  
16 measure the unknown substance to the exclusion of all  
17 others, can't it?

18 A. Sure, that's the best way you can do it, but  
19 we're not -- I'm not interested in any other molecules  
20 besides alcohol, so anything that has a hydroxyl  
21 molecule, that's what I'm very concerned with,

22 especially from the breath of an individual or subject.

23 Q. Okay. But the machine on 11-15 and 11-20 was  
24 reading something in that room air as being alcohol,  
25 wasn't it?

1 A. Sure. And, again, it invalidates the test,  
2 exactly what it's supposed to do. That's a safeguard  
3 that's built into it.

4 Q. It wasn't reading it as an interferant or  
5 anything like that, was it?

6 A. No, the instrument was not able to establish  
7 a zero baseline and so we had an ambient failure which  
8 should be an indication to the operator to clear the  
9 room or move the subject back from the breath tube.

10 Q. But in that situation it looks like they  
11 performed the subject test right after they had that  
12 ambient failure, doesn't it?

13 A. Sure.

14 Q. So they didn't clear it out of the room, did  
15 they, they went ahead and used it anyway.

16 A. Again, the operator -- when we get an ambient  
17 fail, it is instructed to either move the subject back  
18 so we can establish zero baseline or if the room is  
19 being cleaned with a solvent, to wait and insure that  
20 the room is cleared of the solvent which contains the  
21 ethanol. Once the air is clear, the operator can  
22 perform another test on that same subject.

23 Q. Okay. Now, you haven't seen the video in the  
24 case so you don't know whether the fifteen-minute  
25 observation period was properly complied with in this

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1 case, do you?

2 A. Sir, that's something the operator would have  
3 to testify to, not me.

4 Q. Right. You can't say that one way or the  
5 other, can you?

6 MR. EDWARDS: Objection. Asked and  
7 answered.

8 MR. BOYD: Okay. I'll withdraw the  
9 question.

10 Q. Okay. Now, you agree that the accepted rule  
11 of elimination that we use down here is .02 per hour.

12 A. The hour rate of elimination is 0.020 grams  
13 per hour.

14 Q. So the maximum that a person is going to  
15 eliminate in an hour from the time they are arrested,  
16 let's say, is one beer. Is that correct?

17 A. No, not necessarily. We have to take into  
18 account -- 02 is an average, but we have individuals  
19 that eliminate slow, we have individuals that eliminate  
20 fast, okay. But the average accepted rate of

21 elimination is 02 which would be right in the middle.

22 Q. Okay. So we know if he did his drinking,  
23 let's say, between nine and one that night and was  
24 pulled over at two, we can assume he didn't drink  
25 anything from the time he was pulled over until the

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1 time of the test. So, then, you're saying he had the  
2 equivalent of seven beers in his system on the video  
3 that the jury has already seen at the time of that  
4 test?

5 A. For a male 170 pounds with an alcohol  
6 concentration of .148, he has 6.7 plus or minus one in  
7 his system at the time the test was conducted.

8 MR. BOYD: I'll pass the witness.  
9

10 REDIRECT EXAMINATION

11 BY MR. EDWARDS:

12 Q. Mr. Finkley, you were asked on

13 cross-examination about replacement parts of the  
14 machine. Tell jury what is the purpose of that. How  
15 is that conducted?

16 A. With replacement parts, the manufacturer  
17 will send out replacement parts to us technical  
18 supervisors. We are factory trained to do maintenance  
19 and make repairs on all instruments. And, again, this  
20 has to come down not only through the manufacturer, but  
21 also through the Department of Public Safety to insure  
22 that all of our instruments across the State of Texas  
23 have the same software and upgrades.

24 Q. So would it be your testimony that

25 replacement parts is part of the regular maintenance?

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1 It's something periodic that you do?

2 A. Sure, that's correct.

3 Q. Okay. And then let's be clear for the  
4 Members of the Jury the accuracy of the Intoxilyzer  
5 5000, tell the jury how accurate is this machine?

6 A. Again, there's nothing that's infallible, but  
7 we like to insure that our instruments will contain a  
8 confidence interval of 95%. That means 5% plus or  
9 minus .005, whichever of those two values is greater of  
10 the two. Five percent plus or minus .005 we can take  
11 into account.

12 Q. Now, you were asked also on cross-examination  
13 about the length of blowing into the machine,

14 specifically the longer you blow the higher the score.  
15 What is that all about? Tell the jury.

16 A. Okay, I'm glad you asked that question.  
17 Considering the individual does have alcohol in his  
18 system or her system, their mouth is closed, that's  
19 zero. As they begin to blow that alcohol concentration  
20 will increase so they are blowing and as the time  
21 progresses, they are blowing longer and that alcohol  
22 concentration is increasing until it plateaus. Once  
23 that alcohol concentration plateaus, it can never  
24 go higher than that individual's true alcohol

25 concentration. But the implication has always been the

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1 longer an individual blows the higher, and higher, and  
2 higher it goes, you know, indefinitely, and that's not  
3 true.

4 Q. So just to shrug that down, basically, a  
5 person can't blow into the machine, or a subject can't  
6 blow into the machine, and the score goes way off into  
7 the stratosphere --

8 A. No, they are not going to create something  
9 that's not already in the system.

10 Q. That cannot happen?

11 A. No, sir.

12 Q. You were also asked about toxi-traps and  
13 fitting forms. Tell the jury what that's all about?

14 A. Toxi-trap is a piece of equipment that was  
15 made by CMI to go on the back of the instrument to  
16 preserve the sample so the sample could be tested at a  
17 time later than the actual test, and the State of Texas  
18 did not use it, or did not want to use it, because the  
19 toxi-trap wasn't accurate in preserving the samples.  
20 So I guess what I'm trying to say is if you have a  
21 sample that had an alcohol concentration at .148 at  
22 this given time of 3:17, that toxi-trap was not  
23 accurate in preserving that sample, meaning testing it  
24 at a later time you weren't given that same result.  
25 So they were just not consistent with keeping a level

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1 concentration of that preserved sample.

2 Q. Mr. Finkley, you just testified that you  
3 haven't seen the video, of course; the jury has. And  
4 they have seen the Defendant blowing into the Intoxilyzer  
5 5000. If you would make a correlation, if at all,  
6 between the breath testing of the breath sample offered  
7 in the intox room that's on the video and the person's  
8 alcohol concentration at the time of driving.

9 MR. BOYD: I would object to that, Your  
10 Honor. We don't have sufficient data to do that.  
11 We've already discussed it outside the presence of the  
12 jury.

13 MR. EDWARDS: Your Honor, I believe  
14 Mr. Finkley was asked some sort of permutation of that  
15 question on cross-examination.

16 MR. BOYD: I don't believe I've opened  
17 the door on that.

18 THE COURT: I'll tell you what, let me  
19 see the lawyers for a moment.

20 (Discussions were held at the  
21 bench, but not reported.)

22 THE COURT: You may proceed.

23 MR. EDWARDS: The State would withdraw  
24 its question, Judge.

25 Q. Mr. Finkley, now you had mentioned on

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1 cross-examination that you refer to this instrument,  
2 this particular intoxilyzer instrument, as a spare  
3 instrument. Can you sort of explain that to the jury  
4 what you meant by that and what's meant by the term  
5 "spare instrument?"

6 A. Sure. For example, when an agency has an  
7 instrument and it requires maintenance or repairs, that  
8 instrument is taken out and it is our obligation as  
9 Technical Supervisors area over Area 23 to insure that  
10 each agency has an instrument, okay, to check

11 individuals for the presence of alcohol. So in us  
12 picking up the instrument to pull it out for repairs,  
13 we put one in its place. We have a spare instrument  
14 that we put in place for the agency to use while the  
15 instrument is out for maintenance.

16 Q. Okay. Now the term "spare instrument," that  
17 in no way indicates that this instrument is not up to  
18 par as the other instrument, or a standard instrument,  
19 or something like that.

20 A. All of our instruments in Area 23 get the  
21 same level of maintenance whether it be a spare  
22 instrument or one that's, you know, live and in the  
23 duty station or agency.

24 Q. Okay. Now, you were also asked about an  
25 ambient message, particularly on November the 15th,

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1 2004. Now, the ambient message is important. Can you  
2 clear that up for the Members of the Jury, what is an  
3 ambient message and how does something like that occur,  
4 particularly in this instance?

5 A. The ambient message comes up, again, when the  
6 instrument is trying to begin a testing sequence. If,  
7 in fact, the individual that's under the influence or  
8 being tested is standing too close to the instrument,  
9 the instrument will pick it up, especially during the  
10 air blanks. The air blanks -- anytime a test is  
11 conducted, those air blanks invariably have to be zero,  
12 okay, if the instrument picks anything up because if  
13 the subject is standing too close to the instrument,  
14 we'll call it an ambient failure. So it invalidates  
15 the test if the individual has blown once into the  
16 instrument and they get an ambient fail on any of those  
17 air blanks, the instrument will invalidate the test.

18 Number 2, if the room is being cleaned with a  
19 solvent that contains alcohol. And, again, if the  
20 instrument is in the testing mode and the air blank  
21 picks it up, it will call it an ambient fail. The  
22 requirements of the operator is to have the individual  
23 or the subject move back so this ambient or air is not  
24 picked up by the instrument; or if the room is being  
25 cleaned with a solvent that has alcohol, for the room

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1 to be cleared -- the air to be cleared -- and start  
2 your testing up again of the same subject so there's no  
3 problem of re-testing this individual.

4 Q. So that ambient message would, indeed, be a  
5 safeguard of sorts to make sure the procedure goes  
6 correctly?

7 A. Right. Absolutely.

8 Q. Okay. Now, you were also asked about an  
9 operational message on 11-17-2004 particularly at a  
10 0.02 reading. Could you explain that for the Members  
11 of the Jury?

12 A. Sure. When an individual -- you have two  
13 independent samples -- this is not the test that  
14 counsel is referring to. But when an individual blows  
15 into the Intoxilyzer 5000, they take a deep breath and  
16 blow into the instrument, the instrument has

17 requirements that have to be met in order for the  
18 instrument to accept the sample being time pressure and  
19 slow. Okay. You have the next breath sample that  
20 comes around and any slight difference in the breathing  
21 pattern will cause the scores to be different. So if  
22 there's too greater a variance in the breathing  
23 patterns from one breath to the second, the instrument  
24 will flag it again and say, hey, there's no subject  
25 test agreement. Okay. We want to insure when we're

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1 doing our testing that the two breath samples are being  
2 presented in relatively the same manner, the same  
3 pressure, the same rate, for example. So we want to  
4 insure that both of those breath samples are pretty  
5 much dead-on from one breath sample to the second.

6 Q. How about the ambient failure message that  
7 occurred on 11-20-04, was that a cause for concern?

8 A. No, and the same explanation as before.

9 Q. Okay. Now, Defense Counsel asked you about a  
10 disagreement, a .02 disagreement, that occurred on  
11 December 13th, 2004. Correct?

12 A. Yes.

13 Q. And, in particular, I believe you were asked  
14 about the absorption or elimination of alcohol. Can  
15 you clear that up for the Members of the Jury what  
16 occurred in that instance?

17 A. Again, the 13th --

18 Q. If, indeed, my notes are correct it would be  
19 December 13th.

20 A. December 13, no subject test agreement.  
21 Again, that's a difference in the breathing pattern  
22 from one breath sample to the second.

23 Okay. Now, the situation that we have with  
24 the test case today, for sure the individual's

25 breathing pattern from the first breath to the second

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1 breath sample varied in such a way that the instrument  
2 did not accept the sample.

3 MR. EDWARDS: Okay. May I approach the  
4 witness, Judge?

5 THE COURT: You may.

6 MR. EDWARDS: I'm going to hand you what  
7 is being marked now as State's Exhibit Number 6.  
8 (State's Exhibit No. 6 was marked  
9 for identification.)

10 Q. (BY MR. EDWARDS) Sir, can you identify this  
11 document here?

12 A. Yes, I can.

13 Q. Do you feel that it would aid the jury in  
14 further understanding your testimony here today?

15 A. Sure.

16 MR. EDWARDS: Okay. At this time,  
17 Judge, the State moves to offer State's Exhibit Number  
18 6 tendering it to Defense Counsel for any objections.

19 MR. BOYD: I have no objection -- well,  
20 first of all, I mean, I question whether it's relevant,  
21 but -- I have no objection. I'm going to withdraw that  
22 objection. I have no objection to it.

23 THE COURT: All right. It will be  
24 admitted.

25 MR. EDWARDS: Thank you, Judge.

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1 Q. I'm going to set this here and I'm going to  
2 ask you a few questions about it.

3 Now, Defense Counsel on cross-examination  
4 brought up the subject of false negatives particularly  
5 regarding the EN machines or an Enhanced Models.  
6 Right?

7 A. That's correct.

8 Q. Can you tell the Members of the Jury, looking  
9 at that memo, how does that correlate that false  
10 negative -- the issue of false negatives particularly  
11 with the EN model?

12 A. The only correlation is that they are both EN  
13 models. And, now, did this happen on this particular  
14 instrument that we're dealing with today? No. We had  
15 an instance 3-5 of 2005 where an individual sucked  
16 instead of blowing into the intoxilyzer tube which  
17 lodged the checkvalve. Immediately when we saw this  
18 situation from our modem checks that we do every  
19 morning, the instrument was pulled until we could  
20 finally determine exactly what was going on with this  
21 particular instrument.

22 Q. Just to clear this up. Can you let the jury  
23 know, what is a false negative?

24 A. Meaning that the individual, in fact, had  
25 alcohol in his system, but because the individual

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1 sucked into the breath tube and lodged the checkvalve  
2 when the individual eventually blew, it was not a  
3 sufficient pressure to unlodge the checkvalve and the  
4 instrument gave a zero reading.

5 Q. So if a person -- if a machine was not  
6 functioning properly or giving off false negatives  
7 that would actually help a subject, not hurt him or  
8 her?

9 A. Sure, you can look at it that way.

10 Q. Okay. Basically it would not read any  
11 alcohol if, indeed, there was alcohol present.

12 A. That's true.

13 Q. Okay. Now, regarding the accepted rule of  
14 alcohol elimination, what is it and how is it measured?

15 A. Alcohol elimination?

16 Q. Yes, sir.

17 A. The only thing that factor when we're looking  
18 at the elimination of alcohol is just time. It just  
19 takes times to eliminate alcohol. Not a cup of black  
20 coffee, not standing out in the cold brisk wind, not  
21 going to take a jog or a swim, just time is the only  
22 factor when looking at the elimination of alcohol.

23 Q. Mr. Finkley, based on the evidence that  
24 you've been presented with here today, the breath test  
25 record and information that you've had to look at of

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1 your own, can you tell this jury categorically that on  
2 December 18th, 2004 that this Intoxilyzer Instrument,  
3 Serial Number 68012535, was indeed functioning

4 properly?

5 A. I can.

6 Q. Okay.

7 (Discussions held off the record.)

8 MR. EDWARDS: One last question, Judge,  
9 if I may.

10 Q. Mr. Finkley, that breath test record up  
11 there, it is the score that we have for the Defendant,  
12 correct?

13 A. That is correct.

14 Q. Can you extrapolate how many beers it would  
15 take an individual of teh Defendant's body weight to come  
16 up with that exact -- that specific reading?

17 A. Okay.

18 Q. Would you do so for the jury?

19 A. It's not necessarily an extrapolation, and I  
20 did this calculation a little bit earlier.

21 An individual male weighing 170 pounds,  
22 again, has approximately 6.7 plus or minus one

23 standard drinks in his system at the time this test  
24 is conducted.

25 Q. Around 3:17 a.m.?

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1 A. That's correct.

2 Q. Okay. If it's .137 or .134 --

3 A. .134.

4 Q. Yes, sir. And correct me if I'm wrong. When  
5 we're talking about the breath test record up there --

6 A. Right, the .134.

7 Q. -- and you stand by your original

8 calculations?

9 A. Okay. The first calculation was based  
10 on .148. Now, if we're looking at the .134, which we  
11 used only in our calculations, that alcohol or the  
12 content for that individual, okay, changes slightly to  
13 6.1 plus or minus one as opposed 6.7 with the first  
14 calculation.

15 Q. So if you were informed that perhaps the  
16 defendant in this instance consumed maybe five beers,  
17 would that comport with your calculations, roughly?

18 A. It would -- the --

19 Q. Well, let me ask you this, Mr. Finkley. The  
20 defendant would have had to have consumed at least  
21 somewhere around, you know, six beers or so is what  
22 you're saying to the jurors?

23 A. In their system at that time, that's

24 correct. Yes.

25 MR. EDWARDS: Okay. Pass the witness,

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1 Judge.

2 THE COURT: Can I see the lawyers over  
3 here, please, for just a moment?

4 (Discussions held at the bench, but  
5 not reported.)

6

7 RECROSS-EXAMINATION

8 BY MR. BOYD:

9 Q. Okay. Mr. Finkley, the CMI, the manufacturer  
10 of this intoxilyzer, makes that toxi-trap that you know  
11 of.

12 A. That's correct.

13 Q. And the CMI attests to the accuracy of the  
14 toxi-trap?

15 A. That I'm unaware of.

16 Q. Okay. So it's only you that's saying it  
17 doesn't work, is that correct?

18 A. No, it's not me, it's the entire State of  
19 Texas. Back in 1988, the studies were done using the  
20 toxi-trap and the State of Texas confirmed that the  
21 toxi-trap was not consistent in preserving the samples.

22 Q. Now, 2-7-06 today, you still don't know where  
23 the alcohol vapor in Room 4 was coming from that got  
24 into the machine, do you?

25 A. No.

1 Q. Okay. And we determined that two breaths can  
2 be different enough by actual example on 12-13-04 so  
3 that one sample is showing two beers more than the  
4 other sample, is that correct, if it was true?

5 A. In magnitude, sure.

6 Q. Okay. Does SWIFS allow today -- as of  
7 October of last year when you were re-certifying the  
8 breath test operators -- does SWIFS encourage the  
9 fifteen-minute observation period to be done by a  
10 tag-team situation?

11 A. We don't encourage it. Can it be done, sure.

12 Q. So you don't encourage one officer to drive  
13 somebody to the sally port at Lew Sterrett and another  
14 officer to pick that person up at the sally port and do  
15 the fifteen-minute observation period in that manner;  
16 driving, then the sally port, then walking to Lew  
17 Sterrett. Is that correct?

18 MR. EDWARDS: Objection, Your Honor.  
19 The question is compound.

20 THE COURT: I'll overrule it.

21 THE WITNESS: We want to insure whoever  
22 the individual is who is actually going to conduct the  
23 test would be the one doing the fifteen-minute waiting  
24 period.

25 Q. (BY MR. BOYD) because You want to make sure

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1 that you don't have any mouth alcohol present in the  
2 subject, is that correct?

3 A. Sure. It's part of the safeguard.

4 Q. The only way they detected this false  
5 negative that you're talking about with the member from  
6 the Scientific Director of the Technical Supervisors is  
7 that the people that were doing the test didn't believe  
8 the result because their eyes and ears and noses said  
9 that result is wrong. Is that correct?

10 A. Well, that's a twofold answer. Number one,  
11 yes, you have a trained operator in the -- Randell  
12 Brainard that has been doing this for years and years  
13 and has a very trained eye -- and it just was not  
14 consistent the mannerisms in which the subject was  
15 displaying, and also the alcohol concentration which  
16 was zero was just not consistent, so we tested it  
17 again.

18 The following morning, or a day or two later  
19 when we were calling up the instrument, we see these  
20 two tests on the same individual. One being zero and  
21 the next one being .16. It's just not -- it didn't add  
22 up which was a cause for alarm or concern for our  
23 office.

24 Q. Okay. Under today's guidelines since  
25 October, if a breath test operator is going to conduct

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1 that test and is not around that person for fifteen  
2 consecutive minutes, would you certify that test?

3 A. If they were not in their presence for  
4 fifteen continuous minutes, no, I would not.

5 MR. BOYD: Pass the witness.

6

7 FURTHER REDIRECT EXAMINATION

8 BY MR. EDWARDS:

9 Q. Mr. Finkley, back in December of '04 when  
10 this test was conducted, did it comport with proper  
11 procedure at that time for a subject to be within a  
12 continuous presence of an operator for fifteen

13 consecutive minutes?

14 A. An operator?

15 Q. Yes, sir.

16 A. Again, generally, we like to insure. Does it  
17 make it invalid, no, but we would like to insure that  
18 the individual that's going to administer the test be  
19 the one doing the fifteen-minute waiting period.

20 MR. EDWARDS: No further questions,  
21 Judge.

22

23 FURTHER RECROSS-EXAMINATION

24 BY MR. BOYD:

25 Q. Did SWIFS change the procedure essentially?

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1 A. Was procedure changed?

2 Q. Yes.

3 A. No. Again, the procedure wasn't changed and  
4 we've always encouraged, number one, that the operator  
5 do the fifteen-minute waiting period. Now, if you have  
6 two operators doing a culmination or a combination of a  
7 fifteen-minute waiting period, it makes it pretty tough  
8 when you have two reports from two individuals and the  
9 times have to be concise so they don't show gaps.  
10 Again, it's possible. Do we encourage it, no. We like  
11 to insure that one operator is doing the fifteen-minute  
12 waiting period.

13 Q. And you certainly are discouraging breath  
14 test operators from performing the fifteen-minute  
15 observation period while they are driving the subject  
16 to Lew Sterrett, is that correct?

17 A. That's something that we discourage. Does it  
18 make it invalid, no, but we discourage it.

19 Q. Okay. So, again, just to make sure we  
20 understand. The only way that the breath test operator  
21 was able to detect a false negative was that he just  
22 didn't believe it himself with his eyes, ears, or nose,  
23 is that correct?

24 MR. EDWARDS: Objection, Your Honor.  
25 Asked and answered. We've already covered this.

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1 THE COURT: Sustained.

2 MR. BOYD: I'll withdraw that question.  
3 Thank you, Your Honor.

4 No further questions.

5 THE COURT: Anything further from the  
6 State?

7 MR. EDWARDS: Nothing from the State,  
8 Judge.

9 THE COURT: Thank you so much.

10 THE WITNESS: Thank you, Your Honor.  
11 THE COURT: You're free to go.

12 Ladies and Gentlemen of the Jury, it's a  
13 perfect time to break for lunch. Let's do that now.  
14 Why don't you plan to be back at 1:15 and we will pick  
15 back up and get back to business.

16 Thank you again for your time.

17 THE BAILIFF: All rise.

18 THE COURT: Court is in recess until  
19 1:15.

20 (A luncheon recess was taken from  
21 12:07 to 1:15 p.m.)

22 (At 1:21 p.m., all parties present  
23 in open court, the following proceedings were  
24 held.)

25 THE COURT: If everybody will check and

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1 make sure your phones are off, we'll jump back in.  
2 When we last broke, the State had presented  
3 a witness and that witness had been excused from  
4 testimony. That witness was over.

5 What says the State?

6 MR. EDWARDS: The State rests.

7 THE COURT: The State rests. What says  
8 the Defense?

9 MR. BURROWS: We have one witness, Your  
10 Honor.

11

12 (Excerpt of Proceedings concluded.)  
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1 COUNTY OF DALLAS )  
2 STATE OF TEXAS )

3 I, VICKI L. TUCK, Official Court Reporter in  
4 and for County Criminal Court No. 1 of Dallas County,  
5 State of Texas, do hereby certify that the above and  
6 foregoing contains a true and correct transcription of  
7 all proceedings directed by counsel to be included in  
8 the Reporter's Record in the styled and numbered cause,  
9 all of which occurred in open court, or in chambers,  
10 and were reported by me.

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

14 I further certify that the total cost for the  
15 preparation of this Reporter's Record is \$\_\_\_\_\_ and  
16 was paid by Counsel of Record.

17 WITNESS MY OFFICIAL hand on this 2nd day of  
18 March, 2006.

19

20

21

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