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IN THE PIMA COUNTY JUSTICE COURT

STATE OF ARIZONA)
)
v.)
) No. TR 07-016082
GUY ZEPHANIAH KIRKPATRICK)

Tucson, Arizona
July 8, 2008

BEFORE THE HONORABLE CARMEN DOLNY

TRANSCRIPT OF PROCEEDINGS

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APPEARANCES

July 8, 2008

Judge: Carmen Dolny

For the State:

Bill Dickinson

Witnesses:

None

For the Defendant:

Joe St. Louis

Witnesses:

Brooke Arnone

Janine Arbizu

Tucson, Arizona

July 8, 2008

(The Honorable Carmen Dolny Presiding)

EVIDENTIARY HEARING:

THE COURT: All right. This is the matter of four separate cases that have been consolidated for purposes of similar issues, all involving breath testing -- blood.

MR. DICKINSON: Blood. The laboratory access.

THE COURT: Laboratory access.

MR. DICKINSON: For his cohesive -- yeah.

THE COURT: To test the accuracy and lack of contamination or contamination thereof. And the cases are State v. Bogott, Case Number TR 07-005767, State versus Esposito, Case Number TR 07-005007, State versus Kirkpatrick, Case Number TR 07-016082, and State versus O'Leary, Case Number TR 07-011127. State is represented here by Bill Dickinson (phonetic). And the four cases are -- I don't know how to put it. But we have lead attorney who's going to be here today on these, although the other attorneys, or some of them, are here also, will Joe St. Louis.

MR. DICKINSON: And if I can state what I believe is before the Court --

THE COURT: And you may. Go ahead, Mr. Dickinson.

MR. DICKINSON: -- before the Court, and then Mr. St. Louis can correct me or amplify on what he believes

1 we're doing.

2 Basically, with regards to all four consolidated
3 cases, the last time we had left off, were awaiting Mr.
4 Heller's (phonetic) return in order to --

5 THE COURT: Exactly. Get his testimony.

6 MR. DICKINSON: -- get some testimony concerning
7 various issues that he apparently had information concerning.
8 Mr. Heller is still off and it looks like will probably be off
9 at least through September. And we're not sure what we'll --

10 THE COURT: Well, what is it he has? Is this
11 medical?

12 MR. DICKINSON: We're not sure what's going on.

13 THE COURT: Just sort of not --

14 MR. DICKINSON: It's a health matter. It's a
15 personal matter. And so, we have not been made privy to
16 exactly what's going on, simply that he's still on medical
17 leave.

18 THE COURT: Oh, wow.

19 MR. DICKINSON: I requested that Brook Arnone, who is
20 the supervisor of the chemical testing unit through the
21 Department of Public Safety appear today for purposes of this
22 hearing. My understanding has been -- and actually, it was --
23 Mr. George had contacted Mr. St. Louis' office, and it appeared
24 that the issue we were dealing with today was the saving of
25 certain information from the guardian computer, a instrument --

1 the analysis. And so, I'm prepared to address that,
2 provisionally, on two cases, the Kirkpatrick case and the
3 Esposito case. I have no information with regards to this
4 issue on the other two cases.

5 THE COURT: And is that because you think the issues
6 are slightly different or you don't know whether they apply
7 exactly?

8 MR. DICKINSON: We don't know. Right now, the
9 Department of Public Safety has a number of computers that are
10 down. And so, obtaining the information on all of these cases
11 -- and the reason I say it's provisional is we think we have
12 the right information. But until the computers come back up,
13 we cannot verify the fact it's the information -- is accurate.
14 But here is the status that I believe is current.

15 With regards to Kirkpatrick, the State believes that
16 there was never a letter requesting that the electronic data be
17 saved. With regards to Julio Esposito, the Department of
18 Public Safety was in possession of a letter dated the 22nd of
19 February, 2007, requesting that data be saved. Apparently,
20 Mr. Heller had that file, which was not distributed to the
21 supervisors and analysts until some time in June. And so, the
22 data was not saved as to Esposito. We're unsure of the status
23 of the data as to the other two.

24 THE COURT: I see.

25 MR. DICKINSON: The State's position is that we will

1 provide the data if it's requested. We are not agreeing that
2 the data is critical, or that it is necessary in order to --
3 for the defense to analyze its cases. So, that's going to be
4 an issue of contention.

5 We also don't believe that there has ever been a
6 motion filed requesting this data. And so, currently, there's
7 no motion before the Court. But we have agreed to go ahead
8 because Arbizu came in from New Mexico, and Ms. Arnone came all
9 the way from the airport, to go ahead and take testimony on the
10 issue rather than bring people back. Then, Mr. St. Louis is
11 going to file the motion, and I'll file the response. So,
12 we're actually going to --

13 THE COURT: Well, that makes sense, get the testimony
14 first and --

15 MR. DICKINSON: Yeah.

16 THE COURT: -- file the motions afterwards.

17 MR. DICKINSON: Yeah.

18 THE COURT: That's a unique approach.

19 MR. DICKINSON: Now, the Court obviously can decide
20 that they really don't want to see Ms. Arbizu again and say no,
21 you want to see the motion first. That's your prerogative,
22 because you're the Judge. But --

23 THE COURT: We can do it this way.

24 MR. DICKINSON: -- we're hoping you won't do that.

25 THE COURT: Yeah. We can be flexible.

1 MR. DICKINSON: Yeah.

2 THE COURT: All the time, are we not?

3 MR. ST. LOUIS: But, Your Honor, you're a cool Judge.
4 So --

5 THE COURT: Glad to serve.

6 MR. DICKINSON: And we have agreed that both experts
7 can stay in during the testimony of the other one --

8 MR. ST. LOUIS: Yeah. Yeah.

9 MR. DICKINSON: -- so they we can have --

10 THE COURT: So they can hear each other's testimony.

11 MR. DICKINSON: -- somebody who knows what the hell
12 is going on.

13 THE COURT: All right.

14 MR. ST. LOUIS: Seem to.

15 MR. DICKINSON: So, if I've mischaracterized any of
16 that, Mr. St. Louis will not set you straight on what we talked
17 about.

18 THE COURT: Okay. Mr. St. Louis.

19 MR. ST. LOUIS: No. All of that I think is correct.
20 The additional component is we were waiting to resolve this
21 issue about whether the electronic data had been preserved. I
22 think that was the final component that we were waiting for for
23 the Court to make its decision on whether Ms. Arbizu gets to go
24 into the laboratory and do an inspection. And so, we'll be
25 touching on that issue today as well as why this helps to

1 demonstrate our need for that to occur.

2 THE COURT: All right. So, with that, we're ready to
3 take testimony.

4 MR. ST. LOUIS: Sure.

5 THE COURT: Okay. Who's going first?

6 MR. ST. LOUIS: I'll go ahead and call Ms. Arnone
7 first.

8 THE COURT: All right.

9 BROOK ARNONE, DEFENDANT'S WITNESS, SWORN

10 THE COURT: We only started an hour late. But thank
11 you for being here and being patient, everybody, while we
12 handled other matters. And you may proceed.

13 MR. ST. LOUIS: Thank you.

14 DIRECT EXAMINATION

15 BY MR. ST. LOUIS:

16 Q Would you state your name for the record, please?

17 A It's Brook Arnone, A-R-N-O-N-E.

18 Q And, Ms. Arnone, what is your current job assignment over
19 at DPS?

20 A I'm a supervising criminalist over the toxicology unit as
21 well as the controlled substances unit. And then, I fill in
22 where necessary in the other units.

23 Q Okay. How long have you been a supervisor over there?

24 A Officially, since October of last year.

25 Q Prior to that, what was your job assignment?

1 A I was a senior criminalist within the toxicology and the
2 controlled substances units.

3 Q Did you do testing of blood samples for ethanol levels as
4 part of your job?

5 A Yes, I did.

6 Q And there was a time when you were doing that full-time,
7 and then you got moved to something else, right?

8 A Yes, by my choice. Yes.

9 Q Okay. Yeah. I wasn't implying anything bad. When was it
10 that you stopped testing blood samples full-time?

11 A Not knowing the exact timeframe in there, I started doing
12 full-time toxicology, being urine specimens, I want to say in
13 2006, perhaps.

14 Q Okay.

15 A So, I started backing off of blood alcohols, only filling
16 in when needed. And I believe my last blood alcohol run was
17 about October, maybe November, of last year.

18 Q Okay. So, you kept -

19 THE COURT: Of '07?

20 THE WITNESS: Of '07, yes.

21 BY MR. ST. LOUIS:

22 Q I'm sorry.

23 A She asked me the date. I said '07.

24 Q Okay. So, prior to 2006, you were testing blood alcohol
25 -- or blood for alcohol levels at the DPS Crime Lab here in

1 Tucson?

2 A Yes.

3 Q All right. And you kept up your certification, and you
4 were able to test blood for alcohol even after you switched
5 over to urine?

6 A Yes. And I still am current with my permit.

7 Q Okay. All right. So, you're familiar with how blood
8 testing is done in the DPS lab in Tucson?

9 A Yes, I am.

10 Q All right. Let me show you what has been marked as
11 Defense Exhibit CCC. And I'm not stuttering. It had that many
12 letters. Can you tell me what that is, please?

13 A This appears to be a letter from your office, requesting
14 information to Mr. Heller, requesting information on a
15 particular case.

16 Q Okay. And on the second page of that is a -- I guess a
17 certified mail receipt signed by an L. Blake?

18 A Yes. That's whose name appears on here.

19 Q Does --

20 THE COURT: Is this already in evidence by
21 stipulation or --

22 MR. DICKINSON: No, not yet.

23 MR. ST. LOUIS: Not yet.

24 THE COURT: All right. Maybe -- all right.

25 MR. ST. LOUIS: Okay.

1 MR. DICKINSON: He's just laying the foundation, but
2 I don't object to it.

3 THE COURT: All right. Why don't we just go ahead --

4 MR. ST. LOUIS: Okay.

5 THE COURT: -- and clean that up then. Exhibit CCC
6 -- and the Court is not stuttering either -- is entered into
7 evidence at this time. There's no objection.

8 (Defendant's Exhibit CCC received)

9 MR. ST. LOUIS: Okay. Thank you.

10 BY MR. ST. LOUIS:

11 Q Who -- that's Linda Blake, right?

12 A That is correct.

13 Q She's the lady who sits at the front desk of DPS?

14 A Yes.

15 Q Okay. So, this -- at least this document indicates -- it
16 looks like it was received by your agency on February 23rd of
17 2007.

18 A That would be correct.

19 Q Okay. And it is a request to preserve the electronic data
20 from the blood testing being done on a Julio Esposito?

21 A That is correct.

22 Q And there is a Pima County Justice Court case number of TR
23 07-005007; is that right?

24 A That is correct.

25 Q And also, a University of Arizona Police Department report

1 number 07-02020053, right?

2 A That is correct.

3 Q Okay. And it indicates at the bottom of the page that a
4 copy of this was copied to the Pima County Attorneys Office?

5 A Yes.

6 Q All right. Do you know when the blood testing was done in
7 Mr. Esposito's case?

8 A I do, only via a phone call to the analyst just a few
9 moments ago.

10 Q All right.

11 MR. ST. LOUIS: We'll -- we won't worry about
12 hearsay, Judge.

13 BY MR. ST. LOUIS:

14 Q When was the blood testing done?

15 A She told me it was done in March of 2007.

16 Q So, after this letter was received by your office?

17 A That's correct. Yes.

18 Q When I say your office, your agency?

19 A That's fine.

20 Q Okay. And since you say she, I'm assuming it's Reyna
21 Ramirez (phonetic) that you were talking to.

22 A That is who I talked to. Yes.

23 Q Okay. No argument that this letter was received prior to
24 the blood being tested in Mr. Esposito's case?

25 A It appears so. Yes.

1 Q Was the electronic data from the blood testing preserved?

2 A Based on my conversation with Ms. Ramirez, with our
3 computer system being the way it is today, it does not appear
4 that this one was saved. She did go look at a hard copy. I
5 had attached a letter in June of this year that it was
6 requested.

7 Q Okay. Hard copy of what?

8 A The actual run folder, the copy of the report, the
9 analyst's notes, the hard copy of the chromatograms, the chain
10 of custody request form.

11 Q Okay. So, the printed material from the blood test?

12 A That's correct.

13 Q Okay. But in that folder, there was not a floppy disk
14 with some electronic data on it?

15 A That would be correct.

16 Q Okay. And it is your understanding that the electronic --
17 via Ms. Ramirez, that the electronic data on the computer at
18 DPS doesn't exist anymore?

19 A For this particular case, that would be correct. Without
20 having a chance to look at it myself, I would assume she gave
21 me the correct information.

22 Q Okay. Assuming that Ms. Ramirez, yeah, was accurate in
23 what she told you.

24 A Correct.

25 Q All right. Is it -- you say not for this particular case.

1 Is it preserved for the other joined defendants in this case,
2 to your knowledge?

3 A I don't know. I wasn't given all the names to ask. So,
4 without being able to go back to the lab and look, other than
5 Kirkpatrick -- that name was given to me. We looked that one
6 up. That one doesn't appear to have been saved.

7 Q Okay. Let's talk about this. When you do a blood test on
8 a gas chromatograph, there is a computer file that is created
9 or that you have to name in order to do the test?

10 A That is correct.

11 Q And when you complete the test, there is a computer file
12 that has the computer information, the electronic information
13 that is generated during the testing?

14 A Yes.

15 Q Okay. That is -- that computer file is capable of being
16 preserved?

17 A Yes.

18 Q And it is capable of being disclosed if a person requests
19 it?

20 A As long as this particular computer works, yes. We can
21 take information off of it. Yes.

22 THE COURT: I guess, at testing, it wasn't working?

23 THE WITNESS: No. It's a floppy drive. So, you have
24 to have the capability having just a floppy drive.

25

1 BY MR. ST. LOUIS:

2 Q And let me just show you. This is -- it's been marked as
3 Defense Exhibit AAA, BBB, and DDD.

4 THE COURT: Oh, my God.

5 THE WITNESS: Okay.

6 BY MR. ST. LOUIS:

7 Q This is the electronic testing that was done over at the
8 Tucson Police Department Crime Laboratory.

9 A Okay.

10 Q And what happened is we wrote a similar letter, and then
11 they sent us two floppy disks that have all the electronic data
12 on them.

13 A Okay.

14 Q Any reason DPS couldn't do something similar?

15 A No. I do believe we could this with the exact same
16 floppies.

17 Q Okay. Or even -- can you do it like -- I have a thumb
18 drive that I seem to stay here with me.

19 A This particular computer does not have a USB port. So,
20 no.

21 Q Okay. But it does at least have the -- you can make a
22 little 3 by 5 disks?

23 A That would be correct.

24 Q Okay. You routinely -- you ever do anything with DNA,
25 Ms. Arnone?

- 1 A No, I do not, other than check the case files.
- 2 Q Check their files?
- 3 A Yes. I do administrative reviews on their case files.
- 4 Q Okay. You're aware that they preserve the data from the
5 DNA cases?
- 6 A Yes. I've been told that they do that. Yes.
- 7 Q You're familiar that they disclose copies of the
8 electronic data to defense attorneys when it's requested?
- 9 A I have been told that that's what they do. Yes.
- 10 Q Okay. Much bigger files than on a blood run. Wouldn't
11 that be correct?
- 12 A I would assume so. Yes. I, again, don't work in DNA, but
13 yes.
- 14 Q Okay. I guess what I'm getting at is there really isn't
15 any reason that anyone would need to delete electronic
16 information from testing blood, is there?
- 17 A It would depend upon your agency's policies and
18 procedures.
- 19 Q Well, you told us you're a supervisor of that department.
20 Do you have a policy or a procedure regarding the preservation
21 of the electronic data for blood testing?
- 22 A To the best of my knowledge, there is no written policy as
23 to what you should do with electronic data within the
24 toxicology area.
- 25 Q Do you know the -- right now -- well, I guess Ms. Ramirez

1 is no longer testing blood for alcohol at this point?

2 A Unless we need her, that would be correct.

3 Q Okay. But Mr. Ruskin (phonetic) is?

4 A That is correct.

5 Q And then, you have a new lady who I'm -- I think her name
6 is Heather.

7 A We have two. Yes, one is Heather.

8 THE COURT: Heather Johnson.

9 THE WITNESS: Heather Johnson.

10 BY MR. ST. LOUIS:

11 Q Okay. And are they up in -- do you have them up and
12 running as analysts?

13 A No. They are currently waiting to take their
14 proficiencies.

15 Q Okay. Do you know -- so Mr. Ruskin is the only guy who is
16 testing blood full-time right now?

17 A That would be correct.

18 Q And do you know what he does in relation to preserving
19 data?

20 A When we have received the letters that you had shown me
21 earlier, CCC, on those particular cases, we have -- I have
22 informed them to please save the data --

23 Q Okay.

24 A -- as requested.

25 Q Okay. Any difficulty doing that?

1 A No.

2 Q All right. And as you understand it, and I understand you
3 are receiving this information secondhand, but the best
4 information you have is that Mr. Heller just never gave a copy
5 of the letter to Ms. Ramirez, and that's why the data wasn't
6 saved in Mr. Esposito's case?

7 A All I can tell you is that when Mr. Reinhold (phonetic)
8 became our acting regional manager, he handed me a file that
9 said disclosure request electronic data. And I went through
10 the file at, at that time, went to the cases and attached them
11 to the cases, and informed the analysts. Some of them had
12 notification and some of them did not.

13 Q Okay. When -- about when did Mr. Reinhold become the
14 acting director? Do you recall?

15 A The acting regional manager, I -- October of last year,
16 2007, perhaps. I'm not sure the exact start September/October,
17 somewhere in there.

18 Q Okay. How -- all right. So, he became manager last fall,
19 thereabouts?

20 A The acting regional, yes.

21 Q What is it, acting regional manager?

22 A He's the acting regional manager.

23 Q I don't want to get into anything personal. Is Mr. Heller
24 expected to return at this point?

25 A All I know is he's on family medical leave, and he has

1 until September. We -- at DPS, you have a year. And I don't
2 know all the family medical leave rules and regulations.

3 THE COURT: Kind of like the late Olsen?

4 THE WITNESS: I guess so. But that's all I can say
5 is that he's on FMLA.

6 BY MR. ST. LOUIS:

7 Q Okay. All right. So, we'll all find out in a few months?

8 A I guess so. Yes.

9 Q Okay. Do you know if any of the analysts had been
10 provided with copies of the letter? For example, this one is
11 in February. It's dated February 22nd of 2007. Do you know if
12 any requests to preserve data had been given to the analyst
13 between February of 2007 and when you actually did it in
14 September of October 2007?

15 A Without going back to case files with numbers, I wouldn't
16 be able to know that. They would now -- the letters would now
17 be attached to those documents I mentioned earlier, the actual
18 hard printouts, and you could see if there was a letter that
19 had been given to the analyst.

20 Q Let me ask you this. I have never gotten any response to
21 any of the letters I have sent asking for that. Are you guys
22 -- are you waiting for a court order to turn over the
23 electronic data or is there something other than sending the
24 letter that needs to be done for it to be disclosed?

25 A The policy that we follow at the Department of Public

1 Safety is that the request must come through the County
2 Attorneys Office other than the general blood run. But for any
3 disclosure, it must come through a county attorneys office, and
4 we have not received notice from a county attorney to go ahead
5 and release the data to the best of my knowledge.

6 Q Okay. So, if someone whose blood you tested says I would
7 like that electronic data, you're not going to give that to
8 them unless the county -- unless the prosecutor in the case
9 asks for it; is that right?

10 A Unless it comes through the chain, yes, unless somebody,
11 perhaps, went above Ed's head or Kurt's (phonetic) head and
12 said, you know, they contacted them and said please release
13 this information. But as far as the analyst is concerned,
14 there is a certain chain and protocol that they must follow.

15 THE COURT: If you received a request from a
16 defendant --

17 THE WITNESS: Uh-huh.

18 THE COURT: -- or a defense attorney directly, rather
19 than coming through the -- rather than them, perhaps, filing a
20 request for disclosure in court, going through the county
21 attorney, then the county attorney giving it to you -- and for
22 some reason, there was no attorney involved, let's say, the
23 person wanted to waive rights to an attorney, or the defense
24 attorney contacts you directly, you do nothing with that
25 request?

1 THE WITNESS: No. Usually, in that case, we ask them
2 -- we've been asked to say is it a misdemeanor case or a felony
3 case, if they can let us know that. If it's felony, it
4 absolutely has to go through some sort of other chain other
5 than just asking us directly, and we let the county attorneys
6 know if we can find out who it is involved in the case. In
7 these particular cases, the letters were cc'd to the County
8 Attorneys Office, and nobody from the County Attorneys Office
9 contacted us. So, we didn't -- we were kind of put in the
10 middle, and we didn't really -- we preserved the data as it
11 said in there, please preserve the data to the best of our
12 ability, to preserve, and --

13 THE COURT: Okay. So, you would go ahead and
14 preserve the data. You just wouldn't --

15 THE WITNESS: Yes.

16 THE COURT: -- hand it over until you got some okay
17 from the county attorney.

18 THE WITNESS: Yes. That'd be fair to say.

19 THE COURT: But you would go ahead and preserve it
20 pending whatever resolution was done as --

21 THE WITNESS: Yes.

22 THE COURT: -- far as giving it over.

23 THE WITNESS: Yes.

24 THE COURT: All right.
25

1 BY MR. ST. LOUIS:

2 Q And that's at least as of the date that you instructed the
3 analysts or that you handed out the letters that you received
4 in September or October of last year?

5 A And again, you'd asked if some had been given out prior to
6 that.

7 Q Yeah.

8 A Without going back to the cases, if you had a list of
9 cases, I could go and manually check to see, but I have no
10 other recordkeeping way of looking for them.

11 Q Okay.

12 A I could go on the computer and just see what electronic
13 data has been saved.

14 Q But the computer without the USB port is not working.

15 A No. Well, I'm not at the lab right now, so none of our
16 systems are up and running. But that particular computer
17 appears to be okay. It's our whole mainframe system. So, I
18 can't plug in this TR number. I can't plug in any other number
19 other than DPS DR numbers --

20 Q Okay.

21 A -- to look up information today. So --

22 Q Is it fair to say that we just don't know if any efforts
23 were made to preserve any data prior to September or October
24 2007?

25 A It could be fair to say that. Yes.

1 Q Why did you take that file and then go to the analyst, the
2 file that Mr. Reinhold gave you in September or October of last
3 and take that to the analyst?

4 A As the letters were requesting electronic data, and since
5 it had just become my job, I wanted to see what was happening
6 with them and if they had been aware of them. And it was 50/50
7 whether they had them or not. At that point, I did put them
8 with the case files as part of the case document. I did put a
9 note on each of them as to what date I put them in the folder,
10 and wrote a note saying not sure -- did not know if the analyst
11 was aware of these letters.

12 Q Okay. And sometimes the analysts were and sometimes they
13 weren't?

14 A Yes.

15 Q Okay. But all the letters were in the possession of the
16 director, or at least the acting director of DPS when you got
17 them?

18 A Not the acting director, the acting -- the regional crime
19 lab -- acting regional crime laboratory. Those are two
20 different positions you're talking about.

21 Q I'm sorry. My apology. They were in Mr. Reinhold's
22 folder.

23 A They were in Mr. Heller's folder --

24 Q Mr. Heller's folder.

25 A -- that Mr. Reinhold handed to me. Yes.

1 THE COURT: The acting regional crime lab director?

2 THE WITNESS: He's the acting regional crime
3 laboratory manager.

4 THE COURT: Manager.

5 BY MR. ST. LOUIS:

6 Q Curtis Reinhold?

7 A Curtis Reinhold.

8 Q Okay. And Mr. Heller was the -- was/is the regional crime
9 lab manager?

10 A He is still considered the regional crime laboratory
11 manager, yes. He is just on FMLA.

12 Q Family Medical Leave. Got it.

13 A Correct.

14 Q No. It's -- it really helps to define this I think,
15 hopefully.

16 THE COURT: Well, how would Ed Heller or Reinhold,
17 either one, whosever the acting or the real regional crime lab
18 manager, get these letters when they're mailed in to the crime
19 lab? Some secretary or somebody will direct them to the
20 manager?

21 THE WITNESS: They were addressed with a return
22 receipt.

23 THE COURT: Yeah.

24 THE WITNESS: And that's the Linda Blake that was
25 mentioned earlier.

1 THE COURT: Uh-huh.

2 THE WITNESS: She sits in the front --

3 THE COURT: It's the one that --

4 (Simultaneous conversation)

5 THE WITNESS: She's in charge of the front desk of
6 the entire building. So, she would receive them and put them
7 in the mailbox for the Southern Regional Crime Laboratory, and
8 they would be distributed to whomever they were addressed to.
9 Some have been addressed to Mr. Heller, and some have been
10 addressed to Mr. Reinhold.

11 BY MR. ST. LOUIS:

12 Q Because at the point that they're being mailed out, we
13 wouldn't know which analyst is going to end up testing the
14 blood, right?

15 A I would assume that. Yes.

16 Q Okay. Although, now we know it's going to be Mr. Ruskin,
17 most likely.

18 A For a short time.

19 Q For the short term. Ms. Arnone, during the time that you
20 have been at the crime laboratory -- I don't -- I guess I don't
21 know. How long have you been with the DPS Crime Lab?

22 A Eleven and a half years or so.

23 Q Okay.

24 THE COURT: Eleven and a half glorious years.

25 THE WITNESS: Eleven and a half glorious years, yes.

1 BY MR. ST. LOUIS:

2 Q And during that time, have you had individuals come in and
3 take tours of the crime laboratory?

4 A Yes.

5 Q Prosecutors, groups, new prosecutors get to come in and
6 see the facilities?

7 A They haven't been able to come in for quite a while. But
8 at one point, yes, they could.

9 Q There was a tour or two that was established or given to
10 legislatures -- members of the Arizona legislature?

11 A Yes.

12 Q Any other folks, like boy scouts, girl scouts, any
13 other --

14 A We have not allowed our facility to be toured in quite a
15 while since we are under construction with our new facility.

16 THE COURT: When you say quite a while, what do you
17 mean?

18 THE WITNESS: I would say since Kurt has been acting,
19 since at least October of last year, because of so many changes
20 that are occurring. Prior to that, you had to have approval
21 for a tour. And by approval, it usually goes up our chain and
22 then from the director down. And then, our Department of
23 Public Safety Crime Laboratory director, who is Todd Griffith
24 (phonetic), if they sort of give the approval, then we do that.
25 But it does go up the chain as far as being allowed.

1 BY MR. ST. LOUIS:

2 Q Okay. Nothing about having someone who doesn't work at
3 DPS present inside the laboratory that interferes with your
4 ability to do your job, is there?

5 A As far as tours?

6 Q Right.

7 A Again, we try not to have people come in our facility,
8 because when they do, we usually are not doing any type of case
9 work at all. Everybody shuts down.

10 Q Have you ever done case work -- well, there's an AZCLAD
11 inspection (phonetic) that happens every five years?

12 A That is correct.

13 Q And then there is -- on the other years, the other four
14 out of those five years, there is an inspection that is done by
15 members from a different DPS laboratory?

16 A Yes.

17 Q Okay. Do you do case work at all while the AZCLAD
18 inspection is going on?

19 A Are we talking about the five-year AZCLAD?

20 Q Yes.

21 A It's hard to say. I mean we haven't had one in the five
22 years here. But the last time they were here, no, we were not,
23 because they are walking around asking us questions. And so,
24 we have to make ourselves available to them at any time.

25 Q So, it's kind of what I would term as a paper inspection.

1 They read through your policies and procedures, and then they
2 talk with the analysts about how they're doing their jobs.

3 A They do that as well as look at our instrumentation. They
4 can ask us to show them how to do something. They have the
5 right to ask us just about any question.

6 Q Okay. Would it interfere with your ability to perform a
7 blood test at all if an inspector watched while you were doing
8 the blood test?

9 A It would depend how many inspectors were there. It
10 depends whether or not they were constantly asking questions.
11 So, there --

12 Q I agree.

13 A -- are other stipulations that would be put on that. And
14 given our facility and our facility's size, it could cause some
15 issues with where that person might be physically.

16 Q Okay. Let's just say, hypothetically, we've got somebody
17 who understands the process, who's going to stay out of the
18 way, just watch and not ask you a bunch of questions to
19 distract you. That could be done?

20 A I have had that done, yes.

21 Q When have you had that done?

22 A As you mentioned, with -- an inspector has asked me to sit
23 down and show them how our palpator worked, but I did not have
24 blood cases out. So, we just did a sample of how it would --
25 how the instruments in that would function.

1 Q Okay. Didn't interfere with your ability to do that?

2 A In that particular case, no.

3 Q No. When you do the off years, the other four years when
4 the folks come from the other DPS lab and do the inspection, do
5 they watch you do your job?

6 A Sometimes, yes.

7 Q Okay. Is it personality driven as to whether it's a
8 problem having there when you're doing that?

9 A No.

10 Q Does it cause you any difficulties to have somebody --
11 someone who is familiar with the crime lab stand there and
12 watch you do a blood test?

13 A It is -- again, because of the size of our facility,
14 having an extra body in our facility, depending upon what
15 you're working on and depending upon whether or not you have
16 your cases out, how you're working it, it can be cumbersome
17 having other people there.

18 Q Okay. What we're asking for in this case, because I don't
19 know if you know this or not, is that Ms. Arbizu, who has an
20 accreditation from an international agency in conducting
21 inspection of laboratories, be allowed to go and watch you guys
22 on a typical day, sort of from start to finish, prepare some
23 blood samples, put them on the gad chromatograph. Any reason
24 that that couldn't be done?

25 A Well, I wouldn't be able to give that approval. That

1 would have to come from much higher than me.

2 THE COURT: Well, I'm not sure that was the question,
3 but --

4 BY MR. ST. LOUIS:

5 Q No. No. No. No. Yeah.

6 A Could there be another body in there?

7 THE COURT: Say there was approval for it.

8 THE WITNESS: If there was approval for it, there
9 would have to be some adjustments made. Perhaps, instead of
10 everybody working on their cases at the same time, only one
11 individual would then. So, there would be some adjustments
12 that would have to be made due to constraints of the facility,
13 which we do on a daily basis anyway.

14 BY MR. ST. LOUIS:

15 Q That's doable?

16 A It's potentially doable. Yes.

17 Q Okay. And what I'm talking about, just having you say
18 okay, break out some blood samples from the fridge, go ahead
19 and go through your whole process, set them up on the gas
20 chromatograph, that has not been done by AZCLAD. They won't do
21 that type of -- they don't do that type of inspection.

22 A I'm trying to think back to all the inspections --

23 Q Sure. That's fine.

24 A -- I've been available for. You never know what they're
25 going to ask you to do. That's part of being inspected at any

1 one point. They could ask you to do something. I don't think
2 I've ever been asked to take something from start to finish for
3 an AZCLAD auditor, no. That's not to say that other people
4 have not.

5 Q And same thing, in the eleven and a half years you've been
6 there, you've never had that occur with the off-year
7 inspections by the folks from other DPS labs?

8 A That would be very fair to say. They've never asked me to
9 go from start to finish for our own DPS people.

10 Q Okay.

11 MR. ST. LOUIS: That's all I have. Thank you.

12 THE COURT: All right. Mr. Dickinson.

13 MR. DICKINSON: Yeah. I want to go back here to my
14 -- sorry, for a second.

15 CROSS-EXAMINATION

16 BY MR. DICKINSON:

17 Q So, just so we're clear on what your duties are, you're
18 currently responsible for supervising all of the people who are
19 using the Varian instrument to analyze blood alcohol; is that
20 correct?

21 A That's correct.

22 Q In Tucson?

23 A That's correct.

24 Q And currently, you have -- are aware of no letters
25 requesting that the electronic data be saved in the Kirkpatrick

1 case; is that correct?

2 A Yes, per my discussion with Reyna.

3 MR. DICKINSON: And I don't think you have any,
4 right, Mr. St. Louis?

5 MR. ST. LOUIS: I would --

6 MR. DICKINSON: Can I stipulate that there's nothing
7 in Kirkpatrick.

8 MR. ST. LOUIS: I found nothing. I was surprised,
9 but I found nothing in any of our files requesting it, Judge.
10 I'll stipulate to that.

11 MR. DICKINSON: And are you aware of anything in the
12 other two cases or do we need to check that?

13 MR. ST. LOUIS: I would suspect Mr. Barlino
14 (phonetic) did not request it. I do not know if Mr. Nestle
15 (phonetic) would have, and O'Leary, or not?

16 MR. DICKINSON: Okay. So, we will check the other
17 two cases to determine whether there were letters --

18 THE COURT: Okay.

19 MR. DICKINSON: -- and what the timing is, and can
20 submit that to the Court.

21 BY MR. ST. LOUIS:

22 Q Let me talk about the Varian instrument for just a moment.
23 The gas chromatograph actually does the analysis; is that
24 correct?

25 A That's correct.

1 Q And then, the results that were -- are reported from the
2 chromatograph are stored on a laptop or a hard -- or a -- what
3 type of computer?

4 A It's a tower.

5 Q Okay. And would it be fair to say that the amount of data
6 in each of these runs is fairly significant?

7 A I have never looked at the size of the runs, so I can't
8 fairly answer that.

9 Q Okay. Do you have any idea how many runs are being done
10 by your analysts in a year?

11 A In a year? I can give you an estimate of the number of
12 cases, and then you would have to take that with all of the
13 standards and we controls. We do just over 5,000, somewhere
14 between 5,000 and 6,000 blood alcohol cases a year. Included
15 with that, then, would be all the standards and controls. So,
16 we're talking thousands of cases or case files that would
17 potentially be on the computer.

18 Q Is it your understanding that each run typically, at this
19 time, has 40 subjects as well as the verifiers?

20 A There are 40 subject cases, yes, plus the controls and --

21 Q Okay. And so, approximately divide 40 into 5 to 6,000,
22 and you would have the number of runs. Would that be a fair
23 estimate of the number of runs you would be doing in a year?

24 A Correct.

25 Q Do you know what kind of computer tower is connected to

1 the Varian?

2 A No. I sure don't.

3 Q And you're not familiar with the capacity of it?

4 A No.

5 Q So, are you or are you not aware of whether or not saving
6 all of that data electronically would cause problems with the
7 instrument or not?

8 A It does not cause problems with the instruments, per se,
9 but starting to save more and more files slows the computer
10 system down, which then you take the risk of having the
11 computer crash, which then would make our instrument not
12 function.

13 THE COURT: You could download into an external
14 memory, right?

15 THE WITNESS: We could put it on a floppy.

16 BY MR. ST. LOUIS:

17 Q And, in fact, is that what you have been doing with the
18 cases where it has been requested?

19 A We have not saved anything to a floppy yet. We have
20 listed those particular cases, those particular runs, which
21 have come with the letters.

22 Q Okay. So, as you've identified cases, then you save that
23 on the computer that is attached to the Varian?

24 A That is correct.

25 Q And at this point, you're not sure how many cases you have

1 saved?

2 A That's correct.

3 Q Okay. I'd like to show you what's been marked as 1A, and
4 ask if you recognize that.

5 A Yes, I do.

6 Q And what's contained in 1A?

7 A This was a copy of a data file that was saved on the
8 Varian. I put it onto another source and tried to open it up,
9 and this is the printout from opening the file that was saved
10 electronically and then opened up.

11 Q So, in order to make sense of the data that's here, is
12 there software that's required to interpret --

13 A Yes.

14 Q -- what's shown in State's A1 (sic)? And who has the data
15 for that -- or the software?

16 A The software is purchased through Varian, our Star Writer
17 (phonetic) software data program.

18 Q And are -- now, the computer that you have attached to the
19 Varian and chromatograph has that program on it?

20 A Yes, it does.

21 Q Are you aware of whether -- let me -- isn't it true that
22 there is a licensing agreement that prevents you from turning
23 over that software to anyone else other than someone who has
24 purchased the software?

25 A That is my understanding. Yes.

1 Q And so, you can provide the data on the disk, but you
2 cannot provide anything that will make it speak English; is
3 that correct?

4 A That is correct.

5 MR. DICKINSON: I would move the admission of 1A for
6 illustrative purposes.

7 THE COURT: Any objection to the admission into
8 evidence of Exhibit 1A?

9 MR. DICKINSON: And to be --

10 (Simultaneous conversation)

11 MR. ST. LOUIS: No. That's fine.

12 THE COURT: It's admitted.

13 (State's Exhibit 1A received)

14 THE COURT: Let me just look on the back. And that
15 looks like a computer printout with a bunch of little letters
16 and symbols. That is an odd --

17 MR. DICKINSON: I especially like the part in Greek
18 here.

19 THE COURT: Probably, Greek is the closest to it.
20 So, this is a typical thing that would be printed out from the
21 data that's saved?

22 THE WITNESS: No. The --

23 THE COURT: From your Varian -- or what? Am I?

24 THE WITNESS: No. What happens is that is the
25 computer language for lack of a better way of putting it.

1 THE COURT: Oh, okay.

2 THE WITNESS: That is the computer language. The
3 Start Writer software then takes that, puts into a form that is
4 readable, which are the printouts that you are very familiar
5 with, with the peaks, the chromatograms that you actually see.
6 So, the computer program then takes that -- there are some
7 macros involved. There's a format that we have. And then,
8 that would -- it turns that information, or the computer
9 language, into a nice printout form. And that's all done
10 through the Varian software or whatever instrument you have
11 that is performing blood alcohol.

12 THE COURT: Yeah. And what's the point of printing
13 out something that looks like this? Or is there a purpose
14 other than for demonstrative purposes?

15 THE WITNESS: I was trying to make sure that what I
16 saved was actually -- if somebody took this, that something was
17 actually on the program -- or on the disk that I saved.

18 THE COURT: But you can tell by looking at these
19 pages that that is what you would be wanting to save should you
20 need to turn them over?

21 THE WITNESS: That was how -- if I saved it and then
22 I took my disk and put it into another computer to try to open
23 it, that's what spit out. So, that is the computer language if
24 you don't have this Varian software.

25 THE COURT: Uh-huh.

1 BY MR. DICKINSON:

2 Q So, with the Varian software then, if it's done through
3 the computer that's attached to the Varian gas chromatograph,
4 when you put that data in electronically, what do you get?
5 What's the product?

6 A With all the systems attached, we get the nice printouts
7 of the chromatograms that show the peak if there's ethanol
8 present, plus our internal standard. You get -- that we get
9 because we have a custom report writer as well attached to this
10 that shows that. You can actually just get a printout through
11 that same software that would give you the amounts without the
12 pictures. We make the pictures show up because it looks nice.

13 Q And so, basically, without the software from Varian, it's
14 gobbly goo?

15 A Yes.

16 THE COURT: But, obviously, I would imagine -- I
17 shouldn't say obviously. I would imagine that the software
18 comes with the instruments, with the computers, that they're
19 accessible to the lab personnel?

20 THE WITNESS: We have purchased a license for it.
21 So, I don't know how they sell it. I don't know how Varian
22 sells --

23 THE COURT: Well, you must have one there --

24 (Simultaneous conversation)

25 THE WITNESS: We have one, yes. We do.

1 THE COURT: But that's just --

2 (Simultaneous conversation)

3 THE WITNESS: Correct. We have this particular
4 software as --

5 THE COURT: Understandable --

6 THE WITNESS: Yes. As do I know other labs have it.
7 I don't know if anybody can just go and buy it. I don't know if
8 that's --

9 THE COURT: Right. Well, okay.

10 THE WITNESS: Okay.

11 THE COURT: I wouldn't expect anybody would be able
12 to buy it, necessarily. But I would just -- I was kind of
13 concerned that if you were to print this out, you could be
14 assuming that if you coupled this with your Star program, or
15 whatever it is they give you, that it's going to come in the
16 proper readable form that you're looking for or the proper case
17 and the proper printout that -- the one that you're looking
18 for. But you're not going to know that until you actually
19 couple the two together. I'm --

20 THE WITNESS: Yes.

21 THE COURT: I mean you can tell by looking at this.
22 But that's really what you are hoping it's going to be when you
23 print it out with the other software.

24 THE WITNESS: If you look through here, you can see
25 certain --

1 THE COURT: I see --

2 THE WITNESS: -- hybrid information that's --

3 THE COURT: Uh-huh. I can see there are words that -
4 -

5 THE WITNESS: There are certain words, and it would
6 take a while, but I could go back through here. But that's why
7 the computer system all works together as one. So, we take the
8 electronic data that is presented in this format, and it makes
9 it into the nice form that we see.

10 BY MR. DICKINSON:

11 Q So, basically, we can turn the data over to them. Whether
12 or not they can make anything of it will really hinge upon
13 whether they can get access to a Varian program?

14 A Yes. That is my understanding.

15 THE COURT: But you wouldn't turn this over to the
16 defense attorney. He should wait until you printed out in the
17 other form, obviously?

18 THE WITNESS: We already give that printed form out.
19 That's what we provide every time.

20 BY MR. DICKINSON:

21 Q And you're willing to give out, on the cases where you've
22 saved it, the electronic data on a floppy disk just like TPD
23 does?

24 A Correct.

25 Q So the only issue, really, in this case is, on the three

1 of the four, whether or not we saved the data.

2 A That's correct.

3 Q And it appears on Mr. Esposito's that it wasn't saved, and
4 on the other two we don't know yet?

5 A That's correct.

6 Q I was just --

7 THE COURT: On Esposito's it was saved or it was not?

8 MR. DICKINSON: Was not.

9 THE WITNESS: It was not.

10 THE COURT: I understood it was not saved even though
11 there was a request --

12 MR. DICKINSON: No.

13 THE COURT: -- because they had held --

14 MR. DICKINSON: Correct.

15 THE COURT: -- had the request.

16 MR. DICKINSON: Right.

17 THE COURT: Okay. Then, I misunderstood what he just
18 said.

19 MR. DICKINSON: I may have said it quickly.

20 THE COURT: Okay. That's --

21 MR. DICKINSON: I didn't mean to. It is getting
22 late.

23 THE COURT: Yeah. Yeah. Especially when we're here
24 since 1:00.

25

1 BY MR. DICKINSON:

2 Q My last line of questions that Mr. St. Louis was chatting
3 with you about had to do with having other people come in and
4 inspect your lab.

5 A Correct.

6 Q And I think you're aware of -- isn't it true that you're
7 aware of the allegations that what there is in this lab is --
8 in your lab is a number of different issues that got
9 contaminated and caused, basically, variations in the baseline
10 and other sorts of "contamination" issues? Are you aware that
11 that's what we're talking about here?

12 A I have heard about that. Yes.

13 Q Yes. And you're aware of the fact that in the 5 to 6,000
14 cases that you've run annually, that there are very few of
15 these cases where it's been pointed out by the defense that
16 there are these problems?

17 A That's fair to say. Yes.

18 Q And are you aware of the fact -- is it true that you're
19 aware of the fact that some of these issues have been
20 explained? For example, the situation where there was a
21 contaminated acetone in one of the verifiers a while back was
22 identified by Mr. Ruskins and Kurt.

23 A Yes. I was made aware of that. Yes.

24 Q And so, would you agree with me that having someone come
25 in and watch for one run or a part of one run would be very

1 unlikely to result in identifying a potential contaminant?

2 A I honestly don't see how that could happen if somebody
3 came just to see a small portion of it. If there is something
4 happening, it would have to happen exactly when that person was
5 there.

6 Q And so, if there was a problem, it tends to be very
7 situational?

8 A Yes.

9 Q And so, would it be your opinion that having someone watch
10 for eight hours would be highly unlikely to determine the
11 source of any problem that's as rare as it appears to be?

12 A Yes. I would agree with that.

13 Q In the cases where your lab does run analysis using the
14 gas chromatograph, is it a standard practice to have a second
15 tube of blood in those cases?

16 A Yes.

17 Q And in virtually all the cases, or a vast majority of
18 these cases, there is a second tube of blood available that
19 could be tested; isn't that true?

20 A That is correct. Yes.

21 Q And are you aware of whether, in any of the cases before
22 us here today, the Esposito case or the Kirkpatrick case,
23 whether the second tube had ever been tested?

24 A Without looking at the case files and having to go down to
25 property and evidence to see if they were requested, as well as

1 the case files within the lab, I wouldn't know that off the top
2 of my head.

3 Q Would you agree with me that that would be the best way to
4 determine whether or not there was a problem with the initial
5 gas chromatograph analysis?

6 A Most definitely. Yes.

7 Q Thank you.

8 MR. DICKINSON: I have no further questions.

9 THE COURT: Any other direct, cross, whatever it is
10 here?

11 MR. DICKINSON: He's on direct.

12 THE COURT: You call --

13 (Simultaneous conversation)

14 THE COURT: -- direct.

15 REDIRECT EXAMINATION

16 BY MR. ST. LOUIS:

17 Q Ms. Arnone, can you give me the other 4,990 cases to take
18 a look at?

19 A For the year?

20 Q Yeah.

21 A Because we file them in a numerical sequence in the lab, I
22 would have to go back and -- it would be very cumbersome and
23 time consuming, but we have a computer system, when our
24 computers are running.

25 Q Because Mr. Dickinson claims that this is in a small

1 number of cases, and points out that we've only brought a few
2 to the Court's attention. But you're aware that -- I mean you
3 don't give me all the results of the cases that you run, right?

4 A No, only the ones that you've requested, individual.

5 Q Only the cases in which we get hired and then we ask you
6 guys for, right?

7 A I guess so. Yes.

8 Q Okay.

9 MR. ST. LOUIS: I don't have anything else.

10 THE COURT: All right. Anything else by
11 Mr. Dickinson I should say?

12 MR. DICKINSON: No, Your Honor.

13 THE COURT: Thank you. You may step down. All
14 right.

15 MR. ST. LOUIS: We call Ms. Arbizu.

16 JANINE ARBIZU, DEFENDANT'S WITNESS, SWORN

17 DIRECT EXAMINATION

18 BY MR. ST. LOUIS:

19 Q Why don't you go ahead and state your name for the record?

20 A Janine Arbizu, A-R-B-I-Z-U.

21 Q Okay. Ms. Arbizu, you've seen the letter that's admitted,
22 Exhibit CCC? Is it still up there?

23 A I have DDD up here. I think --

24 THE COURT: No the --

25 THE WITNESS: Oh, yes, CCC. Yes. And I'm not

1 stuttering either just to make it clear.

2 BY MR. ST. LOUIS:

3 Q You've seen that before?

4 A Yes, I have.

5 Q And, in fact, you're aware that I started sending these
6 letters requesting this data after a conversation with you or
7 you suggested I should get this?

8 A That's correct.

9 Q Can you tell the Court why you thought it was important to
10 get the electronic data from the testing that was done?

11 A Well, at that point, in reviewing data from the laboratory
12 in a number of your cases over a fairly sustained period of
13 time, it was evident that the laboratory had a recurring
14 problem of contamination showing -- manifesting itself in
15 different ways in different cases. And one -- the first
16 suggestion I had to you in terms of addressing -- trying to
17 understand the scope and magnitude of the problem was an
18 on-site inspection. When it wasn't clear whether or not that
19 was going to be possible, then I suggested getting the
20 electronic data, because an alternate means of investigating
21 the contamination issues in this lab is by reprocessing the raw
22 data. And so, if, perhaps, you are not going to be able to get
23 an on-site audit, this would be sort of a next best attempt in
24 understanding the scope of the contamination problems.

25 Q Well, it sounds like you're suggesting that you can do

1 something other than to print out pages of Greek.

2 A Yes.

3 Q I don't -- would you have access to this Varian Star
4 Writer software that would let you actually look at the
5 electronic data?

6 A I can get access to it. I've been in communication with
7 the Varian technical support people. It is a particular
8 software application that has not been sold and supported for a
9 number of years. It doesn't mean they don't have old copies
10 around. But I would need to know what version the laboratory
11 was using at this point in time to ensure that I got the proper
12 version, because it's just like if you try to open a Word file
13 and you don't have Word, you get gibberish. That's the
14 gobbledy gook that we've got here. And just like Word
15 magically creates these beautiful documents from the gibberish,
16 the Star system application will create data that might still
17 like gibberish if you're scientist, but it really can be
18 reprocessed.

19 And it's more than simply reprinting the reports that
20 were produced by the laboratory. It's actually being able to
21 go back and reprocess the raw data, because what's stored in
22 the data files is the raw data from which those reports are
23 generated. It's a generation earlier, if you will, so that you
24 could actually go in and reprocess. You could do a manual
25 integration where the system did an automated integration. You

1 could handle the baseline different, so you can look for lower
2 levels of contaminations, and they would have been able to see
3 in a visual display the way they have the scale on the output.

4 Q Why don't you try to explain to us what the difference is
5 between manual integration and, what was the other, automated
6 integration?

7 A Yeah. The system actually --

8 Q You can draw if you want to.

9 A You know, it's -- I'm almost congenitally unable to speak
10 without going to a board. But the system has automated
11 routines for integrating the area under a peak, for deciding
12 how big a peak is. And we've been through this before about
13 where you draw the lines. And the system has its default ways
14 of drawing those lines and deciding how much area is under a
15 peak, so deciding how much of that particular compound is
16 present.

17 The analyst has the ability to override and manually
18 adjust that. And there's been testimony previously, I think it
19 was in this case, about the process that's used to manually
20 override and do a manual integration.

21 So, it's really processing the raw data rather than
22 simply -- it wouldn't, frankly, help at all to just reprint the
23 existing data that the laboratory recorded already.

24 Q All right. So, you can get in there and look down in the
25 weeds and see what's in there?

1 A That's the hope. Yes.

2 Q Okay. And how would that help you in assessing the degree
3 of contamination that is going on in these printouts?

4 A Well, as I've suggested earlier, the far better approach
5 is really to observe practices, and conventions, and physical
6 layout of the laboratory. That is where you have the ability
7 to detect practices that have the potential to expose the
8 laboratory to contamination risk. I'm not suggesting that
9 during the eight-hour period of time that I might be present in
10 a laboratory, you know, the skies are going to open up and
11 there's going to be some massive contamination incident that's
12 going to become visually apparent to me. That's not the nature
13 of what's done during an on-site inspection, an on-site audit.
14 Rather, what you're looking for are practices and conventions,
15 what represents good laboratory practices from a contamination
16 control perspective and the kinds of practices that can result
17 in problems.

18 If I might use an example from DNA that's come up
19 earlier in the testimony today, I witnessed testing in a DNA
20 laboratory. And in DNA labs, in between processing each item
21 of evidence, the analyst changes gloves and puts out clean
22 paper, so that -- we're trying to segregate the dirty stuff
23 from the clean stuff. And the analyst seemed to know that that
24 was a requirement, and she did, in fact, put clean paper out
25 between each item of evidence. But when -- and she knew I was

1 an auditor. She knew I was three feet away watching every move
2 that she made. Yet, her practice was to manipulate the
3 samples, touch the samples, at which point, her gloves were
4 dirty, and then --

5 Q Because they had DNA on them?

6 A Yes. Yeah. It's from my radiological handling
7 background. Things are dirty and they're clean. There's no in
8 between. So, once the gloves are dirty. She would then wad up
9 the dirty paper and throw it away. What she should have done
10 is then taken off those dirty gloves to get all the dirty stuff
11 away at once. But she'd go back with her dirty gloves and lay
12 out clean paper. That doesn't mean that every time she did
13 that she cross-contaminated samples, but that's an example of
14 something that you can see when you're doing an on-site
15 inspection, just watching normal practice, that you'll never
16 read in a procedure, and it won't necessarily manifest itself
17 in the data, because you'll just never know whether it came
18 from contamination or not. But when you see that kind of a
19 practice, it alerts you to the fact that the laboratory is not
20 controlling that as an exposure pathway.

21 Q And I don't want -- and I hope we're not repeating two
22 much of what we did last time. And we're going to brief and
23 certainly not do that again. But I think -- and perhaps it was
24 in this case -- we had talked about you went on a public tour
25 of an FBI lab and picked up issues with the way they were doing

1 things.

2 A Yes, the J. Edgar Hoover Building in downtown D.C. The
3 public tour that all the tourists get to go on, I went on it
4 with my auditor's notebook.

5 Q And how many notebooks did you fill?

6 A It was a short tour, and I wrote as fast as I could.
7 There were problems in the DNA laboratory, there were problems
8 in the what are called classical instrumental analysis lab that
9 did paints and those kinds of things, and there were problems
10 in the hair and fiber analysis laboratory, all of them overtly
11 visible to me walking through on a public tour through the
12 glass windows, and relating to quality control practices as
13 executed by people and facility controls. So, it doesn't mean
14 that every one of those things was causing a problem at every
15 moment in time. It simply means that the fact that the young
16 lady that was doing the hair and fibers testing with her little
17 lighted microscope had really big uncontrolled hair and would
18 not have been to work in a fast food joint, but she was busy
19 pulling hairs off the evidence, that was clearly a potential
20 contamination route that had not been addressed by the
21 laboratory.

22 Q And just so the Court knows that you're not critical of
23 every lab you've been under, for example -- I don't recall if
24 it was in this case or another. You talked about there was a
25 laboratory in Utah that I think did blood alcohol testing,

1 which you thought did terrific work.

2 A Did terrific work. Yes. There are wonderful labs out
3 there. And it doesn't mean they don't have issues. But what
4 differentiates them from every other lab is when a problem is
5 identified or when a weakness is identified, they go after it.
6 They're intellectually curious. They're inquisitive. They
7 want to get it right. And so, if there's something they want
8 to do to improve the quality and control the system -- the
9 measurement system better, then they go right after it.

10 Q Okay. So, you're sort of willing to take your chances
11 that if Judge Dolney let's you into the lab for eight hours, it
12 would be productive, and you could find information that would
13 useful in assessing the quality of the work this lab does?

14 A That certainly is my experience based on other audits of
15 laboratories. Yes.

16 Q Even though it's years after the fact?

17 A Even though it's years after the fact, given that it's the
18 same facility, and given that we always hope and pray that the
19 progression in practices in control gets better rather than
20 worse over time. So, if anything, if there are still problems,
21 you would have hoped that, if anything, the situation today is
22 better than it was years ago.

23 Q Okay. And what about the fact that there's going to be an
24 AZCLAD lab inspection later this year? Doesn't that resolve
25 the issue?

1 A No. I certainly wouldn't expect it to.

2 Q Why not?

3 A The AZCLAD inspection is for a very specific purpose.
4 It's to assess compliance with the AZCLAD criteria. So, it's
5 essentially an inspection to assess whether the systems and
6 controls to comply with AZCLAD criteria are in place. As
7 practiced, and this is based on my review of Mr. Heller's
8 testimony and this lab in particular, it's based on my serving
9 on technical panels with people who have been both AZCLAD
10 inspectors and laboratory managers responsible for labs such as
11 AZCLAD inspections, is that it was very much as described
12 earlier today. The AZCLAD inspections generally do not go in
13 and observe ongoing routine production operations in the
14 laboratory. They do much of a data audit rather than observing
15 practices during routine production operations. That would
16 seriously constrain the value of an on-site inspection. I
17 wouldn't recommend doing an on-site inspection to address
18 contamination practices -- control practices if they weren't
19 actually operating in the laboratory, because it's watching and
20 seeing how traffic patterns and how things happen on a day-to-
21 day basis that gives you the real value.

22 So, through -- the other problem is that from my
23 review of testimony in regarding this laboratory, for a number
24 of years the laboratory has not done a very good job, frankly,
25 of documenting things that needed corrective action. There

1 were any number of incidents where problems were identified.
2 As described by people's testimony, they were apparently
3 addressed, but nothing was ever documented to the record, to
4 the file. So, if you're -- they're coming in and auditing the
5 records, if you looked at the corrective action file at this
6 laboratory, it's going to be weak. It's going to be thin.
7 There's not going to be much there. That's indicative of the
8 fact that -- well, at least at the time he was the manager, by
9 Mr. Heller's own testimony, he didn't expect those things to be
10 documented. It wasn't part of the expectation that they would
11 document this was a problem, this is what we decided caused
12 that problem, and here's how we decided to fix it. It was just
13 based on memory -- sort of institutional memory. So, that's
14 not the kind of thing that AZCLAD would be in a position,
15 through review of the records, to even recognize and
16 investigate.

17 Q You told us, I think, last time that when you were -- and
18 I can't remember if it was working in the lab or running the
19 lab, you had auditors in 50 times during one calendar year.

20 A That was the world record, yes, for us personally, 50
21 times during the course of a year. And that was -- the scope
22 of those audits was completely different. Every audit has a
23 different scope. But yeah, that was the most burdensome year
24 that I had. That was -- I was the lab director. Yes.

25 Q Were there folks that would come in and watch you guys

1 doing your work?

2 A Routinely. Actually, we found that the most helpful.

3 Q Why is it?

4 A It's another set of eyes looking at your practices. It's
5 just like anything else. We get immune to the fact -- me
6 personally, I get immune to the fact that there's dust on my
7 ceiling fans. But somebody else can come in and see it and be
8 -- it be immediately apparent to them. So, it's the same kind
9 of thing in a laboratory environment. You can see things that,
10 when they're in your everyday sphere of influence, you simply
11 don't see it. So, if it's somebody who understands the
12 analytical processing, the techniques, the risks, I -- I know
13 that the best audit I ever had was an analyst who came in from
14 Oregon National Lab to my laboratory and just spend a couple of
15 days in the labs watching things. It was the most productive
16 for us to really get at the root cause of some of our bigger
17 performance issues.

18 Q You think you could stay out of Ms. Arnone's way or
19 Mr. Ruskin's way?

20 A You know, she's a very competent and professional chemist.
21 I'm quite confident that I would be able to stay out of her
22 way.

23 Q Okay. Let's go back to the electronic data for a moment
24 if we can. Exhibit 1 --

25 MR. ST. LOUIS: Do I have the original here? Maybe.

1 THE WITNESS: Appears to be so.

2 THE COURT: Its got that little stamp on it.

3 MR. DICKINSON: Actually, two were marked, so I don't
4 think --

5 MR. ST. LOUIS: Okay.

6 THE COURT: Just the ones for you. Well, that's what
7 I was told today.

8 MR. DICKINSON: I think the Court has the original,
9 and that's a duplicate original.

10 (Simultaneous conversation)

11 MR. DICKINSON: Why don't we just X out that one was
12 that was --

13 THE COURT: Well, let me see what the edge -- this
14 one has any markings. Yeah, it has it too. And they're both -
15 -

16 MR. DICKINSON: So, just mark one out.

17 THE COURT: We don't want to have a duplicate.

18 MR. DICKINSON: All right.

19 THE COURT: There you go. There's the Court -- and
20 I'll --

21 MR. ST. LOUIS: Okay.

22 THE COURT: I mean that's the file copy.

23 THE WITNESS: Okay.

24 BY MR. ST. LOUIS:

25 Q I have had to walk back from my office to court because I

1 realized I took an original with me, and it's too hot to do
2 that this time of year. Really. I wanted to -- I think the
3 Court was sort of asking this. Can we look at this, this
4 printout and see that DPS did, in fact, save the right thing?

5 A Save the right thing. You know, I --

6 THE COURT: That is an issue.

7 THE WITNESS: That is a very good question. That --
8 no. I certainly can't. I don't know anybody who could. The --
9 what needs to be done is after they save a data file, they need
10 to take that data file, maybe go to another instrument that has
11 that software on it, the same -- and insert that disk, make
12 sure they can pull it up and read it. That will validate that
13 they are, in fact, saving what they think they're
14 saving --

15 THE COURT: Uh-huh.

16 THE WITNESS: -- to the floppy disk.

17 BY MR. ST. LOUIS:

18 Q Okay.

19 A And that would be a due diligence thing for them to do
20 before they turn it over to you.

21 Q Just like if you save a disk to it or save a document to a
22 thumb drive, you close out of it, pull it back up in the thumb
23 drive to make sure you save the right thing?

24 A Exactly.

25 Q Okay. All right. You know, I don't know that we actually

1 answered the question. What -- you've told us that you can get
2 access to the, the software from Varian. What can we learn
3 from looking at the electronic data?

4 A That's what I was trying to describe earlier. By
5 reprocessing the data, looking down in the graph, trying to get
6 a sense of how pervasive the contamination issues may be in the
7 laboratory. It was sort of referred to earlier in that there's
8 no reason to expect a serious contamination incident to occur
9 right when I'm watching. That's true. So, you have -- in the
10 case of just being able to reprocess electronically, I'd have
11 to look for smaller indicators that practices and controls
12 weren't working.

13 Q All right. So, you can view the data, and there's
14 information that could be in there that could help you
15 determine the scope of the contamination you're saying?

16 A It's certainly not as useful as observing practices in the
17 lab. But in the absence of being able to do that, I would say
18 it's your next best option in trying to really understand the
19 scope and magnitude of the contamination problem.

20 Q Okay. All right. Now, that it's, I don't know, 16 months
21 after Mr. Esposito's blood was tested, and we've learned today
22 that the electronic data was not preserved, would it do any
23 good to go back and test the second vile of blood 16 months
24 later in your opinion?

25 A Oh. We'd almost have to have a whole different discussion

1 about that. The problem is that there are three primary
2 factors that influence, essentially, the integrity of a blood
3 alcohol sample after the fact, because, obviously, the best of
4 all worlds would be if you could collect the sample and analyze
5 it immediately, because then you don't have any problems with
6 either loss of alcohol or increase of alcohol, because we know
7 that both of those things can happen. And since that's from a
8 practical sense, not really going to happen, the three factors
9 that a lot of empirical studies have demonstrated consistently
10 make the biggest difference are temperature, that's number one;
11 the presence of an appropriate concentration of an appropriate
12 preservative, that's number two; and time, number three. Now,
13 if all three of those factors have been controlled from the
14 point of collection, then you can be reasonably confident. But
15 -- and I haven't looked at it in this case. I need to make
16 that very clear.

17 You need to have, essentially, documentary evidence
18 to ensure that you understand the temperature conditions under
19 which the sample has been stored for that uninterrupted period
20 of time from collection to the present time, the presence of an
21 appropriate quantity of preservative, and how long it's been,
22 because is our enemy when we're trying to do this kind of
23 analysis. And to be really careful, you also have to worry
24 about the conditions in which the tubes were stored before the
25 samples were even collected. Because if you look at the really

1 credible tube manufacture suppliers like Becton Dickinson and
2 so forth, when they sell you a batch of tubes and they put an
3 expiration date on that tube, they will essentially certify it
4 as being appropriate for its intended use as long as it's
5 stored in accordance with their conditions. And their
6 conditions put very -- fairly tight windows on the acceptable
7 temperature range, for example. So, before it ever gets any
8 blood in it, you need to store -- you need to control your
9 storage conditions for those tubes. If they're rolling around
10 in the trunk of a patrol car in Tucson in August, that's not
11 controlled temperature for storage for those tubes. Now, if
12 they were appropriately stored, if those documentations show
13 that they were appropriately stored in accordance with the
14 manufacturer's requirements, appropriate temperature before
15 they were used, and the, you know, time, temperature, and
16 preserved overall in control, then we're okay. But otherwise,
17 you can come to me with a result and say what does it mean?
18 And whether it's high or whether it's low, or whether it's
19 right on the same, I can't tell you the mechanistic explanation
20 for that. I can't tell you the mechanistic explanation for
21 that. I can't tell you if that is necessarily the same
22 concentration at the time that sample was collected. And
23 that's really the only thing that's material to this court.

24 THE COURT: Are you familiar with the tubes that are
25 used here in Tucson? Are there more than one manufacturer?

1 THE WITNESS: I am not. My understanding from
2 reviewing the labs reports is they have at least three
3 different options that they can circle which supplier it is.

4 THE COURT: Are the temperature conditions fairly
5 similar for different --

6 (Simultaneous conversation)

7 THE WITNESS: Quite comparable.

8 THE COURT: And what --

9 THE WITNESS: From the -- I'll say from the credible
10 manufacturers, the guys that do a good job.

11 THE COURT: All right. And what kind of conditions
12 should those tubes be stored under?

13 THE WITNESS: You know, if I had access to my PC I
14 could tell you right now. But it's a fairly narrow temperature
15 range. It's something in the room temperature kind of range.
16 It's not above like 75 degrees.

17 THE COURT: Oh, my God. I mean I hear experts
18 testify in this court that it doesn't matter if you throw them
19 in the trunk of the patrol car and they sit there for six
20 months in Arizona summer heat or over anything else.

21 THE WITNESS: I would submit that if you look at the
22 manufacturer's -- the documentation that accompanies their
23 certification -- as long -- they will certify it as appropriate
24 for it's use as long as it's stored in accordance with those
25 conditions. There's also conditions on what color the

1 preservatives are at the time the sample is collected, because
2 they recognize that discoloration can be an indication that the
3 preservative has -- is not going to function at its intended
4 manner. So, yeah --

5 THE COURT: But they know the blood is analyzed.
6 There should be some tip off that something went awry, right?

7 THE WITNESS: Unfortunately, that's really the
8 problem. There really isn't. Unless the anticoagulant wasn't
9 there properly in the blood --

10 THE COURT: Oh. Then you can see that it's
11 coagulating.

12 THE WITNESS: -- then you could see it. The problem
13 with a preservative is there's no sort of visual cue that it's
14 not working. My recollection is they have -- there's --
15 Tritech is one of them. I think BD might be one if you're
16 looking for the tube. It's a little checklist they have at the
17 top.

18 MR. ST. LOUIS: Yeah. What are we up to, EE?

19 THE COURT: Yes, EEE.

20 THE WITNESS: EEE.

21 MR. ST. LOUIS: EEE.

22 THE WITNESS: I'm, frankly, familiar with BD simply
23 because that's what I'm most recently testified about. The
24 problem is really that the integrity of that seal could get --
25 can be compromised if it's outside the temperature range.

1 Whether it's low temperature or high temperature, we know that
2 materials don't behave the way we want them to. You can get
3 breaks in that seal and let contamination if you're outside the
4 temperature range.

5 THE COURT: So, can one predict what the result of
6 that would be, whether it's low temperature or high
7 temperature, what the --- how that would affect --

8 THE WITNESS: I mean it depends what --

9 THE COURT: The sample.

10 THE WITNESS: -- what the -- what's going on in the
11 ambient air at the time that that happens, and any time post
12 that. But you've handed me EEE.

13 BY MR. ST. LOUIS:

14 Q EEE.

15 A Here's just an example of analyst notes, DPS --

16 Q No. I think these are actually analyst notes from
17 Mr. Esposito's.

18 A Oh, okay. Yes. From Reyna Ramirez?

19 Q Yes.

20 A It says it is a Lynn Peavey kit. The other options are
21 NIK and Tritech, and other.

22 Q Do you know the specifics for Lynn Peavey off the top of
23 your head?

24 A I don't. I don't off the top of my head.

25 Q All right.

1 A I'm sorry.

2 Q Okay. So, you gave us sort of a general overview on what
3 you would need. The information that you get out of this
4 laboratory, would it be enough for you to be able to look at a
5 retest done 16 months later and tell us if there were any
6 issues with the original blood test?

7 A I'd have to see a lot more data as to the storage
8 conditions in that whole intervening time that I haven't seen
9 at this point.

10 Q Okay. All right. Let me just ask you. What you're
11 saying is if it's -- if blood is stored outside of room
12 temperature, it can affect the seal on the tubes?

13 A That can be one of the effects. The three things that
14 adversely impact our ability to know that a result at a later
15 point in time and space is actually representative of what
16 happened at the time is -- there's three things that a wealth
17 of empirical data has demonstrated matter, and that is
18 temperature, specifically, that high temperature is bad, the
19 appropriate type and amount of preservative, and the last one
20 is time, the elapsed -- the shorter time is better, longer time
21 is bad.

22 Q Everything else being equal, would you expect the results
23 to be the same 16 months later?

24 A I don't know. I don't even know what everything else
25 being equal means, because, literally, there are plausible

1 mechanisms through which the concentration can be higher or
2 lower. And those -- so, those -- with those competing effects,
3 you know, whether I got a result that was higher, or lower, or
4 the same, I wouldn't know if that was a reflection of the
5 original concentration.

6 Q Okay. Comparing apples and oranges.

7 A Comparing apples and root crops.

8 Q Okay.

9 MR. ST. LOUIS: You know, I do believe I have no
10 further questions.

11 THE COURT: All right. Cross by Mr. Dickinson.

12 MR. DICKINSON: Thank you.

13 CROSS-EXAMINATION

14 BY MR. DICKINSON:

15 Q So, you're talking about the three things that might
16 affect a result of a retest, right? One is temperature. And
17 so, you would agree with me that unless you were personally
18 convinced that the temperature was perfect all of the time, the
19 result can be off, right?

20 A Unless I was convinced?

21 Q Yeah.

22 A One --

23 Q Well, your job is -- all right. Let me -- go ahead and
24 answer.

25 A I'm trying to understand your question. The result -- you

1 know what? You'll be able to get a result. I have no doubt
2 that you would be able to --

3 Q Sure.

4 A -- analytically, to get a result. Now, what I would do in
5 terms of doing a data quality assessment for anybody who is
6 going to use that result --

7 Q Uh-huh.

8 A -- would be to qualify it if there was not documentation
9 to support the fact that those three factors have been
10 appropriately controlled during that period of time.

11 Q Okay. So, assuming that the information was there to show
12 that the temperature was controlled during the 16 months, what
13 you would expect, if anything, would be a decrease in the
14 amount of alcohol that would be in the sample, right?

15 A Not necessarily. If there hadn't been an appropriate
16 amount of preservative, for example, what you're trying to
17 present is the generation of alcohol in the sample through the
18 introduction of an outside microbial material.

19 Q Okay.

20 A So, you know, it can be up. It can be down. Like I said,
21 they're competing effects.

22 Q So, let's talk about the preservatives a little bit. What's
23 your understanding of the standard preservatives that are used?

24 A I don't -- in this case, it was Lynn Peavey. I don't know
25 what Lynn Peavey --

1 Q What chemicals are used as preservatives?

2 A Well, an example can be sodium chloride.

3 Q Okay.

4 A I don't know that that was --

5 Q Are there other ones?

6 A There may be, yes. But I don't -- I just don't know in
7 this case. I'm sorry.

8 Q Isn't it true, as a matter of fact, that there are
9 probably half a dozen, at least, different chemicals that are
10 used in these --

11 A With different efficacies under different conditions,
12 certainly.

13 Q Certainly. And all of these -- virtually all of these are
14 chemical compounds like salt, right?

15 A We're all chemical compounds.

16 Q Sure. And they're in there for a specific purposes, in
17 order to ensure that the blood is preserved, right?

18 A Yes.

19 Q That's why they put them in there.

20 A Yes.

21 Q Now --

22 A To maintain it in that original condition.

23 Q Certainly. And one of the ways that you know that, for --
24 and the other chemical which is in there is an anticoagulant;
25 isn't that correct?

1 A Typically, it's both components. Yes.

2 Q Okay. And what are the standard anticoagulants?

3 A Again, it's different ones. Maybe an oxalate. It just
4 depends.

5 Q Potassium oxalate. Isn't that --

6 A Yes.

7 Q Okay. And to the best of your knowledge, potassium
8 oxalate isn't adversely affected by heat, is it?

9 A I wouldn't expect that to be the case at just normal kinds
10 of temperatures. Again, I'd have to look up -- that's the kind
11 of thing I'd have to look up.

12 Q Exactly. So, assuming potassium oxalate is in there,
13 whether it was refrigerated or not, you're going to expect a
14 liquid in there, right?

15 A Yes.

16 Q If there's no --

17 A If there was --

18 Q If it's not a liquid, if it's --

19 A If there's an appropriate amount of anticoagulant, yes.

20 Q All right. If it's clotted, you've got a clue there was
21 not enough potassium oxalate or whatever the --

22 A That's correct. That's what's so nice about that. You
23 actually have a visual indication --

24 Q Sure.

25 A -- as to failure.

1 Q And likewise, if there's no preservative, or insufficient
2 preservative in there, you've got visual cues.

3 A Not always.

4 Q It turns creamy sometimes, right?

5 A Sometimes it can. Yes. That's correct.

6 Q Yeah. And in reality, the chemicals that are in the
7 various test tubes are not the problem with the expiration
8 date; isn't that true?

9 A I'm sorry. I don't understand your question.

10 Q Okay. The expiration date is there to guarantee the fact
11 that there's a vacuum, that the tube will draw; isn't that
12 true?

13 A Well, yeah. It's essentially -- the suppliers are
14 certifying a tube as appropriate for its intended use. And it's
15 really the entire system. It's the package if you will.

16 Q Okay.

17 A It's the seal, the integrity of that seal, and the
18 sterility of that tube, and the presence of appropriate amount
19 of additives.

20 Q Sure. But if you use a tube which has no vacuum, you get
21 no blood in the tube, right?

22 A Yes, that's true.

23 Q And so, you can tell if there was a vacuum failure on the
24 tube, because it's empty.

25 A Well --

1 Q Or if there's a -- if it -- you don't have --

2 A It's not.

3 MR. ST. LOUIS: I'm sorry. May Ms. Arbizu be allowed
4 to answer the question?

5 THE COURT: It's --

6 THE WITNESS: It's not black and white. You can have
7 partial fills and those kinds of things that may or not be an
8 indication of compromise of the vacuum. Sometimes it's a
9 medical issue. So, yeah, it's a multi-variant problem if you
10 will.

11 BY MR. DICKINSON:

12 Q Sure. But if you get the blood in the tube, you've had
13 sufficient vacuum one way or another to --

14 A You've had sufficient vacuum to get some blood in the
15 tube. Yes.

16 Q Correct. And the chemicals then that are in the tube are
17 -- the tube is certified to do its job, and the preservative is
18 present and the anticoagulant is present, you'd agree?

19 A Not necessarily. Again, it's the integrity of that entire
20 system, that it's used within its state, that it was stored,
21 previous to use, within the acceptable conditions for that
22 tube. And it's the whole package. You can't --

23 Q Okay.

24 A -- just sort of cherry pick little pieces.

25 Q What Becton Dickinson or Lynn Peavey is guaranteeing is if

1 you have a tube with our chemicals in it, and you store it at
2 75 degrees or whatever it is, it will last for X number of
3 months.

4 A Yes.

5 Q That's the guarantee.

6 A Essentially, that's their certification. Yes.

7 Q All right. And so, if goes Y -- X plus Y months and still
8 draws, it is still a good tube. The chemicals are in it and
9 the vacuum is still good, right?

10 A It may or may not. It's like -- you know, it's like --

11 Q So --

12 A -- drinking milk that's expired. It may or may not make
13 you sick. But those control limits are placed -- it's just
14 like in the laboratory. Those control limits are placed to
15 give you a known degree of confidence in the results. And if
16 you use data outside that, it doesn't mean it's necessarily
17 bad, but you have to scale back your degree of confidence.

18 Q Is there any data that you can point to that indicates
19 that use of a tube outside of an expiration date, where the
20 tube works, causes contamination?

21 A Let me make sure I understand your question.

22 Q Are you aware of any studies or data that shows that a
23 tube that's used outside of the expiration date, that works and
24 draws blood, is contaminated?

25 A I am not.

1 Q The third issue you talked about was time. You talked
2 about temperature. You talked about preservatives. You talked
3 about time. Time, in and of itself, typically will reduce the
4 amount of alcohol in a second sample; isn't that true?

5 A That's correct.

6 Q And so, if the second sample was properly preserved and
7 was at a proper temperature, what you would expect to find on a
8 second sample tested 16 months later would be a lower reading.

9 A If the only mechanism of action was evaporation, that
10 would be the case.

11 Q And that would work to the benefit of the defense?

12 A Yeah. The problem is you just never know about the other
13 competing mechanisms. I always feel like our job is to get the
14 answer right not to bias it one way or the other.

15 Q Well, you're aware of the procedures that are put in
16 place, and you've sat through the testimony and reviewed the
17 data that showed that any time there's a choice that's made in
18 these situations, such as two samples are run, the DPS takes
19 the lower value, right?

20 A That is correct. There -- for reporting purposes, they
21 always --

22 Q Correct.

23 A -- select and report the lower value.

24 Q And they round the decimals in favor of the defendant,
25 right?

1 A My understanding is that they truncate. They don't round.

2 Q All right. But that benefits the defendant; isn't that
3 true?

4 A Yes.

5 Q And so, the system which is in place is designed to lean
6 towards benefiting the defendant when in doubt; isn't that
7 correct?

8 A In those examples that you've given, yes. Certainly.

9 THE COURT: I guess if you truncate it, it depends
10 how high the digit was that you truncated whether it benefits
11 him or not.

12 THE WITNESS: Yes, that's true.

13 BY MR. DICKINSON:

14 Q Okay. The -- you would agree that the audit that you were
15 proposing to conduct on behalf of Mr. St. Louis is not to
16 benefit or fix problems that DPS has?

17 A Oh. I would certainly hope that that's the outcome.

18 Q Well, your job is to report back to him and tell him what
19 you find. His job then is to get that case thrown out. And
20 then, eventually, they may discover what it was that you have
21 found, right?

22 A You know, I made reference to this earlier. The hallmark
23 indicator of the best labs is when they take information about
24 weaknesses in their analytical processes and they put it to
25 good use. And in the spirit of an auditor whose primary

1 emphasis is on the integrity of the results -- and we can't
2 make data perfect, but what's really important, we need to
3 understand our uncertainties and try to control them, and
4 communicate them effectively. So, my hope would be that the
5 lap would put it to good use, any observations that are made
6 during the course of the assessment. That would be my sincere
7 hope.

8 Q I believe you've talked to the Varian Company concerning
9 their software and the availability of it?

10 A Yes.

11 Q The availability of the software.

12 A Yes.

13 Q And they're willing to give you any type of software you
14 need; is that correct?

15 A From my -- I've explained the circumstances to them, and
16 the point that I had the discussions, I didn't know the
17 specific version that was used at this point in time. So, we
18 couldn't sort of come to closure. But my understanding from
19 speaking with them is that however it gets accomplished, they
20 don't see any insurmountable problems in either selling or
21 lending us a version of the appropriate application.

22 Q Are you aware that the licensing agreement that DPS is
23 working under only allows them one copy -- or a copy on one
24 computer of the software?

25 A I would expect that to be the case.

1 Q And --

2 A That's very typical.

3 Q And therefore, your concern or request to have a second
4 copy to check the disk would be a violation of the license
5 agreement, to make sure that the disk wasn't gobbledy gook?

6 A I don't believe -- if I gave you that impression, I don't
7 believe that was my intention. The point is after they've
8 saved the disk, they can then take it back and reload it, and
9 open it with the same version and ensure that it actually is
10 able to pull it up. Now, they could do it --

11 Q Correct. But under the licensing agreement, they only
12 have one copy that they're allowed to have on one computer.
13 They don't have another computer that has it --

14 A They only have one GC --

15 Q Yeah.

16 A -- running this application.

17 Q And --

18 A I guess I don't see the problem.

19 Q So, what you want him to do is to take the disk and put it
20 back in the same --

21 A Yeah. And open it in the system that has that
22 application. You know how when you open a file --

23 Q Yeah.

24 A -- and it says, you know, what --

25 Q Sure.

1 A -- do you want me to use to open it?

2 Q Uh-huh.

3 A Tell them you want to use that. So, I guess --

4 Q Okay.

5 A -- I don't see the problem.

6 Q And I guess alls (sic) you're doing is asking to do one
7 more step, which is to verify --

8 A Yes.

9 Q -- that the floppy drive actually has the copy --

10 A I would expect -- yes. I would expect that this gobbly
11 goo was generated by opening it on a system that did not have
12 the Star --

13 Q Correct.

14 A -- software.

15 Q Right.

16 A And so, yeah. It's --

17 Q And so, when you put it back in without manipulating it,
18 you're going to get the same report that --

19 A Co -- fine.

20 Q -- you had already printed out and given to Mr. St. Louis.

21 A Yeah. But it would at least validate that we're getting
22 the data set that we have requested on -- that we're being
23 provided with.

24 Q You would agree with me that the area that is of true
25 concern is that area that's under the peaks for ethanol and the

1 internal standard.

2 A For purposes of --

3 Q Alcohol.

4 A -- quantifying out alcohol. Yes.

5 Q Yes.

6 A Those are the two data points for that purposes.

7 Q And do you anticipate finding anything in the electronic
8 data that will allow you to determine whether or not there's
9 "contamination" in those areas?

10 A No. The problem is really whether the laboratory's
11 contamination control practices are so deficient that if they
12 had ethanol contamination, they would not be in a position to
13 recognize it, because that's sort of the ugly reality of our
14 lives as analytical chemists. If there is alcohol
15 contamination, we can't distinguish the alcohol from a
16 contamination source from the alcohol that may have been
17 present in the sample at the time it was collected.

18 Q So, your concern then truly is whether or not there's
19 internal standard contamination or ethanol contamination?

20 A Or -- I'm just -- frankly, I'm just as interested in
21 whether there's toluene contamination or acetone contamination,
22 because that's an indication -- when most kinds of things show
23 up in control samples, in analytical samples, in reference
24 samples, in blanks, that's an indication that the laboratory's
25 control practices are not working. That's what I'm interested

1 in, is understanding sort of the scope and magnitude of the
2 weaknesses in their control practices. So, it's illustrative
3 to know, for example, that the laboratory has been operating
4 for a period of time and having these spurious volatile
5 contaminants show up in their reference samples that are
6 supposed to be pristine. And if they're showing up in a
7 reference sample, which is supposed to be the most pristine
8 sample you've got, yikes, what else is showing up in my unknown
9 samples, in my evidentiary samples.

10 Q If something else other than internal standard or ethanol
11 shows up in those other samples, it will come out in a
12 different place in the --

13 A It certainly would, and that's what I'm interested in
14 looking to see, because what that tells me is that their
15 control practices -- when I talk about control practices, I'm
16 talking about the actual manipulation of the sample, the actual
17 processing of the samples, and the processing of the controls
18 in such a manner that any opportunity for cross-contamination
19 is limited. And in reviewing the records for this case and
20 testimony, there's reference to things like switching lids
21 between a toluene sample and another sample. Yee, God. That
22 would be very apparent if you watched the actual processing,
23 that that -- that those kind -- that -- you should prevent the
24 opportunity for those kinds of mix-ups ever to happen by virtue
25 of your practices. So, those are the kinds of practices that

1 I'm really interested in trying to identify, because if it can
2 happen for those, it can happen for any of them.

3 MR. DICKINSON: I have nothing further at this time,
4 Your Honor.

5 THE COURT: Any redirect?

6 MR. ST. LOUIS: Briefly.

7 REDIRECT EXAMINATION

8 BY MR. ST. LOUIS:

9 Q Ms. Arbizu, Mr. Dickinson was essentially asking you as
10 long as you get blood into a tube we know that it was working
11 just fine. Do you recall that series of questions?

12 A Yes.

13 Q If a tube loses some vacuum, what goes into the tube in
14 place of the vacuum?

15 A Air.

16 Q And --

17 A Ambient air from the immediate environment, at least.

18 Q So, if we're talking about the trunk of a car, and some
19 air from the trunk of the car goes in there, if there's
20 gasoline in the trunk of the car, that's going to come into the
21 tube?

22 A That could be one of the components.

23 Q And at least part of the air, I guess, gasoline contains
24 ethanol?

25 A I guess it depends where you fill up and what time of

1 year. But quite typically, yes.

2 Q Okay. So, simply by losing vacuum in the back of a squad
3 car, a tube in which blood is going to go can get ethanol into
4 it.

5 A Yeah. You know, our real responsibility as scientists is
6 to identify the potential mechanisms for introduction of
7 contaminants, the plausible sources, and then to protect that.
8 I think that we have to worry not only about introduction of
9 ethanol from external sources, but also the microbiological
10 agents that have the potential to result in an artificial rise
11 in alcohol concentrations in a blood sample. The problem is we
12 don't live in a sterile environment, none of us. And because
13 we don't have data to indicate what the environment is like in
14 the back of a police car trunk under the conditions that these
15 samples are experiencing, the best thing we can do is protect
16 that sample.

17 Q Would you be able to look at the electronic data and say
18 hey, there's stuff in here that is consistent with gasoline
19 being in the test tube?

20 A My guess is -- would it have to be -- it would have to be
21 pretty darn high. You know, whether you're going to see some
22 of the aromatic hydrocarbons that are typically in gasoline, I
23 would think that would have to be a pretty gross failure, and
24 you probably shouldn't be driving around in that car if that
25 much gasoline is leaking into the trunk.

1 Q Okay. It sounds like from what Mr. Dickinson was asking
2 you, that if we retested the blood at this point of time and it
3 came back with a lower number, the response would be well,
4 that's what we expect, 16 months has passed.

5 A I can build you a plausible scenario for it being lower,
6 the same, or greater, but I can't draw those back to the point
7 of origin, and that's my problem.

8 Q I thought that you had responded to one of Mr. Dickinson's
9 questions, that the most likely thing is that we would have a
10 lower BAC after 16 months.

11 A If evaporation was the only mechanism of action.

12 Q So even if we retested the blood, it came back lower, that
13 would -- the State could still respond well, hey, it's been 16
14 months, that's what we expect it to be. That doesn't disprove
15 the original blood test.

16 A I would have to caution you along those same lines, that
17 it doesn't necessarily give you a high degree of confidence
18 that the original result was lower if, in fact, it came out
19 lower.

20 Q Okay. All right.

21 MR. ST. LOUIS: You know, I think that's all I have.

22 THE COURT: Mr. Dickinson.

23 MR. DICKINSON: Just briefly.

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RECROSS-EXAMINATION

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BY MR. ST. LOUIS:

Q Combusted gas, exhaust, doesn't contain ethanol, does it?

A If it's combusted it's not.

Q Yeah. So --

A Heat --

Q Exhausted from the tailpipe --

A Well, incomplete -- products of incomplete combustion come out and -- I thought he was asking about --

Q Yeah.

A -- actual gasoline fumes.

Q Ethanol has a pretty low combustion point, doesn't it?

A I would expect that to be the case. Yes.

Q Yeah. And so --

A Certainly, in comparison to the other large chain.

Q Components of gasoline.

A Yes.

Q So, you would anticipate that if it's exhaust, ethanol is not likely to be there; isn't that correct?

A I would expect ethanol to be a minor component of normal internal combustion exhaust. It's not my area of expertise, per se, but --

Q Okay.

A -- I would expect it to be a minor component.

Q And if it were a gasoline spill in the trunk, for example,

1 you would agree with me that ethanol would be one of the first
2 volatiles to evaporate off, correct?

3 A That's correct.

4 Q And so, what you're looking at is some sort of potential
5 vacuum leak to a tube that captures that fleeting moment when
6 the tube leaks and there's gasoline spilled in the trunk.
7 Isn't that what you're telling us?

8 A No. I'm worried about it at every step in the process,
9 from the point that it's collected, stored, all the way through
10 processing in the laboratory, and controlling it at every point
11 in that process. The more like -- plausible scenario for
12 introduction of alcohol, frankly, from the environment to the
13 sample is not in the field. It's in the laboratory, where they
14 actually have bottles of neat alcohol. That's a much more
15 plausible scenario for introduction of alcohol to a sample as a
16 contaminant.

17 Q But again, you're looking at catching that once in a
18 lifetime mistake if you're seen, you know, drinking beer at the
19 desk or something like that.

20 A I trust no one is drinking a beer at the desk.

21 Q I'm hoping so too.

22 A Unfortunately, it's not a once in a lifetime occurrence in
23 this laboratory. They -- the levels of contamination that is
24 evident in the samples is not what I would consider trace level
25 contamination, and that's what's problematic.

1 MR. DICKINSON: I have nothing further.

2 THE COURT: Okay. You may step down. Thank you. Do
3 you have another witness?

4 MR. ST. LOUIS: I do not.

5 THE COURT: All right. Mr. Dickinson.

6 MR. DICKINSON: I have nothing further.

7 THE COURT: All right.

8 MR. DICKINSON: So, I think the stage we're at now,
9 Your Honor, is Mr. St. Louis is going to prepare his motion. I
10 need --

11 THE COURT: Yeah.

12 MR. DICKINSON: -- a reasonable time for response.
13 Mr. Arnone is going to check the other two cases, and she'll
14 inform me as to whether or not there were requests submitted
15 and whether there's electronic data to support -- you know, to
16 support those cases, and we'll go from there. I'll report to
17 the Court and counsel.

18 THE COURT: Then, how about I set a status hearing or
19 something --

20 MR. DICKINSON: Okay.

21 THE COURT: -- just to make sure everything gets
22 filed as it should. And I'll make note that the hearing -- the
23 evidentiary hearing has ended, that the defense is going to
24 file a motion. You'll have time to respond. You want to
25 deadline by which -- you know, 30 days or --

1 MR. ST. LOUIS: Yeah. I'm going to do it by next
2 week, Judge. I'm going to get the motion in.

3 THE COURT: Okay.

4 MR. ST. LOUIS: In fact, I'll get it done by Monday,
5 because I'm leaving Tuesday.

6 THE COURT: Where are you going?

7 MR. ST. LOUIS: Boston.

8 THE COURT: Boston? What's in Boston?

9 MR. ST. LOUIS: There's a conference that I'm
10 speaking at out there.

11 THE COURT: Really? Okay. Pick a date and tell me
12 by when you think you could have it in. We're at July 8th
13 today. Do you want to have it in by the 18th? Or you're
14 leaving on the -- you know, I don't know what your schedule
15 is.

16 MR. ST. LOUIS: 14th.

17 THE COURT: So, you'll --

18 MR. DICKINSON: I'm out of town from the 16th through
19 the 19th, so --

20 THE COURT: And when are you coming back?

21 MR. DICKINSON: I'll be back Monday the 21st. My
22 concern is that if I -- typically, these things take a day --

23 THE COURT: We can do it August 1st or August 4th.

24 MR. DICKINSON: Okay.

25 THE COURT: But then you might --

1 MR. DICKINSON: I may need a little more time to
2 respond.

3 THE COURT: So, you're set to go? That's not going
4 to cramp you, Mr. St. Louis, to have it in by the 14th?

5 MR. ST. LOUIS: No. I'm good. I can get it done.

6 MR. DICKINSON: All right.

7 THE COURT: Okay. By July 14th. Do you want until
8 August 1st or August 4th, Bill?

9 MR. DICKINSON: Are we going to status conference
10 on --

11 THE COURT: I'm willing to do the status conference
12 -- well, actually, you should have it earlier so --

13 MR. DICKINSON: Yeah.

14 THE COURT: -- so I can have a chance to look at it.

15 MR. DICKINSON: So --

16 THE COURT: So, why don't you get yours in maybe
17 the --

18 MR. DICKINSON: 25th.

19 THE COURT: Or we can set the hearing out a little
20 more. Let's see what we have. Whatever works for you, what
21 works at this point.

22 MR. DICKINSON: The 28th will work.

23 THE COURT: All right. Oh, God. I don't know. Did
24 I do the right one?

25 (Court to Clerk)

1 THE COURT: You know, it used to be we could put four
2 case numbers on one minute entry.

3 THE CLERK: If you want I can make copies.

4 THE COURT: Now, we can't do that. All right. Let's
5 do Esposito since that's the one we really want.

6 MR. DICKINSON: Is it Bogart or Bogott?

7 THE COURT: It's Bogott, B-O-G-O-T-T.

8 MR. DICKINSON: Oh.

9 THE CLERK: All of these --

10 MR. ST. LOUIS: I'll take it back. That's fine.

11 MR. DICKINSON: If you have the case numbers --

12 THE COURT: So, you're going to file yours on
13 Bastille Day, July 14th, it looks like. Okay.

14 MR. ST. LOUIS: Preferally (sic), yes, I am.

15 THE COURT: Yeah. Okay. Status hearing, oral
16 argument, whatever, okay.

17 MR. ST. LOUIS: Okay.

18 THE COURT: I'll give you a time for that.

19 MR. ST. LOUIS: I can't do it on the first, because
20 I'm helping run a cub scout camp on Mount Lemon. In other
21 words, I can do it before.

22 MR. DICKINSON: I don't want to interfere with that.

23 MR. ST. LOUIS: For the record, Mr. Dickinson has
24 more patches on his funny cub scout uniform than I have on
25 mine.

1 THE COURT: Oh. I used to be a girl scout -- brownie
2 scout. We can do it later that week. We could do it August
3 6th, maybe at 2:30 or 3:00. Would that work?

4 MR. DICKINSON: August 6th?

5 THE COURT: That's a Wednesday. Or it could be --

6 MR. DICKINSON: Okay.

7 THE COURT: -- Thursday or Friday, because I've got
8 spaces in there I could get it in.

9 MR. DICKINSON: The 6th I think should work.

10 MR. ST. LOUIS: You know, I got -- the 6th is tough
11 for me because I have an edict at 10:00 and another at 1:30.
12 What other day did you have that week, Judge?

13 THE COURT: the 7th.

14 MR. ST. LOUIS: I'm wide open.

15 THE COURT: Okay.

16 MR. DICKINSON: If I can't do it, Vince will do it.

17 THE COURT: Oh. The pressure is on, boys. And he's
18 going to get you on that motion too.

19 MR. DICKINSON: 1:30?

20 THE COURT: Well, I've got -- no. Let's make it a
21 little later.

22 MR. DICKINSON: You didn't bolt for the door.

23 THE COURT: How about 2:30?

24 MR. ST. LOUIS: 2:30 it is.

25 THE COURT: Because we've got some other things at

1 1:30. August 7th at --

2 MR. DICKINSON: So, we prepared -- Vince will be
3 prepared to argue at that time. We've got an exhibit marked 2A
4 that I'd like to withdraw. We didn't need it. I think I have
5 both of them.

6 THE COURT: Okay. You can pick up the one minute
7 entry right now, I guess, and then I'll print off the other
8 ones if you like.

9 THE CLERK: Why don't you just put the date on the
10 other one? I can do it then.

11 THE COURT: Yeah, okay.

12 THE CLERK: Just so that I can calendar in.

13 THE COURT: And then send that minute entry to all of
14 the defense attorneys.

15 THE CLERK: Okay.

16 (Proceedings Concluded)

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1 STATE OF ARIZONA)
2) SS:
3 County of Pima)

4 I, Antoinette Franks, Electronic Transcriber, do
5 hereby certify that I have listened to the digital recording of
6 the foregoing; further that the foregoing transcript pages 1
7 through 87, were reduced to typewritten form from the digital
8 recording of the proceedings held July 8, 2008, in the Pima
9 County Superior Court, in the matter of State v. Kilpatrick;
10 and that the foregoing is an accurate record of the proceedings
11 as above transcribed in this matter on the date set forth.

12 DATED this 4th day of November, 2008.

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16 Antoinette Franks
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