

1 IN THE DISTRICT COURT OF KING COUNTY FOR
2 THE STATE OF WASHINGTON
3 EAST DIVISION, REDMOND COURTHOUSE
4 HONORABLE DAVID A. STEINER, PRESIDING
5 HONORABLE DARRELL E. PHILLIPSON, MEMBER
6 HONORABLE MARK C. CHOW, MEMBER

7 STATE OF WASHINGTON,)
8)
9 Plaintiff,)
10)
11 vs.) No.
12)
13 AHMACH, SANAFIM,) C00627921
14 CHEUK, ALEXANDER JORDAN,) C00617910
15 CHEUK, ALEXANDER JORDAN,) CR22547KC
16 HILDRETH, BARBARA JEANNE,) C0436675
17 LOEWES, WILLIAM BRIAN,) C005544326
18 REEL, KYLE JOSEPH,) CR16440KC
19 SLAUGHTER, KEVIN WAYNE,) C00534681
20 WATSON, TERESA ANN,) C00601103
21 WOLF, JOSEPH SCOT,) C00608134
22)
23 Defendants.)

24 TRANSCRIPT OF PROCEEDINGS
25 VOLUME V

8:45 a.m.

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516 - 3rd Avenue
Courtroom W355
Seattle, Washington 98104

Reported by Kristin M. Vickery, CCR 3125

Court Reporting Offices of
Robert L.T. Thomas, Sr., Inc.
913 North 36th Street
Renton, Washington 98056
(425)271-0332

APPEARANCES

For the Plaintiff:

Matthew G. Anderson
Christina Miyamasu
King County Prosecuting Attorneys
516 - 3rd Avenue
W554
Seattle, WA 98104-2390
matt.anderson@kingcounty.gov

For the Defendants:

Theodore W. Vosk
Law Offices of Vosk & Velasquez
2135 - 112th Avenue Northeast
Suite 210
Bellevue, WA 98004 - 2923
425.753.6343

Kevin J. Trombold
Law Offices of Kevin Trombold
720 - 3rd Avenue
Suite 2015
Seattle, WA 98104-1814
206.382.9200
206.467.3152 Fax
kevin@tromboldlaw.com

Andrea K. Robertson
Law Office of Steve Rosen
800 Fifth Avenue
Suite 4000
Seattle, WA 98104
206.892.2091
206.770.6136 Fax
andy@rosenlitigation.com

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PROCEEDINGS

JUDGE STEINER: I want to thank our court reporter for being here, and Kim, again, for getting things squared away. I don't know the name of the fellow who brought in FTR, but that was very nice also, as well. Is everyone ready?

MR. ANDERSON: I will be shortly, your Honor.

MR. VOSK: Can I address the Court, your Honor?

JUDGE STEINER: Mr. Anderson, can you prepare and listen at the same time?

MR. ANDERSON: We'll see.

MR. VOSK: Yesterday, I proposed to go down a line of questioning, and your Honor had stopped us.

JUDGE STEINER: Right.

MR. VOSK: And although it wasn't the intent when I designed my examination, at that point, I do have to admit, it was -- the way that I was about to go about it, did contain a small bit of malice, which I think is dishonorable, intemperate, and makes me a bit of a fool.

And I wanted to apologize to the Court and, in particular, to the witness, Barry Logan, for my

1 shortcomings on that.

2 With that said --

3 JUDGE STEINER: I don't know how we
4 would start our day if we didn't start with the Ted
5 Vosk apologies. This is the third day in a row.

6 MR. VOSK: I make a lot of mistakes,
7 your Honor.

8 JUDGE STEINER: I'm beginning to
9 feel like each one of us needs to stand up and confess
10 our shortcomings as well.

11 MR. VOSK: Well, what I wanted to go
12 on with, though, is the question that prompted me down
13 that line of questioning. The original question
14 wasn't pointed because -- like I said, when I
15 originally designed this, it wasn't meant to be
16 pointed, and that had to do with whether or not the
17 things we're seeing here are a systematic pattern of
18 practice in the lab over the years.

19 And yesterday, during the State's cross, they
20 spent approximately 40 minutes going over the
21 accomplishments of Dr. Logan and the things he had
22 done in the lab and how the lab was a model for this
23 or that.

24 And what I wanted to ask the Court -- and I wanted
25 to do it before we got going, so that you didn't think

1 I was trying to slip something in, I think that that
2 opened the door to this line of questioning and also
3 the rules of evidence, which I understand don't apply
4 strictly here, opens it because they were presenting
5 some of these as some of his credentials, we need to
6 challenge those.

7 Now, I have retooled that part of my examination
8 to make it shorter and less pointed. And I am going
9 to request the Court allow me, on redirect, some
10 latitude to start going down that road. And if your
11 Court determines after a few questions that it is
12 aimed at personally embarrassing or humiliating, at
13 that point cut me off, but at least give me the
14 opportunity because I believe that whether or not
15 these are things systemic in the lab and in order to
16 challenge the testimony during those 40 minutes
17 yesterday, I really believe that this is important,
18 and I'm not, at this point, speaking with venom or any
19 malice with respect to the witness.

20 JUDGE STEINER: Let me address a
21 couple of things, and I would invite either of you to
22 indicate that you disagree or add anything that you
23 want.

24 I don't think the State spent 40 minutes talking
25 about Dr. Logan's credentials. I think the State

1 spent a little bit of time -- I don't know what the
2 measurement was -- talking about the Dr. Logan's
3 credentials. I think the rest of the time that you
4 may be referring to was a discussion on what the tox
5 lab does -- actually, what Dr. Logan does, what his
6 duties are. I don't know that that ran to 40 minutes
7 either.

8 That's the first point. I think that you're
9 overestimating the amount of time you believe the
10 State spent on Dr. Logan's credentials.

11 The other point that I want to make is that I did
12 not stop you yesterday because I thought you were
13 being rude and overbearing with Dr. Logan. I stopped
14 you because you were going to go down a line of
15 questioning where you were going to ask about problems
16 in the tox lab and then ask Dr. Logan if that doesn't
17 constitute a systematic patter of misconduct, if you
18 will. In other words, is it systemic?

19 And the question is basically rhetorical at that
20 point. You're not likely -- you know what the answer
21 is for you. You're not likely to get that answer from
22 Dr. Logan. You can certainly try to get it, and so
23 what we talked about was just allowing you to get in
24 the evidence of the prior problems in the toxicology
25 lab. That, I think would be appropriate. So any

1 other...

2 You want to try this again?

3 MR. VOSK: No. I think that that's
4 very workable if the evidence -- some of the evidence
5 is that which the Court can take judicial notice of
6 because that comes straight from published cases, and
7 so those would be things I could use in argument.

8 The rest of it, the instances documented in a PI
9 article which I used as research, I don't know if the
10 State is willing to simply stipulate that in. I have
11 no desire to bring Dr. Barry Logan through all of the
12 incidents that are documented in the article. I think
13 some of them are probably well-known to this Court
14 with some of them having to do with well-known --

15 JUDGE STEINER: You were going to
16 attempt to meet with the State last night and talk
17 about it and see if you could agree on a list, if you
18 will.

19 MR. VOSK: I did not come up with
20 this idea until this morning, to simply use the PI
21 article.

22 JUDGE STEINER: Well, I would
23 suggest then at break, you try to talk about that to
24 see if the State will agree to any or all of the
25 points made or the incidents labeled in the article.

1 Anything else before we begin?

2 MR. VOSK: No. That was all.

3 JUDGE STEINER: Anything from the

4 State?

5 MR. ANDERSON: No, your Honor.

6 JUDGE STEINER: Dr. Logan.

7 (Witness approaches.)

8 JUDGE PHILLIPSON: I was kind of

9 hoping Mr. Anderson was going to stand up and

10 apologize because I've never seen that in the last

11 four or five years I've worked with him.

12 BARRY K. LOGAN, having been first duly sworn

13 by the Court, testified as

14 follows:

15 *****

16 MR. ANDERSON: To be clear, I'm

17 trying to keep the proceedings moving quickly by not

18 making an apology. We'd be talking in terms of

19 months, your Honor.

20 JUDGE STEINER: I might just ask,

21 Mr. Anderson, how long do you anticipate having

22 Dr. Logan on the stand?

23 MR. ANDERSON: An hour or two.

24 JUDGE STEINER: Mr. Vosk?

25 MR. VOSK: So far my cross doesn't

1 look very long.

2 (Pause in the proceedings.)

3 JUDGE STEINER: We are back on the
4 record.

5 JUDGE PHILLIPSON: This part of the
6 Court does have a concern, Mr. Vosk. Where is your
7 conscience this morning?

8 MR. VOSK: Down the hall. Kevin
9 assured me he can whistle as good as Andy.

10 CROSS-EXAMINATION

11 BY MR. ANDERSON:

12 Q Dr. Logan, what is analytic error?

13 A It's variability or error in the measurement of some
14 quantity based on the measurement process. It's
15 inherent to any measurement.

16 Q That was the concept that has been discussed under the
17 term of bias; is that correct?

18 A Yes.

19 Q The machine -- the instruments in Washington do not
20 report analytic error; is that correct? Well, do the
21 machines in Washington report analytic error?

22 A No.

23 Q Why is that?

24 A Well, I think, even based on testimony that I've heard
25 here, there is no universally agreed upon method for

1 calculating the bias.

2 I've heard it described as calculated based on the
3 simulator test result; calculated based on the first
4 ten simulator test results. When a solution is
5 changed, I heard Mr. Gullberg testify to, they
6 calculate based on the quality assurance procedure;
7 you calculate it based on one for labels on the test
8 process. You could calculate it based on a
9 combination of the different types of analytical error
10 or bias.

11 So our breath test program, like every other
12 breath test program in the United States, reports the
13 results without adjusting them for bias.

14 Q You testified that there was no universally agreed
15 way. Now, there was -- I mean, Mr. Gullberg does have
16 a way that he computes bias; correct?

17 A I know the way he does it in court that is based on.
18 Our preferred method is to use the first ten tests
19 proximate in time based on a number of measurements
20 rather than just a single measurement.

21 I think he also testified that he would do that if
22 the result is around .08 of what the field solution
23 is. But if the subject test result was 15 or higher,
24 he would use analytic error that was calculated
25 following the quality assurance procedures. The

1 result of that in this case of this series of
2 11 months, so that est is not proximate in time to
3 when the subject when using different approaches.

4 Q Presumably, if Mr. Goldberg sat down with a computer
5 programmer, and the computer programmer was able to
6 pick his brain on what to do in this situation and
7 that one, some type of very complex algorithm could be
8 derived from that; correct?

9 A I think it's safe to say that in a few years, there
10 will be a new ISO accreditation that's being put
11 together right now. There's discussion of computation
12 of what's called "uncertainty budget" for the breath
13 testing measurement process, and the people who are
14 involved in that committee are designing algorithms
15 for that.

16 Q Within the potential algorithm that could exist from
17 Mr. Gullberg's method, do you know, is that algorithm
18 necessarily agreed upon universally?

19 A No. That is something he developed and uses regularly
20 in court. I'm not aware of any other programs that
21 apply that. Like I said, if you're estimating bias at
22 .08 which is what the simulator solution is, what if
23 the subject's test is a .03 or a .04, if your -- what
24 if your defendant's test is conducted in the first ten
25 after the solution is changed? Do you rely on a prior

1 solution? Same solution on a different instrument
2 where ten tests have been done?

3 You could compute it probably a dozen different
4 ways and come up with a dozen different ways of
5 estimating.

6 JUDGE STEINER: If I can ask one
7 clarification question. You indicated that ISO
8 standards may change in the future. You didn't say
9 "to adjust for bias." You used a different term and
10 could you explain what that means.

11 THE WITNESS: Well, the ISO
12 requirements will require to develop an uncertainty
13 budget, and that means you take any estimate of error
14 based on the value of simulator solution, the
15 calibration of the instrument, of the performance of
16 external standard performance, of the internal
17 standard, presumably some other factors, possibly
18 contributions from acetone below the acetone threshold
19 for the instrument. And you add all those possible
20 sources of error in the appropriate statistical
21 manner, and it gives you 95 percent confidence for the
22 test. But -- and that process is called an
23 uncertainty budget.

24 The ISO requirement does not require that you
25 adjust the breath test for that error estimate. It

1 simply requires that you establish it and provide it
2 upon question.

3 JUDGE STEINER: Just to follow and
4 then has -- anyone that is charged is given that
5 information and can do the math?

6 THE WITNESS: Presumably, yes.

7 JUDGE STEINER: Presumably. Thank
8 you.

9 Q (By Mr. Anderson) Is that -- is that a proposed or an
10 existing -- is it a policy of ISO -- what's the word,
11 first of all?

12 A What's the what?

13 Q So is that a proposed -- is it -- first of all, for
14 ISO, would that be a policy, a regulation, what would
15 that be?

16 A It would be one of ISO requirements or be one of the
17 ASCLD.

18 THE REPORTER: Excuse me. I'm
19 having a hard time hearing.

20 JUDGE STEINER: At the break, do you
21 need to switch?

22 THE REPORTER: Yeah. I think I'm
23 going to need to move at the break.

24 Q (By Mr. Anderson) To be clear, is there a
25 requirement -- to be clear, so this would be a

1 requirement for those labs that were accredited by the
2 ASCLD; correct?

3 A Yes. They would have to determine what the
4 uncertainty budget was and have a record of it.

5 Q Is there a requirement of where that record is placed?

6 A No.

7 Q Does it require that be on the breath ticket, for
8 instance?

9 A No.

10 Q Does the requirement -- and at the time of the issues
11 that we're discussing in this motion, was the tox lab
12 accredited by ASCLD?

13 A No.

14 Q To be clear, it is not accredited by ASCLD?

15 A No. That's right. That was a program that became
16 available this summer, last summer, that I testified
17 to you yesterday that we were pursuing.

18 Q And to be clear, as of yesterday, there are no
19 programs accredited by ASCLD and subject to that
20 potential requirement?

21 A For breath testing, that's true.

22 Q Okay.

23 JUDGE PHILLIPSON: Can I ask a
24 question? Is this the same process that you reported
25 that you were working to for July of '08?

1 THE WITNESS: I -- yes. They're all
2 part of the same tract. We are working towards
3 submitting an application for ASCLD ISO accreditation.

4 What we've committed to doing by July of 2008 is
5 to be employing at least some of their standards,
6 particularly the ones for audits of breath test
7 section records, that these will be applied to the
8 program even assuming the application is not made by
9 July. Some of the standards specifically will be
10 implemented prior to July.

11 MR. ANDERSON: Judge Chow.

12 JUDGE CHOW: Why? Why do this? Why
13 do they call for the standards in the accreditation
14 that's about to come? Why would you move towards
15 establishing it? What's the purpose?

16 THE WITNESS: Well, the purpose --
17 the purpose is so that you can theoretically avoid the
18 kind of arguments that come up in these types of
19 cases, where you know there's no agreed upon method
20 for establishing bias or confidence interval, or
21 there's no agreed upon list of factors that would be
22 considered in a computation of analytical error or
23 estimate.

24 An article that was submitted, I think by Mr. Vosk
25 written by Dr. Jones, talks about the fact that by

1 applying a correction factor or adjustment to the
2 error to the result, in European countries it has
3 reduced the amount of litigation in the cases.
4 Theoretically, if you identify what the total
5 uncertainty is, either by statute, by rule, or policy,
6 at trial adjust the breath test results for that
7 agreed upon or -- or programmatic uncertainty, there
8 would be less opportunity to challenge the results,
9 less basis to challenge the results, I guess.

10 Q (By Mr. Anderson) Essentially, currently, though, it
11 would be a battle any time you would have field bias,
12 there's a possible battle of experts, then this would
13 provide uniformity and accepted standards in
14 calculation of bias; is that kind of a fair statement
15 or not?

16 A I -- I -- I -- generally, I don't think there's a
17 battle of experts because the breath test technicians
18 or Mr. Gullberg would calculate the bias whichever way
19 they're asked to in court, but it's something that has
20 to be done upon request.

21 Q And there's varying ways to do that. This would
22 provide a standard?

23 A Yes.

24 Q You talked about the fact that no other breath test
25 section in the United States corrects for the analytic

1 error or the bias on the ticket.

2 How do you come by that knowledge?

3 A From my discussions with my instrument manufacturers
4 and individuals in breath test programs around the
5 United States or my interaction with the people in the
6 Indiana University program I talked about yesterday;
7 from discussions I've had with Dr. Dubowski, who is
8 intimately familiar with the status of breath tests
9 around the country.

10 I guess the one exception for that is the State of
11 Alabama which adjusts breath test results based on the
12 subject's breath temperature at the time of the test.

13 Q Warmer temperature would result in a different
14 reading?

15 A If the subject's breath test temperature or breath
16 temperature is above the normal range for breath
17 temperature, it makes a downward adjustment to their
18 breath test results.

19 Q That is not analytic error, though; correct?

20 A That's biologic variability.

21 Q To be clear, there are countries in Europe that
22 actually have the calculations for analytic error on
23 the test; is that correct?

24 A Yeah. They don't compute the analytical error for
25 every test. They have some programmatic adjustment

- 1 that is made for every result.
- 2 Q Can you describe what you mean by that?
- 3 A They've gone through that process of looking at
4 possible errors in every stage of the breath test
5 process and computed the maximum possible error for
6 their test, and that is subtracted from every breath
7 test.
- 8 Q Okay. That may or may not be an accurate estimate of
9 the analytic error or the corrected mean for any
10 particular test; correct?
- 11 A That's correct.
- 12 Q How do those jurisdictions differ from the United
13 States and Washington specifically in their
14 measurements of defendant's breath?
- 15 A They use an assumed blood-to-breath ratio of 2300 or
16 2350 to one, as opposed to the United States where in
17 every jurisdictions, the assumption is 2100 to 1.
- 18 Q I don't want to draw this out. You testified to this
19 yesterday. The method used in the United States and
20 Washington the, 2100, underestimates the blood alcohol
21 level; correct?
- 22 A Correct. That's the legacy in the way the breath
23 tests and DUI statutes have evolved. In Washington
24 state, we have separate Breathalyzer test standards so
25 we're required to convert one to the other.

1 In many states, the statute is written in terms of
2 blood, so if you make a blood measurement, you have to
3 have corresponding blood level.

4 Q And the 2300 method in the European places -- in the
5 European countries that do have calculation actually
6 is going to result in a higher number, and therefore,
7 it's more important that that wind up being adjusted
8 down; correct?

9 A Yes. But that may be one of the considerations when
10 we develop the uncertainty budget for the ISO program.
11 If truly you wanted to have the most accurate
12 measurement of the subject's breath, you would use the
13 most accurate breath-blood partition which is probably
14 closer to --

15 MR. VOSK: Your Honor, I apologize.
16 But at this point, I just want to make an objection
17 just to kind of shorten things up.

18 My understanding is that in our state, issues
19 concerning the partition issue are completely
20 irrelevant with respect to breath. They've been made
21 that way by statute, and I think I've heard almost
22 every single judge that I've heard the argument be
23 attempted before, make that indication. So if it's
24 completely irrelevant and the kind of thing we don't
25 go into, I'm not certain why we're going down that

1 road here.

2 And I would object based on relevancy.

3 JUDGE STEINER: Are you --

4 MR. ANDERSON: I'm pretty much done
5 anyway because the Court was concerned about whether
6 or not that should, in fact, appear on the ticket or
7 not. I think it's important for the Court to
8 understand that while it's conceivable that some could
9 choose a standard that has not been chosen in the
10 United States, and this in the United -- in any state
11 in the United States.

12 And Europe, while there is that type of
13 adjustment, they're in a different situation, and
14 therefore, they have different needs requiring that.
15 But I'm happy to move on. That was pretty much the
16 end of it anyway.

17 JUDGE STEINER: We can allow you one
18 or two other questions, if you wish.

19 MR. VOSK: Just for clarity, are you
20 overruling that, then, your Honor?

21 JUDGE STEINER: Yes, the answer is
22 yes. Sorry.

23 Q (By Mr. Anderson) And to be clear, does the
24 manufacturer recommend that you do this?

25 A That we do what?

1 Q That you calculate for analytic error on the ticket?

2 A No. The manufacturers don't make any recommendation
3 one way or the other.

4 Q You've already testified to your discovery of the
5 signing by Ann Marie Gordon. I'm going to ask you
6 about those -- about that subject.

7 Okay. But for the purpose of just setting the
8 stage, is it fair to say that Ann Marie Gordon -- your
9 understanding is Ann Marie Gordon was signing
10 certifications that she tested samples that she did
11 not, in fact, test?

12 A That is my understanding, yes.

13 Q And is it your understanding Ed Formoso, who was a
14 qualified analyst, was actually running those tests?

15 A Yes.

16 Q Why did you make the decision and -- once you
17 discovered this, you faced the choice about whether
18 you remove those tests from the Web and calculate the
19 mean based on the test without Ann Marie -- without
20 the data attributed to Ann Marie Gordon or leave it
21 there, and calculate the mean based on all the data
22 available.

23 What did you choose and why?

24 A Well, the two options were to remove the data or to
25 leave it in as part of the calculations. Upon the one

1 hand, there was data to support every one of those
2 measurements, and it meant the control data was
3 present. The blanks were present. So that the
4 measurements themselves were supported by data as
5 being reliable.

6 On the other hand, and -- given that she did not
7 personally test those, and had signed affidavits that
8 she had, you could make the argument that she should
9 be removed. However, the protocol requires that we
10 include results from all analysts, so I think that
11 whichever route we went, there were arguments that we
12 could have gone the other route.

13 What I did was remove the affidavits which I knew
14 to be false from the state patrol Web site. They were
15 not destroyed. They were, in fact, provided, in fact,
16 in subsequent discovery, but the results where the
17 numbers that were generated by the tests of Ed Formoso
18 were left in as part of the calculation in litigation
19 in other jurisdictions, we've been asked to
20 recalculate the results with and without Ms. Gordon's
21 numbers.

22 Q And, in fact, Rod Gullberg did some of that in this
23 litigation?

24 A Yes.

25 Q And does the lab stand willing on a particular case,

1 if the defense attorney wanted it or the Court wanted
2 it, does the lab stand willing to recalculate to those
3 if the Court determines or the defense wants to argue
4 that there's a relevant change?

5 A Right.

6 JUDGE STEINER: I have a question.
7 Your testimony seems to indicate, however, that either
8 way you go, the protocols would be violated.

9 THE WITNESS: The protocols are
10 certainly violated if the results of an analyst are
11 not included. The protocol at the time that Ed
12 Formoso was doing that testing for Ann Marie Gordon,
13 did not explicitly prevent her from delegating that
14 testing to him. The problem was signing the
15 affidavits.

16 I -- when I found out about it, I determined that
17 it wasn't a good practice and had her stop that
18 practice, but it wasn't strictly speaking a literal
19 violation of the protocol.

20 JUDGE STEINER: The protocol would
21 allow one person to run two of the tests that would be
22 included in the final result?

23 THE WITNESS: Well, it's not a good
24 practice, but it was consistent with -- it was not a
25 good practice in the way in which it was done.

1 However, the laboratory has a routine practice of
2 individuals performing tests for other individuals.
3 For example, one of the tests we conduct is a contact
4 for marijuana, not metabolites of blood. Not every
5 analyst in the laboratory performs that test. It's
6 assigned to two or three analysts.

7 So every analyst who has a case involving the
8 analysis of marijuana, we would assign them to perform
9 the marijuana test. They include in their case file
10 the information about who performed the test, and
11 there's a certification statement on the report that
12 indicates that that information about who performed
13 each test is available from the laboratory.

14 And that the ability to delegate specific tests to
15 specific individuals is a necessary means to
16 officially run the laboratory. That was Ms. Gordon's
17 justification why she was having Mr. Formoso do that.
18 It was not a literal violation of the protocol, but it
19 was not in spirit.

20 JUDGE STEINER: The protocol
21 requires that at least three different toxicologists
22 run tests?

23 THE WITNESS: Yes.

24 JUDGE STEINER: It would be a
25 violation if a toxicologist ran two or three of the --

1 if you only had three toxicologists and a toxicologist
2 ran two or three of those tests?

3 THE WITNESS: Yes.

4 JUDGE STEINER: And the protocols
5 don't appear to be written to indicate that that is a
6 requirement, that is, three different toxicologists
7 run the tests. You don't have anything in the
8 protocols that indicates there's a variance if there
9 are more than there.

10 In other words, they're written to say three
11 different toxicologists have to perform the tests. If
12 you have 16 perform the test, there isn't any proviso
13 that indicates that if there are more than three,
14 someone else can run the test or a toxicologist can
15 run the test for another?

16 THE WITNESS: That's correct. But
17 the laboratory policy and procedure manual gives
18 discretion to the laboratory manager to deviate from
19 that section and that was Ms. Gordon's --

20 JUDGE STEINER: Which document is
21 that?

22 MR. ANDERSON: You're asking for
23 which protocol?

24 THE WITNESS: Well, there is a
25 statement at the end of each of the protocols --

1 MR. ANDERSON: Headspace GC solution
2 .08 --

3 THE WITNESS: -- that Ms. Gordon
4 interpreted as giving her discretion.

5 JUDGE STEINER: Thank you.

6 THE WITNESS: There's also a
7 separate protocol in the laboratory administration
8 that addresses the administrative procedures in the
9 laboratory that says the same thing.

10 And to be clear, I'm not saying that I agree with
11 her interpretation with that.

12 Q (By Mr. Anderson) To be clear, the protocols require
13 that the results of each analyst be included; correct?

14 A Yes.

15 Q And protocols require that at least three analysts
16 perform analysis of either a QAP or a .08 field
17 solution; correct?

18 A Yes.

19 Q So I'm drawing up protocol 6033. This is a QAP
20 solution. Three analysts test it. Has, to your
21 knowledge, has Ann Marie Gordon within -- at any point
22 after she started delegating the testing to Ed
23 Formoso, did she ever do the testing on the QAP
24 solution?

25 A No.

1 Q In fact --

2 A Her name does not appear on any of the QAP documents
3 since 2003. At least, I haven't looked beyond that.

4 Q In fact, Ron Gullberg and Ken Denton, in fact, checked
5 for that?

6 A Yes, they did.

7 Q And there's been no allegation of other people
8 performing tests for somebody else; correct?

9 A I think Mr. Vosk raised questions yesterday, but other
10 than that, I've never heard that anybody else is doing
11 it.

12 Q And so in this case, given that Ann Marie Gordon
13 didn't sign off on any of these, for each QAP
14 solution, would the protocol that three analysts have
15 been -- test the data been satisfied?

16 A Yes.

17 Q And would the protocol that all the data of the
18 analysts be included in the calculation be satisfied?

19 A Yes.

20 Q I'm looking at 07018. This is a .08 field solution;
21 correct?

22 A Yes.

23 Q And the questions I just asked you were about, did
24 they apply to all types of QAP solutions? The last
25 round of questions about whether or not it satisfied

1 the protocols, those apply to the .04, the .10, the.
2 1 -- .80, 04, 08, and 15 QAP solutions, correct,
3 across the board?

4 A Yes.

5 Q This is the only other type of solution that is
6 relevant to this particular proceeding, correct, the
7 external standard solution?

8 A Yes.

9 Q And now this one, to be clear, that's just
10 representative. It does not look like Ann Marie
11 Gordon actually signed off on any of these results;
12 correct?

13 A Correct.

14 Q Okay. I just want to go into the hypothetical as an
15 example to say she did.

16 A Okay.

17 Q All right. Would there still have been three analysts
18 who tested these results?

19 A Yes.

20 Q And so, therefore, would that protocol have been
21 satisfied?

22 A Yes.

23 Q And would the results of each of the analysts who did
24 testing have been included in this?

25 A Yes.

1 Q Despite -- regardless of whether or not Ed Formoso, in
2 fact, did one set because of delegation and one set
3 under his own name?

4 A Yes.

5 Q To be clear, the protocols just don't address this
6 situation as far as delegation and whether or not that
7 should be excluded?

8 A They did not at the time. They did not at the time,
9 and it was never the intent that it be delegated.

10 Q And to be clear, you're not defending the delegation?

11 A Correct.

12 MR. ANDERSON: Does your Honor have
13 any other questions on that?

14 JUDGE STEINER: I'm sorry. I'm
15 shaking my head. The answer was "no."

16 Q (By Mr. Anderson) You actually went through and had
17 your staff calculate whether or not the means and CV
18 for each of the solutions reviewed on the Web -- to
19 determine whether or not the solutions still met the
20 CV requirements and range requirements, if you did
21 exclude Ann Marie Gordon's data, didn't you?

22 A Yes.

23 Q And what were the results of that?

24 A Every solution that met the .098 to .108 and less than
25 5 percent CV, including tests attributed to her, still

1 met the requirements if those test results were
2 excluded.

3 Q To be clear, for that test we're only talking about
4 the field solutions; correct?

5 A Correct.

6 Q Let's talk for a moment about the certificates. Still
7 on 7018. Here's an example of one of the
8 certificates. Well, are you now familiar with the
9 contents of these certifications?

10 A Yes.

11 Q Did you design or develop the language in the
12 certificates before this all came up?

13 A No.

14 Q Had you ever signed one of these certificates?

15 A No.

16 Q Were these certificates in use when you were actually
17 the hands-on lab manager in the State tox lab?

18 A I'm sure they were.

19 Q But were you involved in testing?

20 A No.

21 Q To be clear, when was the last time you were actually
22 the hands-on lab manager?

23 A In 1999.

24 Q Were you aware they were sworn under penalty of
25 perjury?

1 A Not until I reviewed them after receiving the second
2 tip in July of last year.

3 Q Were you aware that they contained language stating
4 that the person signing had analyzed and tested the
5 solution?

6 A No. I was generally aware that there was some
7 documentation. That there were certificates that
8 accompanied the simulator solutions when they were
9 sent out to the breath test program, but I wasn't
10 aware of the specific contents of them, and I couldn't
11 have told you that they included the value of the
12 solution in there as the breath test section didn't
13 use the value from those documents.

14 I didn't realize that the language that was --
15 used came from a Court Rule. It was just part of the
16 administrative -- my recollection is, part of the
17 administrative process of completing the batch and
18 transferring it to the breath test section.

19 Q Did the protocols require that these be done?

20 A No.

21 Q These were done to be available to parties in court
22 proceedings, if they were actually used -- if the
23 parties wished it; correct?

24 A Yes. And I think my recollection is in the 1990s,
25 they weren't routinely produced. They were only

1 produced at the request of the defense attorney or
2 prosecutor or the Court.

3 At some point in the 1990s, we just began sending
4 them out routinely because it was easier to do it
5 routinely than just respond to requests.

6 Q When you became aware of this, what response did you
7 have? Well, actually, you've already testified about
8 that.

9 You wound up tasking Rod Gullberg and Ken Denton
10 to wind up doing an analysis of the documents
11 available on the Web; correct?

12 A Yes. During the course or following Ms. Gordon's
13 departure, a number of errors came to light that we
14 discussed over the last few days.

15 The fact -- the first thing was the calculation
16 error involving the 14 to 16 analysts. The second
17 thing was, during a defense interview with some of my
18 staff with Ms. Callahan, a defense attorney, she
19 pointed out that some of the certificates -- or that
20 the certification worksheets had dates on them that
21 were in conflict with the date of testing.

22 On review of a selected batch of solution
23 certification worksheets, it was clear that there had
24 been data entry errors. So in recognition, rather
25 than trying to fix them error by error by error, as we

1 identified them, I tasked Rod Gullberg and Ken Denton
2 with doing an extensive audit of each simulator
3 solution batch starting with -- at that time with the
4 most current one and go backwards. I think we've gone
5 back to 2005 and then some as far as back as 2002, and
6 then applying the same review methodology
7 prospectively on every batch that was produced
8 subsequent to that date in September.

9 The purpose of that was to check the integrity of
10 the data to make sure that there had not been
11 transcriptional errors; that the dates on the forms
12 were correctly indicated; that the calculation -- that
13 if there were errors in the calculations, they had
14 been corrected. They had a checklist, which you have
15 on your screen there, that shows the task that was
16 part of their review assessment.

17 Q Why did you choose to do this internally instead of
18 externally?

19 A For speed. We felt it was important to get the
20 corrections out as quickly as possible. I have a huge
21 amount of confidence in Rod Gullberg and Ken Denton to
22 do the review that I asked of them. We contacted a
23 couple of different consultants, but none of them
24 could do it in the same time frame. The other
25 advantage was that they understood the process in the

1 lab and how the lab worked.

2 Q Ultimately, how was the list of items to look at
3 determined?

4 A It was based on a roundtable discussion with myself,
5 Rod Gullberg, Ken Denton. I don't recall who else was
6 involved in it.

7 Q Were they responsible -- so there were a number of
8 things they were responsible for, and we've already
9 gone over a great number of them.

10 Were they tasked with ensuring the accuracy of
11 these certifications?

12 A I don't recall that that was part of the checklist
13 that we -- that we collectively drew up. I don't --

14 Q If they were tasked with it, it would have been on the
15 checklist; correct?

16 A It should have been a checkbox on the checklist if
17 that is part of what they were routinely reviewing.

18 Q To be clear, they did wind up correcting errors on
19 this when they saw them; correct?

20 A Yes. And some of the errors have been referred to in
21 testimony, including the wrong solution values on the
22 certificates. The solution values from the
23 certificates were not used by anybody, by the breath
24 test section, and as far as I know, by the Courts.
25 The values were on the certification worksheet.

1 So the documents that we currently issue as
2 simulator solution affidavits from a Court rule, we
3 removed any of the language about the concentration.
4 Concentration data is on the worksheet. Since that
5 was a source of error, we took it off the affidavits.

6 Q There was some testimony there was only a few analysts
7 who do marijuana testing, and that if another analyst
8 is required to do a run testing, on let's say, an
9 autopsy case, they delegate that duty to the marijuana
10 analyst, who then gives the results back, and the fact
11 of delegation is, in fact, maintained in the
12 documentation so if someone comes in they say,
13 Analyst 1 did the marijuana; Analyst 2 did everything
14 but the marijuana; correct?

15 A Yes, yes.

16 Q Not really an issue at this case -- in this
17 litigation.

18 I do want to talk to you about the concept of
19 adding tests onto somebody else's run. Are you
20 familiar with that?

21 A Yes.

22 Q Currently, is that allowed at the lab?

23 A No.

24 Q Was it a practice at the lab in the past?

25 A It was a practice up until, I believe, about October

1 of this year.

2 Q Okay. Were you aware of that practice?

3 A I became aware of it in October.

4 Q And why did the process -- why did you change the
5 process?

6 A Because the way the gas chromatograph was set up, if
7 Analyst A had started the run and without going into
8 the excruciating detail, they generate on the computer
9 screen a list of all the samples --

10 Q I'm going to ask you to stop there because I actually
11 do need the Court to understand what the process is.
12 But when you change the process -- I'll guess I'll ask
13 the question later after the Court understands it. So
14 we do need to go into the some detail.

15 How many HCGS machines -- how many HSGC machines
16 are in the lab?

17 A There are five.

18 Q This is a machine -- let's pretend that this podium is
19 Machine No. 1. Can you give a general -- so an
20 analyst would need to go analyze some -- or needed to
21 do -- analyze some samples, had a variety of samples
22 to analyze.

23 What types of samples do the analysts analyze?

24 A On that instrument, they analyze blood tissue, various
25 biological fluids, and simulator solutions for

- 1 volatiles, alcohols, other solvents.
- 2 Q On a given day, might an analyst need to do some work
- 3 from an autopsy case, from some drug case, and also
- 4 review some simulator solution samples?
- 5 A Yes.
- 6 Q Are they allowed to do all of those samples on the
- 7 same machine?
- 8 A Each sample has to be tested on -- for biological
- 9 samples, they have to be tested on two different
- 10 instruments.
- 11 Q So if you've got some blood to go test, you'll go do
- 12 it on Machine No. 1, and you'll do the same test on
- 13 Machine No. 2?
- 14 A Yes.
- 15 Q Not a requirement for simulator solutions; correct?
- 16 A No.
- 17 Q All right. So but would it be okay if they had some
- 18 blood samples, some breath samples, and some drug
- 19 samples, to all run it on the same machine?
- 20 A Yes.
- 21 Q All right. And it's commonly done in a run; correct?
- 22 A Yes.
- 23 Q All right. How many vials does a run need to contain
- 24 at minimum, approximately?
- 25 A If you were analyzing one sample, you would need

1 approximately ten vials.

2 Q Okay. What are those other vials about?

3 A They would be calibrators where you're basically

4 telling the instrument what kind of response to expect

5 at known levels of different alcohol concentration.

6 You -- we -- we test mixtures of different

7 alcohols to be ensure that ethanol is being separated

8 and properly identified relative to methanol and

9 propanol, acetone, and propanol. So there are two

10 different mixtures that are tested --

11 Q And, actually, just not to go into too many details,

12 is it a fair assessment to say there are a number of

13 vials, apparently nine vials, that are required to

14 calibrate the machine and to serve as a set of

15 controls and to make sure that the machine is accurate

16 and working properly?

17 A Yes.

18 Q And then after that, you can tag on a number of

19 different other vials; correct?

20 A Yes.

21 Q You can do a run of two blood samples from some

22 autopsy. You can do a run of some meth -- suspected

23 meth from some drug case, and you can do a run of five

24 solution samples from some field solution, let's say?

25 A Well, you could don't meth. It would all be alcohol.

- 1 Q Okay. Not meth but --
- 2 A You could be doing DUI cases, or autopsy cases, yes.
- 3 Q And so sometimes these runs would have, like, 60
- 4 some-odd different samples on them; correct?
- 5 A Yes. That -- I -- I believe the instrument, at a
- 6 maximum, would hold 72 vials.
- 7 Q Now, the process of testing refers not only to
- 8 actually putting the machines in the -- putting the
- 9 vials in the instrument. What else does it include?
- 10 A The -- it includes the aliquotting out of the specific
- 11 simulator standard that is to be tested and mixing
- 12 that with what's called an "internal standard" and
- 13 transferring that into a glass vial which is then
- 14 sealed with a rubber cam.
- 15 Q And there's actually analysis after the instrument
- 16 does its test on it; is that correct?
- 17 A I beg your pardon?
- 18 Q There's actually analysis done after the instrument
- 19 does it test; correct?
- 20 A There's -- I'm not sure --
- 21 Q Analysis of the chromatograms.
- 22 A Yes. There's a review of the chromatographs -- of the
- 23 chromatograms after the test has been completed, yes.
- 24 Q The protocols actually require that the analysts do
- 25 things such as, look to see if the internal standard

1 is correct, determine whether or not there's a
2 shoulder in the data to determine whether or not
3 there's been some type of contamination; correct?

4 A Yes.

5 Q The testing is not complete until those are done;
6 correct?

7 A Yes.

8 Q So if Analyst No. 1 was doing a run on Instrument
9 No. 1, and they did -- first they did the controls,
10 and then they set the other vials. In fact, there
11 were times when another analyst who had actually
12 aliquotted their vials and who would later do the
13 actual analysis would say, "Can I put these particular
14 vials onto your run"; isn't that correct?

15 A Yes.

16 Q Is that what you're referring to when you're talking
17 about Melissa Pemberton and Ed Formoso and the batch
18 that the defense asked you about?

19 A Yes.

20 Q Was there ever any allegation that Melissa Pemberton
21 was actually -- or were you ever -- did you ever have
22 any concern, or did you ever determine that Melissa
23 Pemberton was aliquotting the vials for Ed Formoso who
24 had been delegated the authority from Ann Marie
25 Gordon?

1 A No.

2 Q Did you ever become aware of any contention that
3 Melissa Pemberton was analyzing the chromatograms
4 after the fact for Ed Formoso who was supposed to have
5 been delegated from Ann Marie Gordon?

6 A No.

7 Q It was simple matter of "Can I put these vials onto
8 your run?"

9 A Yes.

10 Q Saves the other analysts the time of actually running
11 the controls and the calibration?

12 A Yes.

13 Q Would that analyst still be responsible for reviewing
14 those controls and those calibrations to make sure
15 that they were accurate?

16 A Yes.

17 Q Now, this was actually done at the lab; correct?

18 A It was done on a routine basis, and the protocol
19 allowed for that.

20 Q Why did you stop that?

21 A Because the -- if you are Analyst B who added your
22 five vials plus the control and blank to the end of
23 Analyst A's run, when the printouts come out of the
24 instrument, it would say, even though you were Analyst
25 B and you had done all the work on those samples, it

1 would still say Analyst A, and then above it would
2 say, you know, simulator solution for Analyst B.

3 So it created the impression -- it would appear
4 exactly the same way as Ed Formoso testing solutions
5 for Ann Marie Gordon. So it would be misleading.

6 And that's just the way that particular instrument
7 is setup. The person who starts the run, is the
8 operator, and that is printed on every sheet that
9 subsequently comes out.

10 So to avoid that confusion or to avoid allegations
11 of one person testing for another, I changed the
12 protocol in mid-December to require each analyst to --
13 not to put their samples on other people's runs so
14 that every simulator solution after -- I don't
15 remember the date -- sometime in September, October,
16 each sheet of their simulator results will reflect
17 they set up the controls, the calibrators, and did
18 every step in the process.

19 Q Is it fair to say you didn't want the documentation --
20 you changed it because you didn't want the
21 documentation to create a misleading impression?

22 A Yes.

23 Q Was there a scientific reason that you changed it? Do
24 you believe that the practice was scientifically wrong
25 or would result in erroneous results?

1 A No. In fact, if we can find a way to find have the
2 instrument manufactured to put the actual analyst's
3 name on the report, we would go back to our prior
4 practice because it's a lot more timesaving and
5 efficient.

6 Q We were talking about your response to the discovery
7 of issues at the tox lab. ABFT is your current
8 accrediting agency; correct?

9 A Yes.

10 Q Did you inform them of that? How, if so?

11 A On the day Ms. Gordon resigned, I informed them of the
12 fact that she resigned and the reason for her
13 resignation and allegations that were pending at the
14 time.

15 Q Did you wind up -- were there external audits
16 conducted?

17 A Yes.

18 Q Can you describe -- can you just give an overview of
19 the audits that were conducted, why they occurred, and
20 when?

21 A There were -- there were three audits that were
22 conducted, all for different reasons. The first one
23 that was conducted in August was an audit of sample
24 storage and evidence storage practices, whether those
25 were in compliance with WSP policies and procedures.

1 Q I'm sorry. That was when?

2 A That was in August.

3 Q Hang on one moment. August you said?

4 A Yes.

5 Q What was the purpose?

6 A It was to determine whether the tox lab's evidence
7 handling policies was in compliance with WSP policy
8 and procedures.

9 Just for clarity, the audit was external to the
10 laboratory. It was done by the Washington State
11 Patrol Risk Division. It was internal to WSP.

12 Q Internal to WSP, external to the laboratory?

13 A Yes.

14 Q Did you receive a report on that?

15 A Yes.

16 Q And did you wind up responding to that report?

17 A Yes.

18 Q Can you describe in general how does that work?

19 A The audit report made a series of findings and
20 recommendations to bring the laboratory into
21 compliance with WSP accreditation policies.

22 The Washington State Patrol is accredited by yet
23 another body, CALEA, Commission on Accreditation of
24 Law Enforcement Agencies. So that's another standard
25 that the agency needs to comply with. It's not a

1 forensic accrediting standard. It's a law enforcement
2 agency standard.

3 So the audit was conducted to see whether the tox
4 lab's policies were in compliance with the CALEA
5 policies.

6 Q How do you -- and it comes out essentially with a
7 series of recommendations; correct?

8 A Yes.

9 Q Did you respond to those recommendations?

10 A Yes.

11 Q And did they comment on your response?

12 A Yes.

13 Q What were the findings with regard to your response --
14 with regard to the accuracy of your response?

15 A That where we had completed implementation of changes
16 that were necessary to address the concern, the
17 response was deemed acceptable.

18 In other cases where the process would take
19 longer, like having new software written, a new
20 evidence management system, a computer management
21 system for handling evidence, that when these are
22 fully implemented, we will be fully in compliance.

23 Q And when you're referring to "August," is that the
24 date of the report? Is that the time the
25 investigation was done?

1 A That was the date of audit. It's on the front cover.
2 It was August 7th or 10th or something.

3 Q What was the second one?

4 A The second one was the ASCLD audit of the breath test
5 or the simulator solution policies and procedures.

6 Q Approximately when was that?

7 A It was in October.

8 Q October.

9 A No sorry. It was in September.

10 Q ASCLD?

11 A A-S-C-L-D.

12 Q A-S-C-L-D. I'm sorry. The purpose was to now
13 analyze?

14 A Well, I don't remember verbatim what the scope that
15 was written in the contract was, but it was to review
16 our policies and procedures for preparing and testing
17 of simulator solutions, to review the documentation
18 that we maintained, and to review the assessment of
19 impact of the calculation errors which I had posted to
20 the WSP Web site to determine if this was an
21 appropriate consideration or assessment of the
22 consequences of the error.

23 Q So to review your policies and procedures for testing
24 solutions; correct?

25 A Yes.

1 Q It was also what?

2 A To review the analysis that I had performed about the
3 impact of the .001 calibration error, and whether that
4 was an appropriate assessment.

5 Q Did it develop recommendations for the -- based on
6 review of policy and procedures?

7 A Yes.

8 Q And have you responded to those?

9 A Yes.

10 Q And have they evaluated your response?

11 A Yes.

12 Q And what did they found regarding your response?

13 A They've determined that when the responses are fully
14 implemented that they will -- that they are
15 acceptable. And as with the other audit, some of the
16 things could be changed immediately. Other things
17 will take longer to implement.

18 Q With regard to review of your analysis with regard to
19 the .001 error, to be clear, we are talking about the
20 Spokane error; correct?

21 A Yes.

22 Q We're not talking about the 2019 error because we were
23 not aware of it; correct?

24 A Yes.

25 Q What did they conclude with regard to your analysis of

1 the .001 error?

2 A They agreed with it.

3 Q What was the third audit? Approximately when did it
4 occur?

5 A That occurred on October 25th and 26th, and that was
6 Data Quality Audit by ABFT.

7 Q What was the purpose of that audit?

8 A It was to review the -- well, the laboratory had been
9 inspected and reaccredited in May of 2007 by ABFT,
10 during which time, files were reviewed. I requested
11 that they perform a more extensive review of files
12 that had been signed by Ann Marie Gordon to ensure
13 that they had been properly reviewed and accurately
14 reflected the results of the test and that the
15 laboratory was in compliance with its own policies and
16 procedures.

17 Q So to ensure proper response to the Ann Marie Gordon
18 documentation issue?

19 A Yes.

20 Q Did you receive the results of that audit?

21 A Yes.

22 Q What did that audit conclude with regard to your
23 answer to the AMG documentation issue?

24 A It concluded that Ms. Gordon's review of the cases had
25 been of high quality. They identified specific errors

1 in three of the 300 cases they reviewed, and they
2 identified another ten cases where there were -- they
3 identified as potential differences of opinion, but
4 not errors.

5 Q Now, to be clear, was this primarily regarding the
6 simulator solution, or was much of their review
7 regarding another area?

8 A It was to do with everything except simulator
9 solutions. So it was the drug testing, the poison
10 testing, the biological, alcohol testing, but not
11 simulator solutions.

12 Q So the Court understands whether this does or does not
13 apply to the specific issues of this case: Ann Marie
14 Gordon is in her responsibility manager -- as manager
15 would review the testing of individual analysts before
16 the report would be finished; correct?

17 A Yes.

18 Q And that was with -- in regard to drug cases, blood
19 cases, things like that; right?

20 A Yes.

21 Q And they went to go look: "Was she doing a good job
22 of reviewing that? Was she, in fact, reviewing that?"

23 A Yes.

24 Q They found essentially some errors, but would you
25 characterize the errors they did find, for the Court?

1 A Well, of the three things they identified as errors
2 two, in fact, were errors. One was not. The
3 review -- the auditors misunderstood what they had
4 been looking at.

5 In the two cases that were errors, one was --
6 involved the concentration of drugs in a postmortem
7 decomposed liver sample which were reported as
8 milligrams per kilogram which should have been
9 reported as grams per kilogram.

10 Q She missed those types -- two of those types of
11 errors?

12 A Yes.

13 Q Was there any conclusion by them that she had been, in
14 fact, just not doing review?

15 A No.

16 MR. ANDERSON: This might be a good
17 point to stop.

18 JUDGE STEINER: Well, we're going to
19 have IT come and switch out our court reporter and our
20 clerk. I'm not sure how long it will take. I would
21 rather wait until IT gets here.

22 MR. ANDERSON: Fair enough. I can
23 proceed.

24 Q (By Mr. Anderson) To be clear, is ABFT, your
25 accrediting agency, aware of the issues that had been

1 brought up?

2 A Yes.

3 Q And who informed them of that?

4 A I did.

5 Q There was testimony -- do you recall testimony with
6 regard to Asa Louis's testing of a particular
7 solution?

8 JUDGE PHILLIPSON: Before we take
9 off on this stretch, I have a question. Can I
10 interrupt. This is a different -- you started to
11 change where you're going and --

12 JUDGE STEINER: IT is here.

13 JUDGE PHILLIPSON: IT is here so
14 we're going recess.

15 THE CLERK: Please rise.

16 (Recess.)

17 JUDGE STEINER: We'll go back on the
18 record, and Judge Phillipson had a question for the
19 witness.

20 JUDGE PHILLIPSON: The prosecutor
21 moved on, and I didn't get to ask a question at the
22 proper time, so I've got to take you back a few
23 ratchets.

24 You were discussing the certification that Ann
25 Marie Gordon signed and your knowledge of that

1 certification and that sort of thing prior to this
2 matter blowing up in July or whenever.

3 I am positive, almost dead certain, that in 2007,
4 the first part of the year, Ann Marie Gordon took the
5 stand in my courtroom and testified that she had
6 performed the tests to a direct question: "How do you
7 know these tests are correct?" And she said, "Because
8 I did the tests."

9 Does that change any of your responses? I got the
10 impression that all of your responses were based on
11 signing of these pieces of paper rather than
12 testimony. Maybe it doesn't change, but I want to
13 know if it does.

14 THE WITNESS: I have not heard of
15 any case in which she got on the stand and test --
16 this is the first time I've heard of any case in which
17 she's alleged to have gotten on the stand and
18 testified that she did perform the test that she did
19 not perform. So does that change my responses to
20 which questions?

21 JUDGE PHILLIPSON: Well, any of the
22 questions, really, that the prosecutor was putting to
23 you that the alleged perjury, that the statements made
24 were not written but rather were oral, under oath in a
25 court, and a judge and jury, presumably, and the

1 parties there were relying on that testimony.

2 THE WITNESS: I'm still not sure I
3 understand the question. I don't think it changes
4 anything with respect to the records, but it certainly
5 changes the nature of her behavior from my
6 understanding of her behavior and --

7 JUDGE PHILLIPSON: I guess the
8 question, to be more specific, is that you were
9 testifying that you left that data in because there
10 was nothing wrong with the data. It was with the
11 certification process.

12 THE WITNESS: Yes.

13 JUDGE PHILLIPSON: Does that change
14 any of that?

15 THE WITNESS: It changes my opinion
16 of her, but I don't know that it changes anything with
17 respect to the data because I wasn't relying on her --
18 any information from her in reviewing the data in the
19 file.

20 JUDGE PHILLIPSON: Thank you.

21 MR. ANDERSON: And to be clear,
22 while Ann Marie Gordon, I know, has testified about
23 procedures in the lab, if she testified that she
24 tested a sample, the State would concede that that
25 would be a new trial in that case. This was material

1 testimony that was perjured. There's no doubt about
2 that from the State's point of view.

3 JUDGE PHILLIPSON: Well, I think
4 it's pretty easy to identify which trial that was.
5 You're the supervisor out there, and we had only X
6 number that and only one of them did she actually
7 testify in.

8 MR. ANDERSON: This was a jury
9 trial?

10 JUDGE PHILLIPSON: I'm sure I know
11 which one it was.

12 MR. ANDERSON: I would love to get
13 that information afterwards.

14 JUDGE PHILLIPSON: The only thing
15 that there's any doubt in my mind about was my memory
16 that the question put to her was: "How do you know
17 these tests are done correctly?" And her response was
18 because -- or "How do you know the solution values
19 were correct," or something to that effect. Her
20 response was: "Because I tested them."

21 MR. ANDERSON: Do you have the name
22 of that defendant?

23 JUDGE PHILLIPSON: Not off the top
24 of my head.

25 MR. ANDERSON: Because it's a matter

1 of great concern to the State, we would love to find
2 that out as soon as possible.

3 JUDGE PHILLIPSON: Until I got here
4 was the first time I was aware that nobody was aware,
5 until he said -- until there was a statement that, you
6 know, she never testified to that.

7 MR. ANDERSON: Do you know who the
8 deputy was or when it happened?

9 JUDGE PHILLIPSON: I'm going to
10 be -- I believe it was Relyea, R-E-L-Y-E-A, I think is
11 the spelling.

12 Matt, you and I will have to go back and look.
13 You and I work on all these cases together, so I'm
14 sure we'll be able to locate it.

15 MR. ANDERSON: Do you know what
16 approximate month it was?

17 JUDGE PHILLIPSON: I'm going to say
18 April or May, June at the latest.

19 MR. ANDERSON: Can you mark these?

20 (Exhibits marked.)

21 MS. ROBERTSON: Your Honor, could I
22 inquire, is it possible that trial took place in
23 February?

24 JUDGE PHILLIPSON: Possible.

25 MS. ROBERTSON: Because Ms. Gordon

1 has a trial listed in her calendar for February 13 in
2 King County.

3 JUDGE STEINER: It's possible. I
4 didn't go to Burien until last January 1st, and I know
5 it happened prior to the disclosure, and I remember at
6 the time of reading the first newspaper article saying
7 she testified to me -- that in front of me. And it
8 was only a month or so before that. So I can pinpoint
9 it to the extent of six months and maybe a little
10 closer.

11 MS. ROBERTSON: Okay. Okay.

12 THE WITNESS: And your Honor, in all
13 of these proceedings since they began in August,
14 nobody has come forward and identified a trial at
15 which she testified that she had --- regarding
16 simulator solutions.

17 JUDGE PHILLIPSON: I was not aware
18 of that until I got here in these hearings.

19 MR. ANDERSON: Madam clerk, is there
20 a 117?

21 THE CLERK: Yes.

22 MR. ANDERSON: It's the CV.

23 Q (By Mr. Anderson) I'd like to identify these
24 particular exhibits or -- by the exhibit number. Can
25 you take a look at Plaintiff's Exhibit 118.

1 Which of these -- which of the audits is this one?

2 A This is the toxicology lab evidence audit.

3 Q That is the August one?

4 A That is the August one, yes.

5 Q What does the date say on the outside of it?

6 A September 4th, 2007.

7 Q Why is the date different than what you earlier
8 testified to?

9 A The audit was conducted August 6th and 15th, and the
10 report was issued September 4th.

11 Q Okay. Showing you what's been marked State's
12 Exhibit 119.

13 JUDGE PHILLIPSON: You've got 119 up
14 there. Shouldn't that be 118?

15 MR. ANDERSON: Thank you.

16 Q (By Mr. Anderson) Showing you what's been marked
17 State's Exhibit 118 -- excuse me, 119, which audit is
18 that?

19 A That is Audit No. 3, Exhibit No. 119.

20 Q And the date on that is October 24th through the 26th?

21 A Yes.

22 Q That's 119; right?

23 A Yes.

24 Q I'm showing you Defendant's Exhibit 116. What is
25 that?

1 A That is Audit No. 2.

2 Q Okay.

3 A No. This is also Audit No. 1 without my responses.

4 Q It's number what? 116?

5 A Yes.

6 Q Number 116 is without responses. Okay.

7 A Yes.

8 Q And 69, which is that?

9 A That is Audit No. 2.

10 Q Does that have your responses in it?

11 A Yes, it does.

12 MR. ANDERSON: Madam Clerk, I would

13 ask for a sticker to identify this.

14 THE CLERK: That would be 120.

15 (Exhibit marked.)

16 Q (By Mr. Anderson) Showing you what's been marked

17 State's Exhibit 120. It's a summary of the audits and

18 their correlations to the exhibit numbers.

19 Does it appear to you to be correct?

20 A Yes.

21 MR. ANDERSON: The State offers,

22 118, No. 69, 119 --

23 JUDGE STEINER: 69 has already been

24 admitted.

25 MR. ANDERSON: Thank you. And 120

1 to the extent they've not been admitted.

2 (Exhibit offered.)

3 JUDGE STEINER: 118, 119 or not 119?

4 MR. ANDERSON: 119. 119 and 120.

5 MR. VOSK: Matt, did you include our
6 partial in that?

7 MR. ANDERSON: I did not.

8 MR. VOSK: Which one does it
9 correspond to?

10 MR. ANDERSON: 116 is the partial,
11 and I did not offer that one.

12 MR. VOSK: And which one is the one
13 you put in place of it?

14 MR. ANDERSON: 118, the full.

15 MR. VOSK: Your Honor, we would have
16 no objection to that as long as Defense Exhibit 116
17 would be admitted at the same time.

18 116 was the audit which I was going to discuss
19 with the witness yesterday, and he requested the
20 evening so that he could go to retrieve his responses.
21 My understanding is it's supposed to be the audit plus
22 the responses.

23 I have no reason to believe that the State would
24 put in something different on purpose. I just haven't
25 had a chance to compare the two documents. I have no

1 problem with these coming in as long as Exhibit 116
2 comes as well in case there's a discrepancy later.

3 (Exhibit offered.)

4 JUDGE STEINER: My understanding is
5 116 is the audit without responses.

6 MR. VOSK: It's the audit itself.

7 JUDGE STEINER: Right.

8 MR. VOSK: The responses are
9 separate.

10 MR. ANDERSON: I think the defense
11 concern is brought up by having it marked. And if
12 there is a difference, we can determine whether or not
13 admission is actually required at that point, but I
14 think that the complete audits should be the ones --
15 the audit and responses should be the ones that are
16 admitted.

17 MR. VOSK: With all due respect to
18 the State, your Honor, what it thinks is complete, the
19 audit itself is a complete standalone document. The
20 responses are separate and come later and are by
21 themselves.

22 Now, I if we want to fight whether or not those
23 come in separately, we can. I don't know what to do.
24 All I'm asking is both of those come in so that if
25 there is a discrepancy later -- I mean, this is what

1 we tried to get in yesterday, and the State objected.
2 I'm not objecting as long as they both come in.

3 JUDGE STEINER: I'm going to deal
4 with 118, 119, and 120 first, and then I think just to
5 keep things clear, if you have any objections, we'll
6 go and deal with 116 right after.

7 MR. ANDERSON: However the Court
8 wants to proceed.

9 JUDGE STEINER: I'm going to --
10 anything further on 118, 119, and 120?

11 MR. VOSK: Other than what I've just
12 said, no.

13 JUDGE STEINER: They'll be admitted.

14 (Exhibit admitted.)

15 JUDGE STEINER: The defense is
16 moving to admit 116. Any objection from the State?

17 MR. ANDERSON: I believe it to be --

18 JUDGE STEINER: What's that?

19 MR. ANDERSON: I understand it to be
20 a complete copy of the audit. I believe that the
21 audit should be read together with responses and that
22 provides a completed copy. The State would object on
23 that fact, but it's obviously up to the Court.

24 JUDGE STEINER: Is Exhibit 118 audit
25 with responses?

1 MR. ANDERSON: 118 is with responses
2 and 116 is without. And certainly we're in a
3 different ball game.

4 MR. VOSK: It would be redundant,
5 your Honors, I just have not had a chance to look at
6 the document --

7 JUDGE STEINER: Do you have it?
8 Where is 118? Do you still have -- we'll let you take
9 a look at them. You let us know if you think --

10 MR. VOSK: I'm going to have to read
11 them in their entirety. It would seem quicker and
12 easier to just admit them both. I'm really not trying
13 to be difficult --

14 JUDGE STEINER: May I see them?

15 MR. VOSK: I'm trying to understand
16 why we got an objection to its admissibility
17 yesterday.

18 JUDGE STEINER: May I see 116?

19 MR. VOSK: At this point, your
20 Honor, I'm going to defer to your judgment. I'm not
21 going to make any further argument.

22 JUDGE STEINER: It's not big. I'm
23 going to decline to admit Exhibit 116. And again,
24 since it's only about 12 pages, I'll just let the
25 defense look through, and if you think something is

1 missing -- you should look through.

2 You may proceed.

3 Q (By Mr. Anderson) Testimony regarding Asa Louis's
4 batch, that was Batch 5012.

5 To be clear, the solution originally -- there was
6 some testimony with regard to whether or not the --
7 whether or not the control should properly read .099,
8 .100, or whether or not there was a control done on
9 this batch at all.

10 Do you recall that testimony?

11 A Yes.

12 MR. VOSK: Matt, which one is this?

13 MR. ANDERSON: 5012.

14 MR. VOSK: Was this testified to?

15 MR. ANDERSON: Yes. This is Asa

16 Louis's --

17 MR. VOSK: Okay. Good enough.

18 Q (By Mr. Anderson) What do the protocols require with
19 regard to these control batches? First of all, are
20 they used in the calculation -- are controls used in
21 the calculations of any of these statistics?

22 A No.

23 Q What are controls used for?

24 A They're to ensure the proper operation of the
25 instrument and the reliability of the results

- 1 obtained.
- 2 Q Okay.
- 3 A The control is a ethanol/water solution that we
4 purchased from an independent vendor who certifies as
5 containing a certain amount of alcohol. We set our
6 procedures up and we test that before we test any of
7 our samples or solutions. And it gives external
8 validation to our calibration, our instrumentation,
9 our procedures.
- 10 Q What do the protocols require specifically when they
11 happen and what documentation should occur?
- 12 A They require that a control is injected at least every
13 ten -- at least every tenth injection in the
14 instrument as a control.
- 15 Q So if you've got 60 some-odd vials, once every ten,
16 there's got to be an injection of a control?
- 17 A Yes.
- 18 Q And that makes sure it's still reading correctly on
19 the control?
- 20 A Yes. So that -- because the run could run for an hour
21 and a half or two hours and checks that the instrument
22 maintains its calibration during the course of the
23 run.
- 24 Q Is it required that a control be included on this
25 sheet in the protocols?

1 A I don't recall. It would be a problem if it was not.

2 Q Why would it be a problem?

3 A Because there's no external validation of the
4 analyst's results recorded.

5 Q Are you familiar with the phrase "contemporaneous
6 control"?

7 A Yes.

8 Q What does that phrase mean?

9 A It means proximate to the time of the sample -- of the
10 analysis of the sample in question, within the same
11 run.

12 Q Within the same run. Does it mean the closest control
13 to that particular vial?

14 A Generally, that's how it would be interpreted, yes.

15 Q Is a control done at the beginning of the run, a
16 contemporaneous control?

17 A Yes. Yes, it is.

18 Q And as far -- so as far as the protocols, do the
19 protocols require that the control that is listed to
20 be the one closest in time or the one later in time?

21 A It doesn't require -- it doesn't specify. It doesn't
22 require either one specifically.

23 Q I'm going to take a look -- go through with the
24 documentation of these controls.

25 We're looking at the first -- the first vial here

1 by Asa Louis in Exhibit 5012. At the top that reads
2 "A5012A," the second one reads "A5012B."

3 Are these the first, second, third, fourth, and
4 fifth simulator controls for this solution?

5 A They're the simulator aliquots that Mr. Louis tested,
6 yes.

7 Q To be clear, this is an actual QAP solution; correct?

8 A Yes.

9 Q At a .08 level?

10 A Yes.

11 Q At the first one in the document reads at 9:40:10;
12 correct?

13 A The time of analysis was March 21st, 2005 at
14 9:40:10 a.m.

15 Q And if you need to stand up...

16 A That's fine. I can see.

17 Q Okay. So 5012B is when?

18 A Same date, 9:43:22 a.m.

19 Q Three minutes later and he ran the second sample?

20 A Yes.

21 Q Third sample, 5012C, is what time?

22 A 9:46:32 a.m.

23 Q Fourth sample, 5012D, what time?

24 A 9:49:39 a.m.

25 Q 5012E, the fifth sample?

1 A 9:52:55 a.m.

2 Q The next one is labeled ".10 CON." What does that
3 refer to?

4 A That would be the .10 control.

5 Q This is the one that Asa Louis crossed out after Rod's
6 review; correct?

7 A Yes.

8 Q And to be clear, the value on this is .100; right?

9 A Yes.

10 Q Going back up to the summary worksheet.

11 A Did I -- did I -- I don't recall the time on that.

12 Q Okay. We'll go back to that. Looking at the summary
13 worksheet, he originally put .099; correct?

14 A Yes.

15 Q Rod wrote down seeing a .100 control in there;
16 correct?

17 A Yes.

18 Q So the 5012D and then the first control -- sorry. The
19 5012E, fifth one, .10 control, 9:56, shortly after the
20 last series; correct?

21 A Yes. All the tests are about three minutes apart,
22 which is the cycle time for the instrument.

23 Q This was a .100, Asa initially put down a .99;
24 correct?

25 A Yes.

1 Q This appears to be the one Rod likely believed was the
2 closest time control; correct?

3 A Yes.

4 Q And the one that he apparently saw. The next one is
5 .10 CON A-1. What time is that?

6 A 9:14:33 a.m.

7 Q What is the likely relationship of this control to the
8 five samples of the solution?

9 A Well this is Vial No. 7, so it was at the beginning of
10 the run when the instrument calibrated. So it was
11 probably the first control in that run.

12 Q So to be clear, is this a contemporaneous control?

13 A Yes.

14 Q Is the last one we discussed a contemporaneous
15 control?

16 A Yes.

17 Q And then it goes into Ed Formoso's?

18 A Yes.

19 Q Do you see any evidence in there that there was not an
20 appropriate control recorded for this batch?

21 A No.

22 Q Does the protocol say you need to use -- or does the
23 protocol indicate which of the controls used on a run,
24 which of those contemporaneous controls are documented
25 on the batch?

1 A No.

2 MR. ANDERSON: Could you please mark
3 this?

4 (Exhibit marked.)

5 Q (By Mr. Anderson) Showing you what's been marked
6 Plaintiff's Exhibit 121, what is this?

7 A This is a chart that I prepared for you earlier this
8 week assessing the effect of applying different bias
9 calculations to a subject test based on an instrument
10 which had been calibrated with this -- or which had
11 been QAP'd with this .08 solution.

12 MR. ANDERSON: Your Honor, the State
13 has three courtesy copies of this. With the Court's
14 permission, I'll hand it forward.

15 JUDGE STEINER: Yes.

16 Q (By Mr. Anderson) Can you take us through your
17 analysis of this? I'm going to bring it up on the...

18 MR. VOSK: Your Honors, I'm going to
19 object at this point. I had originally thought this
20 was a document prepared by Mr. Polissar, and I wasn't
21 going to object.

22 When I was speaking to Dr. Logan as a witness
23 beforehand, he indicated to me that he would be doing
24 no calculations here at this hearing. When I inquired
25 as to whether I could have him do some for me, he said

1 he wasn't going to be doing any calculations. So this
2 is something completely new to me.

3 If this is something coming from Mr. Polissar,
4 that's one thing. I didn't go into any of this with
5 Dr. Logan because he specifically told me he was not
6 going to be doing any because in an earlier hearing,
7 he had indicated he was not an expert in statistics
8 and mathematics and stuff. I've had conversations
9 with the witness myself, and I've got to object on
10 those grounds.

11 MR. ANDERSON: To be clear, these
12 are not really statistics, and -- but if Counsel needs
13 to be able to interview the witness beforehand, I
14 would be happy to defer this discussion until he gets
15 a chance to do so.

16 MR. VOSK: I guess my objection
17 would still stand as we should just exclude this
18 altogether, because if I had had the opportunity to go
19 through these things with Dr. Logan before these
20 hearings began, I could have had him do some of these
21 analyses for me.

22 MR. ANDERSON: I guess I'd just
23 inquire, these were done very recently at request for
24 me. I don't know if the conversation happened before.

25 JUDGE STEINER: I'm not sure what to

1 do with the statement that Dr. Logan said he would not
2 be doing any analysis. You could have --

3 MR. VOSK: Calculations. He said --

4 JUDGE STEINER: Calculations. You
5 could have asked him on the stand to do a calculation.

6 MR. VOSK: But I asked him during
7 our phone conversation whether he felt comfortable
8 doing those. He said, no. He had testified in
9 Arnston when we had Gullberg there as well, and we
10 were doing a lot of calculations, he said he was not
11 expert in these type of things. So when I spoke to
12 him, my question to him was in the nature --

13 JUDGE STEINER: I'll allow you to
14 voir dire the witness, but -- and I'm not going to
15 rule on the objection at this point. Based upon what
16 you've said thus far, I'm not going to sustain the
17 objection.

18 MR. VOSK: I'll just save voir dire
19 for cross-examination.

20 JUDGE STEINER: All right.

21 MR. VOSK: But I would keep my
22 objection.

23 JUDGE STEINER: Sure.

24 Q (By Mr. Anderson) Do you recall some calculations the
25 Counsel asked Mr. Gullberg to do, I think on the stand

1 but I'm not positive about that, indicating that under
2 one circumstance, the weighted mean or -- I'm sorry
3 the two breath samples of a particular ticket were to
4 fall outside the plus or minus 10 percent of the mean?

5 A Yes.

6 Q What were those two original samples on the involved
7 ticket?

8 A The breath test ticket that you asked me to look at
9 had the printout results as shown in the first column,
10 which said, "As reported, no bias adjustment .139,
11 .144 -- 114."

12 Q And this was for Instrument 140035, which is up at the
13 top; correct?

14 A Yes.

15 Q Just so we know what we're doing. What was the
16 first -- did those results fall within 10 percent of
17 the mean?

18 A Yes.

19 Q Okay. What was the first calculation you performed?

20 A The first calculation was adjusting for bias using the
21 .08 QAP. So looking at the amount of bias from
22 accuracy calculation on the QAP document, it showed a
23 positive bias of .88 percent.

24 Q Now, would that necessarily be the one you would
25 necessarily use?

1 A Well, I testified earlier that there are a number of
2 different ways to do bias calculations or handle
3 different error calculations.

4 MR. VOSK: Your Honor, I'm going to
5 object and ask for the opportunity to voir dire at
6 this point.

7 JUDGE STEINER: Concerning?

8 MR. VOSK: What we're getting into
9 now. If he's now going to be talking about
10 calculations to do with bias and everything else,
11 these are statistical calculations and these are
12 things -- the type of things he indicated in Arnston
13 -- he said explicitly he was not an expert in.

14 MR. ANDERSON: And I can ask more
15 specific questions. I would obviate the need for
16 that.

17 JUDGE STEINER: I'm going back and
18 forth because I offered you the opportunity to voir
19 dire before, really on this very issue and now you've
20 decided to take me up on it.

21 MR. VOSK: The only reason is
22 because -- I'm trying not to be obstreperous. I
23 wanted to see where it was going, and if it didn't get
24 into offensive material, I saw no reason to waste the
25 Court's time.

1 JUDGE STEINER: I don't see this
2 as -- you have in front of you what is being
3 discussed. I'm not sure there's anything new. I'm
4 going to decline the request, but I am going to ask
5 that you ask some specific questions as to Dr. Logan's
6 ability to make these calculations.

7 MR. VOSK: Thank you, your Honor.

8 Q (By Mr. Anderson) There's a judgment involved in
9 determining which QAP solution to -- or which solution
10 to use to determine the analytic error or the bias of
11 an instrument; correct?

12 A Yes.

13 Q Are your calculations here -- and Rod Gullberg is
14 certainly qualified to offer opinions on that;
15 correct?

16 A Yes.

17 Q What I'm asking you -- what I'm going to be asking you
18 about is how these -- how particular court
19 calculations would actually turn out as opposed to
20 judging which one is the most appropriate at this
21 point.

22 Do you understand that?

23 A Yes.

24 Q Are you qualified -- do you know how to adjust for
25 bias assuming that you would use the .08 QAP?

1 A I believe I'm qualified to do that. It's not a
2 calculation that I have typically done in the past. I
3 performed it at your request based on the formula that
4 Trooper Denton wrote on the board during his
5 testimony.

6 Q At this point, I'm going to ask you about the results
7 of those particular calculations that you performed.

8 JUDGE STEINER: Are you renewing
9 your objection?

10 MR. VOSK: And I -- yes, your Honor.
11 And I want to add to that, I still -- your Honor
12 wanted him to lay basis for knowledge. I still
13 haven't heard it. Ken Denton admitted on the stand
14 that he was neither a statistician or a
15 mathematician --

16 JUDGE STEINER: I'm not satisfied at
17 this point. I don't know if the defense wants to let
18 it go or voir dire. I would allow you to voir dire,
19 if you wish.

20 MR. ANDERSON: The witness has
21 indicated that he does know how to calculate for bias.
22 And I'm not at the point -- at this point asking him
23 to judge which one is appropriate. I can certainly
24 have him demonstrate to the Court how he does, but he
25 has indicated that he does have the training to do

1 that. I mean, I can have him --

2 JUDGE STEINER: His answer was that
3 his calculations were based upon a formula that
4 another witness had produced here in court, which
5 doesn't give me a lot of confidence in his expertise
6 in this area.

7 MR. ANDERSON: And what I'm trying
8 to display for the Court are various calculations of
9 that formula. He knows how to calculate the formula.
10 Let me go further afield.

11 JUDGE STEINER: Again, I said I
12 would give the defense the opportunity to voir dire.
13 Do you want to do that?

14 MR. VOSK: I'm happy to let the
15 State lay foundation, and I will renew my request if
16 that's okay with the Court.

17 JUDGE STEINER: You may proceed.

18 Q (By Mr. Anderson) How do you calculate bias, and how
19 do you know how to calculate bias?

20 A Are you asking how I know how to calculate?

21 Q Yes.

22 A Well, we've been referring to bias here in these
23 proceedings as basically a calculation of accuracy.
24 It's a comparison of the -- or the difference between
25 the known value and measured value as a function of

1 the -- of percentage of known value.

2 Q And how do you know how do that?

3 A That's a standard test for accuracy that's used in all
4 branches of measurement science.

5 Q Okay. While you don't consider yourself a
6 statistician, is that necessary -- what branches of
7 science are you educated in?

8 A Chemistry, physics, biology, pharmacology, toxicology,
9 French.

10 Q When you do experiments and procedures in these areas,
11 excluding French, do you need to be able to evaluate
12 the accuracy of the machines that you're using?

13 A All of these fields require the ability to do some
14 kinds of calculations.

15 This is -- when I've testified in the past that
16 I'm not an expert in statistics or statistical math, I
17 believe that was in response to Mr. Vosk's questions
18 about weighted means. And I profess to have no
19 statistical expertise in that respect, but I'm able to
20 do simple calculations involving subtraction and
21 division and multiplication, which is all that was
22 required of this.

23 MR. VOSK: And, your Honor, at this
24 point, if the witness is not going to be testifying
25 about weighted means, unless I hear anything else, I'm

1 happy with the foundation that was just laid.

2 JUDGE STEINER: Withdrawn. You may
3 proceed.

4 Q (By Mr. Anderson) The first calculation you
5 performed, you were adjusting to provide for bias
6 using the .08 QAP; correct?

7 A Yes.

8 Q Just to be clear, so the Instrument 140035 goes into
9 the field after having had a QAP performed, and they
10 do -- the technician does a run of ten tests for -- at
11 each of the levels: 04, 08, 10, and 15; correct?

12 A Yes.

13 Q The 08 is actually the level that affects calibration;
14 correct?

15 A Yes.

16 Q You wound up adjusting for bias comparing it to the
17 ten breath tests done at .08 at the time of the QAP;
18 correct?

19 A Yes.

20 Q And what were the new results?

21 A Well, what I did was subtracted .88 percent from the
22 results that were shown in the first column, so the
23 139 -- .139 became .1379. I then truncated that to
24 three decimal places, which is the rule that's
25 specified in WAC 448.16.060. I did the same for the

1 114, adjusting it down by .88 percent and arrived at
2 .113.

3 I then computed, using the rules for rounding and
4 truncating from the WAC, what the upper and lower
5 acceptable limits for that test would be, plus or
6 minus 10 percent of the mean and made a determination
7 of whether the adjusted value for the subject's test
8 results would meet that plus or minus 10 percent
9 requirement.

10 Q If you used the .08 QAP, the stated values on that,
11 would these lie within plus or minus 10 percent of the
12 mean?

13 A Yes.

14 Q So the first example becomes 137, and the upper limit
15 is 137?

16 A Yes.

17 Q And the lower sample becomes a 113, and the lower
18 limit is 112?

19 A Yes.

20 Q And the next calculation you did?

21 A I removed Asa Louis's results from the calculation of
22 bias based on the QAP. So if you remove Asa Louis's
23 result, the ethanol vapor equivalent concentration
24 changes because you've taken some of the data out. So
25 the calculation of bias changes because you're

1 comparing the results of ten simulator tests on the
2 instrument with the reference value from the lab.

3 And if you recalculate the bias, it turns out to
4 be 1.13 percent rather than .88 percent and --

5 Q Before you do that, I want the Court to understand,
6 before you go into your results, so we are looking at
7 5012, this is the one -- this is the sample we're
8 talking about?

9 A Yes.

10 Q And essentially, Asa Louis's results are contained
11 here under Analyst 1; correct?

12 A Yes.

13 Q You took -- got rid of all of these results?

14 A Yes, yes. Based on the hypothetical that was
15 presented in earlier testimony.

16 Q If all of these results happened, would this
17 instrument have been properly QAP'd?

18 A No.

19 Q Are you arguing the test would have been admissible --
20 resulting test would have been admissible?

21 A No. If only -- if -- if Asa Louis had not conducted
22 those tests. The protocol requires a minimum of three
23 analysts, so it would not have been an acceptable QAP
24 solution.

25 Q Specifically, the breath test section policy required,

1 at this time, a certified solution; correct?

2 A Yes.

3 Q Would this have been a certified solution?

4 A No.

5 Q But nonetheless you -- walking down the hypothetical,
6 you calculated it?

7 A Yes.

8 Q Based on your review of the chromatograms, do you have
9 any reason to believe you should, in fact, get rid of
10 those results?

11 A No.

12 Q Nonetheless, you calculated this based on the .08 QAP;
13 correct?

14 A Yeah. I believe that's the calculation that Rod
15 Gullberg did in his testimony, and I came up with the
16 same results.

17 Q As Rod Gullberg?

18 A As Rod Gullberg. If you excluded Asa Louis's results,
19 the new subject test results would fall out of the new
20 test range.

21 Q The new result of 137 and 112. And the truncated
22 upper limit is a 136; correct?

23 A Yes.

24 Q Therefore, that would, in that world, would be not
25 only a test that was done with non QA -- properly

1 QAP'd instrument, but also would fall outside the
2 mean?

3 A Yes.

4 Q The technicians testifying would be able to, in fact,
5 calculate this if requested at trial; correct?

6 A Yes.

7 Q The next calculation you did, what is that?

8 A I was doing the same calculation as in Column 2 only
9 using the .10 solution rather than the .08 solution.
10 And there was, to my knowledge, no question about the
11 reliability of the .10 QAP or the .15 QAP solution
12 that was on that instrument's QAP. But I, just for
13 sake of comparison, calculated with these two other
14 solutions.

15 Q The solution didn't fall within the mean when you used
16 .10 QAP?

17 A Yes.

18 MR. VOSK: At this point, your
19 Honor, I just want to object on vagueness. I'm not
20 sure which solution we're talking about now.

21 JUDGE STEINER: I think he said the
22 .1.

23 MR. ANDERSON: I'll clarify.

24 Q (By Mr. Anderson) During the QAP process, there are
25 four solutions that they run ten tests apiece on;

- 1 correct?
- 2 A Yes.
- 3 Q The first solution, you calculated field bias based on
4 the .08 QAP; correct?
- 5 A Yes.
- 6 Q And you determined if you actually decided to use
7 those numbers instead of the numbers reported on the
8 breath ticket, it would fall outside the 10 percent of
9 the mean?
- 10 A No.
- 11 Q But that was the way you did it, you compared it to
12 the .08 QAP?
- 13 A Yes.
- 14 Q Then you compared to it .10 QAP; correct?
- 15 A Yes.
- 16 MR. VOSK: And, again, your Honor, I
17 have to object and only because I know when we were
18 talking about -- and basis -- I know we were talking
19 about the .08, we actually had a solution identified,
20 the 5012. At this point, no solution is being
21 identified, and he's talking about numbers so I'm
22 wondering -- I need a basis.
- 23 Q (By Mr. Anderson) Did you go to the QAP document for
24 this instrument?
- 25 A Yes. I did, and I have it somewhere with me.

- 1 Q I can also put it up on the board. This was 140035;
2 correct?
- 3 A Yes.
- 4 Q Do you have the date of the relevant solution? Is
5 that contained on here?
- 6 A The QAP was conducted on 9/27/2005.
- 7 Q Looking at the board, we have QAP from 9/27/05;
8 correct?
- 9 A Yes.
- 10 Q What was the solution number that you compared this to
11 for the .10 level?
- 12 A It was Solution Batch 04043, I believe.
- 13 Q Okay. Did the result fall outside the mean if you
14 used that solution batch, or if you determined bias
15 based on that one?
- 16 A The test -- well, what I indicated on this sheet is
17 the test meets the 10 percent requirements, so it did
18 not fall outside of 10 percent.
- 19 Q Finally, if you adjusted for bias using the .15 QAP,
20 that's Solution 4040; correct?
- 21 A Yes.
- 22 Q What would the results of that be? Would it fall
23 within the ten -- plus or minus 10 percent of the
24 mean?
- 25 A Yes.

1 Q So the one situation in which this particular result
2 would fall outside 10 percent of the mean would be if
3 you ignored those results; correct?

4 A Yes.

5 Q Is there a requirement of the WAC that you adjust for
6 bias?

7 A No.

8 Q Or the protocols or the RCWs?

9 A No.

10 Q Specifically, it refers to readings on the ticket;
11 correct?

12 A I don't recall the specific language.

13 Q That's for argument later. That's fine.

14 Even if you adjusted with the true bias or the
15 corrected mean with Asa Louis's -- with Asa Louis's
16 results, it still falls within plus or minus; correct?

17 A Yes.

18 Q Would there even be a discussion of whether or not it
19 fell out of plus or minus 10 percent of the mean, if
20 Asa Louis didn't perform those results, or if those
21 results should have been excluded from the
22 calculation?

23 A No.

24 Q The original results were a 139 and a 114; correct?

25 A Yes.

1 Q That's further away -- the .10 solution is actually
2 closer to those results than the .08 solution;
3 correct?

4 A Yes. It's between .10 and .15.

5 Q Likewise the .15 is at least adjacent to those
6 results; correct?

7 A Yes.

8 Q And in general when calculating bias, you would be
9 doing the bias as determined by the solutions actually
10 close to the actual results; right?

11 A Yes.

12 MR. ANDERSON: State offers State's
13 Exhibit -- I'm sorry.

14 (Exhibit offered.)

15 JUDGE STEINER: 121, any objection?

16 MR. VOSK: Absolutely none.

17 JUDGE STEINER: 121 will be
18 admitted.

19 (Exhibit admitted.)

20 Q (By Mr. Anderson) The issue of weighted mean has come
21 to your attention whether or not you should be using
22 the weighted mean when calculating the average value
23 of the solutions; correct?

24 A Yes.

25 Q To be clear, there's been testimony from Dr. Emery

1 that weighted mean is a more precise measure of the
2 average of -- the average of those solutions; correct?

3 A Yes.

4 Q And, likewise, if you used the weighted mean, the
5 number here, giving average solution content and the
6 number for equivalent vapor content, would arguably be
7 more precise according to Dr. Emery?

8 A Yes.

9 Q Okay. Have you considered whether or not the breath
10 test section --

11 MR. VOSK: I'm just going to ask
12 that that be withdrawn. Whatever Dr. Emery's
13 testimony will be, we'll have it. If he wants to get
14 Dr. Logan to express his opinion on that, that's one
15 thing but...

16 JUDGE STEINER: Objection overruled.
17 This is setting up a question, unless you think it's
18 deliberately confusing Dr. Emery's testimony.

19 MR. VOSK: No, your Honor.

20 Q (By Mr. Anderson) Have you ever considered whether or
21 not the weighted mean is appropriate for use or
22 whether or not the toxicology lab should start using
23 the weighted mean to calculate these two statistics:
24 The average solution concentration and the equivalent
25 vapor concentration on the worksheet summary?

- 1 A Yes.
- 2 Q Can you describe your consideration, and what,
3 ultimately, was your conclusion?
- 4 A My consideration was to discuss it with, or to have
5 Rod Gullberg and Doctor --
- 6 Q And I'm going to ask you about how you went about
7 getting to the conclusion. What decision did you
8 ultimately make?
- 9 A That it was not -- that it was not necessary to use a
10 weighted mean for these calculations.
- 11 Q So you would continue to use the arithmetic mean?
- 12 A Yes.
- 13 Q Can you tell me how you arrived at that conclusion?
- 14 A I had Rod Gullberg contact Dr. Polissar, and to review
15 the data that we had, and determine what the most
16 appropriate -- what the different options were for
17 calculating the mean, and whether we needed to change
18 that to a process of using the weighted mean.
- 19 And their advice to me was that because of the
20 precision of test results, it made no difference and
21 that there was no need to change our practice.
- 22 Q Did you consider the practices of other programs
23 across the United States?
- 24 A Yes. I contacted a number of my colleagues to find
25 out if anybody was using a process similar to ours for

1 certifying simulator solutions.

2 MR. VOSK: Your Honors, I'm going to
3 object at this point. I'm getting -- I get the
4 feeling the next thing coming out is going to be
5 Dr. Logan's recitation of other people's opinions.
6 That's an improper use of the expert. If he wants to
7 give his opinion, that's one thing.

8 MR. ANDERSON: Dr. Logan is not
9 testifying as an expert. There's been a challenge to
10 the decision the State Toxicologist made to not use
11 the weighted -- to use the arithmetic mean instead of
12 the weighted mean.

13 Essentially, the Court would need to determine
14 that under the arbitrary and capricious standard. I
15 want the Court to understand what this witness, the
16 State Toxicologist, would consider. There is no way
17 for the Court opine on that.

18 MR. VOSK: And your Honor, pursuant
19 discussions we had at the very beginning of this
20 hearing where I wanted to have Dr. Logan excluded.
21 The State's been claiming he's an expert witness.
22 He's been testifying here as an expert as to the need
23 for weighted mean and how he came to everything else.
24 If he's not an expert, I don't know, you know, why
25 we're allowing him to testify as an expert.

1 JUDGE STEINER: He was both a fact
2 witness and expert witness. The State is indicating
3 that he's asking -- the prosecutor is asking this
4 question to a fact witness, essentially, today rather
5 than to an expert witness.

6 MR. VOSK: And a fact witness
7 wouldn't be able to give this kind of opinion. An
8 expert witness might be able to rely on opinions and
9 materials by others. But if he's a fact and not
10 expert witness, I don't know where -- how that makes
11 the hearsay that we're about to get into anywhere
12 admissible. What he's about to give is then the
13 expert opinion of a bunch of other people in this
14 field, but he's a fact witness. If he's a fact
15 witness, I don't know how he can give the opinions of
16 other experts.

17 JUDGE STEINER: Because he is both
18 an expert and fact witness, he can testify to both of
19 the things. And so on the one hand, he can indicate,
20 My opinion is thus, however, I also -- and that's --
21 he would be testifying as an expert. However, he may
22 also testify as a fact witness, We also collected data
23 from other agencies to determine what they do, and he
24 would be a fact witness under those circumstances.

25 So the objection is overruled. You may ask the

1 question.

2 Q (By Mr. Anderson) You investigated what other
3 programs do. Can you please describe that
4 investigation?

5 A I don't know there was an investigation. I contacted
6 some of my peer program directors and asked them if it
7 was a common practice for them to use weighted means
8 for any applications in their toxicology laboratories.

9 MR. VOSK: And, your Honor, I have
10 to object again. I'm very -- I do apologize. I mean
11 no disrespect, but if we're about to let him testify
12 to what some other experts in this field have said
13 that runs afoul in every rule -- there's not a rule
14 you can point to which would allow him to do that.

15 He's getting ready -- even as an expert, he can't
16 give the opinion of other experts. He has to give his
17 own as a fact witness.

18 JUDGE STEINER: I don't think this
19 changes my earlier ruling, which was that if Dr. Logan
20 is testifying as to why he made the decision, then the
21 testimony is not coming in so that I can hear from
22 other expert witnesses. The testimony is coming in to
23 hear why Dr. Logan decided -- the director of -- head
24 of the State tox laboratory, at this point, not to use
25 weighted mean. So the objection is overruled. Your

1 objection is noted. We need to move on.

2 MR. VOSK: Let me just make it
3 clear, and then I'm going to sit down.

4 JUDGE STEINER: Very quickly.

5 MR. VOSK: Hearsay.

6 JUDGE STEINER: I think we're all in
7 agreement.

8 Q (By Mr. Anderson) What did you find out?

9 A Well, I -- I -- the first thing I found out was there
10 was no standard practice in terms of how states
11 certify simulator solutions. Every state does it
12 differently. I didn't find another state that did as
13 many analyses of a simulator solution as we do by a
14 large margin --

15 MR. VOSK: Your Honor, I'm going to
16 object. This is nonresponsive. He asked a simple
17 question, and he's going off to all other practices.

18 JUDGE STEINER: Objection is
19 overruled.

20 You may answer the question.

21 THE WITNESS: Many do two tests or
22 three tests of simulator solution rather than 5 or 75.
23 Many don't do any tests at all other than running
24 simulator solution on a breath test solution that's
25 maintained in the laboratory. But none of the

1 laboratories that I'm aware of use weighted means for
2 calculation of simulator solution values.

3 Q (By Mr. Anderson) Just so I understand the points of
4 comparison, you indicated that some other toxicology
5 labs do one test or two tests.

6 Now, are you talking about one set of five or two
7 sets of five, or are you talking about one test or two
8 tests?

9 A One test or two tests.

10 Q And on this one, there's 16 analyses times 5?

11 A 80.

12 Q 80 tests. Do you have knowledge of how the number of
13 samples will effect the accuracy of means if you're
14 talking about a comparison of 1 or 2 samples and 80 or
15 15 for that matter of a QAP?

16 A That's probably a better question for Dr. Polissar.

17 Q Have you had the discussion with Dr. Polissar?

18 A Yes.

19 Q You also testified that some wind up checking their --
20 the accuracy of their solutions by running it through
21 the simulator standard; correct?

22 A By running it through a breath test instrument.

23 Q So the same result that -- essentially, they do the
24 same thing that is done on every single test -- every
25 single defendant's breath test when a breath

1 instrument says simulator is between 072 and 088.

2 That's what you're talking about?

3 A Yes.

4 Q And that's the way that they make sure the solutions
5 are accurate?

6 A Yes.

7 Q Can you describe the other ways that you know that
8 other states know that their solutions are accurate?

9 A Those are the two -- well, a number of states are now
10 going to the dry gas standards that I referenced from
11 my earlier testimony, which they purchase from a
12 vendor, and they also validate it by running through a
13 breath test instrument before they send it out to the
14 field for evidential use.

15 Q You indicated that there were some that sent them out
16 to other labs; correct?

17 A Yes.

18 Q And how would the adjustment be made after that sample
19 was sent out?

20 A The practice in the state of Wisconsin is the breath
21 test program mixes the simulator solution. They take
22 three aliquots from it and send it to the State
23 Laboratory of Hygiene. Each of these aliquots is
24 tested one time, and then the laboratory will call
25 back to the breath test program and tell them to add a

1 little more water or add a little more alcohol to
2 adjust the concentration.

3 Q Do they send it back to the lab for another test?

4 A Yes.

5 Q To be clear, are you aware of any other -- did you
6 receive information about any other lab that does 15
7 samples?

8 A No. I believe one of the commercial producers of
9 simulator solutions, depending on the size of the
10 batch, may do more than 15 samples.

11 Q One. The use of weighted mean -- has the use of
12 weighted mean been discussed or required as a result
13 of your ABFT accreditation?

14 A No.

15 Q Have you considered whether or not the lab should
16 change its practice with regard to outliers?

17 A Yes.

18 Q Would you describe what decision you've made on that?

19 A We have -- I have instituted a change in the protocol
20 that specifically identifies outliers and then rules
21 for how to treat the solution if there are more than
22 two outliers.

23 Q Those have already been admitted in the December
24 changes to the field solution protocol and the QAP
25 solution protocol; correct?

1 A Yes, yes.

2 Q I'm not going into the details of that. Why did you
3 make that decision?

4 A It's a good scientific practice to have standard
5 written criteria so that everybody is handling that
6 situation -- all the analysts are handling the
7 situation the same way.

8 Q Did you -- who did you -- what did you go into or who
9 did you speak with or what research did you do to
10 arrive at that decision?

11 A I consulted with Dr. Polissar and Rod Gullberg.

12 Q Now, there's also been declaration -- there's also
13 been discussions of and declarations offered regarding
14 the use of data for assignable causes.

15 Do you know what that is?

16 A Yes.

17 MR. VOSK: Your Honors, I just want
18 clarification. Are you discussing the declarations
19 from the analysts that are yet to testify?

20 MR. ANDERSON: Just the general
21 concepts of them.

22 MR. VOSK: Okay. Because if you
23 are, I'm going to ask that they be marked and
24 admitted, if you're going to do that.

25 And, your Honors, just for the -- so the Court

1 understands what I had just asked, he had asked about
2 the declarations of the witnesses yet to testify. I
3 just asked that they be marked and admitted, and we're
4 doing that.

5 MR. ANDERSON: Madam clerk, can you
6 mark these? Once that's done, I'll ask about specific
7 numbers.

8 (Exhibits marked.)

9 Q (By Mr. Anderson) Rejection of data for assignable
10 causes, has the lab done that in the past?

11 A Yes.

12 Q Will the lab continue to do that?

13 A Yes.

14 Q What's the difference between rejection of data for
15 assignable causes and rejection of data under a
16 statistical model?

17 Actually, I think we're just ready do a little bit
18 of housekeeping.

19 A Okay.

20 MR. ANDERSON: Plaintiff's
21 Exhibit 122 is marked for identification as the
22 declaration of Lisa Noble.

23 123 is marked for identification. It's the
24 declaration of Amanda Black.

25 124 is marked for identification. It's the

1 declaration of Sarah Swenson.

2 125 is marked for identification. It's the
3 declaration of Chris Johnston.

4 126 is marked for identification. It's the
5 declaration of Brian Capron.

6 127 is marked for identification. It's the
7 declaration for Brianna Peterson.

8 128 is marked for identification. It's the
9 declaration of Naziha Nuwayhid.

10 Q (By Mr. Anderson) What's the difference between
11 rejection for assignable causes -- and I'm not going
12 to be asking about the intricacies of the statistical
13 model.

14 What's the general difference between rejection
15 for assignable causes and rejection under a
16 statistical model?

17 A Well, if you have a test that violates the protocol,
18 or you made some identifiable error in conducting the
19 test, then it would be inappropriate to conclude or
20 rely upon that data for any purpose, calculating the
21 mean, using it in the simulator.

22 So if you used the wrong protocol: You mixed the
23 samples up; you didn't run a control; you ran the
24 wrong control; you ran four samples instead of five
25 samples. These would all be errors that violate the

1 protocol and would be the basis for excluding that
2 data as opposed to simply that the results of tests
3 fall outside of an expected range for some unknown
4 reason.

5 Q Who's in the best position to know whether or not a
6 test should be excluded -- what goes into that
7 decision? What do you need to know to be able to make
8 that type of judgment?

9 A You need to have intimate, firsthand knowledge of what
10 happened at each step in the testing process.

11 Q Do you believe that an item that you have an
12 identified problem with but that does not fall outside
13 a statistical model -- so let's say we had Analyst 16,
14 Result No. 3, and there was some crazy number in there
15 or not even a crazy number, 102, 103, 103, 103, 102.

16 If you knew there was a problem in the preparation
17 of that or documentation regarding that, do you
18 believe the simple fact that these values do not fall
19 within -- were not characterized as outliers under
20 statistical method should prevent the analyst from
21 rejecting the use of that data?

22 A No.

23 Q Why not?

24 A If they're aware that there was some improper method
25 used in arriving at those results or failure to comply

1 with the protocol, then that, in and of itself, would
2 be the basis for rejecting the data, even before you
3 know what the values are.

4 Q Would it be responsible for toxicologists to include
5 that data if they knew about that problem just because
6 they didn't fall within the statistical model?

7 A Yes.

8 Q Would it be responsible for them to include that data?

9 A No.

10 Q Does excluding that data constitute a departure from
11 the protocols?

12 A No.

13 MR. VOSK: Your Honors, we'll
14 concede if there's an identifiable, physical reason to
15 exclude, that's appropriate. We're not going to argue
16 that it would be appropriate scientifically and in the
17 protocols.

18 Q (By Mr. Anderson) As part of the -- the job of the
19 toxicologist is also not only to do scientifically
20 good work, but to properly communicate their work in a
21 clear manner, correct, and document it?

22 A Yes, yes.

23 Q Does that affect whether or not documentation issues
24 should lead to rejection of data for assignable
25 causes?

1 A It could, yes.

2 Q And describe how, please.

3 A If the data -- if part of the data is missing or the
4 batch identification information is missing from the
5 chromatograms, or the documentation for the fact that
6 the control was conducted is not available or is
7 missing, these would all be a basis for excluding the
8 data.

9 Q In fact, you changed the protocols specifically just
10 to make sure the documentation would be clear, and
11 indicated that no one should tag a test onto another's
12 run, not because it was scientifically indefensible,
13 but merely to make sure that the documentation would
14 be clear; correct?

15 A Yes.

16 JUDGE STEINER: Counsel, there was a
17 specific request to admit the affidavits. Did you
18 intend to do that or not intend?

19 MR. ANDERSON: You know, I was,
20 frankly, intending to do it before their testimony,
21 but the State moves to admit if Counsel agrees to it
22 at this point.

23 (Exhibit offered.)

24 MR. VOSK: No objection.

25 JUDGE STEINER: Exhibits 122 through

1 128 will be admitted.

2 (Exhibit admitted.)

3 Q (By Mr. Anderson) Showing you what's been marked
4 Plaintiff's Exhibit 129, can you take a look at it,
5 please, and let me know, do you recognize what this
6 is?

7 A Yes.

8 Q What is it?

9 A It's a document that you prepared and showed me this
10 morning that summarizes issues that have been
11 discussed in testimony up to this point, with respect
12 to specific batches, the number of instruments
13 affected, and what the nature of the affects was.

14 Q Would this help you in illustrating the analysis of
15 the programs, of the issues with these tests to the
16 Court, and your decisions with regard to that?

17 A Yes.

18 MR. ANDERSON: State offers
19 Exhibit 129 for illustrative purposes.

20 MR. VOSK: There's no objection your
21 Honor.

22 (Exhibit offered.)

23 JUDGE STEINER: All right. For
24 illustrative purposes only, 129 will be admitted.

25 (Exhibit admitted.)

1 MR. ANDERSON: And I've got three
2 courtesy copies for the Court.

3 Q (By Mr. Anderson) The first three -- the first three
4 batches I want to discuss with you are 6003, 5008, and
5 600 -- I'm sorry -- 6048.

6 These were each -- there's been prior testimony
7 about each of these and that the solution content --
8 the solution concentration -- well, each of these were
9 field solutions used at some point or another, used as
10 a QAP solution.

11 Do you remember that?

12 A Yes.

13 Q And each of these had -- well, 6003 and 5008 had
14 reported means either after being corrected by
15 Trooper Denton, Mr. Gullberg, or actually initially on
16 the sheet of -- I'm sorry -- 6003 and 6048 had means
17 of 12 -- 1024 and 1027; is that correct?

18 A Yes.

19 Q Okay. The top end of the acceptable range for a
20 solution prepared as a .08 QAP is 102 with no fourth
21 digit; correct?

22 A That's according to the toxicology lab's protocol,
23 yes.

24 Q Were you aware until delving into the issues that
25 we're talking about now, that the breath test section

1 was using field solutions as QAP solutions?

2 A No. And just so I can make sure that this is clear
3 that the tox lab's preparation of a field solution
4 with a mean concentration of .1024 complies with their
5 policy.

6 Q Correct. And we'll go into that.

7 MR. VOSK: I'm sorry. Can the
8 witness --

9 JUDGE STEINER: Complies with their
10 policy.

11 MR. VOSK: I may have missed the
12 question. Who is "their"?

13 THE WITNESS: The tox lab.

14 MR. VOSK: Oh, for field solutions.
15 I'm sorry.

16 Q (By Mr. Anderson) The field solution is -- the
17 concentration solution for field solution is 098 to
18 108; correct?

19 A Yes.

20 Q So for these exhibits 6003, 5008 -- I'm sorry --
21 Solution 6048, each of these would fall within the
22 acceptable range for a field solution; correct?

23 A Yes.

24 Q The acceptable -- and that's true regardless of
25 rounding or anything else, yes; correct?

1 A Yes.

2 Q Field solutions were intended by you to be used as
3 field solutions; correct?

4 A Yes.

5 Q A QAP solution acceptable range is .092 to .102;
6 correct?

7 A I believe so, yes.

8 Q And there's no fourth digit in there?

9 A Correct.

10 Q There's been testimony review of the breath test
11 policy and procedure manual during your direct by
12 Mr. Vosk.

13 Do you remember that testimony?

14 A Yes.

15 Q He reviewed the most recent breath test policy manual.
16 Do you remember that?

17 A Yes.

18 Q In that manual -- who does that manual govern?

19 A It governs the breath test section of the Washington
20 State Patrol.

21 Q And there was also review of the .08 simulator
22 solution, the QAP solution protocols, and the HSCG
23 protocols.

24 Who do those protocols govern?

25 A The State toxicology lab.

1 Q Those protocols clearly envision that -- once the QAP
2 governs the QAP solution production, and the field
3 solutions governs the production of field solutions;
4 correct?

5 A Yes.

6 Q And the current policy manual for the breath test
7 section actually requires the breath test technician,
8 at the time of the QAP, to use QAP solutions; isn't
9 that correct?

10 A Yes.

11 Q Has that always been the case?

12 A No.

13 Q When was that changed?

14 A It was changed in September.

15 Q What was the prior requirement for a -- what were the
16 prior requirements for a breath test technician with
17 regard to what solutions they used?

18 A The procedure manual at that time said they had to use
19 a certified ethanol/water solution from the toxicology
20 lab.

21 Q Is a QAP solution from the toxicology -- would a QAP
22 solution qualify for that?

23 A Yes.

24 Q Would a field solution qualify for that?

25 A Yes.

1 Q Do you believe it's good policy to be using the field
2 solution as the QAP solution?

3 A To the extent that it created confusion, no, it was
4 not a good policy, but scientifically there was no
5 reason for them not to do that.

6 MR. ANDERSON: Please mark this.

7 (Exhibit marked.)

8 JUDGE STEINER: May I just
9 briefly -- then why the difference between the
10 requirements for the preparation of a QAP solution and
11 a field solution?

12 THE WITNESS: The reason for that is
13 that the field solutions are prepared with a target
14 concentration of .082 to allow for the fact that some
15 of the alcohol depletes during its lifetime in the
16 field, and that allows it to and ensures that it
17 maintains an external standard result within the range
18 of .088 to .072.

19 With the QAP solution, the goal was to the
20 target -- to make it up with the target concentration
21 of .080 which is for the purposes of establishing
22 precision and accuracy at the per se cutoff seemed to
23 be the most appropriate.

24 JUDGE STEINER: So I'm confused,
25 because you indicated that there wasn't any reason

1 that you couldn't use a field solution for a QAP, and
2 yet you indicate that the intent for both of them are
3 different and that the intended final alcohol level
4 for each is different.

5 THE WITNESS: That's true. But as
6 long as you know -- well, the important thing is that
7 the field solution has sufficient additional alcohol,
8 if you like, to allow to it maintain -- stay within
9 the 072 to 088 range even with depletion.

10 The important thing for the purposes of the QAP
11 procedure is that whatever the stated reference value
12 for the solution is, is accurately measured by the
13 breath test instrument. So whether it s accuracy is
14 being checked at .082 or .080, it doesn't really
15 matter as long as it's -- the calculations are being
16 performed properly.

17 JUDGE STEINER: I'm sorry. Just go
18 on.

19 MR. ANDERSON: I'm going to be going
20 into it.

21 JUDGE STEINER: I believe we've had
22 testimony from Rod Gullberg that the machine was
23 setup -- that the breath test machine was setup
24 specifically for a .08 simulator solution.

25 THE WITNESS: No. I'm not sure I

1 heard that testimony. It -- it can be -- well,
2 when -- during the process of calibration, the -- I
3 think I heard testimony from Trooper Denton that when
4 he goes in to do the calibration, the default value
5 that comes up on the screen is .080, and that he then
6 adjusts that up or down by increments so that it -- he
7 adjusts it to the value of the solution that he's been
8 provided by the toxicology lab.

9 JUDGE STEINER: Okay. Thank you.

10 THE WITNESS: And I think the rest
11 of that discussion revolved around, you know, how high
12 he could set it or low he could set it, and the
13 instrument would still accept the solution and --
14 calibrated solution.

15 JUDGE STEINER: Okay.

16 Q (By Mr. Anderson) Showing what's been marked State's
17 Exhibit 130. Do you recognize what this is? If so,
18 please tell me.

19 A This is a copy of the policy and procedures manual for
20 the breath test section dated November 4th, 2005, and
21 signed by me.

22 Q This is the document that governed the conduct of Ken
23 Denton and the other technicians during relevant --
24 time periods relevant to -- well, since 2005 and up
25 until the change of protocol in December; correct?

- 1 A In September.
- 2 Q Thank you. September.
- 3 A Yes. Yes, it did.
- 4 Q This is the document that would determine what
5 certifications they should be use -- or what solutions
6 they should be using; correct?
- 7 A Yes.
- 8 Q Can you show us where the requirement is that you were
9 discussing that they use a certified solution?
- 10 A I believe it's on page --
- 11 MR. VOSK: Your Honor, if I could
12 just have witness stop.
- 13 (Discussion off the record.)
- 14 Q (By Mr. Anderson) Have you found it?
- 15 A Yes.
- 16 Q Please read it for us.
- 17 A I'm reading from Page 22, which is entitled.
18 "DataMaster Calibration Procedure, Section 1, Part B."
19 It says, "Use a certified ethanol solution from the
20 State toxicology laboratory."
- 21 Q And the change in September that resulted in the new
22 document that the defense spoke with you about
23 yesterday, was essentially that now at a QAP process,
24 they need to use a QAP solution; correct?
- 25 A Yes, yes.

1 Q Thank you.

2 MR. ANDERSON: State offers 130.

3 (Exhibit offered.)

4 JUDGE STEINER: Any objection?

5 MR. VOSK: None your Honor.

6 JUDGE STEINER: 130 will be

7 admitted.

8 (Exhibit admitted.)

9 JUDGE STEINER: I know you are
10 having so much fun and we just didn't notice, but it's
11 after noon. So I think we'll take our noon recess.

12 I have a meeting, but I'm just inclined to tell
13 them that we have priority so any reason we can't
14 start at one? We'll start at one.

15 THE CLERK: Please rise.

16 (Lunch recess.)

17 JUDGE STEINER: Please be seated.

18 Mr. Anderson?

19 MR. ANDERSON: Thank you.

20 Q (By Mr. Anderson) We left discussing QAP solutions
21 and using field solutions as QAP solutions.

22 A Yes.

23 Q I don't want to go back over, so correct me if -- I
24 think I'm cutting off at the right portion. We've
25 already discussed how the protocols -- the protocols

1 at the State toxicology lab certainly intend that QAP
2 solutions be used as QAP solutions, and simulator
3 solutions be used as simulator solutions?

4 A Yes. Back in the midst of time when those processes
5 were set up, that was my understanding of the way they
6 were to be used.

7 Q And we also covered that the -- up until the
8 modifications in -- September or October?

9 A September.

10 Q September, the techs were merely required to use a
11 certified solution of ethanol and water from the crime
12 lab?

13 A Yes.

14 Q Or from the tox lab, excuse me.

15 A Yes.

16 Q I want to talk to you about what effects use of a
17 solution with a higher concentration would have and
18 the reasons for that.

19 There were some questions from the bench with
20 regard to the .082 target mean for the field solutions
21 and the .080 for the QAP solutions?

22 A Yes.

23 Q And the background of this, there have been questions
24 about -- there's been testimony on the subject from
25 Mr. Gullberg and Mr. Denton. You heard the testimony

1 from Mr. Denton -- Trooper Denton. Did you hear the
2 testimony from Trooper Gullberg -- from Mr. Gullberg?

3 A On this subject?

4 Q On whether or not the breath tests -- whether or not
5 the DataMasters accept readings outside a certain
6 level.

7 A Yes.

8 Q Have you had the opportunity to review the
9 capabilities of the machine? Are you familiar with
10 the capabilities of the machine?

11 A Yes.

12 Q Is there any reason that a machine would not be able
13 to -- well, I'm guess I'm going to review the QAP
14 procedure first.

15 Pulling up QAP 14011, not for any particular
16 reason, just at random to illustrate the point.

17 This issue is solely relevant for the .08 QAP
18 solution; correct? Are you aware of -- I guess I
19 should say, are you aware in the review of any
20 instances of somebody using the field solution as a
21 .04, a .10, or a .15 QAP solution?

22 A No.

23 Q So we're just talking about substituting in .08 -- a
24 field solution with a target value .082 for the 08 QAP
25 solution, as a target value of .08?

1 A Yes.

2 Q The two points that they actually use the .08 solution
3 at the QAP process is: One, to calibrate the machine
4 and two, to run a series of ten tests to see how
5 accurate the machine is and see what the CV of the
6 machine is; correct?

7 A Yes.

8 Q Okay. I want to discuss both of those processes.
9 Is there any reason that having a field solution
10 with a correctly -- well, I guess first of all, the
11 acceptable range of a QAP -- a .08 QAP solution is 092
12 to 102; correct?

13 A Yes.

14 Q Approximately how large is that range in EVC -- in
15 equivalent vapor concentration, ballpark?

16 A Oh, I -- I don't recall. Sorry. You're asking me
17 about the field solution?

18 Q Do you have a calculator with you?

19 A Do I have a what?

20 Q Do you have a calculator with you?

21 A I don't.

22 MR. VOSK: He can borrow mine as
23 long as he promises not to run off with it.

24 THE WITNESS: Actually, I do. I
25 have one on my phone.

1 Q (By Mr. Anderson) Just a simple one will do. Can you
2 convert the .092 to 102 range into equivalent vapor
3 content?

4 A .098 to .108?

5 Q First the 092 to 102, and then the 098 to 108.

6 A 092 would be .074.

7 Q 074.

8 A Or .075 rounded to three decimal places.

9 Q Okay. .075 to?

10 A What was the upper?

11 Q 092 to 102.

12 A .083.

13 Q Can you convert the .098 to 108 field solution range?

14 A Point zero -- I'm sorry --

15 Q And to be clear, that the calculation you're doing is
16 you're dividing by 1.23; correct?

17 A Yes. So .098 --

18 Q 098 divided by 1.23.

19 A 080.

20 Q Low end. High end is?

21 A .087 -- .089. .089.

22 Q Are you sure that's correct? Sorry. I'm asking you
23 to do this on the spot. Would you like an
24 easier-to-deal-with calculator?

25 A No. That's okay.

- 1 Q Okay.
- 2 A Yes.
- 3 Q That is right?
- 4 A Yes.
- 5 Q So it's skewed slightly higher.
- 6 Anywhere within that range would be acceptable for
- 7 a .075 to a .083; correct?
- 8 A Yes.
- 9 Q So we know that the DataMaster's designed to at least
- 10 accept or -- well, I guess, how large of a range can
- 11 the DataMaster instrument use in calibrating results?
- 12 A .070 to .110.
- 13 Q .070 to .110. Is that a function of how things are
- 14 calibrated, or a function of the limits placed on the
- 15 process by that particular instrument?
- 16 A It's a limit -- it's a limitation determined by the
- 17 software.
- 18 Q Okay. So it won't accept anything outside that range?
- 19 A Correct.
- 20 Q Calibration is actually something that is quite common
- 21 in science; correct?
- 22 A Yes.
- 23 Q Necessary for HCGS [sic] machines?
- 24 A Yes.
- 25 Q Necessary for DataMasters?

- 1 A Yes.
- 2 Q Are you familiar with how these machines in -- with
3 the concept of calibration and the requirements for
4 those types of solutions?
- 5 A Yes.
- 6 Q Is there any reason that you couldn't -- if the
7 software would allow you to do it, use a solution of,
8 you know, let's say, a .15, so twice that,
9 approximately twice that or a .16 to calibrate the
10 machine?
- 11 A You could, as long as you check the linearity across
12 the relevant range. You could calibrate it with any
13 concentration you liked as long as you were able to
14 check it, and it still met the precision and accuracy
15 requirements within the range of which you were
16 interested of measuring human subjects.
- 17 Q Would using a higher calibration result in -- as long
18 as the software allowed it, result in any change to
19 the effect on the breath test, to the number -- and by
20 "breath test," I mean the actual number printed on the
21 breath ticket, the two samples?
- 22 A Not if it met all the requirements for quality
23 assurance procedure, no.
- 24 Q And to be clear, what we're talking about right here
25 is the use of the actual calibration of the machine

1 during the QAP process. So regardless of the actual
2 value, if you use a .075 or a .083 solution, the
3 calibration process is the same?

4 A Yes.

5 Q It's essentially comparing what it has with what it's
6 told it has; correct?

7 A Yes.

8 Q And the process here where they're calculating whether
9 or not the accuracy of the CV, the precision of this,
10 and we're referring to the ten samples taken during
11 the QAP process at a .08, is there any reason that
12 using a sample with a higher value, properly measured,
13 would affect the accuracy of CV?

14 A No.

15 Q Referring you back to State's exhibit -- what was the
16 number on the chart?

17 A 120 -- 129.

18 Q 129, thank you. So the possible affects on 6003,
19 5008, and 6048, is that it would not affect the
20 machine's ability to calibrate. It would not affect
21 any of the numbers printed on the machine?

22 A Correct.

23 MR. ANDERSON: And to be clear, your
24 Honor, I actually compiled the exhibit list and the
25 possible test effected list in this. That was not

1 anything he's reviewed for accuracy so that's one of
2 the reasons why I offered it as an illustrative
3 exhibit.

4 Q (By Mr. Anderson) 6003 actually had a -- 6003, to be
5 clear, was a field solution, and it had a reading of
6 1024; correct?

7 A Yes.

8 Q Do you believe that that lies outside the protocol
9 limits for a QAP solution prepared by the tox lab?

10 A No.

11 Q Explain to the Court why, please.

12 A Because the tox lab protocols specifies the number to
13 three decimal places and .1024 rounded to three
14 decimal places or truncated to three decimal places
15 would still be .102, but rounding would be more the
16 appropriate process.

17 Q I'm going to show you State's Exhibit 92. State's
18 Exhibit 92 requires that the average of the results
19 from all of the analysts are computed, parenthesis,
20 rounded to four decimal places. The standard
21 deviation and relative standard deviation CV on all
22 the results are computed.

23 So there it clearly talks about rounding to four
24 decimal places. Why does that -- why do you believe
25 you should round to three decimal places?

1 A For the purposes of interpreting the protocol, the
2 acceptable range is listed to three decimal places.

3 Q What was the date of the protocol I just showed you?

4 A October 23rd, 2004.

5 There's a table in here that lists each of the
6 simulator QAP concentrations and the acceptable ranges
7 for these, and the acceptable ranges are all given to
8 the three decimal places.

9 MR. ANDERSON: I'm going to show the
10 Court that on the screen. I pulled up that exhibit.

11 Q (By Mr. Anderson) This is the table for the
12 acceptable range; correct?

13 A Yes.

14 Q For the point zero -- and this is for a QAP solution;
15 correct?

16 A Yes.

17 Q For the .08 QAP solution, the acceptable range is a
18 092 to .102; correct?

19 A Yes.

20 Q And 1024 rounded would, in fact, be a 102; correct?

21 A Yes.

22 Q Why do you not believe that truncating is the correct
23 thing to do?

24 A Well, because you lose data when you truncate. You --
25 you -- rounding gives you the scientifically more

1 accurate estimate. Because if you have .191 and a
2 .199 and you round them, one would be .19 and the
3 other would be .20.

4 Whereas if you truncate them, they would both be
5 .19, so you lose information when you truncate or chop
6 off that third digit.

7 Q I'm going to show you 6048.

8 This was, likewise, a field solution used as a QAP
9 solution. The stated range of this is a one -- or the
10 stated solution concentration is a 1027?

11 A I'm sorry what was this batch number?

12 Q 6048.

13 A Okay.

14 Q The 1027, do you believe that that runs afoul of
15 preparation for a QAP solution?

16 A If this was a QAP solution, it would not meet the
17 requirements of the protocol.

18 Q Because you're not going to truncate, you're going to
19 round?

20 A Yes.

21 MR. VOSK: For the purposes of the
22 record, your Honor, the defense would stipulate to
23 that.

24 Q (By Mr. Anderson) The solution -- the determination
25 of whether or not -- but at that point still, at the

1 time that this solution went out back in 2006, the
2 tech -- the techs were still certified to use any
3 aqueous water and ethanol solution; correct?

4 A Yes. Neither the toxicology lab nor the breath test
5 program violated their protocol.

6 Q Nonetheless, it wasn't what you intended when you
7 actually --

8 A But the protocols were in conflict, and you shouldn't
9 have protocols that are in conflict.

10 Q Nonetheless, you don't believe that -- that was not
11 what you intended to have happen?

12 A No.

13 Q Now I want to look at 5008, the last of those.

14 Incidentally, that last solution was within the
15 range for a field solution; correct?

16 A Yes.

17 Q 5008. The statistics show that the average solution
18 concentration is .1020; correct?

19 A Yes.

20 Q Regardless of whether or not you round, truncate, or
21 even keep all four digits, that still falls within
22 the requirements for a QAP --

23 A Yes.

24 Q -- solution, correct, at .08?

25 There were calculations done at defense counsel's

1 request to remove Ann Marie Gordon's values from that.
2 If you removed the values from that, it would show
3 10 -- .1022 mean, thus arguably be above the 102
4 requirement of the protocols.

5 Again, do you believe that her values should have
6 been removed?

7 A No.

8 Q There were further calculations under a particular
9 weighted mean. The number would then go from 1022 to
10 1023, a ten-thousandth increase.

11 Again, do the protocols require a weighted mean?

12 A No.

13 Q I'm going to continue on. On State's Exhibit 129 to
14 Solution 604 -- and I guess, just summarizing 603,
15 5008, 2048 --

16 MR. VOSK: And your Honor, just at
17 this point if -- and I don't know what the State's
18 going to do, but if the State's trying to say that
19 is -- that this would be Dr. Logan's testimony, we're
20 willing to stipulate that this is what Dr. Logan will
21 testify to and shorten this up and then cross-examine
22 him on it.

23 MR. ANDERSON: I do need to go into
24 it, so the Court understands his reason for saying
25 that.

1 JUDGE STEINER: I think that this is
2 used, as I understand it, is being used as a
3 foundation for this --

4 MR. VOSK: I was just trying to
5 help, your Honor.

6 JUDGE STEINER: Okay. I appreciate
7 it.

8 Q (By Mr. Anderson) I'm going to go on to 6037.

9 6037 was the software bug where the equivalent --
10 where the rounding of the equivalent vapor
11 concentration resulted in a reading of 0400 instead of
12 0395; correct?

13 A Correct.

14 Q I'm going to go through the possible affect this could
15 have on could have on a test.

16 Would this affect the -- has the breath so -- so
17 this is an 040 QAP solution; correct?

18 A Yes.

19 Q Not used for calibration; correct?

20 A Correct.

21 Q Could it have any effects on calibration as a result?

22 A No.

23 Q That's the second bullet point on the right; correct?

24 A Yes.

25 MR. VOSK: Which solution are you

1 talking about?

2 Mr. Anderson: 6037.

3 MR. VOSK: And you're saying it's
4 not a QAP solution?

5 MR. ANDERSON: It is. It's an 04
6 not an 08.

7 Q (By Mr. Anderson) This would have been used here in
8 the QAP process. For the machine to still pass the
9 QAP process, it would have still had to have an
10 accuracy percentage of within 5 percent and the CV
11 within 3 percent; correct?

12 A Yes.

13 Q Has Ken and -- have Ken Denton and Ron Gullberg gone
14 back and checked that every time one of these numbers
15 changed to ensure that it, in fact, it meets it?

16 A Yes, they have. And they've completed a repair record
17 that reflects that they've done that, which is posted
18 on the Web site.

19 Q So while it's conceivable that this could affect these
20 numbers, they've actually verified every single one on
21 the Web site?

22 A Yes.

23 Q Now, because -- now, there are a number of different
24 ways that someone may compute field bias of a machine;
25 correct?

- 1 A Yes.
- 2 Q They can use any of these four solutions, if their
3 judgment says that's the appropriate one to use?
- 4 A Yes.
- 5 Q Or they could use a later field -- or the results of
6 the later test of field solution; correct?
- 7 A Yes.
- 8 Q What is the one instance in which they would use this
9 particular solution to compute field bias?
- 10 A If somebody had a breath test result presumably
11 between -- or less than .06.
- 12 Q Okay.
- 13 A .06 or less, but potentially, I mean, it would be
14 whoever was doing the calculations judgment call.
- 15 Q They still may wind up using the later field solution?
- 16 A Yes.
- 17 Q If it was much later in time; correct?
- 18 A Yes.
- 19 Q Given then the change is known, in the .0395 to four
20 -- .040, would they incorporate that change in their
21 calculation?
- 22 A Yes.
- 23 Q Would they still be able to give a corrected mean?
- 24 A Yes.
- 25 Q I'm going to move onto 6028.

1 In 6028, Lisa Noble was helping to prepare an 08
2 field solution, and she rejected her first batch of
3 data. There's been testimony about this, and
4 declarations entered in about this.

5 First of all -- and we've also talked about
6 rejection for assignable cause. I'm not going to ask
7 you to -- I'm not going to ask you to opine whether or
8 not her rejection was correct or incorrect. I'll let
9 her to testify about that.

10 But with regard to -- let's enter the world where
11 the rejection of data was valid. Would -- in that
12 case the average solution concentration would be the
13 same; the equivalent vapor concentration would be the
14 same; all the statistics would be the same; correct?

15 A Yes.

16 Q Would there be any effects on a breath test?

17 A No.

18 Q Let's go into the world where the rejection was
19 invalid. First of all, are you saying that her
20 rejection of data was invalid?

21 A No.

22 Q How much would that have changed a breath -- the
23 result on a breath ticket?

24 A If her rejection of that data was invalid --

25 Q Yes.

1 A -- and the original --

2 Q Yes.

3 A -- data that was actually used --

4 Q Yes.

5 A -- in place of the data that was actually used?

6 Q Yes.

7 A It would have changed the reported mean equivalent
8 vapor concentration by .001 which would have led to a
9 subsequent change in the calibration factor by .001.

10 So results that were reported as .080, should have
11 been reported as .079 at that level. At the .151
12 level, readings as high as .5151 [sic] should have
13 been reported as .149.

14 JUDGE STEINER: So Mr. Anderson, I
15 now understand the stipulation that was offered. It
16 appears that it's possible, at least, that the
17 remainder of Dr. Logan's testimony would potentially
18 mimic the bullets that you already have; is that
19 correct?

20 MR. ANDERSON: I would ask to be
21 able to go through the one set of the bullets, and
22 then the remaining bullets are extremely similar, and
23 I'm just going to say "same effect," "not same
24 effect," but I would ask that we be allowed to
25 explain.

1 JUDGE STEINER: Each bullet?

2 MR. ANDERSON: One through five.

3 JUDGE STEINER: Just in this one,
4 6028?

5 MR. ANDERSON: Yes. And then we're
6 going to give short rift to the rest. Fair enough?

7 JUDGE STEINER: Well, let's see what
8 you do with this one and then we'll talk about the
9 rest.

10 Q (By Mr. Anderson) And essentially that's the thing
11 same that happened in Spokane. What happened in case
12 that -- that's the effect of a calibration change in
13 the actual QAP; correct?

14 A Yes. If you adjust the results -- if you -- it's
15 determined that somebody's data was faulty or it
16 shouldn't be included and you exclude it, or you
17 switch it for other data, then it can change the mean
18 value for that QAP solution in the third decimal place
19 which could affect calibration.

20 Q And for the other solutions the breath test section
21 has already gone back and determined every case in
22 which that occurred; correct?

23 A Yes.

24 Q They've notified every person affected; correct? I
25 guess they're in the process of notifying people

- 1 affected by 02019; correct?
- 2 A We're still in the process of identifying the
3 individuals affected, but they be will notified, yes.
- 4 Q The breath test could -- section could do that on this
5 if it was found to be required by the Court; correct?
- 6 A Yes.
- 7 Q Moving onto two. The breath test section has actually
8 gone through and determined whether or not -- there's
9 been testimony that a change in the mean could
10 actually affect whether not -- well, I guess -- on any
11 breath test -- breath test ticket, there's a simulator
12 solution printout; correct?
- 13 A Yes.
- 14 Q And it's a verify -- it's a way to verify that,
15 broad-brush strokes, this machine is generally reading
16 accurately?
- 17 A Yes.
- 18 Q If you had a reading at 072 and there should have been
19 a correction downward, then the resulting reading
20 should have been an 071; is that correct?
- 21 A Yes.
- 22 Q Has the breath test section gone through for all the
23 Spokane cases to determine whether or not there were
24 any readings at 072?
- 25 A Yes.

- 1 Q Were there any at 072?
- 2 A No.
- 3 Q And has the breath tech -- and to be clear, one of
4 the -- there were two types of effects in Spokane.
5 One, the ticket read "X," and it should have read, "X
6 minus .001"; correct?
- 7 A Yes.
- 8 Q So for those, an 072 should have read, arguably, an
9 06 -- an 071; correct?
- 10 A Yes.
- 11 Q All right. At the other end, there was another type
12 of error where the defendant actually benefitted.
13 Instead of reading an 080, his reading should have
14 been 081; correct?
- 15 A Yes, on the other solution.
- 16 Q So there you have the converse problem. If you had a
17 reading of 088 on the simulator solution, then that
18 reading, arguably, should have been an 089 and outside
19 the 072 to 088; correct?
- 20 A Yes.
- 21 Q Has the breath techs -- test section gone through and
22 searched for all those possibilities?
- 23 A Yes.
- 24 Q And were there any?
- 25 A No.

1 Q For 0219, the analysis -- some of the analysis is not
2 yet complete; correct?

3 A Correct.

4 Q Has the breath section -- test section, however, gone
5 through and looked for any 072 external simulator
6 standards that may have gone below?

7 A Yes.

8 Q Were there any?

9 A I seem to recall that there were some, yes.

10 Q Okay. In fact, there were six; correct?

11 A Yes, that's correct.

12 Q Do you recall receiving Ken Denton's evaluation how,
13 of those six, whether or not how many of those would
14 it affect after calculating the entire bias?

15 A Yes.

16 Q How many would those affect after calculating the
17 entire bias?

18 A I -- I don't recall. I'm sorry.

19 Q I'll come back to that and refresh your recollection
20 with, of course permission.

21 MR. VOSK: I'm sorry. What was
22 that? I wasn't paying attention.

23 MR. ANDERSON: He doesn't recall.

24 Q (By Mr. Anderson) We'll come back to that later.

25 That has been determined though; correct?

- 1 A Yes.
- 2 Q Likewise, if there were two solutions that were -- or
3 two breath samples -- well, the breath samples are
4 required to be within plus or minus 10 percent;
5 correct?
- 6 A Of their mean, yes.
- 7 Q Of their mean.
- 8 And if you have two breath samples, one and two,
9 and the mean is -- they're both within .999 percent of
10 their mean, and you wound up reducing the overall --
11 reducing the mean. So we had two breath samples at
12 two high numbers, and you found out you needed to
13 correct them down. It's technically possible that
14 since these were at .0999 and because this is now a
15 larger percentage of their mean, that these would now
16 be .101 or something beyond the mean, correct, and
17 that's how it would lie outside?
- 18 A Okay.
- 19 Q Okay. Are the breath techs capable of calculating
20 this independently every time they need to answer the
21 foundational question of whether or not these results
22 lie within plus or minus the mean?
- 23 A After adjusting for errors caused by inaccurate data
24 in the QAP calibrating solution?
- 25 Q Yes.

1 A Yes. They are capable of doing that, yes.

2 Q The final way that this could affect something is -- I
3 guess one of the ways this could affect something is
4 likewise -- also on the quality assurance procedure.

5 This could affect whether or not the accuracy or
6 CV fell within the required limits; correct?

7 A Yes.

8 Q So Ken and Rod have already gone back for each of the
9 Spokane cases, and are in the process for doing it for
10 the 2019 cases, and determining whether or not this
11 has affected any particular defendant; correct?

12 A Yes.

13 Q Would they be able to do that for 6028 if the Court
14 found a problem with that?

15 A Yes.

16 Q Finally, the one final way this could affect
17 something --

18 MR. VOSK: And if I could just have
19 one clarification because we're thinking about
20 stipulating this in, is this testimony that these are
21 the only possible ways that a person's breath test
22 could be affected by these problems?

23 Q (By Mr. Anderson) Do you know of any other ways other
24 than as shown in this chart that the person's breath
25 test could be affected?

1 A I can't think of any right now. I believe what's
2 reflected in this exhibit, and again, it was compiled
3 by you rather than by me, reflects the means by which
4 the defense has alleged the tests could be affected.

5 Are there other ways in which tests could be
6 affected that neither they nor I have thought of up to
7 this point? I can't rule it out, but I can't think of
8 any.

9 Q Finally, the QAP solutions are required to reach -- to
10 have -- to fall within a particular range and have a
11 particular precision CV; correct?

12 A Yes.

13 Q Is it possible that a replacement of data could affect
14 that?

15 A Yes.

16 Q And if that was the case, would we be able to
17 determine that by merely recalculating?

18 A Yes.

19 Q Okay. At which point you would be able to notify any
20 defendants who were affected; correct?

21 A Yes.

22 Q The effects are essentially the same between -- the
23 potential effects are essentially the same between
24 6028, 6029, 6030 and 5036; correct?

25 A Yes.

1 Q Are you aware of any case in which the correction as a
2 result of transposing data, as a result of any of the
3 issues complained of by the defense, weighted mean, et
4 cetera, is greater than the .001 at .08 or .002 at
5 .015?

6 A No.

7 Q That's after review of essentially all solutions since
8 2005 to present and other specific ones attached to
9 this case or specifically requested?

10 A Yes.

11 Q Draw your attention to Batch 60 -- well, first of all,
12 Katie Hoff and Kelly Gross, who are they?

13 A They are former employees of the State toxicology lab.

14 Q They no longer work for them; correct?

15 A Correct.

16 Q Where does Katie Hoff live?

17 A In the Seattle area. I'm not sure exactly where.

18 Q Where does Kelly Gross live?

19 A In Wisconsin.

20 Q Draw your attention to 0618. It's actually one of the
21 solutions with rejected data.

22 Chromatogram shows that Katie Hoff actually
23 rejected this data. Did you wind up analyzing what --
24 why she reasoned there was for rejecting this data?

25 MR. VOSK: Your Honor, I'm going to

1 object. This is speculation. He's about to enter a
2 statistical opinion whether or not there was physical
3 affect that is nowhere noted on the chromatogram.

4 JUDGE STEINER: I think the question
5 is "Do you know," at least that's what I understood
6 it.

7 MR. ANDERSON: I asked whether or
8 not he analyzed, whether or not there was a reason for
9 disqualifying this data or rejecting this data.

10 JUDGE STEINER: Perhaps you can ask
11 if he was able to analyze, and then how, and then
12 we'll revisit the objection.

13 Q (By Mr. Anderson) Were you able to analyze whether
14 there was a legitimate reason for rejecting this data?

15 A I reviewed the chromatograms, so to that extent, I'd
16 be able to do that level of analysis.

17 Q Was there something that you found in the
18 chromatograms that you found a legitimate reason for
19 excluding the data?

20 A I believe there was, yes.

21 Q Can you describe that to the Court?

22 A Could I briefly review that data?

23 Q Yes. I am going to ask you to stand up. I don't have
24 a copy of that.

25 A Yes. On her second aliquot there is a late peak from

1 an earlier injection.

2 MR. VOSK: Your Honor, I'm going to
3 object to this one. Whether or not Dr. Logan can see
4 a reason why somebody may have rejected it is one
5 thing, but it has nothing to do with whether or not
6 that's the reason that Katie Hoff actually rejected
7 it.

8 Now, Katie Hoff is available for a subpoena. We
9 had her up in Skagit County testifying. If they want
10 her to come in and testify why she rejected a piece of
11 data, that's fine. I think having Dr. Logan go in
12 after the fact and reconstruct what another witness
13 could tell us is nothing but speculation on what was
14 in her mind.

15 MR. ANDERSON: Dr. Logan would
16 testify to the facts that any analyst would reject
17 this data. I believe his conclusions in looking at
18 that are appropriate for this Court to consider.

19 MR. VOSK: And with respect to that,
20 when he talks about the reason "any analyst would
21 reject," I would also have to ask for a basis of
22 knowledge how he would know any analyst would do this.

23 (Judges conferring.)

24 JUDGE STEINER: We're going to
25 sustain the objection.

1 MR. ANDERSON: Would the Court allow
2 Katie Hoff to testify with regard to this? And I
3 would indicate that this was a portion of the State's
4 brief presented earlier, and we indicated that
5 Dr. Logan was going to testify, that was the
6 information we provided the Court and Counsel from the
7 get-go.

8 JUDGE STEINER: Ultimately, the
9 objection needs to be made now, and we have to decide
10 whether or not to allow the State to call an
11 additional witness. I don't know if the parties have
12 discussed this with Katie Hoff, if the representations
13 can be made by the State to the defense that would
14 allow a stipulation, but I'm going to sustain the
15 objection. So that's something to be discussed.

16 MR. VOSK: Oh, you didn't want me
17 to -- were you asking us to discuss --

18 JUDGE STEINER: No. I was hoping,
19 in order to save time, if in fact that is what Katie
20 Hoff would testify to, that it might be possible to
21 get a stipulation to that effect, but that's something
22 for the parties to discuss.

23 MR. ANDERSON: I understand.

24 Q (By Mr. Anderson) Please have a seat, Dr. Logan.

25 What is a "shoulder"?

1 A In terms of chromatography it's a peak that appears on
2 the leading or tailing edge of another chromatographic
3 peak. Each of those spikes is what we call a "peak."

4 Q What does shoulder mean?

5 MR. VOSK: Your Honor, I'm going to
6 object at this point. I think the State is trying to
7 bring in through the back door what it couldn't get in
8 through the front here.

9 JUDGE STEINER: Is that correct?

10 MR. ANDERSON: Certainly regarding
11 the same subject, but the existence -- we can talk
12 about how particular results on chromatograms would
13 affect the validity of the test results.

14 I'm not going to have him draw conclusions about
15 this, but he is, in fact, in this case actually an
16 expert with regard to readings of these chromatograms.

17 Quite frankly, an expert should be able to look at
18 the information available to an analyst and draw
19 conclusions about whether or not there are, whether
20 there exists, legitimate reasons to exclude the
21 information.

22 I'm not going to have this expert say that was
23 what was in her mind, but he should be entitled to
24 say, "I see chromatograms. There's an issue with this
25 particular chromatogram, and this would wind up

1 affecting the results in a particular way."

2 JUDGE STEINER: And I think that
3 testimony would be helpful if the analyst or the
4 toxicologist had testified. This is the reason I
5 excluded it.

6 The defense was attempting to undermine that
7 statement of the analyst's or toxicologist's
8 credibility, and you want to provide a buttress, if
9 you will, her or his testimony. But we don't have
10 anyone indicating why the toxicologist excluded the
11 data, and it is entirely possible that what Dr. Logan,
12 I presume, would testify to, would be the reason that
13 toxicologist might have excluded the data. But we
14 can't know that, so I'm going to sustain the
15 objection.

16 MR. ANDERSON: Your Honor, the
17 record thus far has included -- I mean, this is a case
18 about seven particular defendants and their tests.
19 The defense has expanded the scope of that to talk
20 about other tests which have been excluded, tests
21 which are the subject -- go back years and years.

22 There have been reasonable conclusions testified
23 to by each of the witnesses, quite frankly both at
24 Mr. Vosk's -- during Mr. Vosk's direct and my direct.
25 They went back through and talked about why a variety

1 of things were struck out, whether or not it was
2 consistent with, and what decisions they made as
3 result.

4 Dr. Logan is qualified to talk about whether or
5 not there existed a reason for excluding it. The
6 contention by the defense is that there was no reason
7 to exclude.

8 JUDGE STEINER: Well, I haven't
9 heard that yet.

10 MR. ANDERSON: It's in his brief.

11 JUDGE STEINER: All right. But it
12 isn't in any testimony that we've heard and this, I'll
13 speak for myself, if you have ten analysts, ten
14 toxicologists, that come in, and you're able to
15 establish reasons that eight of them excluded data,
16 and you simply don't have the other two, we're not
17 likely to assume then that other two excluded data
18 inappropriately.

19 We are likely to conclude that the other two
20 didn't tell us why they excluded data, and we simply
21 don't know and there isn't much we can do under those
22 circumstances.

23 So I don't think it's worthwhile to spend too much
24 time getting speculation, educated though it may be,
25 as to why a particular toxicologist excluded data.

1 MR. ANDERSON: Thank you, your
2 Honor.

3 Q (By Mr. Anderson) I want to switch your attention to
4 Solution 02019. That was discovered in the last
5 couple of weeks, and this is -- the solution includes
6 the -- the data entered by Jayne Thatcher, essentially
7 switching from 2018 -- the data from 2018 and 2019.

8 Do you recall that?

9 A Yes.

10 Q Can you describe the investigation that occurred into
11 that to determine what the source of error was?

12 A Well, the first thing that was identified was in
13 preparation for these proceedings, Trooper Ken Denton
14 reviewed not just the field solution for this
15 particular test which I think was Defendant
16 Hildreth's.

17 JUDGE STEINER: And so Judge Chow
18 mimics my very concern. We've already heard testimony
19 about this. Why would we hear that again?

20 MR. ANDERSON: I'll just summarize
21 and get to the point, your Honor.

22 Q (By Mr. Anderson) As I understand, Trooper Denton
23 called up Ms. Thatcher who indicated that she didn't
24 remember, but you should take a look at the
25 surrounding tests to see if she, perhaps, switched

1 data. After that they did, in fact, find surrounding
2 tests with data consistent with having merely been
3 transposed.

4 Did you wind up conducting any investigation of
5 your own before determining -- before concluding this
6 was, in fact, switched data?

7 A Yes.

8 Q Can you describe that?

9 A Well, I was the one that pooled the surrounding files
10 and reviewed those. And I found chromatograms
11 representing the numbers that Ms. Thatcher had entered
12 for 2019 in the file for 2018.

13 I met with her -- this was uncovered the week
14 before we started these proceedings. I met with her
15 over that weekend and asked her to take a look at
16 those files and determine how that transposition had
17 occurred, and she did that and determined that it was
18 a careless error that she had entered one for the
19 other.

20 Q Are you familiar with Kurt Dubowski's article cited by
21 the defense?

22 MR. VOSK: Your Honor, I'm going to
23 object to that last answer --

24 JUDGE STEINER: I'm sorry. I'm
25 focusing on whose telephone was ringing in the back,

1 and I did not hear the question.

2 MR. VOSK: And I was just trying to
3 make sure it wasn't mine.

4 JUDGE STEINER: I think it was our
5 back.

6 MR. VOSK: He indicated that the
7 question had been asked --

8 JUDGE STEINER: What was the
9 question? Could you read -- I'm sorry.

10 (Requested question and
11 answer series read by the
12 reporter.)

13 MR. VOSK: Yeah. And then it was
14 that question and the answer to his question. He
15 essentially testified to what Jayne Thatcher told him
16 was the confusion. And I'm not sure it actually
17 answered our question, but, I mean, Jayne Thatcher is
18 available, and if the State wants to call her to
19 testify to that, they can call her to testify, and we
20 can cross-examine her on the stand.

21 I'm not real comfortable having Dr. Logan tell us
22 what everybody says, and now, all of a sudden
23 we're supposed to trust everybody from the lab.

24 JUDGE STEINER: Are you objecting?

25 MR. VOSK: Yes, your Honor. I'm

1 object again.

2 JUDGE STEINER: Sustained.

3 MR. VOSK: Thank you.

4 Q (By Mr. Anderson) What did you do as a result of
5 that?

6 A We changed the -- or Rod Gullberg and Ken Denton are
7 in the process of changing the values on the
8 certification worksheets to reflect the 2081 -- 2018
9 data and 2019 and vice versa.

10 Q Are you familiar with the article cited by the defense
11 relating to a 1.3 percent error in calculation?

12 A Yes.

13 Q Okay. Are you familiar with that article?

14 A Yes, I am.

15 Q Do you believe it stands for the premise that a 1.3 --
16 an error of 1.3 percent in a breath alcohol reading is
17 forensically indefensible?

18 A No.

19 Q I'm showing you State's Exhibit 37. Can you explain
20 your position to the judges.

21 JUDGE STEINER: I'm sorry.

22 Counsellor, this is Exhibit No.?

23 MR. ANDERSON: 37.

24 JUDGE STEINER: 37.

25 THE WITNESS: The section I believe

1 defense will stipulate that the 1.3 indefensible error
2 is unrelated to the plus or minus 5 percent indicated
3 on these sheets.

4 MR. ANDERSON: Thank you. The State
5 is not satisfied with that stipulation.

6 Q (By Mr. Anderson) Proceeding on. What do you base
7 your belief with regard to this article and whether or
8 not it makes such an error indefensible?

9 A It would be -- well, the direct analogy would be on
10 the Spokane instrument where we identified that a .001
11 error had been made in the vapor reference
12 concentration for that Solution 50 -- 05036 -- where
13 we became aware that there was an error in the
14 calibration factor that was used which coincidentally
15 turns out to be about a 1.2 percent error. If we were
16 to ignore that, then that would be forensically
17 indefensible. That's why we notified those
18 defendants.

19 Q And we had the conversations -- or have you based your
20 opinions on conversations with Mr. Dubowski?

21 A With Dr. Dubowski, yes.

22 Q How did that -- how did that affect your conclusion?

23 MR. VOSK: Your Honor, I'm sorry.
24 And I hate to interrupt. Is it possible -- Dr. Ashley
25 Emery just arrived. I'm trying to work out with him

1 to make things shorter for the Court.

2 Could we please take a brief five-minute break? I
3 don't mean to be rude.

4 MR. ANDERSON: I guess I just ask
5 that before that, the witness to be allowed to answer
6 the question.

7 MR. VOSK: Could we hold that
8 because I think I had o an objection to that question.

9 JUDGE STEINER: I think we're going
10 take our 15-minute break, so we'll come back just
11 before 2:30.

12 MR. VOSK: Thank you, your Honor.

13 THE CLERK: Please rise.

14 (Recess.)

15 JUDGE STEINER: Please be seated. I
16 understand the parties would like to start with a
17 discussion -- a discussion regarding witnesses and
18 scheduling.

19 MR. ANDERSON: My understanding is
20 that Mr. Vosk will still have Dr. Emery available at
21 2:00 tomorrow. That may have been -- the Court's
22 understanding may have been that he was only going to
23 be available on Thursday anyway. My understanding is
24 he is going to be available today, but I don't think
25 that's going to happen today, so Thursday's fine.

1 JUDGE STEINER: Tomorrow? We have
2 Thursday --

3 MR. ANDERSON: That's apparently the
4 other portion of the discussion. I'd understood there
5 was a courtroom available tomorrow. I had heard
6 discussion from Judge Chow with somebody else
7 indicating that he was not anticipating tomorrow.

8 JUDGE STEINER: That's correct.

9 JUDGE PHILLIPSON: I think the court
10 is available. I'm not sure the judges are available.

11 MR. VOSK: Dr. Emery will be
12 available Thursday. What I was trying to do by
13 bringing him on Wednesday was maximize the use of our
14 time. The State would have extra time to
15 cross-examine or whatever.

16 I was under the misimpression because I think that
17 I overheard the same conversation that Mr. Anderson
18 did when you were speaking to -- I think that was the
19 court administrator.

20 JUDGE CHOW: Paul.

21 MR. VOSK: And I thought that you
22 had reserved the courtroom Wednesday as well --

23 JUDGE STEINER: Well, this was
24 Mr. Manolopoulos indicating that, "I know you said you
25 didn't want Wednesday, but we have Wednesday for you."

1 And so I was simply acknowledging that, "Yes, thank
2 you very much."

3 But we are hoping, perhaps beyond hope, of not
4 coming in on Wednesday, and of just coming in
5 Thursday. So tell me that's not possible.

6 MR. VOSK: I think in order to get
7 in those analysts, it's not possible. I do think
8 we'll get the analysts done early in the day unless
9 the State's got a lot, and I don't think they do
10 because they're going on affidavits, and that's why I
11 said I was going to have Emery come in early. So I
12 was trying really to help us get done Thursday, but I
13 will do whatever the Court says.

14 MR. ANDERSON: I'm just about done
15 with Dr. Logan, and then whatever cross that exists,
16 but I don't think it's possible to get through the
17 analysts --

18 JUDGE STEINER: Let's talk about it
19 at the end of the day. Any reason that we can't wait
20 until the end of the day?

21 JUDGE PHILLIPSON: If we're going to
22 go tomorrow, we've got to notify and get pro tems
23 lined up. I know you guys don't have to do that out
24 at Redmond.

25 JUDGE STEINER: Yeah. That's my

1 golf day tomorrow.

2 MR. VOSK: I apologize, your Honor.
3 I honestly think I misunderstand. Correct me if I'm
4 wrong, I think both Mr. Anderson and I misunderstood
5 about that conversation. I think we both thought we
6 were going to be here Wednesday.

7 MR. ANDERSON: We both made an
8 assumption.

9 MR. VOSK: And we have agreed on
10 very little so it's significant that we have agreed on
11 this.

12 MR. ANDERSON: I don't know what our
13 understanding consists of so...

14 JUDGE PHILLIPSON: Ms. Vuong, are
15 you going to go on strike if we have one more day?

16 JUDGE STEINER: In the meantime,
17 perhaps, you can both show your appreciation for all
18 of the time that we've spent by just going really
19 fast, but not speaking fast, avoiding conjunctions or
20 any words that we don't need to utter.

21 THE WITNESS: Your Honor, I would
22 not be available on Thursday if that makes a
23 difference.

24 JUDGE PHILLIPSON: Hopefully you're
25 going to be done by then.

1 JUDGE STEINER: Everyone else
2 already knows you're not available?

3 THE WITNESS: Yes.

4 JUDGE STEINER: Okay.

5 Q (By Mr. Anderson) Have you changed any of the
6 policies and procedures based on, well, the defense
7 understanding of the article, that the 1.3 percent
8 error is forensically indefensible, any of your
9 protocols with regard to HCGM, HSCG, the QAP
10 protocols, the simulator solution, the field solution
11 protocols, the breath test section manual?

12 A No.

13 Q Why not?

14 A Because we've established appropriate limits for
15 acceptable error in each of those methods based on the
16 available technology.

17 Every -- I testified -- I think the first thing I
18 testified to was that every analytical method has some
19 variability or error. The important thing is that you
20 determine what that is for your method, your
21 equipment, your instruments.

22 Q But doesn't the language, "a 1.3 percent error -- such
23 a 1.3 percent error is forensically indefensible,"
24 doesn't that lead you to another conclusion?

25 A No.

1 Q Why not?

2 A Because that's not what that article says. It says --

3 MR. VOSK: Your Honor, I'm going to
4 object. This has been asked and answered. He already
5 went into what he thought it meant, and he
6 distinguished it from the 5 percent.

7 JUDGE STEINER: Objection sustained.

8 Q (By Mr. Anderson) Has your understanding of the
9 article been influenced by discussions you had with
10 Mr. Dubowski since the date of this article?

11 A Yes.

12 Q How did they influence you?

13 MR. VOSK: And, your Honor, at this
14 point I'm going to object. If the witness wants to
15 give an opinion that's okay. This is almost trying --
16 trying to get Kurt Dubowski's opinion through
17 Dr. Logan.

18 Dr. Logan's the witness, and I would like to add
19 for the record he is nodding his head "yes."

20 JUDGE STEINER: It appears to me
21 that this is an attempt to get in Dr. Dubowski's
22 opinion through Dr. Logan.

23 Any reason that's not correct?

24 MR. ANDERSON: Well, I mean, that's
25 exactly what it is. I think it's allowable for a

1 couple reasons. One, the basis for Dr. Logan's
2 decision to not change the policies, to adopt the
3 policies that he's specifically talked about, the
4 policies which talk about errors of 5 percent
5 inherently is relevant.

6 And he's gone through, and we've talked about the
7 discussions that we've had, discussions with members
8 of other breath test programs, about what they do,
9 about what they think the right thing to do is. This
10 is about the forensic state of the art. And defense
11 is trying to get Dubowski's opinion or is trying to
12 infer Dubowski's opinion from the statement in that
13 article.

14 Dr. Logan actually spoke to him in investigating
15 whether or not this should wind up causing him to
16 change the policies he's put into effect. He should
17 be able to talk about why he is or is not doing
18 that -- and just one sentence -- ultimately the
19 question for this witness is going to be -- one of the
20 questions for this court is whether or not his
21 decisions to not require BACs with less than 5
22 percent, to not institute the weighted mean that the
23 defense wants is going to be based -- is going to be
24 subject to an arbitrary and capricious ruling by this
25 Court, and that's part of what the doctor was basing

1 his opinions on.

2 JUDGE STEINER: One of the comments
3 that I made on the ER 11501, it allows the Court to
4 decide whether to admit testimony and then also the
5 Court -- always what weight to be given to that
6 testimony.

7 We have denied the State's request to call
8 Dr. Dubowski. So I'm going to overrule the objection.
9 You may answer the question. I will indicate,
10 however, the weight we would afford to this is likely
11 to be very limited.

12 MR. ANDERSON: Fair enough.

13 MR. VOSK: For the record, may I
14 make a quick objection?

15 JUDGE STEINER: Sure.

16 MR. VOSK: And I understand your
17 ruling. My objection includes the fact that this is
18 hearsay. If there was an article or something we
19 could examine, see what the opinion was so we could
20 cross on it, that would be a different matter. The
21 fact that we have no idea to know what the substance
22 of this was forms the basis for our objection.

23 Thank you for giving me that opportunity.

24 JUDGE STEINER: Thank you.

25 Q (By Mr. Anderson) What did Dr. Dubowski say?

1 A Well, I told him that it was my opinion that I
2 referenced --

3 MR. VOSK: Now, I am going to
4 object. I think that was a different question than
5 what was asked before. Now, he just outright asked
6 what Dr. Dubowski said, not "Did you have discussion
7 with him?"

8 JUDGE STEINER: Mr. Vosk, keep in
9 mind, "What did Dr. Dubowski say?" "Hello." "How are
10 you?" We need to know the context. I'm going to
11 overrule your objection. I think he's just setting
12 the context for his response. His response was in
13 response to a question of mine.

14 Go ahead. You may answer.

15 Q (By Mr. Anderson) Please describe the conversation.

16 A I sent an e-mail to Dr. Dubowski where I referenced
17 that particular section of the article. I sent him a
18 copy of the article along with that.

19 I told him that my reading of his article was not
20 that an error of 1.3 percent was forensically
21 indefensible given that there is an acceptable error
22 of plus or minus of 5 percent within the accuracy
23 limits of the -- our breath test program, which is
24 consistent with that in other jurisdictions.

25 I referenced an acceptable limit of plus or minus

1 20 percent error on controls in toxicology tissue
2 analysis which is also forensically defensible and
3 asked if he disagreed with my opinion that those
4 were -- that those ranges were forensically
5 indefensible -- or were -- were forensically
6 defensible.

7 And he indicated that his article did not
8 contradict -- he indicated in response that his
9 article did not contradict my opinions. And I can
10 provide --

11 MR. VOSK: And defense is not
12 claiming that it does contradict on the plus or
13 minus --

14 JUDGE STEINER: I just want to try
15 to limit the use of argument until actually we're at
16 the end.

17 MR. VOSK: I'm sorry.

18 Q (By Mr. Anderson) You referenced the 20 percent error
19 rate on blood testing. Can you explain what you're
20 talking about?

21 A When you analyze at controls for drug testing and
22 tissue toxicology, because of the limitations of the
23 matrix, that the substance that you're analyzing, the
24 nature of the drug itself, for some drugs the limits
25 of accuracy for those tests are much larger, and

1 limits of plus or minus 20 percent, or plus or minus
2 35 percent in some instances for some drugs, may be
3 best that the technology can offer, which is what
4 makes it forensically defensible.

5 Q In fact, the BAC in Washington used to only report to
6 .08, two digits, as opposed to .081; isn't that
7 correct?

8 A Yes, up until 1995.

9 Q What does the Washington State Patrol toxicology lab
10 do when they know they have a predictable mistake, or
11 a an error that would affect a defendant's test in a
12 predictable manner?

13 A We published a notice about on it our public Web site.

14 Q In fact, you went beyond that and actually sent out
15 letters to those affected in Spokane and intend to
16 send out letters to those affected by 0219?

17 MR. VOSK: I'm going to object.

18 This is all already testified to.

19 JUDGE STEINER: I think it has been.

20 Sustained.

21 Q (By Mr. Anderson) In general, does most areas of
22 forensic science have known error rates?

23 A Yes.

24 MR. VOSK: Objection. Asked and
25 answered a number of times, your Honor. It seems like

1 we're beginning to rehash things.

2 JUDGE STEINER: All right. I'm not
3 quite sure where we're going, but I'm going to spend
4 more time on this than on the next question.

5 Q (By Mr. Anderson) Can you explain -- well, I guess
6 and not "error rate." What I met was accuracy, like
7 percentage accuracy.

8 In general, does forensic science -- most areas of
9 forensic science, do they deal with forensic
10 accuracies like we just talked about, the 20 percent,
11 the 5 percent, the 1.3 percent?

12 A Most areas of forensic science are not quantitative in
13 that regard. They're qualitative. Drug chemists
14 identify is it cocaine? Is it methamphetamine? Trace
15 evidence analyst indicate is it this brand of
16 cigarette butt or that brand of cigarette butt.

17 In forensic toxicology where you're making
18 quantitative assessments, then there is a statement of
19 accuracy or a determination of the accuracy or of the
20 limits of accuracy of that test established as part of
21 the accreditation criteria for ABFT.

22 Q With regard to your reinvestigation of the protocols,
23 can you describe how you revised the protocols
24 governing the laboratory, the testing of simulator
25 solutions?

1 A How I've revised the protocols?

2 Q Just within recently.

3 A Since July, every error that we've identified, whether
4 it be transcription errors, dating errors, data entry
5 errors, issues with having a consistent protocol for
6 keeping or discarding data have resulted in updates to
7 the laboratory protocols.

8 One of major deficiencies that was identified was
9 the fact that there was no review process in place for
10 the collective simulator solution gas chromatography
11 results. So that responsibility for review has now
12 been delegated to a supervisor.

13 There are three levels of checking of data that
14 have been added to protocol: One, by the analyst at
15 the time of analysis; second, at the time of data
16 entry; a third, after the certification worksheet is
17 printed out where the results of the chromatograms are
18 checked against the entered data.

19 A subsequent review by a supervisor of the same
20 data to make sure that results have been correctly
21 entered. And then finally, the audit process that
22 we've used going backward is being used prospectively
23 by the breath test program to check everything you saw
24 on the checklist before they accept simulator solution
25 for use in field, whether it be a field solution or a

1 -- or a QAP.

2 Q You kind of rattled through the double checking. You
3 said there were three steps of double-checking by the
4 actual analyst?

5 A There are three -- I guess there are two steps. One
6 is when they enter the data into the spreadsheet, and
7 they check -- they go back and recheck their entry of
8 that data.

9 Q So they enter it, they back to the chromatograms: Is
10 this right? Is this right? Is this right?

11 A Yes.

12 Q Go on.

13 A And then the second one is when the certification
14 worksheet is printed out upon completion of all the
15 analysts' tests, we go through the same process. They
16 pool the chromatograms again, and check the printed
17 values on the sheet to match the values on the
18 chromatogram.

19 The third level is the review of the chromatograms
20 and the worksheet by the supervisor.

21 Q You've also instituted the statistical outlier
22 analysis; correct.

23 A Yes. And it was -- yes. We did not have a formal
24 policy in place prior to December for statistical
25 outliers. It was a very infrequent happening.

1 I think collectively we've identified 13 sets of
2 data out of probably over a thousand tests, if you
3 considered all the tests by all the analysts over the
4 last three years. It was not a frequent occurrence
5 that led us to identify a need for a written outlier
6 policy.

7 But it was clear that different analysts were
8 applying different criteria, so that was not a good
9 practice. We have an outlier policy in our protocol
10 now.

11 Q And to be clear, you're not saying 13 -- those 13 of a
12 thousand all qualified as statistical outliers, are
13 you?

14 A That's correct. I'm not saying that.

15 MR. ANDERSON: Thank you. Nothing
16 further.

17 RE-DIRECT EXAMINATION

18 BY MR. VOSK:

19 Q Dr. Logan, when the State was asking you about Asa
20 Louis's solution, I think it was 5012?

21 A Yes.

22 Q You indicated that you only had to have one control
23 every ten runs. Where do you get that from?

24 A I didn't say every ten runs. I said every tenth
25 injection had to be a control value, and that's in the

1 gas chromatography protocol.

2 Q Which one?

3 A Any of them.

4 Q I'm going to hand you Exhibit 103, and I'm going to
5 look for Exhibit 102. Can you identify for the Court
6 and show me where that is in there?

7 A Yes. This is Exhibit 103 Analysis of Alcohols in
8 Aqueous and Biological Samples by Headspace Gas
9 Chromatography, dated 10/10/06. And I'm looking on
10 Page 3 of 11. It's section F. "Controls." You want
11 me to read that?

12 Q Sure.

13 A "Commercially prepared controls are purchased for use
14 in each assay. At a minimum, two controls levels are
15 included in each batch. Reanalysis of some samples,
16 certification run or other limited runs must include
17 at least one control per ten samples. See Appendix B
18 for a list of current controls. After every ten
19 unknowns, one quality control sample followed by one
20 blank is analyzed."

21 Q So then that -- are you saying that that overrides
22 this simulator solution protocol?

23 A No.

24 Q Okay. So then how do those two match? Because
25 doesn't the simulator solution protocol say that

1 they've got to do a control with each of their runs?

2 A Yes.

3 Q So how do those two match up?

4 A Because the simulator aliquots would be measured as
5 part of a larger run, so there would be multiple
6 controls in that run.

7 Q Okay. So this and the other one, these are GC
8 protocols talked about in the audit?

9 A Yes.

10 Q When we took a look -- what I want you to do now is
11 take a look at Section K-3 for me.

12 A Sure.

13 MR. ANDERSON: Of the? Counsel,
14 what exhibit?

15 MR. VOSK: Same exhibit.

16 Q (By Mr. Vosk) Can you read K-3 for the Court, please?

17 A Sure. "Verify that each control is properly
18 identified and quantifies within plus or minus .01
19 grams per hundred mL of the target value. Verify that
20 the other standards quantify within .01 grams per
21 hundred mL of their respective target value.

22 "If any" -- then goes into Section i. "If any
23 quality control values are out of range or any of the
24 blanks following a quality control are positive,
25 determine if it is due to incorrect placement of the

1 sample vials in the same autosampler. This can be
2 corrected only before any vials are removed from the
3 autosampler as follows:

4 "a) Compare the written numbers on the autosampler
5 vials in each position with the sample ID on the
6 sequence log table.

7 "b) If there was a mismatch, the samples can be
8 moved to the correct position and a partial sequence
9 analyzed.

10 "ii. If one quality control per analytical run is
11 out of range but within plus or minus .02 grams per
12 100 mL of the target value, all positive samples
13 within ten samples of failed QC are realiquotted and
14 reanalyzed.

15 "a) Use the same calibration, if it is within the
16 same original calibration time.

17 "b) Use the same internal standard.

18 "c) Include a positive control and a blank at the
19 beginning and end of the partial sequence.

20 "iii. If more than one QC is out of range or the
21 partial sequence in "i" does not resolve the problems,
22 the entire run realiquotted, including standard and
23 controls and rerun."

24 Q I'm going to hand you Exhibit 102. Does that say --
25 can you identify that for the Court, and let it know

1 whether or not it says the same thing?

2 A Exhibit 102 is "Analysis of Alcohols in Aqueous and
3 Biological Samples by Headspace Gas Chromatography"
4 dated 10/23/2004. And you're asking me --

5 Q Does it have that same section in there?

6 A Yes, it does.

7 Q When we took a look at Asa Louis's chromatogram and we
8 wanted to make sure that that QAP was okay, we took a
9 look at the other solutions that were up there. The
10 first one you indicated in that QAP was solution 4040.
11 Analyst No. 2, the control value, is that within
12 plus or minus 01 of the control value?

13 A Yes.

14 Q How?

15 A Because the control value is .10.

16 Q And what's the control value for Analyst 2?

17 A .098.

18 Q So what we need to have is right here in this column
19 is what you're talking about? (Indicating.)
20 So if this turned up to be a .08, that would be
21 incorrect?

22 A Yes. If the -- if the -- if the value for the control
23 was .08, that would not be acceptable.

24 Q Okay. Now, with respect to Asa Louis, that was
25 Solution 5012?

1 A Yes.

2 Q You have no idea whether Rod Gullberg's right or Asa
3 Louis is right, do you?

4 A With respect to what?

5 Q What control value is suppose to be there, which
6 chromatogram was meant to be used?

7 A Well, the protocol says a contemporaneous control.

8 Q Well, Rod Gullberg is the one you assigned to correct
9 this. And you said this value is wrong for some
10 reason. I'll assume you explained the process to him;
11 is that correct?

12 A Yes.

13 Q So he would understand how it works?

14 A Yes.

15 Q And for some reason he decided that value was
16 incorrect?

17 A I didn't hear that part of his testimony.

18 Q Well, whose signature is that? Whose initials?

19 A I'm not disputing that he made that change. I didn't
20 hear him testify his reason for doing that.

21 Q Well, I'm just asking what's right there on the
22 certificate?

23 A Yes. I'm agreeing with you.

24 Q And Asa Louis crossed off the .10. We saw that
25 earlier. So they are both saying Dr. Logan [sic] is

1 saying this value is wrong. Asa Louis is saying the
2 .10 is wrong. So either we don't know who's right, or
3 there's neither value is right?

4 A I'm not saying that's wrong.

5 Q You're not saying what's wrong?

6 A You just said "Dr. Logan" is saying that's wrong. I'm
7 not saying that that's wrong.

8 Q I meant Rod Gullberg. Either Rod Gullberg is wrong or
9 Asa Louis is wrong, and we can't know which.

10 A Or they're both right. Either one is acceptable.

11 Q But we don't know that. We don't know that that's
12 what occurred here, do we?

13 A You would have to ask them individually their reasons
14 for doing that. I haven't discussed it with them.

15 Q So you don't know?

16 A I don't know their reasons for what they did, no.

17 Q Okay. Now, when we took a look at Melissa
18 Pemberton's solution, 5017 and you talked about --
19 when we have somebody put in a test value or an
20 aliquot into their runs, you've said we've got these
21 60 or 80 or however many slots for the aliquots. And
22 if I'm going to go ahead and run some of mine, it's
23 okay. It was accepted in the past that I could just
24 go in and add in somebody else's right along with it.

25 We found out earlier that, in fact, Melissa

1 Pemberton and the alleged Ann Marie Gordon tests were
2 run on different machines?

3 A Yes.

4 Q Two different instruments. One was Instrument 4, and
5 one was on Instrument 5?

6 A Yes.

7 Q Now, if we go through these solutions right here, and
8 we can go through them one at a time if the Court
9 would like or if you would like, are we going to find
10 that Melissa Pemberton had another simulator run on
11 that same date, June 3rd?

12 A I don't know.

13 Q Well if she didn't --

14 A Well, are you asking if she did -- if she had -- if
15 she ran her own solutions, or are you asking about if
16 she tested a different batch? I'm not sure of your
17 question.

18 Q Well, what you indicated was that she was already
19 running some of her own, somebody else could throw
20 theirs in on top?

21 A Yes.

22 Q So that would mean, since the machines are different
23 Ann Marie Gordon's aliquots for this solution couldn't
24 have been run part of -- as part of Melissa
25 Pemberton's aliquots for this solution because they

1 are different machines.

2 So they would have had to be run as part of her

3 run for a different solution; isn't that correct?

4 A No.

5 Q Why don't you explain to me why not.

6 A Because Melissa Pemberton was running samples on both.

7 She had full runs on both instruments.

8 Q She had --

9 A She was run -- she was running samples on both

10 instruments. I think I testified --

11 Q Her own samples?

12 A Yes. Blood alcohol samples, other analytical samples

13 for alcohol.

14 Q Do we have those records?

15 A We those records, yes.

16 Q Have you reviewed those records?

17 A I don't recall.

18 Q Have you seen any record where she was actually

19 running a test on that other instrument?

20 A Yes.

21 Q On that instrument?

22 A Yes.

23 Q At that time?

24 A Yes.

25 Q Can you produce that for us in court for us tomorrow

- 1 morning?
- 2 A Yes.
- 3 Q Would you be willing to stipulate at this point in
4 time that there was not another simulator solution
5 being run?
- 6 MR. ANDERSON: Objection. The
7 witnesses don't stipulate.
- 8 JUDGE STEINER: The witness is what?
- 9 MR. ANDERSON: Don't stipulate.
- 10 JUDGE STEINER: Oh. Agreed.
- 11 MR. VOSK: It wasn't used as a term
12 of art.
- 13 Q (By Mr. Vosk) Would you agree that there was not a
14 single -- she was not running another simulator
15 solution on the instrument at this time?
- 16 A What do you mean by "another simulator solution"?
17 Another batch?
- 18 Q She wasn't testing another batch. She wasn't testing
19 any simulator solution on this machine at this time?
- 20 A My -- my understanding is that she was testing her own
21 aliquots of a simulator solution in the batch that she
22 was running.
- 23 Q With Ann Marie Gordon's?
- 24 A Yes.
- 25 Q And are those the other solutions you're saying that

1 were being run at the time?

2 A My understanding of what -- what was explained to me
3 had happened in that run was that she had prepared
4 samples and aliquots to test one of her cases, her
5 blood cases, her death investigation cases, and added
6 her simulator solutions to the end of her run: The
7 five vials, plus the control, plus the blank.

8 And then she was given an additional set of
9 aliquots by Ed Formoso and told that they were to be
10 added for Ann Gordon.

11 Q Why don't we take a look. Let's pull up 5012 first,
12 just to verify our dates. I'm sorry. That was 5017.

13 The date we're looking at here is June 3rd?

14 A Yes.

15 Q All these solutions are numbered in order, so any
16 others she did on June 3rd should be those falling
17 right around it; right?

18 A Yes.

19 Q Let me take a look at 5016.

20 MR. ANDERSON: 5016.

21 MR. VOSK: 5-0-1-6.

22 THE WITNESS: Maybe I'm not
23 understanding your question because I'm not disputing
24 that -- I'm not claiming that other solutions were run
25 on the same date. I have no knowledge of that.

1 Q (By Mr. Vosk) Okay. So then you would agree then or
2 you would at least not dispute that she was not
3 running any other simulator solutions in this batch?

4 A Any other batches?

5 Q Simulator solutions.

6 A Simulator solution batches?

7 Q Yes.

8 A Simulator solution batches, correct, there were two
9 sets of aliquots for 05016 on one run -- or run on the
10 same day by Melissa Pemberton.

11 Q But not on June 3rd?

12 A Are you telling me that the dates of the two runs were
13 different?

14 Q No. I'm asking you. I've moved on from 5017 because
15 on 5017 what we have are, Melissa Pemberton and Ann
16 Marie Gordon have two solutions tested. Same date,
17 different machines?

18 A Yes.

19 Q You've indicated that, or least insinuated that what
20 happened is that she just threw Ann Marie Gordon's
21 test into one of her runs?

22 MR. ANDERSON: Objection.

23 Mischaracterization. She threw in Ed Formoso's test
24 under Ann Marie Gordon's name.

25 MR. VOSK: I'm just trying to get

1 through this.

2 JUDGE STEINER: You may proceed.

3 Q (By Mr. Vosk) Assuming for the moment that that's
4 correct, I'm not conceding it, but assuming for the
5 moment that's correct, I'm now going to other
6 solutions to demonstrate that she, in fact, tested no
7 other simulator solution on that date.

8 Do you now understand where I'm going with this?

9 A I understand your argument, but I don't know where
10 you're going with it.

11 Q Well, what I'd like to do is if you're saying that
12 your understanding is she had put in some of her own
13 simulator solutions, and then added Ann Marie Gordon's
14 to some of her own, it ought to be right here in the
15 record, and we ought to be able to find it.

16 So now I'm looking at other batches to see if we
17 can find it.

18 A I'm not -- I don't think that's what I'm saying.

19 I'm -- I'm sorry if I'm -- if I'm not explaining.

20 Q Perhaps I'm not quite understanding. Why don't you
21 explain again?

22 A My understanding, based on what Melissa discussed with
23 me, was that she was running samples on two
24 instruments. You could look at the chromatograms to
25 see which ones. She had space on the end of one of

1 the runs on one of the instruments because on the end
2 of the run on the other instrument she had her
3 simulator solutions for Batch 05017. And that she was
4 provided by Ed Formoso with an additional set of five
5 aliquots, control, and blank which were added to the
6 other instrument.

7 So for Melissa Pemberton's testing on June 3rd,
8 there would have been two sets of results for Batch
9 05017. Both of which carry her name as operator. One
10 of which is flagged, "AG," and the other is "MP" or
11 Melissa Pemberton. So that's the limits of my
12 understanding of what's --

13 Q So you won't dispute if we say there's not a single
14 other simulator solution that was tested on that date
15 by Melissa Pemberton?

16 A I have no reason to dispute that, no.

17 Q Now, what made the fact that -- why did you tell Ann
18 Marie Gordon that she wasn't supposed to be having
19 other people run tests for each other when she was
20 first brought in on the job?

21 A I'm sorry. Say that again.

22 Q You testified yesterday -- is it yesterday now? You
23 testified yesterday that when Ann Marie Gordon came
24 in, you told her that it was inappropriate to have
25 people testing for each other.

1 A Yes.

2 Q Why did you tell her that?

3 A Because she told me that David Cradmore [phonetic], in
4 the 1990s, had had people test simulator solutions for
5 him.

6 Q But why was that inappropriate?

7 A Because the purpose of testing -- of -- of having so
8 many people test a simulator solution is so that they
9 could go to court to testify about -- that the
10 solution met the requirements established in the
11 protocols.

12 Q So the thing that the judge brought up earlier,
13 whether or not it mattered if somebody else was
14 testing, you knew the only reason to have all these
15 people testing the solutions was to make sure somebody
16 could go in and testify that they had done it?

17 A Yes.

18 Q So if, in fact, Ed Formoso went to Melissa Pemberton
19 and said, "Hey, run this for Ann Marie Gordon," the
20 understanding would be the reason she's doing it is so
21 Ann Marie Gordon could come into court and say, "I
22 tested it"?

23 MR. ANDERSON: Objection. Calls for
24 speculation.

25 MR. VOSK: This has been testified

1 to by everybody.

2 JUDGE STEINER: Overruled.

3 Q (By Mr. Vosk) Yes or no?

4 A Are you asking me what Melissa Pemberton's expectation
5 would have been?

6 MR. VOSK: Can you please read back
7 the question, Madam Clerk -- or Court Reporter.

8 (Requested question read by
9 the reporter.)

10 Q (By Mr. Vosk) So is that the understanding of why
11 somebody would have this tested?

12 A That would be a reasonable conclusion, I guess.

13 Q And, in fact, Melissa Pemberton has already testified
14 that the reason they had all these people test is so
15 that somebody would be available to testify.

16 So when Ed Formoso comes to her and says, "Hey,
17 test this is for Ann Marie Gordon," how could she not
18 know she was testing it so Ann Marie Gordon could go
19 into court and testify under oath that she tested it,
20 not Melissa?

21 A I don't know.

22 Q And so by doing so, Melissa Pemberton was helping her,
23 helping Ann Marie Gordon, commit this act?

24 MR. ANDERSON: Objection calls for a
25 legal conclusion. I mean the facts are in the record.

1 JUDGE STEINER: Objection sustained.

2 Q (By Mr. Vosk) How could Melissa Pemberton know
3 whether or not these little aliquots had been prepared
4 for Ann Marie Gordon?

5 A I don't know.

6 Q So she's just getting some aliquots from a third
7 person who says, "Hey run this and say it's for
8 so-and-so," and you think that's okay?

9 A No, I don't think it's okay.

10 Q Now, you indicated that one of the things that
11 Sergeant Gullberg was checking for you in this
12 analysis were these declarations?

13 MR. ANDERSON: Objection
14 mischaracterizing the testimony. I think that was one
15 of the things he said he wasn't asked to be checked.

16 MR. VOSK: Well, the witness can
17 tell me what he said, but that was what I heard.

18 THE WITNESS: No. It was not part
19 of the checklist -- of either checklist. But I think
20 I testified that he had -- or I was asked by the
21 prosecutor if Sergeant Gullberg had in fact identified
22 some errors in the declarations, and I agreed that he
23 had.

24 Q (By Mr. Vosk) Okay. So he identified some, but you
25 have no idea whether these declarations have been

1 corrected yet?

2 A Which -- which ones?

3 Q Pick one. You have -- with respect, let's say there
4 is a declaration -- there is a solution out there
5 that's got Rod Gullberg's signature and everything
6 signed off, that correction sheet.

7 Do you know whether or not those declarations have
8 been corrected?

9 A Well, I know that any errors that were identified, and
10 then during that process, have been corrected. Are
11 there are others that may not have been corrected? I
12 can't say that there are not.

13 Q So my question is: Can you tell us whether or not the
14 declarations have all been corrected in the those
15 things that Rod Gullberg has looked at?

16 MR. ANDERSON: I think he answered
17 that question. Objection.

18 JUDGE STEINER: The question assumes
19 that there are errors. And I think the question was:
20 Is it possible that there were errors in the
21 declarations, and that they haven't been corrected?

22 If you want to ask that question, you certainly
23 may.

24 MR. VOSK: If I can have just a
25 second, your Honor?

- 1 Q (By Mr. Vosk) Solution 6044, does this have Rod
2 Gullberg and Ken Denton's signatures on it?
- 3 A Yes.
- 4 Q And do they indicate that there's any corrections that
5 need to be made to the declarations?
- 6 A No.
- 7 Q If we take a look down, then, in the declaration for
8 the QAP, the number we ought to see reported is .0500,
9 then, isn't it?
- 10 A Yes.
- 11 Q What number is there?
- 12 A Point --
- 13 MR. ANDERSON: I ask Counsel to
14 identify for the record the certification he's looking
15 at.
- 16 MR. VOSK: The certification for
17 Dr. Naziha Nuwayhid.
- 18 Q (By Mr. Vosk) What number is represented there?
- 19 A .04 grams per hundred mL.
- 20 Q That's wrong, isn't it?
- 21 A Yes.
- 22 Q Dr. Nuwayhid went back after the fact, after the
23 corrections here on October 8th, 2007, signed off,
24 again saying it was correct, didn't she?
- 25 MR. ANDERSON: Your Honor, I'm going

1 to object. This has already been gone into with
2 either Denton or Gullberg.

3 MR. VOSK: I'm not going to go past
4 this point, your Honor.

5 JUDGE STEINER: Okay.

6 THE WITNESS: I think you need to
7 carefully read what it is she's signed there.

8 Q (By Mr. Vosk) Well, we can read it if you want to,
9 but isn't it affixed to this declaration?

10 A Yes.

11 Q So wouldn't -- isn't your expectation that people are
12 going to expect that that signature is signing off on
13 this declaration?

14 A That would be part of the expectation, but her
15 signature on there accurately reflects the addition
16 statement that was added to the declaration.

17 I'm not -- I'm not saying that it's okay to --
18 if -- if we have the wrong number on there to ignore
19 it. I'm saying that it should be corrected, but I'm
20 saying that her signature on there doesn't say the
21 number that appears on the declaration was correct.

22 Q Are we playing word games here?

23 A Would you like me to read that?

24 Q No, no, no, no.

25 Don't we expect when that's been signed that it's

1 your expectation because you're the one who maintains
2 the Web sites and has those things put out, is it your
3 expectation that a defendant, a citizen that's been
4 charged is going to rely on that signature --

5 JUDGE STEINER: Mr. Vosk, you've
6 asked this a number times. I think we all understand
7 the issue.

8 MR. VOSK: Okay. I'm going to move
9 on, your Honor.

10 JUDGE STEINER: Thank you.

11 Q (By Mr. Vosk) Now, you spoke before about how you had
12 consulted others in the forensics community and found
13 out that the weighted mean isn't used.

14 Isn't it the case that most of the responses you
15 got back had to do with the actual analysis of a
16 substance of evidence, not these solutions, but most
17 of the responses you got back concerned the actual
18 evidence being introduced into court?

19 A It was about the general practice of the laboratory.
20 Most of which -- for many of which did not test
21 simulator solutions, but it was about -- I -- the
22 question I asked was about their general practice and
23 whether they employed weighted means for any
24 toxicological procedures.

25 Q And you indicated that no one did?

1 A That's right.

2 MR. VOSK: Can I get this marked,
3 please.

4 (Exhibit marked.)

5 Q (By Mr. Vosk) Isn't it true that you got a response
6 from Rod McCutcheon, Chief Toxicologist in Bexar
7 County, Office of the Medical Examiner of San Antonio,
8 Texas?

9 I'm going to hand you what's been marked as
10 Exhibit 131 where he said, "We do not use weighted
11 means for any results we report. I'm not aware of
12 laboratories that are reporting weighted means. The
13 only area I would anticipate considering the use of
14 weighted mean in operation would be for the
15 calculating the standard deviation of our alcohol or
16 drug controls."

17 Isn't that --

18 A Yes.

19 Q -- what he says?

20 And we're talking about reference materials here,
21 essentially, our controls for the breath test; is that
22 correct?

23 A Yes. And he says he would anticipate considering the
24 use of weighted means. He doesn't say he uses
25 weighted means.

1 Q It doesn't say he doesn't?

2 A Are we playing word games now?

3 Q You just got done telling us nobody did this. Isn't
4 it, in fact, true that he's indicating that for the
5 purposes we're talking about here, it's something he
6 might anticipate doing?

7 A He might anticipate considering. He doesn't say that
8 he does it. I'm sure if he was doing it, he would
9 have answered my question directly, and said he was
10 doing it.

11 Q How long ago did you and I discuss this e-mail?

12 A How long ago did we discuss it?

13 Q Didn't we talk about it?

14 A I think we probably talked about it a couple of weeks
15 ago.

16 MR. VOSK: Your Honor, at this
17 point, I would move to admit Exhibit 131.
18 (Exhibit offered.)

19 MR. ANDERSON: No objection.

20 JUDGE STEINER: 131 will be
21 admitted.

22 (Exhibit admitted.)

23 MR. ANDERSON: The State would ask
24 that 131 be published to the judges so that they can
25 see it.

1 JUDGE STEINER: Please.

2 MR. VOSK: Your Honor, we've had 132
3 marked for illustrative purposes. This was prepared
4 by Counsel. It is, to identify for the Court, a
5 listing of the errors reported on the corrections by
6 Rod Gullberg, and some that were missed by Rod
7 Gullberg prepared by Miss Linda Callahan. I'm going
8 to hand this to the witness.

9 Q (By Mr. Vosk) How many of these errors --

10 MR. VOSK: And by the way, your
11 Honor, these are not software errors.

12 Q (By Mr. Vosk) How many errors are listed on that
13 document?

14 A 151.

15 Q So and most of those --

16 JUDGE STEINER: I'm sorry. What was
17 that number?

18 THE WITNESS: 151.

19 Q (By Mr. Vosk) And almost all of those have occurred
20 since the year 2005; correct?

21 A The majority of them, yes.

22 Q And the errors for 2018 and 2019 aren't even included?

23 A Correct, because they were -- well, yeah. I don't
24 know why Ms. Callahan didn't include them, but they're
25 not included.

1 Q So even leaving software issues aside, in the last
2 three years, we've counted up 151 errors made by the
3 analysts in the lab?

4 A Yes.

5 MR. VOSK: I move to admit this at
6 this point in time, your Honor.

7 (Exhibit offered.)

8 MR. ANDERSON: For illustrative
9 purposes.

10 MR. VOSK: Exhibit 132,
11 illustrative.

12 JUDGE STEINER: Admit for
13 illustrative purposes only.

14 (Exhibit admitted.)

15 Q (By Mr. Vosk) Now, you also indicated at one point
16 that the only reason you were moving over -- the only
17 reason ISO was making standards for this type of stuff
18 was to help you avoid legal complications?

19 MR. ANDERSON: Objection,
20 mischaracterization. I don't think that's only...

21 MR. VOSK: That's what I have. If
22 I'm wrong, please correct me.

23 THE WITNESS: I don't believe that
24 was my testimony.

25 Q (By Mr. Vosk) Well, then please clarify. Can you

1 tell me why you are moving to ISO? Are there reasons
2 other than simply to avoid legal complications?

3 A Because it's good standard scientific practice, and
4 sure, if it helps us avoid making the types of errors
5 we've made in the past, then it's a good thing.

6 Q Now, when you indicated earlier that the 2005 policy
7 and procedure manual said that the lab -- the breath
8 test lab could use any solution it wanted to certify
9 its machines --

10 MR. ANDERSON: Objection,
11 mischaracterizes the testimony. He read from the
12 manual.

13 MR. VOSK: Then I'm asking the
14 witness right now, if I make any statements that
15 mischaracterize your testimony, please correct me.

16 JUDGE STEINER: Is the objection to
17 a QAP solution or field solution, or is the objection
18 to the fact that the word "any" solution was used?

19 MR. ANDERSON: It's form of the
20 question. He's saying, "you said this" and, in fact,
21 that wasn't what was said, and assuming that, then he
22 goes onto another question. He didn't say, "Did he
23 say this?" "Yes." And then go onto another question.

24 Unfortunately, it's assumes facts that -- it's
25 going to wear the witness down and stop quibbling

1 about small little things. But, in fact, those things
2 actually do matter and it winds up leading to
3 conclusions that are misleading down the road.

4 JUDGE STEINER: I think we'll get to
5 the same place. But if you would ask whether he said
6 that, and then we'll go on to the next question.

7 Q (By Mr. Vosk) Did you say that based on the policy
8 and procedure manual of 2005, the breath test section
9 could use any solution it wanted to do its QAP?

10 A No.

11 Q What did you say?

12 A I read from the protocol.

13 Q Okay. And how did you characterize that protocol?

14 A How did I characterize it? As the policy and
15 procedures manual for the breath test section.

16 Q No. But didn't you say it gave the technicians in the
17 breath test lab certain liberties as to which
18 solutions they could use?

19 A The policy, as it was written, would have allowed them
20 to use a .08 field solution, a .08 QAP solution, or,
21 in fact, at one time a .10 QAP solution to calibrate
22 the instrument.

23 Q Does it say that in there?

24 A You asked me how I characterized it. That was how I
25 characterized it.

1 Q What I'm asking you is: Does it actually say that in
2 there?

3 A I quoted from Page 20 -- this is Exhibit 130. I
4 quoted from Page 22, 1B which says, "Use a certified
5 ethanol solution from the State Toxicology
6 Laboratory."

7 Q Now, how did they know they couldn't use a .04
8 solution?

9 A Because the instrument would not accept it.

10 Q How did they know they couldn't use a .15?

11 A The instrument would not accept it.

12 Q How did they know they could use a .10?

13 A In the past, the State toxicology lab's QAP protocols
14 said they could use it.

15 Q The toxicology lab. We're talking about the protocols
16 for the QAP solutions?

17 A Well, I'm sorry then. I guess my answer would be,
18 that would be how I would know they could use it. I
19 wouldn't know how they would know they could use it,
20 other than they have the latitude to do that within
21 the 1B on Page 22 of the document I just quoted from.

22 Q Do you have Exhibit 102 up there?

23 A Yes.

24 Q And what year is that for?

25 A 2004.

1 Q And so is that for a QAP solution?

2 A No. That's headspace gas chromatography protocol.

3 MR. VOSK: I'm sorry, your Honor,
4 I'm having a problem with exhibits.

5 THE WITNESS: I do have 92.

6 Q (By Mr. Vosk) And what is 92?

7 A The QAP protocol from 2004.

8 Q 2004. Okay. And does it -- and it specifies exactly
9 which solutions are supposed to be used?

10 MR. ANDERSON: This is preparation
11 QAP protocol for 2004?

12 THE WITNESS: Yes, it is.

13 MR. ANDERSON: Okay.

14 THE WITNESS: On Page 1, under
15 "Principle and Purpose," amongst other things it says,
16 "The .100 grams per 210 liter solution may also be
17 used to calibrate the BAC DataMaster."

18 Q Okay. And so that's for the QAP solutions?

19 A Yes.

20 Q And we understand that it's the .08 level we're
21 typically calibrating against? I'll change the
22 question.

23 Why does it say that .10 can also be used?

24 A I don't know.

25 Q You wrote it, didn't you?

1 A At some point I probably did, yes. There would be no
2 reason why it could not be used to calibrate the
3 DataMaster. The important thing is to know what it's
4 reference value is.

5 It's like being able to tune a piano with an F
6 tuning fork or a C tuning fork. As long as you are
7 tuning the right note to the right tuning fork, the
8 piano will be in tune.

9 Q But by saying the .100 can also be used, doesn't it
10 imply that the only other one that can be used would
11 be the one necessitated by the simulate -- that QAP
12 protocol?

13 A You could read it that way, yes.

14 Q Isn't that the way you intended it?

15 A I don't recall.

16 Q It's funny, a little bit ago, and I'll give you a
17 second, you testified that that was the way you
18 intended.

19 Do you want to rethink it? Isn't that the way you
20 intended that to read?

21 A I don't recall being asked that question before.

22 Q Okay. Do you recall whether or not you intended this
23 protocol to be read that these are the solutions that
24 are to be used to QAP DataMasters?

25 A Yes.

1 Q "Yes, you recall" or, "yes, those are the ones that
2 are intended to be used for the QAP"?

3 A It was my understanding and I guess my expectation
4 that the breath test section was using the QAP
5 solutions for QAP and calibration of the DataMaster.

6 Q And my question -- and I understand this is tough.
7 But you talk about your understanding and your
8 expectations. You're the one who wrote this, and
9 you're boss.

10 What was the rule?

11 A I -- I've -- I've already testified that the two
12 protocols, both of which I signed off on, were in
13 conflict. The breath test section's protocol said use
14 a certified ethanol solution. The tox lab's protocols
15 said these are for the purposes of quality assurance
16 so...

17 Q And so what does this rule mean?

18 A What does which rule mean?

19 Q This rule right here in your hand. I don't know want
20 to know what your understanding was, or what your
21 expectation was. You wrote it and you're the boss.

22 What does the rule mean?

23 MR. ANDERSON: Your Honor, it's
24 either asked and answered or it draws for a legal
25 conclusion drawn by the Court.

1 He's indicated what he was intending. He's
2 indicated -- but statutory intent becomes relevant if
3 it's not clear. And then the Court, this would be --
4 this would be interesting, but he told him what he
5 intended. He's acknowledged the conflict between
6 those two or that both of them allow for different
7 things, essentially.

8 I think it's been asked and answered or draws for
9 a legal conclusion because what the actual question
10 was, what does this require, that's something for the
11 Court to answer.

12 JUDGE STEINER: I don't believe the
13 question is as difficult as Dr. Logan is making it.
14 So I'm going to overrule the objection.

15 THE WITNESS: Could you ask me the
16 question again.

17 Q (By Mr. Vosk) What does the rule mean?

18 A And you'll have to specify which rule you're referring
19 to.

20 Q You've got a protocol here that talks about certifying
21 a QAP solution.

22 A Yes.

23 Q And there it gives a "Principles and purposes to
24 certify the accuracy, reliability in the testing of
25 the machine by the breath test division." And it says

1 that a .10 solution can also be used and a .10
2 solution could only be a QAP because we don't use it
3 in a field context.

4 So that what is does that rule mean?

5 MR. ANDERSON: I'm going to object.

6 "What the rule means," again, this isn't for court.

7 MR. VOSK: He wrote it, your Honor.

8 JUDGE STEINER: I think the intent
9 of the question is pretty simple for anyone who's been
10 listening to this for the last five questions.

11 So answer the question, if you can.

12 THE WITNESS: The purpose of the
13 quality assurance solutions is to conduct the quality
14 assurance procedure on the DataMaster.

15 The purpose of having a recipe for them and
16 preparing them and certifying them according to this
17 protocol is for the purpose of the breath test section
18 to use them for quality assurance.

19 Q (By Mr. Vosk) And was the rule intended to require
20 that only a QAP solution be used in doing this?

21 A No.

22 Q Why don't you have anything in the field solution
23 manual or field solution protocols talking about QAPs
24 or calibration?

25 A Because the toxicology lab is not doing QAPs or

1 calibration of the DataMasters. So the controlling
2 rule for the breath test program would be what is in
3 their policy and procedures manual, and it was in
4 conflict with what's in the tox lab's procedure.

5 Q Did you ever intend those field solutions to be used
6 to QAP a machine?

7 A I don't think I ever thought about it. There would be
8 no scientific reasons for not doing it. If you
9 know -- if you have a reliable value for the reference
10 ethanol concentration, you could use a either field
11 solution or a QAP.

12 Q You wrote down some values for the equivalent vapor
13 concentration earlier.

14 A I calculated some values, yes.

15 Q Can you flip that page up?

16 A (Witness complies.)

17 Q Go to a clean page, please.

18 A Oh, okay.

19 Q For the field solution, you put down a range of
20 values, .08 to .088.

21 Can you write that down for me, please?

22 A I need a pen.

23 Q Do we have a...

24 A I'm sorry. What did you want me to write?

25 Q 080 to 088. That's a field solution.

1 A (Witness complies.)

2 Q And actually, can you check? I think you wrote an
3 089. Can you go back to your further calculation? I
4 think you put down 089.

5 A (Witness complies.)

6 Q Yep. 080 to 089. Can you just change that last
7 number to a 9.

8 A (Witness complies.)

9 Q For the QAP you had an 075 to a .083.
10 Now, how much overlap is there between those two?

11 A .003.

12 Q What percentage, then, of the acceptable values do
13 those two solutions share? Can you just calculate the
14 percentage? You've got an entire range of .0014[sic]?

15 A I'm sorry?

16 Q We've got an entire range of .0014? We go from .075
17 to .089; correct?

18 A Yes.

19 Q So how much of that region is shared by the two?

20 A I'm sorry. 014, yes, okay. I'll calculate that.

21 Q Please.

22 A 21 percent.

23 Q So you've got different rules -- you can sit down.
24 You've got two different rules for two different
25 solutions, one a QAP and one a field, and you've got a

1 range of acceptable vapor concentrations.

2 80 percent of which for the two are different.

3 They share only 20 percent of the same --

4 MR. ANDERSON: Correction. 79.1.

5 MR. VOSK: It's okay for me to say
6 "80"; isn't it? I heard the objection. I just wanted
7 to make sure.

8 JUDGE STEINER: It's acceptable with
9 me.

10 Q (By Mr. Vosk) And you're trying to tell us you didn't
11 mean to have two different rules?

12 A That's -- I see absolutely no relevance in the
13 calculation you had me do. It's meaningless.

14 MR. ANDERSON: I'm sorry. I didn't
15 hear that.

16 THE WITNESS: I said, I see no
17 relevance in the calculations that Mr. Vosk had me do
18 in terms of the questions he's asking. It's not
19 meaningful in helping me answer the question.

20 Q (By Mr. Vosk) Well, what I'm trying to get at is the
21 difference between your two rules. You've set up two
22 rules, or you've given them -- their principals and
23 purposes express completely different purposes.

24 You've given them ranges which share only 20
25 percent of the value, so that if somebody were to come

1 out and say that the rule actually had to be followed,
2 one wouldn't be acceptable for one use, and the other
3 wouldn't be acceptable for the other use except in a
4 very small range of values.

5 And you even testified that you intended, you
6 inspected [sic] all of the QAPs solutions to be used
7 and only those, and yet when we ask what the rules
8 require, all of a sudden, you're unable to tell us
9 that, in fact, that QAP solution -- the rules required
10 that the QAP solution be used.

11 And isn't that what the rule was written to
12 require?

13 MR. ANDERSON: Objection. The
14 question confuses intent and the legal effect of the
15 question.

16 JUDGE STEINER: Overruled.

17 THE WITNESS: I'm not trying to be
18 difficult in the way I'm answering your question. But
19 it was my expectation -- I have to go back and to say
20 that it was my expectation that the solutions that
21 were being prepared according to the recipe and
22 protocol solutions were the ones that would be used
23 for the QAP.

24 Q (By Mr. Vosk) Okay.

25 A And I've said that's in conflict with what was in the

1 breath test section protocol. I've also testified
2 that there's scientific basis for not using a -- a
3 field solution if you know it's ethanol vapor
4 concentration to calibrate an instrument. There is no
5 scientific reason for not doing that.

6 Q So when you wrote that policy and procedure manual,
7 the earlier one, that just kind of left it open, that
8 talked about you have to use a certified simulator
9 solution. It was still your expectation that the QAPs
10 were to be used. You just weren't real clear about
11 it?

12 A Well, the protocol would have been written by probably
13 Rod Gullberg, and I would have approved it. And I
14 didn't question the language that was in there. I
15 approved the language that was in there, but I
16 didn't --

17 Q Was your expectation, was your understanding that that
18 language was referring to a QAP solution?

19 A Probably is.

20 Q And is that why you clarified it in the latest policy
21 and procedure manual?

22 A Yes.

23 Q Now, you also indicated that you didn't see any reason
24 to remove Ann Marie Gordon's data because the data was
25 run, and data is data; right?

1 A I think I testified that it would probably be a legal
2 decision as to whether the data was removed or not,
3 but that I left it in because there was data to
4 support the results that were on all of the
5 certification worksheets.

6 Q Now, you were in the courtroom when Rod Gullberg
7 testified about his weighted means article, weren't
8 you?

9 A Part of it. I was testifying in Seattle Municipal
10 Court that morning. I didn't hear all of his
11 testimony.

12 Q Had you guys discussed that article before?

13 A Yes.

14 Q So you know what's in the article?

15 A Yes.

16 Q And in there he indicated part of his reason for
17 thinking that weighted means was the way to go was
18 because of the difference between operators?

19 A Seventeen years ago, yes.

20 Q And you're claiming now that because you have
21 automatic injection that should no longer matter?

22 A It no longer appears to matter. That's correct.

23 Q What if we could demonstrate that even with the
24 automatic injection, there were interoperator
25 differences would it matter then?

1 A Not based on the advice that I got from Dr. Polissar
2 and Dr. Gullberg -- or Mr. Gullberg.

3 Q But wasn't their advice based on the fact that you're
4 using these automatic injection, and that there's no
5 interoperator variability?

6 A It's not that there was no interoperator variability.
7 It was that it was so small as to not be significant.

8 Q Let's take a look at 6048, Solution 6048. Who are the
9 last two signatures on that list?

10 A Ed Formoso and Ann Marie Gordon.

11 Q And that precision right now is up around 2.075?

12 A Yes.

13 Q And, in fact, this is one -- one of the solutions
14 we've looked at that, that we've said is outside of
15 the QAP limits, correct, that the defense has claimed?

16 MR. ANDERSON: Your Honor, the State
17 is going to object. He's not a statistician. It
18 appears to be going towards an evaluation by this
19 non-statistician as to the statistical significance of
20 taking away particular witness's or comparing of the
21 variability of analysts. These are questions
22 appropriately directed towards the experts in this
23 field. This witness is relying on their advice.

24 JUDGE STEINER: Mr. Vosk, so if
25 you're going to say that that is not direction you're

1 headed in, my concern would be that it may not be
2 helpful to pick one run --

3 MR. VOSK: I'll show another.

4 JUDGE STEINER: Well, I question --

5 MR. VOSK: I'll have further
6 testimony from statistical expert. What I want to do
7 here -- all I'm trying to do here, your Honor, is just
8 to establish --

9 JUDGE STEINER: We'll, let's just
10 see difference. I take it that you're not heading the
11 direction that Mr. Anderson thinks you are.

12 MR. VOSK: I'm not going to ask
13 Dr. Logan to do statistical calculations.

14 JUDGE STEINER: Mr. Anderson, I'm
15 not going -- you can renew your objection if you think
16 it's headed in that direction. We'll wait and see.

17 Q (By Mr. Vosk) Let's take a look at data for this one
18 solution. Everybody from Analyst 12 on down, all of
19 these values seem to hover -- most of them seem to
20 hover around a 100. We've got some 102s, some 105s,
21 some 104s. Most of them are pretty low?

22 A Yes.

23 Q In those last two columns, do we find all of the
24 highest values?

25 A Yes.

1 Q Do we find values higher than reported by any other
2 analyst?

3 A That's my recollection, yes.

4 Q Now, would this appear to show you that there's a
5 difference depending on which operator does the test?

6 A In this particular case, yes.

7 Q Okay.

8 MR. ANDERSON: I guess on this one,
9 again, I'm going to object. The appearance of someone
10 who is not the expert in this is not really relevant.
11 The relevance here is -- for this particular witness
12 is, did he rely on the advice of others and is that
13 advice valid? He's not a statistician to evaluate how
14 good that advice is.

15 JUDGE STEINER: In this particular
16 area, I think a statistician is required, so the
17 objection is overruled. But again my concern is I
18 don't know how many of these we have, the worksheets,
19 but it's going to require more than a few, and I'm not
20 inclined to go through all of them.

21 MR. VOSK: I don't want to go
22 through all of them, your Honor. What I'm trying to
23 do is show examples here, and we will follow-up with
24 our statistics expert at a later time.

25 JUDGE STEINER: All right.

1 Q (By Mr. Vosk) Here, what analysts are Ed Formoso and
2 Ann Marie Gordon for Solution 6049?

3 A 7 and 8.

4 Q And if we take a look at all of the data outside of 7
5 and 8, doesn't everything appear to hover around 101,
6 102, 103, got some 100s in there?

7 A Yes.

8 Q And for 7 and 8, what do we get?

9 A The values are higher.

10 Q Aren't they significantly higher? Aren't they all
11 107s and 108s?

12 MR. ANDERSON: Your Honor, the
13 State -- the defense is asking the witness to evaluate
14 significant differences based on anecdotal
15 differences. He's asking the --

16 JUDGE STEINER: He hasn't asked him
17 to evaluate the significance.

18 MR. ANDERSON: He said, "Isn't that
19 significant." I'm sorry. I didn't mean to interrupt.

20 JUDGE STEINER: I'm going to
21 overrule the objection. I mean, I think that
22 Dr. Logan has a sufficient education and experience
23 and this is, after all, his department, to be able to
24 make that -- to reach that conclusion. So the
25 objection is overruled.

1 THE WITNESS: They are different.

2 Q (By Mr. Vosk) So then, again, would your answer have
3 been the same as it was for the last test, that this
4 seems to indicate that there is some interoperator
5 affect?

6 MR. ANDERSON: Same objection.

7 THE WITNESS: Yes.

8 JUDGE STEINER: Overruled. And the
9 question that was asked before as to this, yes, and I
10 take that the answer again as to this, there is
11 clearly an effect.

12 MR. VOSK: Okay. And for
13 clarification, I'm using them as examples, and we will
14 tie it up with our next witness.

15 Q (By Mr. Vosk) Now, you talked about the margin of
16 error that was allowed for testing tissue samples and
17 stuff in blood cases?

18 A Yes.

19 Q What is the margin of error when we're testing alcohol
20 in a blood case? Honestly, I haven't done one in a
21 while.

22 A .01.

23 Q Okay. And so if we are doing a .08, what's that
24 margin of error?

25 A Well -- I --

1 Q I guess, let me rephrase that because maybe we're
2 mixing apples and oranges.

3 We talked about the plus or minus 5 percent error.
4 And it was -- I believe you were talking about the
5 QAP?

6 A Yes.

7 Q And so do we have a similar -- when we're testing our
8 machines that we're using for blood testing, do we
9 have a similar margin in the blood case -- or in the
10 blood alcohol case?

11 A There's a -- yes. Yes.

12 Q And for blood alcohol, what is that?

13 A Well, that's controlled -- well, there's a minimum
14 standard and a method that it has to be able to meet,
15 which is specified in the WAC.

16 Q And can you tell us what that is?

17 A I don't remember. It's Wac 448.14.

18 Q Is it smaller than 20 or 30 percent?

19 A Yes.

20 Q And all these drug cases that you're talking about, is
21 there a per se limit on any of the drugs?

22 A No.

23 Q Is the reason we can allow a little bit more
24 uncertainty with those drugs because we don't need to
25 have a specific quality in order for that to be

1 meaningful in the criminal system?

2 A It's just more a function of the limitations of the
3 technology, or the capabilities of the technology of
4 those tests. It's what it's capable of.

5 Q Now, you had also talked about one of the policy
6 procedure manuals talking about discretion somebody
7 could exercise. I'm going to point you to Defendants'
8 Exhibit 72.

9 MR. ANDERSON: Counsel, which
10 protocol?

11 MR. VOSK: It's Exhibit 92.

12 JUDGE STEINER: 72?

13 MR. VOSK: I'm sorry. 92.

14 Q (By Mr. Vosk) If you can identify that for the Court,
15 and then I want you to read the section above the
16 signatures.

17 A This is the procedure for preparation of quality
18 assurance solutions for use in the breath test
19 instrument, Exhibit 92.

20 MR. ANDERSON: I'm sorry. Can you
21 repeat the page reference.

22 MR. VOSK: Just above the
23 signatures.

24 THE WITNESS: This is reading from
25 Page 4 of 5. There are signature lines indicating

1 that analysts have reviewed the protocol, and the
2 statement above that reads:

3 "The following toxicologists have read the quality
4 assurance solution protocol and agreed to follow this
5 procedure as it is written. Any deviations from the
6 procedure must be documented in writing and approved
7 by the laboratory manager and/or the State
8 Toxicologist."

9 Q (By Mr. Vosk) So they don't have any discretion to
10 ignore what's there in their protocol. They've got to
11 get approval in writing first?

12 A Yes.

13 Q And will it say the same -- I think that was a QAP.
14 Will it say the same thing for a field solution?

15 A I expect so, yes.

16 Q Now, if this Court determines, based on your
17 testimony, that, in fact, these spell out the uses for
18 the QAP and field solutions, then that doesn't leave
19 for discretion, does it?

20 A I'm not sure I understand your question. If the
21 court --

22 Q If the Court determines, based on your testimony, that
23 these protocols govern the use of a QAP solution and a
24 field solution --

25 A Okay.

1 Q -- that doesn't leave any room for independent
2 discretion?

3 A Other than what's allowed for in the protocol.

4 Q Yep.

5 A That would be a reasonable conclusion.

6 JUDGE STEINER: It is 4:00. I hate
7 to end, but --

8 MR. VOSK: No. That's just fine
9 because I can probably shorten it if I have time to go
10 home and cross out stuff.

11 JUDGE STEINER: We're going to be
12 back here tomorrow. We're apparently still working on
13 a pro tem for Judge Chow.

14 JUDGE PHILLIPSON: How about for
15 Judge Phillipson?

16 JUDGE STEINER: Judge Phillipson has
17 his pro tem. So we'll be back here tomorrow at 8:45.
18 We're going to have Dr. Logan not too much longer, I
19 hope.

20 MR. VOSK: I don't expect.

21 JUDGE STEINER: Then we're going to
22 go right into the toxicologists and may even be done
23 with them early and finish early for the day.

24 Are there any other witnesses for tomorrow?

25 MR. ANDERSON: Dr. Emery.

1 MR. VOSK: Oh, yeah. Dr. Emery will
2 be here at two assuming we're done with the others.

3 MR. TROMBOLD: Your Honor, may I
4 address the Court?

5 JUDGE STEINER: Yes.

6 MR. TROMBOLD: Regarding the
7 exhibits and facilitating and aiding the Court, I
8 would offer the Court that I take them in a box, as an
9 officer of the court, to my office where they would be
10 locked tonight. I will scan them. It could happen --
11 I could do it tomorrow at the end of the afternoon, if
12 we end testimony. But at some point if it's agreeable
13 with the parties, I would like to scan them and send
14 electronic copies to the State and defense and to many
15 other people out there in the state that want copies
16 of these matters. At some point I, would like to
17 facilitate that.

18 JUDGE STEINER: Any objection?

19 MR. ANDERSON: The State's
20 suggesting that we have a -- we planned to suggest it
21 yesterday but we didn't work it out with defense,
22 either tonight or tomorrow morning, someone come in
23 and organize these by number and provide a means of
24 keeping them organized because obviously the parties
25 have had a devil of a time getting them back together.

1 I think that should have priority over sending them
2 out to the state or to the whoever --

3 JUDGE STEINER: So the next day
4 then?

5 MR. TROMBOLD: Sure.

6 MR. ANDERSON: And quite frankly, I
7 don't know if that's going to be part of it. It looks
8 like this may have actually partially happened, in
9 which case we're going to be offering either
10 three-ring notebooks, if the Court's not concerned
11 about damage done by the whole punches, or perhaps one
12 of those expandos, one through ten, something like
13 that, so we have some way of finding stuff, but I
14 think that should be the first priority.

15 JUDGE STEINER: In thinking about
16 what Mr. Trombold is offering it sounds as if he's
17 going to organize them before he scans them.

18 MR. TROMBOLD: Put them in order,
19 and as they come out they can be organized.

20 MR. ANDERSON: If it comes back
21 tomorrow morning organized along with -- we also need
22 to arrange some way of keeping them organized because
23 we've seen the way these things fly. And so I'm
24 certainly happy to work out something with
25 Mr. Trombold about something like that.

1 JUDGE CHOW: I hear that as no
2 objection.

3 JUDGE STEINER: Well, the only
4 question is when to get them to the paralegal. Are
5 you -- you're not proposing to put them in a
6 three-ring binder?

7 MR. TROMBOLD: Whatever the parties
8 want. Most important I think the parties will find
9 them useful if it's scanned and in their computers.

10 MR. VOSK: You're not suggesting
11 taking them out of the court, are you?

12 JUDGE STEINER: He was. Do you have
13 an objection?

14 MR. VOSK: Oh. Oh. Goodness.

15 MR. ANDERSON: Certainly the safer
16 thing is to organize them here and then when the
17 court's office scans everything to the extent that
18 they are able to scan everything, then it can happen.
19 That's certainly the safer thing.

20 JUDGE STEINER: Since the defense
21 hasn't agreed to this process, we'll just leave them
22 here and we'll let the paralegal take a look at them
23 and put them in order in the courtroom.

24 MR. ANDERSON: So there's two
25 possible ways of doing this. The most secure way is

1 using a three-hole punch as long as nobody has any
2 objection --

3 JUDGE STEINER: Any objection to
4 three-hole punching the exhibits?

5 MR. VOSK: I have no objection. I
6 would want to have a member of defense and State
7 represented or a member of the court present.

8 JUDGE STEINER: That's fine. When
9 would you propose to do this?

10 MR. ANDERSON: I need to find out.

11 JUDGE STEINER: We're off the
12 record. Thank you.

13 (Court adjourned 4:06 p.m.)

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1 STATE OF WASHINGTON) I, Kristin M. Vickery, CCR,
 2) ss CCR #3125, a duly authorized
 3 County of King) Notary Public in and for the State
 4 of Washington, residing at
 5 Renton, do hereby certify:

6 That the foregoing transcript hereto annexed was
 7 given before me and stenographically recorded at the time
 8 and place indicated in said transcript;

9 That the foregoing transcript contains, to the
 10 best of my knowledge and belief, a full, true, and accurate
 11 record of all the testimony and of the proceedings given
 12 before me;

13 That I am not a relative, employee, attorney or
 14 counsel of any party to this action or relative or employee
 15 of any such attorney or counsel and that I am not
 16 financially interested in the said action or the outcome
 17 thereof;

18 Dated at Renton, Washington day of , 2008.

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 Kristin M. Vickery, CCR
 Notary Public in and for the State
 of Washington, residing at
 Renton.