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COUNTY COURT  
ARAPAHOE COUNTY  
COLORADO  
7325 SOUTH POTOMAC  
CENTENNIAL, CO 80112

THE PEOPLE OF THE STATE OF  
COLORADO  
Plaintiff,  
  
And  
ANDREW DUNBAR  
TERRA POPLSTEIN  
Defendant,

For Plaintiff:  
CHRISTOPHER OPFER  
MONIQUE WASHINGTON  
For Defendant:  
RHIDIAN ORR  
SHAWN GILLUM

**\*FOR COURT USE ONLY\***

Case No. 12T3742 AND 11T12652  
Division 306

The matter came on for hearing on November 5, 2012, before  
the HONORABLE ROBERT TOBIAS, Judge of the County Court, and the  
following FTR proceedings were had.

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NOVEMBER 5, 2012

HEARING

THE COURT: Let's go on the record. We're going to call 2 cases, Theresa [sic] Poplstein, this is 11T12652, and Andrew Dunbar 12T3742.

MR. OPFER: Christopher Opfer on behalf of the People, Your Honor.

MR. ORR: Rhidian Orr, 33738, representing Ms. Poplstein and Mr. Dunbar. I am accompanied by - -

MR. GILLUM: - -Shawn Gillum, registration number 35682.

MR. ORR: Your Honor, the District Attorneys would like to call the Dunbar matter on a separate incident fir, first, uh, to address testimonial motions being reset on another date, um, for their officers. Ms., uh, Ms.- -

THE COURT: - -Okay, do me a favor, this is on Dunbar?

MR. OPFER: Yes, because- -

MR. ORR: - - Your Honor, I don't believe that we're going to be able to get through this motions hearing as well as testimonial hearings on Dunbar this afternoon. So, instead of having the officers sitting around doing nothing, we'd rather have them released.

MS. WASHINGTON: Fair enough, I just (inaudible).

THE COURT: That's, Ms. Washington is here?

MS. WASHINGTON: Yes, Your Honor.

1 THE COURT: (Inaudible) Ms. Washington on that? So,  
2 you're moving to continue the motions hearing?

3 MR. ORR: Your, Your Honor, I don't believe there's  
4 going to be time to have, not, no, the test, we're talking about  
5 the discovery request today, we're not continuing that. But I  
6 need motion to suppress, I need the other testimonial, for the  
7 police officers, having that set on another date.

8 THE COURT: Let me ask you a question. I'm just trying  
9 to understand this. Now, it's, I'm having one of those days where  
10 Monday is here and I'm back here. We have testimony regarding  
11 discovery in both these issues right now?

12 MR. ORR: Correct.

13 THE COURT: We're not going to get done by 2:30? We're  
14 not, where we could have the officers testify as to, is that just  
15 motion to suppress and that sort of stuff?

16 MR. ORR: Yes, Your Honor.

17 THE COURT: We're not going to?

18 MR. ORR: I don't think so, Your Honor.

19 THE COURT: Why not?

20 MR. ORR: Uh, we can try, Your Honor, but I don't want  
21 to have the officers sitting around - -I'm will to, we're willing  
22 to waive speedy trial and have it reset and have it set on, so we  
23 can actually - -

24 THE COURT: - - That's on Dunbar?

25

1 MR. ORR: Yeah.

2 UNKNOWN FEMALE: Dunbar is February 2<sup>nd</sup> - -

3 MR. ORR: - -Or, we can set it within speedy, I'm fine  
4 with that. I'm just, another day that works.

5 THE COURT: Well, I've got to get so many cases, so what  
6 we're going to do is we're going hear all the discovery issues,  
7 (inaudible) reset the motions for suppression, that sort of thing?

8 MR. ORR: Correct.

9 THE COURT: On Dunbar, with a waiver, with a waiver of  
10 speedy trial?

11 MR. ORR: Sure.

12 THE COURT: And to reset everything, everything has been  
13 filed, we just need to reset that. People have any objections?

14 MS. WASHINGTON: Your Honor, no, I just spoke with Mr.  
15 Orr about that. We don't have a date for, I know this is not  
16 (inaudible) at our disposal at this moment, so if the Court wants  
17 to wait until like, uh, after this hearing is done to actually get  
18 - -

19 THE COURT: - -Okay- -

20 MS. WASHINGTON: - -good dates, we could contact our  
21 officers. But we just, I just found out about that and I, um,  
22 just wanted to let our advocate know we can release, release for  
23 this afternoon.

24 THE COURT: Okay, so- -

25 MS. WASHINGTON: - -We are- -

1 THE COURT: --we're looking at May 1<sup>st</sup>, with a waiver of  
2 speedy trial, May 1<sup>st</sup>, 2013, or May 2<sup>nd</sup> actually, for speedy trial.  
3 So, we're going to reset and I'll wait for dates. We're going to  
4 reset motions and reset trial. And that's on the suppression  
5 stuff, right?

6 MS. WASHINGTON: And, Mr. Orr, are we doing, because I  
7 also thought there were also testimonial motions filed on  
8 Poplstein as well. Are we doing the same thing, as far as having  
9 a separate date for testimonial motions?

10 THE COURT: No.

11 MS. WASHINGTON: No?

12 MR. ORR: That would make sense.

13 MS. WASHINGTON: Okay.

14 THE COURT: So, on Poplstein, motion for- - O-P-F-E-R,  
15 right?

16 MR. OPFER: (Inaudible).

17 THE COURT: Opfer, I can't spell Opfer, O-P-F-E-R?

18 MR. OPFER: Yes, Your Honor.

19 THE COURT: There's no H in there? Okay. So, we're,  
20 you're going to continue that case- -

21 MS. WASHINGTON: --And we'll need to get dates on those  
22 as well.

23 THE COURT: So, my understanding is Defendant's going to  
24 move to continue motions and that's a suppression stop?

25 MR. ORR: Uh-huh.



1 THE COURT: Is that such a legal term?

2 MR. ORR: Sure, that works for us.

3 THE COURT: Suppression and, so we're going to reset the  
4 motions and reset trial with a waiver, so we know speedy trial is  
5 going to be like May 2<sup>nd</sup>, 2013.

6 MR. ORR: Thank you, Your Honor.

7 MS. WASHINGTON: And, Your Honor, when I return, I'm  
8 going to be in the Courthouse, going to (inaudible). When I  
9 return this afternoon, I'll try to have the, those dates for both  
10 these cases- -

11 THE COURT: - -Okay- -

12 MS. WASHINGTON: - -for the Court. It's my  
13 understanding that you guys will actually still be in here  
14 (inaudible) time anyway.

15 MR. ORR: I have a strange feeling that that might be  
16 true.

17 MS. WASHINGTON: Okay.

18 THE COURT: So, we're doing discovery issues today on  
19 both of these, right? So, we're doing discovery issues, the other  
20 2 we're going to reset with a waiver of speedy on both? Am I  
21 correct?

22 MR. ORR: Yes, Your Honor.

23 THE COURT: Thank you, Ms. Washington. I'll, I'll be  
24 sitting right here.

25 MR. ORR: Does that work for you?

1 MS. WASHINGTON: Yeah, we'll, I just don't know the  
2 dates and I'll (inaudible) them when I come back- -

3 MR. ORR: - -We can do it this afternoon.

4 MS. WASHINGTON: Okay.

5 MR. ORR: Thank you.

6 MS. WASHINGTON: Thank you.

7 THE COURT: Okay. Ms. Arvizu, I realize you're sitting  
8 out there, good morning. I found all my notes from the hearing in  
9 Jeffco, I saved those on a pad that one of the judges gave me  
10 because it has holes in it. I believe this is all pre-stamped, or  
11 pre-(inaudible). You can put it in there.

12 UNKNOWN FEMALE: Okay.

13 THE COURT: All right, this is my understanding,  
14 basically what I heard in, again, greater detail and, from the,  
15 uh, order regarding the Defendant's motion to compel discovery  
16 that was heard in Jefferson County in April, or whenever he heard  
17 it, I made notes, yeah, I think it was June 4<sup>th</sup>, 2012, I think.  
18 So, we're going to have a continuation of that hearing where- -  
19 you're going to call Ms. Arvizu? Who else is going to get called  
20 today? Mr. Orr, who else is going to be called beside, beside Ms.  
21 Arvizu?

22 MR. ORR: I believe Ms. Arvizu is it.

23 MR. OPFER: Yeah, the People don't have any witnesses,  
24 Your Honor.

25 THE COURT: So- -

1 MR. OPFER: - -Do you already have all this (inaudible)?

2 THE COURT: So, this is a discovery motion.

3 MR. OPFER: Your Honor, may I approach?

4 THE COURT: Sure.

5 MR. OPFER: I'm (inaudible) some documents. These are,  
6 uh, some of the Jeffco pleadings. The People are going to adopt  
7 the, uh, pleading from the Jeffco Das, um in the case, as far as  
8 rule 16 and their arguments. Um, so I put a copy of that in  
9 there. I also put a copy of the Court requests, or the requests-  
10 -

11 THE COURT: - -Is this my copy?

12 MR. OPFER: That's your copy, Your Honor.

13 THE COURT: Can I have a stamp? And we'll just stamp  
14 this. This is for both copies and I'll have to remember, I'll put  
15 a stamp on it, Jeffco. And this is for Dunbar. People's  
16 response, okay. People's response to Dunbar and P-O-P, is it P-O-  
17 P-E-L? Ms. Poplstein?

18 UNKNOWN FEMALE: P-O-P-L-S.

19 THE COURT: L-S-T-E-I-N?

20 UNKNOWN FEMALE: Yes.

21 THE COURT: Okay. People's response, all right. I'll  
22 make that, and hopefully I won't lose it. Okay, so I've got  
23 their, your response, pre their response. And I do have my notes  
24 from that particular hearing. And, I'm sorry, Ms. Arvizu, am I  
25 correct in pronouncing that correctly? I don't know why they

1 (inaudible), I didn't think it was that hard of a name. Okay.  
2 So, we're going to call her, swear her in, have her testify, am I  
3 correct?

4 MR. ORR: Yes, Your Honor.

5 THE COURT: Okay.

6 MR. ORR: And, Judge, if I may- -

7 THE COURT: - -Sure- -

8 MR. ORR: - - just a housekeeping thing that I talked to  
9 Mr. Opfer about before the hearing. Um, we have, as, as the Court  
10 said, we are litigating 2 discovery motions, however, I should  
11 point out to the Court that one was filed in May of this year, one  
12 in September. The numbering is a little off and I just realized  
13 that. Uh, and I'm, and so I just wanted to make the Court aware  
14 of that. There, so if I could just, for example, if you, um, look  
15 at- -

16 THE COURT: - -I've got Dunbar, let me make sure I have  
17 it- -

18 MR. ORR: - - Yeah.

19 THE COURT: On Dunbar's, well, hang on, give me, let me  
20 go off the record.

21 (Recess)

22 THE COURT: I have, again, I think we're clear, the  
23 Dunbar matter, I have my working copy. I have motion to compel  
24 discovery, the one I'm looking at, that we're going to discuss, is  
25 the one from September 7<sup>th</sup>, 2012, am I correct?

1 MR. ORR: Correct.

2 THE COURT: Then the other one I'm looking at now is the  
3 motion to compel, it's on Ms. Poplstein's case, and that I show  
4 from 6/6/12.

5 MR. ORR: And- -

6 THE COURT: - -Now, there's another one- -

7 MR. ORR: - -And, Judge, might I stop you? Does that  
8 motion have 1 through 51 as well as the Dunbar?

9 THE COURT: Um, this goes through 51, correct.

10 MR. ORR: Okay.

11 THE COURT: Do I want- -

12 MR. ORR: - -Well, then they are the same, because I- -

13 THE COURT: - -Do me a favor and let's, well, if there's  
14 a (inaudible), I don't have to make another copy. This is- -

15 MR. ORR: - -What happened is we filed an initial motion  
16 (inaudible), Your Honor that have letters. And I think probably  
17 what happened is in June I realized that and filed an updated- -

18 THE COURT: - -Yeah, this is exactly the same.

19 MR. ORR: Yeah, sorry.

20 THE COURT: I show, yeah, so we're, we're good. My  
21 motions from the June are the same, am I correct?

22 MR. ORR: I'm sorry?

23 THE COURT: We're good, okay? That works?

24 MR. ORR: Yeah, I'm just double checking, if I may.

25 THE COURT: It's all numbered. I have Poplstein and- -

1 MR. ORR: - -Yeah- -

2 THE COURT: - -Dunbar are both numbers, does that work?  
3 Okay?

4 MR. ORR: That works.

5 MR. OPFER: Yeah. Well, they're, they're the same,  
6 aren't they?

7 MR. ORR: They are the same.

8 MR. OPFER: Okay.

9 THE COURT: Yeah, the one from June and September are  
10 exactly the same.

11 MR. OPFER: Right, and we just- -

12 MR. ORR: - -Yeah- -

13 MR. OPFER: - -I, and I'm sure Mr. Orr sent it, we just  
14 didn't get it in our file, the updated one for Ms. Poplstein. So,  
15 we still - -

16 THE COURT: - -You want one of mine, do you want a copy  
17 of mine right now?

18 MR. OPFER: It's fine. Uh, Mr. (inaudible) was just- -

19 THE COURT: - -It's the same thing.

20 MR. OPFER: Yeah. Mr. Orr said it's the same, so I'm  
21 just going to see if I can piece it together and make it work,  
22 Your Honor.

23 THE COURT: September 12 and June 12<sup>th</sup> motions, I'm just  
24 putting a note so they're both the same, it's 1 through 51, right?

25 MR. ORR: Yes, Judge.

1 THE COURT: Okay. Does that work? I'm going to have to  
2 put on my glasses. All right, do you want to call Ms. Arvizu or?

3 MR. ORR: Please.

4 MR. OPFER: Act, actually, Your Honor, I think the, the  
5 last few things, I know the Court wanted to know, from our meeting  
6 last Monday, um, with Ms. Poplstein's case, there was no 2<sup>nd</sup> blood  
7 tube. Apparently, uh, she became uncooperative with those trying  
8 to draw her blood, this is according to the police report, and,  
9 uh, Mr. Orr can laugh if he wants, the, um, uh, so they were only  
10 able to get partial, a partial tube of blood. So, not even a full  
11 tube. I talked to Ms. Burbach this morning. There is still some  
12 blood remaining in that first tube that she's happy to turn over  
13 to Defense Counsel for their testing. Um, so if, if that's  
14 something the Defense Counsel so, so wishes, then he may have  
15 that. In Mr. Dunbar's case, there was a retest. I'll leave it up  
16 to Mr. Orr whether or not he wants to tell the Court what that  
17 retest number was. Um, because I don't know whether or not he  
18 told me that number in, uh, plea negotiations, but there, there  
19 was a retest, Your Honor, and I know the Court was wondering  
20 whether or not there was one.

21 MR. ORR: And, Your Honor, for clarification on the  
22 Poplstein, uh, my, my chuckle actually comes down to the fact that  
23 there was 4 blood tests, 4 viles attempted on Ms. Poplstein's- -

24 THE COURT: - -That's what I remember- -

25

1           MR. ORR: - -arm, and, uh, not 1 of those 4 comes up  
2 with a substantial amount to get us a re-testable amount. I know  
3 the State's now saying that we can come and take a minimal amount,  
4 I (inaudible) blood minimal amount is because it's probably going  
5 to have to be diluted, which takes us out of standard operating  
6 procedures for blood testing in Colorado. But we'll, uh, we'll  
7 address that issue after the hearing. It's nice to know we still  
8 have a possibility of getting a blood sample retested. Um,  
9 anything else?

10           MR. GILLUM: Do you want to address Dunbar? Do you want  
11 to tell them what the result was?

12           MR. ORR: Um, the test on, originally on Dunbar was a  
13 08. The retest was, uh, 7 and a half percent lower, at an 0.74.  
14 One of the things we're going to address today, Your Honor, is  
15 what happens in the lab that, um, from the time when, you know,  
16 how cross-contamination and things like that can happen, to both  
17 samples when they travel together. We discussed that last week.

18           THE COURT: Okay.

19           MR. ORR: If we may call Janine Arvizu to the stand.

20           THE COURT: Ms. Arvizu? Good morning, ma'am. Please  
21 raise your right hand. Do you solemnly swear or affirm, under  
22 penalty of law, the testimony given before this Court shall be the  
23 truth, the whole truth and nothing but the truth?

24           WITNESS: I do.

25



1           THE COURT: Okay. Ma'am, get as comfortable as you can  
2 and put your computer up there, whatever you need to do. And  
3 again, for the record, um, my understanding of the People's  
4 response in both of these cases is pursuant to, um, this is, looks  
5 like Keith Colamar (phonetic) from Jefferson County, 11T11819, the  
6 People are adopting as their position regarding the motions in  
7 both cases, re, requesting rule 16 discovery. Mr. Opfer, am I  
8 correct, this is the response in both cases? Your position is the  
9 same as the Jefferson County District Attorney's?

10           MR. OPFER: It is, Your Honor. I think the only, uh,  
11 the only difference, uh, substantively, is the, um, there were,  
12 or, there was a, they mention, or the DAs in Jeffco talked about,  
13 uh, I think in all those cases there was a 2<sup>nd</sup> blood sample that  
14 was either available to be tested, I don't know if it was taken or  
15 not. Um, and this case, obviously with Ms. Poplstein, we don't  
16 have that 2<sup>nd</sup> blood sample, although we will, are willing to turn  
17 over whatever we do have to Defense Counsel, so they can retest  
18 that.

19           THE COURT: Okay. And my understanding, clearly from  
20 the record that was being, due to the fact that (inaudible), she  
21 was uncooperative enough to give a 2<sup>nd</sup> sample?

22           MR. OPFER: That- -

23           THE COURT: - -Is that right?  
24  
25

1 MR. OPFER: That, that's in the police report, yes,  
2 apparently. And I'd be happy to, to read it to Your Honor if  
3 you'd like to hear it.

4 THE COURT: No, I, I believe you. So, I have that  
5 response filed, response to both matters. All right, Ms. Arvizu  
6 has been sworn in. Mr. Orr, you may proceed.

7 **DIRECT EXAMINATION OF MS. JANINE ARVIZU**

8 BY MR. ORR:

9 Q Ms. Arvizu, would you please state and spell your name  
10 for the record?

11 A My name is Janine Arvizu, J-A-N-I-N-E A-R-V-I-Z-U.

12 Q And what is your career, what do you do for a living?

13 A I am a quality consultant, quality assurance auditor.  
14 As a chemist, I focus my work on the assessment of analytical  
15 laboratories and their work product.

16 Q Okay. And what are, what is your educational  
17 background?

18 A I have Bachelor of Science Degree in Biochemistry from  
19 Cal Poly in San Luis Obispo, California. And a (inaudible) in  
20 Chemistry from the University of New Mexico; that's all but  
21 dissertation, it's admittance to PhD candidacy, but, by virtue of  
22 having completed all the coursework, examinations, preparation of  
23 proposal and proposal defense.

24 Q So, your dissertation is short of doctor?

25 A That's correct.

1 Q Okay. And have you ever done a quality assurance,  
2 quality control evaluation on a lab before?

3 A Yes.

4 Q How many?

5 A How many? Oh, I don't know, hundreds. I've never tried  
6 to count.

7 Q Okay. On a State level or Federal level?

8 A Um, I have, I have done quality assessments of  
9 analytical labs for government agencies for many, many years. I  
10 don't know if you call that State or Federal.

11 Q Okay- -

12 A - -Um, it was for Federal agencies, for the Department  
13 of Energy and the Navy, uh, the commercial and the governmental  
14 labs that did analytical work for those entities. In the forensic  
15 arena, I have assessed and provided testimony in the quality of  
16 forensic work in the both State and Federal Courts. I'm not sure  
17 if that answers your question.

18 Q It partially does. And we're going to go down, so how  
19 many times have you testified, rough estimate, in State Courts, as  
20 an expert?

21 A Um, many dozens.

22 Q How about Federal?

23 A Um, yes, not as many times in Federal Court, but, uh,  
24 I've never tried to count, again, but probably a dozen or so times  
25 in Federal Court.

1 Q Okay. And you've testified for the government in these  
2 cases?

3 A Um, no I've always testified in criminal cases for the  
4 Defense.

5 Q Okay. Okay. Now, Your Honor, I offer Ms. Arvizu as an  
6 expert in quality assurance, quality control for forensic labs.

7 THE COURT: Mr. Opfer?

8 MR. OPFER: Brief voir dire, Your Honor?

9 THE COURT: Sure.

10 **VOIR DIRE EXAMINATION OF MS. JANINE ARVIZU**

11 BY MR. OPFER:

12 Q Good morning, Ms. Arvizu.

13 A Good morning.

14 Q You call yourself an independent quality assurance  
15 consultant?

16 A Yes.

17 Q And, so essentially you're a laboratory auditor, is that  
18 fair to say?

19 A That's correct.

20 Q And, as you just stated, you work mainly for defense  
21 attorneys?

22 A In forensic cases, yes.

23 Q And that's, what we're talking about here is a forensic  
24 case.

25 A Correct.

1 Q And, I hate to poke at this, but you're, you're not a  
2 doctor?

3 A No, I'm not.

4 Q And you don't have your PhD?

5 A No.

6 Q And, uh, you don't have a degree in toxicology?

7 A No.

8 Q And the last time you did lab work was in the 1980's, is  
9 that right?

10 A Probably, yes, in the 80's. Actually bench work you  
11 mean?

12 Q Yeah.

13 A Yes.

14 Q It was over 30 years ago?

15 A Yes. Well, yeah. It depends on when in the 80's, I  
16 guess.

17 Q Have you ever worked in a forensic lab?

18 A I've never worked in a forensic lab. I've worked in  
19 laboratories that did analytical work, that may have been  
20 introduced in Court, but that was not their primary arena of  
21 practice.

22 Q Well, and there's a difference between analytical work  
23 and forensic work, isn't that correct?

24 A Not really. Um, much of the work that goes on in  
25 forensic laboratories is analytical work. Uh, my understanding of

1 the forensic designation is simply that it's intended for  
2 introduction in a court.

3 Q And it generally deals with biological samples of some  
4 kind?

5 A Uh, not in my experience. I do a lot of other forensic  
6 quality assessment work, gunshot residue and other kinds of things  
7 that are not necessarily biologically based. Um, forensic is  
8 simply, uh, when science intersects with law, if you will. Um,  
9 the analytical chemistry, the underlying principles of analytical  
10 chemistry are still the same.

11 Q But you don't do any of the forensic stuff?

12 A I have never practiced in a, I've never worked in a  
13 forensic laboratory, no.

14 Q And you've never tested blood on a regular basis?

15 A No.

16 Q And you have no training in forensic alcohol testing?

17 A No.

18 Q You've never used a gas chromatograph to test for blood  
19 alcohol?

20 A No.

21 Q And you, uh, helped the Defense Counsel in this case  
22 write the request that we're talking about today, is that correct?

23 A The discovery requests? Yes.

24 Q Um, and many, as in many other cases across the state?

25 A Across the country.

1 Q Well, I'm talking about for the Defense Attorney here.

2 A Oh.

3 Q Like, like the Jeffco hearing, for example. You were  
4 present for that obviously- -

5 A - -I was- -

6 Q - - And you helped him write the request for that,  
7 right?

8 A I did, yes.

9 Q Okay. And so you're here to testify solely, solely  
10 about whether, what, what you consider to be proper laboratory  
11 procedures, is that correct?

12 A My understanding of my purpose here today was, was to  
13 provide the scientific justification for the items that I have  
14 requested. Those are the items that I told Mr. Orr were necessary  
15 for an independent assessment of the reliability of the results in  
16 this case. And so my understanding is that I was here to explain  
17 why each of those items were necessary.

18 Q So you can essentially audit CPH, fair to say?

19 A Yes, it's essentially what's called a data audit. It's  
20 an audit based on the records, as opposed to an audit based on  
21 inspection of the laboratory.

22 Q Okay. And what were you offering her as an expert in?

23 MR. ORR: Quality assurance, quality control (inaudible)  
24 for labs. I'll, I'll clear it up.

25 MR. OPFER: Yeah.

1                   **DIRECT EXAMINATION OF MS. JANINE ARVIZU (continued)**

2 BY MR. ORR:

3           Q       (by Mr. Opfer) Counsel asked you, with regards to these  
4 51 things, um, they're the same 51 things that I was told to ask  
5 for because that's the audit stuff that we need, is that correct?

6           A       Correct.

7           Q       Okay. So, you didn't get paid to do it 50 different  
8 times statewide, you- -

9           A       - -Uh, no- -

10          Q       - -(inaudible) once?

11          A       Yes.

12          Q       Okay. Um, now, Counsel asked you, in regards to, um,  
13 never testing a blood sample using a GC or such, um, what  
14 qualifies you to testify about the quality assurance, quality  
15 control in the running of the lab, uh, in these cases?

16          A       Um, I'll give the general answer first and then the GC  
17 specific answer.

18          Q       Please.

19          A       Um, ac, academically by background, um, in both  
20 (inaudible) and undergraduate and as a graduate student was in  
21 chemistry. I started my, my working career by managing,  
22 establishing and managing an analytical laboratory for the  
23 Department of Energy. In that capacity, I did everything from  
24 hiring the people to writing the procedures to buying and, and  
25 testing and validating instrumentation. That process is a process



1 that exists across all analytical laboratories, whether they're  
2 engaged in the field of testing food or pharmaceuticals or  
3 forensic samples or environmental samples or whatever. That, that  
4 basic process is the same. When my career transitioned into the  
5 field of quality assurance, applied to analytical measurements,  
6 again, the principles of quality assurances are independent of the  
7 field of application. In fact, you can get a book in quality  
8 assurance of analytical measurements and read through virtually  
9 the entire book without ever encountering anything that is  
10 specific to a particular field of testing, because the principles  
11 of accuracy and precision and detection limit and selectivity and  
12 reproducibility, all those principles are independent of the field  
13 of application. And so, um, my ability to do after the fact data  
14 quality assessments, based on those quality control principles, is  
15 really independent of the field of application. I've audited  
16 environmental labs, done this similar kind of data audits in  
17 environmental labs, labs that do food testing, pharmaceutical  
18 testing and the process is essentially the same. As an auditor, I  
19 go into the laboratory and I try to reconstruct the entire  
20 analytical process from the point at which a sample was identified  
21 through its collection packaging, transport to the laboratory,  
22 receipt and processing in the laboratory, the analysis and  
23 ultimately the reporting. And you look at every step of that  
24 measurement process to evaluate whether the entire system was in  
25 control for all those variables that affect the final quality of

1 the final product. So, the, the process is largely independent of  
2 the field of application. The one thing that's very important to  
3 recognize in this type of a field is that the level of quality  
4 control necessary to have reliable results at the point of use is  
5 a function of the intended use of the data. If you're using data,  
6 for example, to make a decision that doesn't have significant  
7 financial impact or process impact or whatever, then you can  
8 accept a little higher tolerance and a little more uncertainty and  
9 you don't have to have such a high degree of confidence in your  
10 final results. If you're using the final results to make a very  
11 important decision, where somebody's life and liberty may be at  
12 risk, in the case of a forensic case, in the case of a  
13 pharmaceutical case, where you are really, it's real important  
14 that you know that it was a therapeutic dose of medicine instead  
15 of lethal dose of medicine, um, those kinds of cases where the  
16 intended use of the data demands a higher degree of confidence,  
17 then you need to have more of those elements controlled and be  
18 able to demonstrate that they were in control at the time the  
19 measurement was done. So, the process of doing a data quality  
20 assessment, auditing the data and evaluating the records to see to  
21 what extent they support a final determination is the same  
22 regardless of the field of application.

23 Q Okay. And so, in particular, in these cases, what  
24 qualifies you to- -

25

1           A     - - And in this, these cases in particular, uh, the  
2 technique is gas chromatography, um, (inaudible) gas  
3 chromatography in particular, with flame ionization technology,  
4 uh, detection. That is an analytical technique that's been around  
5 even longer than me, uh, for a very long time. Uh, it's very well  
6 understood, well documented, um, very accepted, analytically, as a  
7 technique. It's performance is well understood. Uh, I'm, I'm  
8 not, in any regard, here to challenge the validity of gas  
9 chromatography for this application. I've used gas  
10 chromatographs, um, and I've been reviewing and evaluating the  
11 quality of GC results for decades. Um, and only been looking at  
12 blood alcohol, specifically the blood alcohol application for  
13 about the last 10 or 15 years. Uh, but have been looking at  
14 headspace GC applied to volatile organics analysis, which is, on a  
15 scientific level, what we're looking at here, for all 30 years.  
16 So, my ability to do that in this case, um, is based on those many  
17 years of experience.

18                 MR. ORR: At this time, I would offer her as an expert  
19 in quality assurance, quality control in gas chromatography as  
20 well as forensic labs as well as laboratory services and  
21 processes.

22                 MR. OPFER: And, Your Honor, I have no objection to her  
23 testifying generally about auditing labs and what's required, for  
24 that would be information generally (inaudible), but if we're  
25 going to talk about gas chromatography, just, and toxicology in

1 particular, she said she's not a toxicologist, so I, I think if we  
2 keep it general, which is what she was saying, I think that's  
3 fine, Your Honor.

4 MR. ORR: Um, she's got the discovery list.

5 THE COURT: Okay.

6 MR. ORR: So, when I go through one, I say- -

7 MR. OPFER: - - That's fine.

8 MR. ORR: It saves us from reading it into the record.

9 THE COURT: Okay, so it's my understanding, at this  
10 point, um, on a general basis, not specifically based on her  
11 experience, pursuant to rule 702, based on her multiple  
12 experience, time, length and experience that, uh, she's qualified  
13 at this point, generally, for, uh, basically assurance in quality  
14 control.

15 MR. ORR: And, Your Honor, we'd ask for, specific to  
16 these cases, because she's reviewed the data that was provided in  
17 the hard copy litigation packet.

18 THE COURT: Well, she's still a, generally, she can  
19 express her opinion, I assume she has reviewed the material that  
20 you've given to her, so with that done, I think she can testify  
21 and we'll take it for whatever it's worth. I- -

22 MR. ORR: - - Thank you very much, Your Honor- -

23 THE COURT: - - think she can testify about her  
24 experience.

25

1 Q (by Mr. Orr) So, you provided me with an outline of 51  
2 things that you need to be, to receive from the lab so you can do  
3 a quality assurance quality control, is that correct?

4 A Correct, so I could assess the integrity of the sample,  
5 the validity of the method and the reliability of the work.

6 Q So, let's go through those 51 things. I'd like to ask  
7 you what they are, why they're important and how readily available  
8 they would be in those labs. Before we do that, these 51 things,  
9 have they been provided to you in other cases?

10 A Yes.

11 Q On a regular basis?

12 A Yes.

13 Q Have they been provided to you in Federal Court?

14 A Yes.

15 Q On a regular basis?

16 A Um, I don't do as much blood alcohol work - -

17 Q - -In Federal Court- -

18 A - -specifically in Federal Court, um, but again the  
19 principles, or the basis or the application, I generally can get.

20 Q Okay. So, these 51 things are generally provided?

21 A As, as an auditor, these are the kinds of things that  
22 you routinely look at, yes.

23 Q All right. What is number 1?

24 A Um, the number 1 item relates to the, uh, validation  
25 study for the method that's used by a laboratory and, um, that

1 speaks to, I said there were 3 things that I look at when I, when  
2 I do a data quality assessment: sample integrity, method validity  
3 and reliable performance. That relates, this relates to method  
4 validity. Um, method of validation means something very, very  
5 specific to, in the field of analytical chemistry. A method  
6 validation study is a planned and deliberate, empirical study  
7 where you actually go into the laboratory in accordance with a  
8 plan and you run a series of known samples whose purpose was, was  
9 configured specifically to allow you to test the performance of  
10 your method. Because, under both national and international  
11 quality standards, every analytical method must have been  
12 scientifically validated and found to be appropriate for its  
13 intended use before it's used to analyze unknown samples. That  
14 appropriate for intended use part is really very, very important  
15 because a method that's perfectly appropriate for doing, for  
16 example, hospital blood alcohol testing, may be completely  
17 unsuitable and inappropriate for use in determining blood alcohol  
18 in a forensic application. So, it's important that you define,  
19 essentially, what you're going to do with the data before you set  
20 up a method validation study. In the case of a blood alcohol  
21 test, for forensic purposes, there are 2 kinds of testing that  
22 have to be performed. The first is qualitative identification of  
23 ethanol. You need to be able to identify ethanol and be able to  
24 distinguish ethanol from everything else that might be  
25 inadvertently detected as methanol in, in the laboratory. So, you

1 need to be able to identify it and to be able to selectively  
2 identify it, in relation to other kinds of volatile organics that  
3 will also be analyzed by this instrument. So, qualitative  
4 identification of ethanol is the first thing you have to be able  
5 to do. The 2<sup>nd</sup> thing you have to be able to do for a forensic  
6 blood alcohol test is to be able to tell you how much ethanol is  
7 present, not just that I detected ethanol and identified it, but  
8 that I quantified it or knew, or did the testing to determine how  
9 much ethanol was present. And what's really, really important is  
10 that you have to be able to know how much ethanol is present to a  
11 known degree of confidence. And that means that you have done the  
12 studies to empirically test that method and know when it works and  
13 when it doesn't and when it's working, how accurate is it, what  
14 uncertainty is associated with that measurement, so that  
15 scientifically you've done the statistical analysis and you know  
16 the range of values that includes the true value of that sample.  
17 So, a method validation study is, uh, a very intense, very data  
18 intensive effort that goes on in a laboratory to test all those  
19 things. There's typically a plan that describes here's what we're  
20 going to do, here's how we're going to test the accuracy at  
21 different concentrations, because it's different, the performance  
22 of a method is different at different concentrations. Um, you're  
23 going to determine what is the precision of the measurement, how  
24 much variability do I get in my results when I run the same  
25 sample, the same day on the same instrument with the same analyst,

1 what kind of variability you, do I get in my numbers. That's a  
2 start, but what matters is the between day variability. So, how  
3 much variability if I run the sample on a different day, with a  
4 different instrument and a different analyst? Because those are  
5 different numbers. So, when you're doing a method validation  
6 study, you're checking the variability under circumstances where  
7 you don't expect much, as well as under circumstances where you  
8 expect as much variability as, as is allowable. So, the study is  
9 a very rigorous exercise. There's a plan that sets all, all the  
10 tests that are going to be run. It's run using traceable  
11 standards, and we'll be talking more, I'm sure, about  
12 traceability.

13 Q Thank you- -

14 A - - Um, and the outcome of the emp, of this validation  
15 study is a set of performance measures. It's not unlike testing  
16 out an airplane and deciding, you know, what, under what, how  
17 much, how much, uh, at risk, uh, or what, uh, performance are you  
18 at risk of a stall and how long of a runway do you need and all  
19 those kinds of measures. You're essentially, essentially setting  
20 those similar kinds of boundaries on your method. These are the  
21 conditions under which it works and how well it works.

22 Q Okay. And there should be a scorecard at the end of  
23 that?

24 A There is a scorecard. It's typically issued as a method  
25 validation report and the ultimate outcome is it sets boundaries.



1 It says between these concentrations, this is the accuracy of my  
2 method, this is the uncertainty in my result and these are the  
3 conditions under which this method has interferences or does not  
4 perform acceptably. So, and it'll identify the things that, um,  
5 potentially pose an interference for the, the analysis.

6 Q Does the lab have to keep the raw data on those tests?  
7 Do they keep the, what do they keep, what is- -

8 A - - Yes- -

9 Q - -(inaudible)- -

10 A - - absolutely. The laboratory needs to keep the raw  
11 data that serve as the basis for their method of validation. Um,  
12 as part of record management in a laboratory, you're not expected  
13 to keep everything forever. Um, you generally set a retention  
14 period, depending on the intended use of the data. Ten years, 13  
15 years are common retention periods for laboratories. Um, but in  
16 the case of method validation records, as long as you're using  
17 that method to analyze samples, you have to keep that data on  
18 file.

19 Q Okay, and how often do labs, or should labs do a method  
20 validation study?

21 A You do a method validation study every time your method  
22 changes, every time you make substantive operational changes in  
23 the performance of that method. So, if there's just routine  
24 things that are going on during the course of analysis, it's not  
25 necessary to revalidate your method. But if you change your

1 instrument, um, if you change the operating conditions of your  
2 method, then you may have to go back in and do a revalidation of  
3 your method.

4 Q Okay. And then you just do the same standard steps that  
5 they would do in a regular validation study?

6 A It's the same steps. Um, they can be tailored to the  
7 nature of the changes that were made.

8 Q Okay.

9 A Um, if, if the changes were something that you would  
10 expect to affect the retention time of your, of your analysis,  
11 then you would go in and look specifically at those measurements  
12 that are affected by retention time.

13 Q Okay. Is there anything else on 1 that we need to cover  
14 at the moment?

15 A Um, no, except those data are often available. It's my  
16 experience, in the case of blood alcohol, um, results, when I get  
17 a method validation package, if you will, it's, I was looking to  
18 see if there was a box in here, a copy box of data, uh, typically.  
19 That's about how much it is if it's a hard copy set of data.  
20 That's about the typical size. Nowadays, it's mostly provided to  
21 me on CD, but if, if they provide hard copies, that's about how  
22 much data it is.

23 Q And they can easily put it on, or labs can easily put it  
24 on a jump drive or a CD?

25 A That's generally how I get it. I prefer it that way.

1 Q Okay. And in regards to 1, is there a difference, uh,  
2 between gas chromatography and mass spectrometry, um, on desires?

3 A Oh, uh- -

4 Q - - What do you- -

5 A - -Is there a difference in- -

6 Q - -What do we need differently (inaudible)?

7 A Oh, um, you just need validation that includes not only  
8 the gas chromatography piece, but also the mass spectrometry.

9 Q Okay.

10 A So, it's just, it's essentially the same information  
11 for, applied to the different technique.

12 Q May we go on to number 2?

13 A Sure.

14 MR. OPFER: (Inaudible), Your Honor, talked about 1 to 1  
15 and 1 to 2 too, otherwise I've got to go back through everything  
16 (inaudible).

17 MR. ORR: Oh, yeah, that's fine. Thank you.

18 MR. OPFER: And actually, Your Honor, I think we're on  
19 page 1, 1, that way it's, we're staying on subject for each  
20 individual, each individual request.

21 MR. ORR: I figured it would be easier for the  
22 transcript to be followed, as well as the Court to follow it.

23 MR. OPFER: That's what we talked about last, last  
24 Monday, and actually on this one- -

25

1 THE COURT: - -So, you're going to go, you're going to  
2 do 1, then he's going to do 1, and then 2 and 2? Just like  
3 normal- -

4 MR. ORR: - -I think that makes sense, for the record.

5 THE COURT: Direct, Cross Examination sort of thing?

6 MR. ORR: Please.

7 MR. OPFER: If the Court would prefer we did it a  
8 different way, I'd- -

9 THE COURT: - -Oh, no, that's fine.

10 MR. OPFER: Okay.

11 THE COURT: That's, whatever.

12 MR. OPFER: Now that I've said all that, on this one  
13 actually, we don't have any cross examinations. There's the CORA  
14 request number 1, there's also the number 1 in Jeffco. The  
15 response to this request, Your Honor, was that the, um, uh, the  
16 Department has provided a validation study and supporting  
17 information that's based on the document I provided to the Court  
18 earlier.

19 THE COURT: Okay.

20 Q (by Mr. Orr) And, Ms. Arvizu, we will, uh, after we are  
21 done going through the 51 things, in tandem, we're going to go  
22 through, uh, what was provided in CORA, what wasn't, sufficiency,  
23 etcetera.

24 A Okay.

25

1 Q So, just to keep the record as clean as possible. What  
2 is, what is (inaudible), what is number 2, how often do you get it  
3 and - -

4 A - -Number 2 is the, is a request for any validation  
5 verification records of any laboratory prepared or modified  
6 software applications. It's very, very common in analytical  
7 laboratories that, in addition to the instrumental software, which  
8 is typically man, validated by the manufacturer, laboratories will  
9 sometimes use, for example, like cell spreadsheets that they have  
10 created and used to process and, and report results. Um, in the  
11 event that a laboratory uses that kind of a software application  
12 to process their data, then this is a request for their validation  
13 records for that software. Because software needs to be validated  
14 just like analytical methods need to be validated, um, and it's a,  
15 it's something that's routinely assessed during the course of  
16 laboratory audits, whether or not all the software that's in use,  
17 to process data, has in fact been validated.

18 Q Okay. And, and these in particular cases, we know that  
19 CDPHD uses an Excel spreadsheet on a separate computer to store  
20 blood results?

21 A It certainly appears that way, from the hard copy. Um,  
22 it looks like an Excel spreadsheet. I can't, obviously, tell that  
23 unless I get a response to this kind of a request.

24 Q So, this would be a, this is what we're using to do this  
25 (inaudible)?

1 A Correct.

2 Q Okay. And how often do you get this and is this  
3 routine?

4 A Um, in forensic laboratories, it's probably less routine  
5 than it is in any other kind of an analytical lab, simply because  
6 forensic labs are new to being accredited and this has been an  
7 accreditation requirement for so long that any lab that's failed  
8 accreditation for any period of time typically has this already.  
9 It's generally labs that are new to this whole quality assurance  
10 business that don't have this.

11 Q Okay. So, before we go on, accreditation, that's done  
12 by a national organization?

13 A Typically, accreditation is done by a 3<sup>rd</sup> party entity.  
14 Um, they may be national or international in scope and, uh,  
15 they're a 3<sup>rd</sup> party agency that comes in and inspects a laboratory  
16 to determine their compliance with a published standard.

17 Q Okay. And you know that Colorado Department of Health  
18 does the accreditation for this lab?

19 A I- -

20 Q - - (Inaudible)- -

21 A - - don't recall if they call it accreditation or  
22 certification.

23 Q Okay, certification, I apologize for that.

24 A Yeah.

25

1 Q Um, so when you look at the definition of, um,  
2 litigation packet, they talk about records and chain of custody,  
3 analytical data, part of that falls into section 1 to section 2,  
4 is that correct?

5 A Yes.

6 Q Of our request?

7 A Yes.

8 Q Okay. Um, before Mr. Opfer stands up, anything else on  
9 2?

10 A That's it.

11 MR. OPFER: I'm (inaudible).

12 MR. ORR: Oh.

13 MR. OPFER: (Inaudible). Uh, Your Honor, no, no  
14 questions, but the People just point out that this is the CORA  
15 request number 2 in which the State responded back the Department  
16 has no response to the documents.

17 Q (by Mr. Orr) And if, if a lab doesn't have this kind of  
18 documents, is that important to know?

19 A It's certainly important, because I never know if the  
20 reason I don't get it is because they don't have it, they don't  
21 generate it, it's not part of their quality system, or because  
22 they're just unwilling to produce it. It, the quality assurance  
23 implications are different in each of those cases.

24

25

1 Q Okay. Number 3, uh, produce a copy of the laboratory  
2 approved blood analytical standard operating procedure. Could you  
3 please explain what this is and why it's important?

4 A Um, yes. Again, and I'll probably say this way too many  
5 times, but under national and international quality standards,  
6 laboratories that test unknown samples are required to have a  
7 written, approved procedure that, very prescriptively, describes  
8 each of the components. It's like a recipe for how the laboratory  
9 conducts its testing. It defines what steps are taken, what  
10 criteria must be met, what operating conditions for the  
11 instrument, all the details of the lab's analytical recipe. So,  
12 this is a request for, um, the laboratory's procedure that was in  
13 effect and in use by the laboratory at the time the testing was  
14 performed. Um, there are essentially 2 approaches for documenting  
15 your work in an analytical laboratory. You can use a procedure to  
16 define all the steps and to document all the steps that you take,  
17 or you can write each and every step down in great, gory detail.  
18 That is not productive in a production lab, you can't write  
19 everything down every time. So, production labs, uh, use standard  
20 operating procedures. Um, oft times a laboratory will have 1  
21 procedure for, uh, blood alcohol testing and they'll have related  
22 procedures, which are described here, in separate procedures for  
23 sample preparation or calibration of the instrument or their  
24 quality control practices. So, if, if, um, the lab chops that up  
25 and puts different things in different procedures, then I need a



1 copy of all the procedures. Essentially, all the steps involved  
2 in receipt and processing of that blood alcohol sample.

3 Q Okay. Um, any questions on this?

4 MR. OPFER: No questions, Your Honor. We would note  
5 this is the request number 3 out of CORA, which the Department,  
6 uh, says provided a standard operating procedures dated March 26<sup>th</sup>,  
7 two thousand, or March 2006, October 2007 and March 2010, it's  
8 also number 3 in Jeffco.

9 THE COURT: Okay, this has been provided?

10 MR. ORR: No, Your Honor, okay, so I don't think this is  
11 going to work the way I wanted to do it, which was do CORA then  
12 do, um, this. Why don't we do this, Ms. Arvizu, you are aware of  
13 what we received on CD from the Colorado Open Records Act?

14 A Yes.

15 Q (by Mr. Orr) Do you have a copy of your notes on that,  
16 so- -

17 A - -I do- -

18 Q - -Okay. Let's go back to 1, okay? Because I know  
19 that, on 1, what did we receive and why is woefully insufficient?

20 A Um, we got what, what was described as their method  
21 validation file. It was in a folder with that name, from January  
22 of 2008. It was essentially a week's worth of, of data. Um, it  
23 did not include any statistical analysis and it did not include,  
24 essentially, the con, the conclusory statements. It didn't  
25 include the uncertainty, um, it, it didn't include any statistics.

1 Q Okay. And why is that not sufficient to answering  
2 question 1?

3 A Well, it may be all they have and I guess, um, my  
4 assessment of the impact of that on their, um, on their analytical  
5 results would depend on whether that's, if that's all they have,  
6 then that's all they have and I would have to draw my conclusions  
7 based solely on that, um, which would mean they have not done the  
8 statistical analysis necessary or determined an uncertainty for  
9 their measurements.

10 Q Okay. And would that cause you, as an auditor, concern?

11 A Um, it would cause me concern as a data user, because  
12 they have not done this foundational step to determine  
13 statistically the performance of their method.

14 Q And when we talk about data users, who are we referring  
15 to? Are we referring to the District Attorney in these kind of  
16 cases and the Defense?

17 A Yeah, the Court, if it's a blood alcohol result, yes.

18 Q So, in your professional opinion, was 1 answered in its  
19 entirety?

20 THE COURT: Are you referring to number 1 on your  
21 request?

22 MR. ORR: Yeah, we're going to go back there for a  
23 second, because I understand Mr. Opfer was going to say this was  
24 CORA number blah, blah, blah. I figured we'll just keep it tidy,  
25 neat and tidy and keep it together, so.

1           A     Um, I have to assume, it, it appears that they sent what  
2 they had, in response to our request for their method validation  
3 data. And the reason I say that is because we asked for the  
4 complete validation file, including the design, the planning  
5 document, all the assumptions, because there are always scientific  
6 assumptions, both the raw and the processed data, the results, the  
7 statistical analysis. We asked for all those things, so the fact  
8 that we didn't get some many of them, I would have to assume means  
9 that they don't exist or were never generated.

10          Q     Okay. And so, from an external auditor, you couldn't  
11 rely on the results coming out of this lab?

12          A     Uh, it, it means that their, their method, their, their  
13 analytical method has not been scientifically validated for its  
14 intended use.

15          Q     Okay. Do you want to cross examine?

16                                   **CROSS EXAMINATION OF MS. JANINE ARVIZU**

17 BY MR. OPFER:

18          Q     And just on this one, so you're saying that it appears  
19 that they sent everything that they had?

20          A     It does.

21          Q     Okay. And so you don't know if there's anything else  
22 out there?

23          A     Exactly. There may be, I, like I said, that's my  
24 dilemma of not knowing whether they have it, but didn't provide  
25 it, I can't tell.

1 Q So, you're just kind of guessing at this point?

2 A I'm kind of guessing, in the absence of an explicit  
3 answer, yes.

4 MR. OPFER: Okay.

5 **REDIRECT EXAMINATION OF MS. JANINE ARVIZU**

6 BY MR. ORR:

7 Q And only, we only have 1 week in January 2008, is that  
8 correct?

9 A That's correct.

10 Q And if they were doing it, they would have it on a  
11 regular basis?

12 A Um, it depends on if they've made changes to the method.  
13 There's nothing inherently wrong with having data from 2008  
14 applied to results now, as long as they haven't made any changes  
15 during that period of time. Um, it speaks to the need to document  
16 in a procedure and then have a, a method validation study for  
17 that. And then when you issue a new version of the procedure, you  
18 make it, you actually go in and consider do I need to revalidate  
19 and if so, for what parameters.

20 Q And we were never given, in 1, a method validation?

21 A That's correct. Well, again, what, apparently what they  
22 had.

23 Q Okay. But not what you would expect from a lab?

24 A No.

25 Q Okay.

1 A Incomplete.

2 Q Incomplete, okay.

3 DIRECT EXAMINATION OF MS. JANINE ARVIZU

4 BY MR. ORR:

5 Q Let's go to 2. Um- -

6 A - -Okay- -

7 Q - -what did we receive in response to request number 2?

8 A Um, the response said there were no responsive  
9 documents, as we've heard. Um, that tells me that they have none  
10 of the documents that fit this description, that they have never  
11 validated any software applications that they use in the  
12 laboratory for processing their data. Either they have no such  
13 applications or they've never validated them.

14 Q Okay. So, under national and international standards,  
15 what does that mean?

16 A It means that the results that are processed, using  
17 those tools, cannot be relied upon. Uh, the insidious little  
18 practice of software is it gets little glitches, it gets errors,  
19 they're, um, the algorithms get corrupted, things that you think  
20 are, are just transporting data may in fact be switching things,  
21 so it's really important that it be validated and then protected  
22 from alterations, so that you know that you're using a valid data  
23 processing routine.

24 Q Okay. And if you're not using a validated processing  
25 system, they can't be relied on?

1           A     That's correct. The, the purpose for having it  
2 validated is so you can rely on the results.

3                           **DIRECT EXAMINATION OF MS. JANINE ARVIZU**

4 BY MR. ORR:

5           Q     And number 3, we've described what it is, why we need  
6 it. Um, what did we receive, or not receive, and why is it not  
7 sufficient, in 3?

8           A     Um, we received, as we heard, um, several revisions to  
9 the laboratory standard operating procedure for blood alcohol  
10 testing. Um, the ones that we received were not controlled  
11 documents and, um, what that means is under quality standards,  
12 you're required to have controlled documents. That means that you  
13 know when a document was generated, when it was approved, and when  
14 it was put into effect. And that that was the version of that  
15 document that all the people in the laboratory were using from  
16 that effective date until it was retired and replaced by something  
17 new. Uh, a document control system, there are rules for how the  
18 documents are identified, how they're approved, it's all according  
19 to procedure, and so there's no ambiguity. An auditor can come in  
20 later, after the fact, and say on this date I should be able to  
21 determine exactly which procedure was in use for which activity  
22 and rely on that as an accurate reflection of practice. Um, when  
23 they're uncontrolled documents, there's always some ambiguity  
24 about whether that actually was, the lab apparently didn't have a  
25 formal system for putting a new procedure into effect, making sure

1 that everybody is following the new procedure and then retiring  
2 that procedure when a new one comes out.

3 Q One of the first things you said on 3 was that they made  
4 changes and they've given revisions, at least revision 3, correct?

5 A Um, I believe revision 4 was issued in March of 2010, if  
6 I recall.

7 Q So, when a revision happens, uh, we would get  
8 information from 1 and 2 because of the changes, is that correct?

9 A Depends on the nature of the revision. If it's anything  
10 that affects the analytical method, yes, that would be expected.

11 Q Okay. Um, questions on 3?

12 MR. OPFER: No, Your Honor.

13 MR. ORR: (Inaudible)

14 THE COURT: So, my understanding- -

15 MR. OPFER: - -Take it how you will.

16 THE COURT: There's no more, there's no more cross  
17 examination, you're adopting the Jeffco, am I correct?

18 MR. OPFER: Yes, Your Honor, and I, yeah. Uh, because  
19 we've already addressed 3. I think we, at least I did.

20 THE COURT: Okay.

21 **DIRECT EXAMINATION OF MS. JANINE ARVIZU**

22 BY MR. ORR:

23 Q Number 4, what is it, why is it important, how, and  
24 should a lab have it?

25

1           A     Uh, a quality manual was requested. That is essentially  
2 a document that establishes what a lab's policies are and how the  
3 lab is going to comply with those policies. So, it essentially  
4 sets, at a very high level, the ground rules for operation of the  
5 laboratory. Uh, quality assurance is a really big deal in  
6 analytical labs. It's a very difficult job to do science on a  
7 production line and to get consistently reliable results. It's,  
8 that's a difficult thing to do. So, this describes how all those  
9 essential factors are going to be controlled.

10           Q     And you, you've used this phrase a couple of time, and I  
11 probably, for clarification, you keep mentioning production line,  
12 what does that mean?

13           A     Um, laboratories, uh, that do forensic testing operate  
14 like production lines. Uh, they receive samples, batches of  
15 samples, they process samples in batches and, um, the quality  
16 control is structured around those batches. It's not like working  
17 in a research lab, where you've got a sample and you're going to  
18 spend the next 3 months, you know, testing that one sample and,  
19 and knowing everything you can about it. In a production  
20 laboratory, because you're doing dozens of samples at a time, it's  
21 necessary to put your effort into controlling all the peripheral  
22 elements so that you understand the quality effects on all those  
23 unknown samples. So, the quality manual describes how you're  
24 going to do that. It's, again, required by both national and  
25 international quality standards.



1 Q And we were provided a quality, a QA plan, correct?

2 A Uh, it's described in some places as a QA and other  
3 places as a quality manual.

4 Q What was the concerns we had with the number 4?

5 A Um, the one that I received was just a, a typed  
6 document. It was undated, it was unsigned, so I couldn't tell if  
7 it was actually the document that was in effect at the time the  
8 work was done. And because it's undated and unsigned, it's, it  
9 was kind of ironic because it talks about the need for document  
10 control and it's like the, the ultimate document and it wasn't  
11 controlled. I couldn't even tell if it had been ever, was it the  
12 official one that was ever approved, you know, can't tell.

13 Q And in regards to, we can't tell if it was done on the  
14 time and dates when Mr. Dunbar was (inaudible)?

15 A No, because it was com, it was undated.

16 Q Okay.

17 **CROSS EXAMINATION OF MS. JANINE ARVIZU**

18 BY MR. OPFER:

19 Q Ms. Arvizu, you did actually receive the document  
20 though, correct?

21 A Yes, it's described as a quality manual and it was  
22 provided in response to number 4, the request for item 4.

23 Q Which was, quote, the toxicology lab's quality manual,  
24 is that right?

25

1           A     I, I'm sorry, I don't remember the title, but yeah, it  
2 did, it called it a quality manual of some flavor, I don't  
3 remember.

4           Q     So, you got something titled what you were thinking you  
5 requesting?

6           A     And it, having these, the kind of content I would expect  
7 for a quality manual.

8           Q     Okay - -

9           A     - -Yes.

10                           **REDIRECT EXAMINATION OF MS. JANINE ARVIZU**

11 BY MR. ORR:

12           Q     But it wasn't signed or approved by anybody, it was just  
13 a document?

14           A     Correct. As an auditor, you don't want to have to rely  
15 on somebody's memory that gosh, yeah, that's the one we used back  
16 then in 2010. Um, we want to be able to rely on written records  
17 to demonstrate that that was the official one that had been  
18 approved, who approved it and then what periods it was in effect.

19           Q     Okay. Uh, is that everything with 4?

20           A     Yes.

21                           **DIRECT EXAMINATION OF MS. JANINE ARVIZU**

22 BY MR. ORR:

23           Q     Number 5. What is it, should they have it?

24           A     5 is a request for the laboratory's, what's called non-  
25 conformance reports, um, although it describes them as however

1 they are named. And non-conformance reports are a tool that are  
2 used, they're described in quality standards and they are used to  
3 document failures and errors and problems that occur in the  
4 laboratory, as well as, um, the laboratory is expected to have a  
5 written system for investigating and, and responding to non-  
6 conformances. So, as a data user, uh, non-conformance reports are  
7 very helpful to understand first, whether the lab identifies its  
8 own problems and second, when they do identify problems, how  
9 effective are they at investigating them and responding to them  
10 and, um, in a remedial fashion, dealing with the effects of those  
11 problems. So, non-conformance reports are required by quality  
12 standards and were asked, we asked for them for a period of time  
13 that included the testing.

14 Q Okay. So, 2010 to 2012?

15 A Correct.

16 Q Okay. And what did we receive from the CORA requests?

17 A Um, in response to the CORA requests, they got, they  
18 provided a series of letters, um, written by, and I'm not sure I'm  
19 going to pronounce her name properly- -

20 Q - -Burbach.

21 A Burbach? Um, Ms. Burbach describing, um, some problems  
22 in the laboratory, uh, but these were like inter-office  
23 correspondence memos, that type of thing- -

24 Q - -There's 1 from Cindy Burbach to Chris Houser  
25 (phonetic) from (inaudible), that type of stuff?

1           A     Correct.

2           Q     Okay.

3           A     Um, non-conformance reports are used within the  
4 laboratory to investigate and report and respond to problems.  
5 They may re, they may precipitate letters going to the client,  
6 informing them about, about problems and, uh, describing the scope  
7 of the laboratory's problems and the effects of those problems on,  
8 on users' results. But, um, the, those kinds of letters are the  
9 outcome of a non-conformance, not the non-conformance report  
10 itself.

11          Q     So, we never received any of the non-conformance reports  
12 that should be produced, correct?

13          A     Correct. They should, I would expect them to have them,  
14 if they have a fairly basic quality system in place in the  
15 laboratory. Um, again, this is what they responded in response to  
16 item number 5 requesting non-conformance reports, so I have to  
17 assume that they don't have any, that this was the closest thing  
18 they have to such a document.

19          Q     And why would that concern an auditor or a quality  
20 assurance control person if they don't have these?

21          A     Um, because things do happen in laboratories.  
22 Everything doesn't always work right every time and part of your  
23 role and responsibility is being able to have a systematic means  
24 of identifying and responding to those kinds of problems when they  
25 occur. It's part of insuring consistent, acceptable results.

1 MR. ORR: (Inaudible)?

2 MR. OPFER: One thing.

3 CROSS EXAMINATION OF MS. JANINE ARVIZU

4 BY MR. OPFER:

5 Q Ms. Arvizu, so something, once again, was provided?

6 A Yes.

7 Q And your, your belief is that's it?

8 A Uh, because that, what was provided to response of that  
9 item, I believe that that's all they have.

10 Q But that's kind of all- -

11 A - -That response- -

12 Q - -you can go off with all of the CORA items, is that  
13 correct?

14 A Yes, as a general rule, that's my opinion. If they gave  
15 me something and say that's all they had, then I figure that's all  
16 they had.

17 MR. OPFER: And, Your Honor, I don't see the point in  
18 necessarily crawling through each one. It's already on the CORA  
19 request that if Ms. Arvizu is testifying that's all they have,  
20 that that's her belief, then I don't know what else the Court can  
21 order aside from, if this is where we're at, I mean it's, and the  
22 only reason I'm saying that, Your Honor, is we can keep going  
23 through each one of these items individually. Um, it's already  
24 been - -

25

1 THE COURT: - - Have you and Mr. Opfer talked about  
2 this? What you're saying makes sense to me. My understanding is  
3 that there, I still have the notes from 41 through whatever we  
4 discussed in Jeffco. The request for certain things that you want  
5 in response back from, apparently the Department of Health- - what  
6 is it? CDH or whatever you call it, what do you call that?

7 MR. ORR: CDPH.

8 THE COURT: C-D- -

9 MR. ORR: - - P-H- -

10 THE COURT: - - P-H-E, um, has been this is all we have.  
11 You've been given the CORA, right? The CORA records- -

12 MR. ORR: - -And, Your Honor, we haven't litigated the  
13 failure for the State to provide proper documentation. These  
14 documents, in many cases, have to exist for any quality assurance,  
15 quality control to be in place.

16 THE COURT: Okay, let me ask you, I understand what  
17 you're saying. My understanding, from Mr. Opfer's response, is  
18 they've given you everything that they have. No matter what the  
19 request is, this is all we have. That's been given- -

20 MR. ORR: - -Mr. Opfer hasn't, nothing personally- -

21 THE COURT: - -Yeah, so.

22 MR. ORR: The 18<sup>th</sup> Judicial District Attorney's Office  
23 has not given us anything, in regards to our request. What  
24 happened in Jefferson County, and what happened in a CORA request  
25 has no bearing on this hearing today, Your Honor. Because the

1 fact is that this items have no time stamps to our 2 clients who  
2 are here. They're not relevant to, I mean even, even, let's say  
3 go back to where we were on documents that quality, quality  
4 management, that doesn't have, uh, number 5, does not have- -

5 THE COURT: - -You're (inaudible) it's unsigned and  
6 undated.

7 MR. ORR: Right. So, we don't know whose, okay. Just  
8 because they pulled something out of a file and sent it, doesn't  
9 correlate to our clients' cases. And that's what we're here for  
10 on discovery, Your Honor, is we're talking about validating  
11 quality assurance, quality control of the information that was  
12 used and the systems that were in place and the protections that  
13 should be in place, or weren't in place, for cross examination  
14 alone. The fact that Ms. Burbach is going to get up and say that  
15 this is a reliable test, or whomever they bring, and we need to  
16 know what quality assurance, quality controls were in place at the  
17 time for my 2 clients' cases. Just because they sent us half,  
18 half material, okay, or no response at all, now, can we litigate  
19 that and is that probably going to actually end up happening,  
20 where we actually have to sue the State lab? I hope not. Because  
21 I think the State has the same interests that we do to be able to  
22 rely on these tests. And this information that has not been  
23 provided, is something that needs to be, and I'll let Mr. Gillum  
24 address the rule 16 information, in regards to the law and why  
25 this is, the DA's Office is obligated to provide this to us, not

1 some Colorado Open Records request that didn't get answered. And  
2 you can actually look at the Attorney General's responses if and  
3 when we go down and file a lawsuit against them, if we have to,  
4 but that's not the criminal proceeding. That's not what should be  
5 addressed today. We discussed this last week, that we were going  
6 to go through all 51 things. I was going to answer the State's  
7 questions in regards to what was provided, what wasn't. And  
8 that's we agreed upon for this hearing today Your Honor.

9 MR. OPFER: And just to be clear, what I told Mr. Orr  
10 was that I was going to ask him to make a record stating what he's  
11 received and I, because I think requesting an item you already  
12 have, or you're fishing for, is improper. And that's what we're  
13 getting to, and that's why I keep asking Ms. Arvizu you don't  
14 know, and she says, yeah, we don't know, we're assuming this is  
15 it, that's all we can do. And even Mr. Orr has perfectly said it  
16 a few, a few moments ago, we don't know. That's the problem- -

17 THE COURT: - - Yeah, because we don't know, we don't  
18 know, but my understanding is the response is they've asked for  
19 it, they've responded the best they can, theoretically, through  
20 what you have and what they don't have, they don't have.

21 MR. OPFER: That, that's as far as I know, at this  
22 point. The, the, that's where my problem lies with this, Your  
23 Honor. If we're going through essentially the CORA requests, this  
24 is the im, this is improper form to litigate that. And  
25 essentially what Defense Counsel is asking for and saying is well,



1 I didn't get it from the State here, so I want to go fish over  
2 here. You can't do that. So, all I'm asking is that we- -

3 THE COURT: - -Well, he can try to do that, but- -

4 MR. OPFER: - -Well- -

5 THE COURT: - -I understand.

6 MR. OPFER: So the, but the issue is what I'm, is this  
7 is really a hearing on what Defense Counsel didn't get, then let's  
8 focus on the items that are not on the CORA request. I already  
9 asked, I told Defense Counsel last, uh, last Monday that I was  
10 going to ask him to make a record, as far as what he got and what  
11 he didn't get. We didn't do that. Um, I don't think, and I  
12 think, and I'm using his words, and I am in no way speaking ill of  
13 Mr., Mr. Orr, I think it's just ingenuous to argue for something  
14 that you don't even know exists. And that's what Ms. Arvizu is  
15 saying, is we don't even know if this exists. This is what we  
16 have and this is all we have and that's what we're assuming. And  
17 she can do her audit based on that. And she can say based on  
18 this, they get an F. And that's where we're at. But the, but the  
19 problem is if we're re-litigating all of this stuff just to say we  
20 don't know, we don't know, we don't know, what's the point? And  
21 that's, that's kind of where I'm getting. I understand Mr. Orr  
22 wants this all for impeachment, but the problem is if it doesn't  
23 exist, then that isn't impeachment. Because then you can say  
24 well, hey, here's our open CORA, or here's our CORA request, Ms.  
25 Burbach, and you said this was all we got, and this is

1 insufficient, is it not? You have it. Because if that's all  
2 they're giving you, that's absolutely impeachment. It's, I, I'm  
3 just trying to use the Court's time (inaudible), Your Honor. I  
4 understand Mr. Orr wants to get up and he wants his full record  
5 and he asked that I zealously cross examine Ms. Arvizu, but this  
6 is something that's, I feel, is kind of a mute point at this, at  
7 this juncture.

8 THE COURT: But my understanding, basically, again, to  
9 make it very simple for me too, is what she doesn't have,  
10 allegedly, the lab cannot supply her, because they don't have the  
11 same thing. She's received, theoretically, in good faith,  
12 everything pursuant to the CORA request that the People have  
13 assembled, pursuant to their obligations under rule 16. That they  
14 have contacted the lab, and this is what we have, this is all we  
15 have, folks, that's it. Am I correct? So, if there's  
16 deficiencies, there's deficiencies, but what we don't got, we  
17 don't got. Strange English, but- -

18 MR. OPFER: - - Correct, and also, with the CORA issue,  
19 there is an appellate process for that. And, so we're at the  
20 point now, and, and I've asked Ms. Burbach have they received  
21 everything and she said yeah, we've honored their CORA requests as  
22 best as we can, because there's some things we can't, there's some  
23 things that are protected. And that's something they need to take  
24 up on the CORA end, and they can request it here, but then it's  
25 essentially the same thing. We go through the STD process,

1 (inaudible), go through that analysis, we can object and the Court  
2 can decide if they want to do it that way. But what we're  
3 essentially arguing here is CORA, which is, this is not the proper  
4 forum for it.

5 MR. GILLUM: Judge, can we respond?

6 THE COURT: Sure- -

7 MR. GILLUM: - -Or may I respond? We're not arguing  
8 CORA. Our motion is based on rule 16. Our position is that these  
9 items are mandatory disclosures under rule 16. Yes, we issued a  
10 CORA request. We did that in the good faith because we're trying  
11 to get these materials. Whether or not we issued a CORA does not  
12 stop us, under rule 16, from pursuing these materials. As was  
13 pointed out several times on cross examination already, we are put  
14 in the position now as a, a criminal defendant in this case- -  
15 let's take away CORA, as having to guess whether or not some of  
16 these documents exist. Rule 16 exists to allow the Court to  
17 oversee discovery in criminal cases. We are entitled to these  
18 materials. So, he can't say well we guess we have these  
19 materials, maybe we do and maybe we don't. The Court, uh, under  
20 rule 16, can order these. Our position is, again, is if they're  
21 mandatory disclosures, it doesn't matter whether or not we pursue  
22 these under CORA. We are not litigating CORA in this Courtroom.  
23 In fact, it's the District Attorney who keeps bringing up our CORA  
24 request. We're having to respond to it to say well, we've gotten  
25 these things, we've gotten these things, we don't, we're not

1 really sure, but the point is that we are proceeding under rule 16  
2 in this hearing. We are asking the Court to issue orders, um, in  
3 regards to the materials we are requesting. Those orders may or  
4 may not become, um, issues to an appellate case, I don't know. We  
5 are not litigating CORA in this case. We are under no obligation,  
6 criminal defendants are under no obligation, in this case, because  
7 we think they're mandatory disclosures, to go CORA, to go STD  
8 materials, this is a rule 16 hearing, not CORA.

9 MR. OPFER: And so, to address that, Your Honor, Defense  
10 Counsel then has to show that they're material and that they  
11 exist.

12 MR. GILLUM: No, not under mandatory disclosures, we  
13 don't. No, that's under discretionary disclosures, read the rule.

14 MR. OPFER: Calm down, you're okay.

15 MR. GILLUM: Well, no, it's- -

16 THE COURT: - -I'm sure he read the rule. (Inaudible)- -

17 MR. OPFER: - -And, and- -

18 THE COURT: - -there's discretionary- -

19 MR. OPFER: - -Okay, and that's- -

20 MR. GILLUM: - -There's discretionary.

21 MR. OPFER: And that's where my assertion is that we  
22 are. So- -

23 MR. GILLUM: - - And- -

24 MR. OPFER: - -let- -

25 MR. GILLUM: - -Your Honor- -

1 MR. OPFER: --let me finish.

2 MR. GILLUM: Oh, please.

3 MR. OPFER: Yeah, thank you. So, Your Honor, the, the  
4 issue becomes is what Ms. Arvizu just said, and that's why, that's  
5 why I broached the subject with the Court, that everything she  
6 just received, everything that she received CORA, that's their  
7 belief, she said that's their, that's all they have. We don't  
8 know. So, if we're under, and that's where I think we have to  
9 determine where we are. And I, I agree with Mr. Gillum, we have  
10 to determine where we are under rule 16. They're going to argue  
11 mandatory disclosure and that's where I think we're kind of doing  
12 everything backwards now.

13 MR. GILLUM: No, we have to hear the testimony first  
14 before we know where we are--

15 MR. OPFER: --If, if I could finish, Your Honor.

16 THE COURT: Go ahead.

17 MR. OPFER: Thank you. The, the issue becomes, is, if I  
18 think it's under, if I'm going to argue, and I'm going to, that  
19 it's under the discretionary disclosure, not under mandatory, then  
20 they have to prove its materiality, which is what they're trying  
21 to do, and that was my understanding from the meeting last week.  
22 With the issue being now what, but it cannot be a fishing  
23 expedition, you can't just hope that it's there or think that it's  
24 there, you have to show that it's there and that it is material.  
25 It may all be material to a proper audit, that's fine, but the

1 problem is now we're speculating about whether or not it exists.  
2 And that is what Ms. Arvizu just said. So, if we're under the,  
3 the discretionary section of rule 16, they lose. If we're under  
4 the mandatory discretion, or the mandatory disclosure, they may  
5 win, but we have to address that. That, but the mandatory  
6 disclosure just means that we would turn it over. So, that's  
7 what, that's what I'm saying, I think we're kind of doing this  
8 backwards. I understand Mr. Orr wants his record, I understand  
9 that he wants to go argue this in other counties and wants this  
10 record for that. He just said it's for his clients here, so let's  
11 keep it for his clients here. So, in dealing with that, Your  
12 Honor, I think perhaps then maybe we go to rule 16, we, we hear  
13 from Mr. Gillum- -and am I pronouncing that right, Mr. Gillum?

14 MR. GILLUM: Yeah.

15 MR. OPFER: Okay. Sorry, I have a terrible (inaudible).  
16 Maybe we hear from Mr. Gillum as to why he thinks it's, it's, uh,  
17 mandatory and then we can start going through that and then maybe  
18 we, we readdress all these issues under CORA, if we're going to  
19 start fishing again.

20 MR. ORR: And, Your Honor, my position is that, and as  
21 we talked about last week, (inaudible) we won't talk about CORA,  
22 what we've received, what we haven't received, we're done, okay?  
23 Well, have that issue and we can raise it afterwards, which was my  
24 original plan. Today is an offer of proof why these things are  
25 material. We think they're mandatory disclosures on the

1 (inaudible) and if they're not mandatory disclosures, this hearing  
2 is to discuss and give the Court the offer of proof necessary to  
3 move forward so the Court shall order them. And that's why we're  
4 here today. We think they're mandatory, so if the Court agrees  
5 with us on that, and wants to order them right now, we can stop  
6 this hearing and be done. But I don't know if that's what the  
7 Court wants to do.

8 THE COURT: Well, Mr. Opfer, do you have a response?  
9 Because I know what you're, I know what you're talking about.

10 MR. OPFER: Well, and, and I think that's, that's why  
11 we're having this problem is if their expert, and I don't want to  
12 repeat myself, if, I think if we're going to have a rule 16  
13 argument, let's have the rule 16 argument. And I understand that  
14 they're to prove the materiality of it, but what, what her, what  
15 the problem is, is we have to decide where in rule 16 we are  
16 first. Because if we're in the mandatory disclosure, then we may  
17 not have to have this. If we're in the discretionary, then we do  
18 have to have this and, which she just said that she doesn't know  
19 if it exists. So, then we lose there. So, I think we have to  
20 decide, Your Honor, where we are. Whether it's mandatory or  
21 discretionary.

22 THE COURT: Okay, and again, we're talking about, just  
23 by looking at the rule in front of me, you're talking about 16(C),  
24 material held by other governmental personnel and then D is  
25 discretionary? That's exactly what we're talking about?

1           MR. GILLUM: Judge, I think a couple of things. Our  
2 position is, under rule 16, part 1, (A)(2), the prosecuting  
3 attorney shall disclose to the defense- -

4           THE COURT: - -Okay, do me a favor. A?

5           MR. GILLUM: A2.

6           MR. OPFER: The number 2, yeah.

7           THE COURT: A, oh, the prosecution shall disclose to the  
8 defense any material information that is in his possession or  
9 control, which tends to negate the guilt, are you talking about  
10 that?

11          MR. GILLUM: Yeah, exactly.

12          THE COURT: Okay.

13          MR. GILLUM: And, and our position, Judge, is, and the  
14 alternative, if it doesn't fall under that then it does fall under  
15 the discretionary disclosures. And I think what we're trying to  
16 do through this hearing, through the testimony today, is show, uh,  
17 number 1 that the Prosecution, uh, that these items fall under A,  
18 number 2, or in the alternative, that they are discretionary  
19 disclosures. And I, I think Ms. Arvizu is, is testifying to that  
20 information and that is what the Court, we're asking the Court to  
21 use to make its order, regardless of CORA and what we've done with  
22 CORA (inaudible).

23          THE COURT: My understanding of the People's position  
24 that it's not mandatory. They believe it's under discretionary,  
25 discretionary section, am I correct?



1 MR. OPFER: That's correct, Your Honor.

2 THE COURT: Under 16D?

3 MR. OPFER: And that's one of the reasons we adopted the  
4 Jeffco, uh, pleading. I don't know if the Court had a chance to  
5 read that when you, when you were in Jeffco, um, but that's why we  
6 are adopting that- -

7 THE COURT: - -You mean the results? I, I have the  
8 orders from Judge Fisch.

9 MR. OPFER: You, you have that, Your Honor, but you also  
10 have the, in that packet I provided to you and I provided to  
11 Defense Counsel, there was a- -

12 THE COURT: - -I haven't read it- -

13 MR. OPFER: - -brief, um- -

14 THE COURT: - -I haven't read it- -

15 MR. OPFER: - -you, you, I'm sorry?

16 THE COURT: I haven't read it. I was there. I haven't  
17 read the brief per say, I read the order that came up from Judge,  
18 uh, Fisch - -

19 MR. OPFER: - -And, and- -

20 THE COURT: - -that I have.

21 MR. OPFER: And obviously we're asking, you know, this  
22 Court to, uh, once again, as the Court already issued a, an order  
23 previous to this hearing, um, we're asking this Court to adopt the  
24 Jeffco hearing. But we are adopting the, uh, pleading filed by  
25 the Jefferson County Das, which didn't, doesn't address rule 16.

1 Um, and I provided that to the Court, it's fairly lengthy. Uh,  
2 because I don't know if the Court wanted to take a moment and read  
3 that, but I, I think- -

4 THE COURT: - -Well, it's lengthy. I, I remember the  
5 order coming out. I do have your copy, but I'll make another one.

6 MR. OPFER: But the, the brief is a, the brief is  
7 different than the order.

8 THE COURT: Right.

9 MR. OPFER: Yeah.

10 THE COURT: I understand that. This is the, uh,  
11 discussion enclosed, disclosures. I'm assuming the Court came to  
12 a conclusion in a, ages ago. This is discretionary, not  
13 mandatory, am I correct?

14 MR. OPFER: I believe it did. Is that right, Rhidian?

15 THE COURT: Discretionary disclosures under 16(1)(D)(1).

16 MR. OPFER: Did the Jeffco court say it was  
17 discretionary?

18 MR. ORR: Um, parts of it, yes.

19 MR. OPFER: And there were 4 things they required? But  
20 I think they said that 4 things were mandatory, because the one  
21 should be included in the lit packet. I don't, I don't, I'm not  
22 going to fight Mr. Orr on that one, I agree.

23 THE COURT: Well, my understanding, and again, was that  
24 (inaudible) Judge, uh, Murray upstairs ordered something too, so  
25 there have been some orders already given, that are mandatory

1 disclosures from the Jeffco hearing and, uh, for Judge Murray to  
2 (inaudible)- -

3 MR. ORR: - -Judge Vahle.

4 THE COURT: Well, Judge, well I, I talked to him today  
5 about that. You signed an order regarding the raw data?

6 MR. ORR: Yes.

7 THE COURT: We talked about that the other night. Is  
8 that still a problem? I know you, Mr. Opfer, love talking about  
9 it, that it's, it's to be given to you?

10 MR. ORR: We haven't gotten it, Your Honor.

11 MR. OPFER: But I, I asked Ms. Burbach if, I basically,  
12 and I'll tell the Court my conversation with her, and Mr. Orr,  
13 that I told her, I said you know, it says (inaudible), I said I  
14 think this is something you're going to have to turn over. I said  
15 it sounds like judges are ordering it and I said, quite frankly,  
16 if it's in the definition, it's in the definition. And I said  
17 just because- -

18 THE COURT: - -Well- -

19 MR. OPFER: - -you're worrying about Mr. Orr committing  
20 a felony with the (inaudible), it doesn't, I said it (inaudible)  
21 and I said you know if you want him gone, this is an easy way to  
22 get rid of him.

23 THE COURT: No- -

24 MR. OPFER: - - But, uh- -

25

1           THE COURT: - -and we're talking about, again, that  
2 discussion we had, again, both Counsel were present, uh, with me  
3 in Court until 6:30 that night. We got thrown out by the Sheriff.  
4 And, uh, I am looking at, again, the Department of Public Health  
5 and Environment Laboratory section, services division, 5CCR1005-2,  
6 rules pertaining to testing for alcohol and other drugs  
7 (inaudible) by the State Board of Health. Last amended 1/21/09,  
8 effective 3/2/00. And I thought it became apparently clear, even  
9 to the Court at that point, when we all looked at it, that the  
10 litigation package, which you're certainly entitled to, that is  
11 part of a mandatory disclosure, includes, and it states in here,  
12 in their rules, where appropriate, should be included, but not  
13 just the raw data reports, but worksheets, sequence tables,  
14 quality control data, including target ranges. I don't think  
15 that's a problem. I'm, I think Judge Vahle signed the order  
16 regarding that and I think that is a part of litigation package  
17 already in, in part of mandatory disclosures. Does, does that  
18 have, does that solve that problem?

19           MR. OPFER: I think it does, Your Honor. And I don't  
20 think, like I said, I think that that, I would agree I think that  
21 has to be turned over and if Mr. Orr wants to purchase the, the  
22 program to run it, I think that's fine. We may- -

23           THE COURT: - -My understanding, it already happens- -

24           MR. ORR: - -Let me clarify, for the record, wants to is  
25 not a word that I would put in that paragraph- -

1 THE COURT: - - My understanding you have gratuitously,  
2 on behalf of your clients, purchased that material- -

3 MR. ORR: - -Needs to- -

4 THE COURT: - -Am I correct, you have purchased that?

5 MR. ORR: No, I've got (inaudible) too, because I  
6 haven't received the raw data yet. I'm not going to go by gas,  
7 I'm not going to go buy a car if I don't have gasoline, so- -

8 THE COURT: - -Well, you may be able to fly into Nepal  
9 again and fly into that particular landing strip.

10 MR. ORR: Your Honor, and what - -

11 THE COURT: - -(inaudible)- -

12 MR. ORR: - -what I don't think the District Attorney  
13 and, and (inaudible), and here's my position, if the Court finds  
14 that the 52 things that we are, um, asking for are under the  
15 discretionary disclosures, I still need to make a record today for  
16 appellate purposes.

17 THE COURT: Okay, well let's do this, I believe, and you  
18 certainly may- -

19 MR. ORR: - -(inaudible)- -

20 THE COURT: - -I'm not going to stop you at all,  
21 absolutely. That is my understanding, the People's position,  
22 again the requested items, 1 through 51, are discretionary,  
23 correct? Most of them?

24 MR. OPFER: Most of them. Not, and I say, I, I agree, I  
25 think the raw data is, and actually I agree with the ruling out of

1 Jeffco, I think that those are discoverable and I think especially  
2 the raw data. I think Mr. Orr is absolutely correct, that should  
3 absolutely be in there.

4 THE COURT: I do too.

5 MR. OPFER: Okay.

6 THE COURT: I don't think that's a problem.

7 MR. ORR: So, and Your Honor, I, and I think I can help  
8 the Court and I can help the District Attorney- -

9 THE COURT: - -What- -

10 MR. ORR: - -if we go over the packet definition. Ms.  
11 Arvizu, would you please read to the record the paragraph that's  
12 bracketed, called litigation packet- -

13 THE COURT: - -Isn't that what I just read? But I, go  
14 ahead, she can, I just read it, I think.

15 MR. OPFER: He did just read it.

16 MR. ORR: Oh, did you read from top to bottom?

17 MR. OPFER: Yeah.

18 THE COURT: Yeah, litigation packet. Same thing, Ms.  
19 Arvizu, records requested for litigation purposes must include  
20 sufficient material to allow independent review by qualified  
21 toxicologists. These records should include the requests for an  
22 analysis, chain of custody documents and all analytical data which  
23 supports identification and, if applicable, quantitation analysis,  
24 analyses, analyte, I'm sorry- -

25 WITNESS: - Analytes.

1 MR. ORR: Analytes.

2 THE COURT: And then there's an S, to include the limits  
3 of quantitation L-O-Q, which stands for what?

4 WITNESS: Limits of quantitation.

5 THE COURT: Oh. Well, there you go. Where a  
6 (inaudible) should include, but not just the raw data reports, but  
7 worksheets, sequence tables, quality control, including target  
8 ranges, period. Material in the litigation package should be  
9 complete and properly organized. I think, is that, Ms. Arvizu, am  
10 I correct? We're looking at the same rules- -

11 WITNESS: Yes, sir- -

12 THE COURT: - -and regulations? I think that's a  
13 complete, that record is complete like that. And I, I don't think  
14 there's any problem between the Court, Defense Counsel or the  
15 District Attorney, that should be turned over to Defense. And if  
16 it's not, therein lies a great big problem.

17 **REDIRECT EXAMINATION OF MR. JANINE ARVIZU**

18 BY MR. ORR:

19 Q Ms. Arvizu, what, in these 51 things, is in that  
20 paragraph? Could you help the Court help me?

21 A Sure. There are a bunch of them. And the reason is  
22 because it states that these records should include all analytical  
23 data which supports identification, that's the qualitative  
24 analysis piece, and if applicable, quantitation of the analytes,  
25 that's the quantitation, or how much piece. Um, a number of the

1 things on the list are very, to, to my perspective, that's how I  
2 evaluate the qualitative and the quantitative confidence in the  
3 results. Um, you want me to go through and identify which items  
4 those are?

5 Q That my help the Court, if the 51 things that are  
6 covered in that paragraph, is it, the problem is we're asking for  
7 specific documents and- -

8 THE COURT: - -Oh, I understand what you're asking.

9 MR. ORR: No, we're asking for specific documents.  
10 We're not saying hey guys, just, you know, give us- - what's  
11 happened over the decades, Your Honor, is we haven't been getting  
12 this and nobody knew we should be getting this, even though we  
13 read the (inaudible). I think we had that, um, come to the light  
14 moment last week where we all kind of looked at each other and  
15 said why aren't you getting the raw data? And it was like, um, it  
16 says it in here.

17 THE COURT: Okay, my understanding, just so we know for  
18 the record, and we have this, and this is the Court kind of, as I  
19 call it, Court babble, for a second, is that we all want to be  
20 assured that the results are precise or accurate, although in know  
21 there's a difference in semantics between precise and accurate,  
22 that we all can rely on those, uh, on those particular results.  
23 My understanding, from that conversation, that the litigation  
24 package, the raw data, and I was present when we were in Jeffco,  
25 there was a fear that if the raw data, and my understanding, that



1 can be done through a jump drive, um, these new technical terms  
2 are way above me. I know what it looks like- -

3 MR. ORR: - -Or a CD Rom- -

4 THE COURT: - -Or a CD Rom, that possibly they could be  
5 manipulated, manipulated by the Defense. The corresponding  
6 argument could be that they could be manipulated by the  
7 Prosecution. So, I don't understand, in this discussion I had  
8 with Counsel at the time, that we take the results and they should  
9 be compared. My understanding it sounds like trying to adjust a  
10 radio to find the right frequency. You can start, you know zero  
11 might be up here, as opposed to zero being down here, and you take  
12 the same data, data, you get different results. That would be a  
13 great fun to have at a hearing, why one, if you take the same  
14 amount, you get different results. I understand that your concern  
15 is (inaudible) to your clients. And it was Mr. Opfer's concern  
16 too. Just, we all get on the same page, so I don't know why the  
17 raw data, if it gets out there and gets done, and just supports  
18 everything, can't be done.

19 MR. ORR: And, Your Honor, that, that paragraph that  
20 we're relying on doesn't just say raw data. That's the important  
21 (inaudible). It's the qualitative worksheets, it's the- -

22 THE COURT: - -Right- -

23 MR. ORR: - - it's the process. It's, it's literally  
24 everything we're talking about today.

25

1           THE COURT: Now, let me ask you question. Mr. Opfer,  
2 help me too, because I'm just trying to jump in here. I  
3 understand what you're asking for and I don't think that's a  
4 problem with the Court or (inaudible). I just want to make sure,  
5 because I can see where the monkey is, throw the, uh, wrench in  
6 there and fling it real hard, is we asked you to produce this,  
7 you're ordered to do it and we don't have it. That's, is that the  
8 great big question? And then I'm getting from Ms. Arvizu, maybe  
9 yet, we don't have any of these kind of documents that even  
10 support, allegedly, our conclusions or how we got there?

11           MR. ORR: And the wonderful thing is that the lab  
12 director, whoever that would be, or is, wants to sign a piece of  
13 paper saying we don't have this information- -

14           WITNESS: - -They've done it- -

15           MR. ORR: - -that's sufficient to fill our request.  
16 Right now- -

17           THE COURT: - -I understand that's what you do have.

18           MR. ORR: No- -

19           THE COURT: - -Through CORA. You've gone through CORA-  
20 -

21           MR. ORR: - -Let, let Ms. Arvizu, because she shook her  
22 head - -

23           THE COURT: - -Okay- -

24           MR. ORR: - -no and that doesn't go on the record.  
25

1 THE COURT: And, Mr. Opfer, you can ask questions  
2 regarding that. If you want to go through every single item, my  
3 understanding they've received some things, some things they  
4 haven't. But what's crucial, I guess, is the litigation package.  
5 Whatever you have, that chunk should be given to you, that's a  
6 Court order, right? But if they don't have the data supporting  
7 it, because they don't have it, that's what they need to tell you?

8 MR. ORR: Yes- -

9 THE COURT: - -Is that right?

10 MR. ORR: Is that fair- -Ms. Arvizu?

11 WITNESS: Yes.

12 THE COURT: Mr. Opfer, does that appear, to me it's just  
13 common sense, you either, here we have data, we're supposed to  
14 give this to you. You know, we have to give you 1 through 10, we  
15 only have 1, 2 and 6. It doesn't exist, the rest of it. And  
16 that's- -

17 MR. OPFER: - - And that's what I was arguing. That's  
18 where I think Ms. Arvizu helped clarify things for me, because  
19 that's what I said. You, you're assuming this is all they have,  
20 and if that's all they're giving, then yes. So, that's where, if,  
21 if they're going after the impeachment material with Ms., Ms.,  
22 with what Mr. Orr's was arguing earlier, that he wants to be able  
23 to impeach Ms. Burbach, he's got it now. And it may be, and maybe  
24 it doesn't, and maybe he wants to try to get more if it doesn't  
25 exist, but the fact that it, I think that you can go up and like I

1 handed you, Your Honor, the, the CORA response and you can say  
2 now, you make sure, Ms. Burbach, you make sure you, you know, you  
3 keep all of these, these logs, and she says yeah. And you say,  
4 well right here it says you don't. You don't have any of those.  
5 And this is coming from essentially your boss, or somebody that's  
6 even above you, yes? Yes. So, you have your impeachment and I  
7 think that's, once again, where Ms. Arvizu clarified it for me,  
8 was that she said that we're just guessing, she doesn't know.  
9 And- -

10 THE COURT: - -Well, let me ask you- -

11 MR. OPFER: - -(inaudible)- -

12 THE COURT: - -I don't know if I can order any, jump  
13 right in here and help me too, something you mentioned, order her  
14 to respond to the litigation package itself, saying, you know,  
15 these are the documents in here and she'd have to say, and I'm  
16 just throwing this out there, I don't know if I can do this, that  
17 your response is that we have this, this and this, as part of the  
18 litigation package, our obligation to turn over to you, but we  
19 don't have this stuff, it doesn't exist in our lab. Is that what,  
20 is that what we're asking for?

21 MR. ORR: Yeah. Your Honor, I think I'm to 6, the  
22 internal audit schedule, 5 year period, ending with this, the year  
23 of the test. Um, and they say, sorry we don't do- -

24 WITNESS: - -Done- -

25

1 MR. ORR: - -annual audits. And it's not in some sort  
2 of other requests, it's in the, the case in question. At the time  
3 - -because again, at the time that they asked for them, we asked  
4 for it, okay, on Mr. Dunbar's case, did they have it? Had they  
5 been doing this for 5 years? And if not, we know in 2013,  
6 hopefully, they'll start doing audits, because they realize they  
7 weren't doing them. So, now, we're going to get a year's worth of  
8 hey, these are the audits we have. And then back to the  
9 disingenuous portion of the con, the conversation, if I ask you  
10 for 2013 a 2<sup>nd</sup> time, that, that, I believe, would fall under the  
11 disingenuous portion of, you know, I've got it. But we need it in  
12 every case or we need to know that, as I say with standardized  
13 field sobriety testing, officer says I was trained under manual,  
14 uh, uh, 2006- -

15 THE COURT: - - I think it's 2006 for awhile- -

16 MR. ORR: - -Yeah, well I was going to say two thousand,  
17 or 1996, the '96. Okay, well great, I have a copy of that.  
18 Please do not waste my taxpayer's money or my money, um, on  
19 producing another copy, just give me the dates, so we know. Oh,  
20 okay. So, the next case would come down, Ms. Applegate comes down  
21 the road, 6 months from now, and I say we were given this in Mr.  
22 Dunbar's case, what was in effect at the time of Mr. Dunbar's case  
23 and what changes have happened? And at that point, the State gets  
24 to answer probably 6 little things, and we have the information,  
25 okay? The issue is- -

1 THE COURT: - -According to her, according to Ms.  
2 Arvizu, I listened carefully, if they made those changes, then  
3 they have to account for the changes and now all the effects,  
4 etcetera, etcetera.

5 WITNESS: Uh-huh.

6 MR. ORR: And that's the part where we run into the huge  
7 problem on, because we have proof from other sources that they've  
8 made changes. They didn't specify what those changes were and if  
9 they were in the analytical process, steps 1 through 4 had to be  
10 done, and if they weren't done, then we truly can't rely on the  
11 testing. And that's the part we're running into. I want to go  
12 through and explain to the Court, and whether we do it on the 1<sup>st</sup>  
13 part of the hearing, or we do it as part of my just building a  
14 record, it's up to the Court. I really, it's up to you.

15 THE COURT: Well, it's up to you two. I'm here to, I'm  
16 just trying, I, I know where you're going, kind of. I'm trying to  
17 get to the point, so you don't belabor anything, so you both get,  
18 get what you want from here. But I'm getting, there's certain  
19 information out there they may not have, but we don't know what  
20 they don't have. We don't know what we don't know, basically.

21 MR. ORR: All right. What I would like to do is go  
22 through my 51 things with Ms. Arvizu.

23 THE COURT: Okay.

24 MR. ORR: Have, have it explained, so the Court and the  
25 District Attorney and I are all talking in the same vernacular,

1 giving our offer of proof why it's important, so in case the  
2 Court decides it's discretionary, then we've made our offer of  
3 proof and we can forward on that. Then I would like to address  
4 that paragraph in detail, of the 51 things that we have discussed.  
5 What of these 51 things fall into the definition on that  
6 paragraph.

7 THE COURT: Why, I understand where you want to go with  
8 it. I am very clear where you want to go with it. Um, Mr. Opfer,  
9 you are too, I assume?

10 MR. OPFER: I understand, but once again, Your Honor,  
11 where he wants to go with it. I, to address 2 things, first of  
12 all, he just basically said that he needs this for his client  
13 here, but he's willing to use it again in the future. It, it's,  
14 he kind of wants the best of both worlds. I understand that. I'm  
15 sure every defense attorney does. The, it, once again, Your  
16 Honor, I think what we need to do is determine where we are in  
17 rule 16. Because that's what this is, as Mr. Gillum just said,  
18 this is a rule 16 hearing. So, if this is something that, where  
19 we're entirely fishing for and it falls within the discretionary  
20 section, it's obviously not reasonable. If the, my own personal  
21 opinion.

22 THE COURT: Okay.

23 MR. OPFER: If it's something that, um, is  
24 discretionary, and you're saying, Your Honor, and Your Honor is  
25 going to say you have to produce this in every single case,

1 period, so that some auditor can do an audit of the lab in every  
2 single case, then that's something that we need to address. And  
3 if you're going to do that, as Mr. Orr said, there's no need to go  
4 forward any further.

5 MR. ORR: And, Your Honor, we're here to give the offer  
6 of proof on every one of these items. And then, at the end of the  
7 day, we're going to go through the mandatory portion. Because the  
8 State and the Court, in my interpretation of this conversation,  
9 have agreed that whatever that definition is, that's mandatory.

10 THE COURT: We're talking about the litigation package?

11 MR. ORR: The litigation package, defined by CDPHD,  
12 defined by the Department of Health in 5CCR1005-2.

13 THE COURT: And I don't think there's an argument  
14 regarding that though. The interpretation in there may be - -

15 MR. OPFER: - -And, and there's not. But the receipts  
16 for latex gloves obviously are not in there and we're going to try  
17 to read it in there, or I'm assuming Defense Counsel is, and  
18 that's, that's where I'm having this, this issue, is that if  
19 we're, we need to find out what we're arguing. That's kind of  
20 what we were trying to talk about on Monday.

21 THE COURT: Right.

22 MR. OPFER: And I thought we had it nailed down, and  
23 apparently we didn't. So, that's where I'm trying to, now, with  
24 what Ms., Ms. Arvizu just said, as far as that, she has no idea  
25 what else is out there and she's assuming that she got everything.



1 I'm trying to figure out where we are at this point. Because that  
2 was testimony I was not expecting. And I don't know that Mr. Orr  
3 was expecting that. So, I think we need to figure out where we  
4 are. Are we, are we going to argue rule 16 or are we just- -

5 MR. ORR: - -Well- -

6 MR. OPFER: - -does Defense Counsel just want to build  
7 his record for appeal, is that all we're doing here? And talking  
8 about wasting taxpayers' dollars, I don't know.

9 THE COURT: Well, let me, let me do this, because I'm  
10 just looking at the time. It's 20 after 12. I have some little  
11 items then we'll get back to it. Keep your witness here. I want  
12 you to make whatever record you believe is appropriate.

13 MR. ORR: Thank you, Your Honor. And, and, so the Court  
14 knows, I will be going through with Ms. Arvizu, Court permitting,  
15 um, all 51 items.

16 THE COURT: Okay.

17 MR. ORR: Um, okay. But we can go through mandatory  
18 disclosure of that paragraph and explain and while, I'm assuming  
19 you're going to take about a 10 minute, 15 minute break for lunch  
20 here? Or you said you had a few things to do.

21 THE COURT: No, I've got a 1:30, uh, what do I have? I  
22 have you at 1:30, I have a couple of matters then the rest of the  
23 afternoon. I'm here to accommodate you the best I can, you and  
24 Mr. Opfer. Um, I want to get this resolved. It's not the easiest  
25 issue. I understand what you're talking about. The problem,

1 we're going to get (inaudible) in the same thing if you go through  
2 the 52, go through it, is then we're going to get done, get into  
3 the litigation package and how it relates to the 52 items,  
4 therefore, Judge, you couldn't find them to be discretionary,  
5 they're mandatory. Well, I, I understand where you want to go.  
6 It's like Pamplona, we have to run with the bulls and see who gets  
7 trampled. Um, I'm just trying to figure out where to go with this  
8 and, Mr. Opfer, too, is to getting the result. The other part  
9 you're going to tangle with is do you know exactly is what the  
10 statute says? You know, about strict compliance and this sort of  
11 thing and the results, that I'd have to find it, again, so, you  
12 know, below the standards of, uh, you know, it's just, it's, it's  
13 so poorly done - -

14 MR. ORR: - -But we don't - -

15 THE COURT: - -that you can't use that.

16 MR. ORR: Right, and that's the issue here.

17 THE COURT: I understand that's the issue- -

18 MR. ORR: - -Your Honor, if we don't have, if we don't  
19 have this information, I can't come to you and say this is a load  
20 of horse manure. This is a terrible test. It's absolutely  
21 unreliable in every facet, because we don't have the information  
22 we're seeking. We don't have, let me ask- -Ms. Arvizu, you have  
23 reviewed the discovery in both of these cases?

24 WITNESS: Yes.

25

1           MR. ORR: And in that litigation packet, the raw data,  
2 all the (inaudible), what have we received from the District  
3 Attorney's Office in regards to that information?

4           THE COURT: Okay, and my understanding, let me just do  
5 this, Mr. Opfer, I need you to back up here a second. My  
6 understanding, just for the record, that your office has complied  
7 with the litigation package that you normally comply with, am I  
8 correct?

9           MR. OPFER: Normally, aside from the raw data now, which  
10 we will turn over.

11          THE COURT: Okay, the raw data is the only thing we  
12 don't- -

13          MR. OPFER: - -Assuming it still exists- -

14          THE COURT: - -(inaudible) that should be a part of it-  
15 -

16          MR. OPFER: - - actually.

17          THE COURT: Okay. So, he's going to relate, again, get  
18 to the issue in the litigation package, what they haven't got that  
19 should be in it, I assume?

20          MR. OPFER: I'm sorry, Your Honor, I was trying to  
21 listen to 2 people at once.

22          THE COURT: My understanding, what he's now going to do,  
23 and again, if you want to keep going through 6 through (inaudible)  
24 is fine. My understanding, now that you want to change and ask  
25 her if you want to specifically get into the litigation package,

1 what part of that, that should be given to me, hasn't been given  
2 to me to review? Am I correct?

3 MR. OPFER: Correct.

4 MR. ORR: Your, Your Honor, and a lot of these things,  
5 and that's what I'm trying to say, a lot of the things we're  
6 talking about in these 51 fall under that definition.

7 THE COURT: No, I, that's your theory, I understand.

8 MR. ORR: No, that's scientific- -

9 THE COURT: - -(inaudible)- -

10 MR. ORR: - - that's scientific lab analysis, Your  
11 Honor, that's not my opinion. I don't have an opinion in this  
12 way. I have, I have a national standards and international  
13 standards on toxicology on lab practices. That's, if they're,  
14 that's what I'm basing my opinion on. It's not, you know, we get  
15 gas chromatograms, as I was explaining to the Court off the  
16 record, the other day. A gas chromatogram is like a, the one, the  
17 hard copy that we get, is like a Christmas picture at the Orr  
18 family house. It's perfect. It's airbrushed. It's, everybody  
19 looks good, all the dogs are in the right spot, everything is  
20 perfect. But if you really truly want to know what the day at the  
21 Christmas part was like for the Orr family, chasing dogs around,  
22 getting them, trying to put a bow in the right hair, trying to  
23 manipulate things, you have to see the raw data, which is the  
24 videotape of the entire day. And we don't get the raw data. We  
25 don't get a lot of the quality assurance, quality control on the

1 backend. So, now we get the raw data. Okay, how reliable is this  
2 raw data? Well, it goes down to very simply what quality  
3 assurance and what quality controls were put in place to make this  
4 movie reliable. And that's what we're talking about here. We're  
5 not just talking about, you know, giving me the photos. We've  
6 already agreed that I need the (inaudible). But the question is  
7 how can I trust this video? Why was this video, what were the  
8 parameters that the test was, that's the test, that's the gas  
9 chromatograph.

10 THE COURT: That's the raw data you're talking about.

11 MR. ORR: That's the raw data.

12 THE COURT: Okay.

13 MR. ORR: But what happened when analyst A picked up the  
14 sample, what did they do with it, how was it stored, what were the  
15 refrigeration components, what was the training of this person who  
16 pipetted, because this then comes down to this whole oh, it's got  
17 to be a rogue analyst, or Mitchell Fox-Rivera, because they're  
18 saying he was doing a pipetting problem. Well, if they're doing  
19 pipetting problems, that means that there's training problems.  
20 What were the training, what was the training on this? Because  
21 yes, the raw data gives me what happened once it hit the machine,  
22 but I would say, and I'm just going to ballpark it, about 90  
23 percent of all the mistakes that happen in gas chromatography  
24 happen - -

25

1 THE COURT: --Hello? Pardon? Ma'am, you have the  
2 wrong number. Thank you. I got to (inaudible). This is, I  
3 thought it was a political call. I can't--

4 UNKNOWN FEMALE: --Robo-call.

5 THE COURT: It is, I get them. And I don't know how  
6 they found my number. I'm sorry. I'll turn it, I'm used to just  
7 emergencies. I'm also on duty, so, in case they call me, right?  
8 Okay, let me go off the record for a second. I'm going to stand  
9 up. Do you want to stand up for a second?

10 (Recess)

11 THE COURT: We're back on the record. This is, again,  
12 uh, the Dunbar matter, which I believe, and the Poplstein matter?

13 MR. ORR: Yeah.

14 THE COURT: This is 12T3724 [sic] and 11T12652. Ms.  
15 Washington, don't forget, has to come back and just do trial dates  
16 and, uh, motions dates for you all.

17 MR. ORR: Thank you, Your Honor, and we will make sure  
18 that gets taken care of. Since speedy was waived today, we've got  
19 a little bit of time. Um--

20 THE COURT: -- Well, let's continue. We were going  
21 through, Ms. Arvizu is still on the stand and I want you to get  
22 through what you need to go through.

23 MR. ORR: Thank you, very much. Um--

24 THE COURT: -- We were at 5 the last time--

25 MR. ORR: --5, Your Honor, yes.

1                   **REDIRECT EXAMINATION OF MS. JANINE ARVIZU (continued)**

2 BY MR. ORR:

3           Q     Again, could you explain what 5 is and why it's  
4 important and why, what, what it is?

5           A     I think I did that one already.

6           Q     Yeah, I think you did- -

7           THE COURT:   - - She did do that one.

8           Q     (by Mr. Orr) Now, is that in, this is the last  
9 (inaudible) question. Is that part of what was listed under  
10 5CCR1005-2, um, would that fall under the litigation packet in  
11 that definition?

12          A     Oh. I'm sorry, I didn't recognize the CCR reference.  
13 Um, only if there was a non-conformance report associated with  
14 this particular batch of samples.

15          Q     Okay. And we don't have anything- -

16          A     - -No- -

17          Q     - -like that? Okay.

18                   **DIRECT EXAMINATION OF MS. JANINE ARVIZU**

19 BY MR. ORR:

20          Q     What is number 6 and why is it important?

21          A     Um, number 6 and number 7 are related. Uh, it's a  
22 request for a copy of the laboratory's schedule for their internal  
23 audits. And then the reports that are generated as a result of  
24 those audits.

25          Q     Okay.

1           A     Um, laboratories, um, under national and international  
2 quality standards, conduct internal audits of their own systems to  
3 make sure that they're complying with their own requirements on a  
4 periodic basis. This is a means of evaluating the ethicisy of the  
5 laboratory's quality program.

6           Q     Okay. And, um, how hard would it be to produce this?

7           A     Um, not hard at all. They're generally available  
8 electronically and if not it would be just a matter of making a  
9 couple of copies.

10          Q     Okay. And would this, would this be part of the LP  
11 litigation packet?

12          A     It would not- -

13          Q     - -Under (inaudible), not?

14          A     No.

15          Q     Okay. Um, number 7?

16          A     Um, I just did 6 and 7 together.

17                               **DIRECT EXAMINATION OF MS. JANINE ARVIZU**

18 BY MR. ORR:

19          Q     Okay, number 8 then, please?

20          A     Um, there, this is also a series of related ones. Uh,  
21 number 8, number 9 and number 10 all relate to accreditations or  
22 certifications held by a laboratory, in the event that they hold  
23 such, um, independent, uh, accreditations of certifications.  
24 Asking for a copy of their scope and, and correspondence

25



1 associated with that. Uh, the laboratory in this case apparently  
2 is, does not hold external accreditation.

3 Q Okay, and in the CORA request we received nothing on  
4 accreditation, is that correct?

5 A That's correct.

6 Q Um, but you have actually had a chance to look at the  
7 forensic toxicology lab, laboratory accreditation program by the  
8 American Board of Forensic Toxicology?

9 A That is correct. Uh, that is essentially the kind of  
10 information I was trying to obtain, is copies of that kind of a  
11 report from external agencies.

12 Q And, um, it could be interpreted that because they  
13 failed that inspection, that it wouldn't possibly fall under 8, 9  
14 and 10, is that what you're saying?

15 A No.

16 Q Okay.

17 A Um, just that it wasn't provided.

18 Q Okay. So, that inspection report led you to some  
19 conclusions in regards to this lab?

20 A Um, yes. It was useful information regarding, um, the  
21 opinions of an external accrediting agency.

22 Q Okay. And did they raise any issues that would come  
23 into something in this hearing why this information was important?

24 A Yes, they certainly raised a number of concerns  
25 regarding the laboratory's practices.

1 Q Regarding quality assurance and quality control?

2 A That's correct.

3 Q Okay. Um, and 8, 9 and 10 would not be normally found  
4 in a, the definition under dash 2?

5 Q That's correct.

6 A Okay.

7 **DIRECT EXAMINATION OF MS. JANINE ARVIZU**

8 BY MR. ORR:

9 Q Let's talk about number 11.

10 A Um, number 11 is a request for, um, documentation  
11 regarding any internal or external inspections of investigations  
12 of the laboratory. Um, in the case of the CORA response, they  
13 referenced annual inspection reports.

14 Q Uh-huh.

15 A Um, but they didn't provide any.

16 Q Okay, so they said they had them, but they're not giving  
17 them to us?

18 A That's correct.

19 Q Okay. And that's 11?

20 A Number 11.

21 Q Okay. And how hard would it be for a lab to produce  
22 these?

23 A Making a couple of copies. I presume they're readily  
24 available.

25 Q Okay.

1                                   **DIRECT EXAMINATION OF MS. JANINE ARVIZU**

2 BY MR. ORR:

3           Q     Uh, number 12.

4           A     Um, I'm going to deal with 12, 13, 14, 15 all together,  
5 because they're all related to the same issue, if I may- -

6           THE COURT:   - -Do me a favor.  12 and what?

7           WITNESS:  12 through 15.

8           THE COURT:  Okay.

9           A     These are all items that, uh, relate to the  
10 laboratory's, uh, administrative practices and physical controls  
11 for preventing contamination in the laboratory.  Uh, when you run  
12 volatile organic analytes, as is the case in a blood ethanol test,  
13 you're very concerned about contamination transport air, in the  
14 airborne phase, because these are samples that are subject to  
15 contamination through vapor phase transport.  It doesn't have to  
16 actually touch a contaminated material in order for a sample to  
17 become contaminated, contaminated.  It can actually pick it up  
18 through the air.  So, physical proximity matters when you're  
19 worrying about volatile organic contaminants.  And, uh, that  
20 speaks to item 12, which asks for a floor plan of the laboratory  
21 facility.  Um, that is very useful for determining whether there  
22 are essentially what are incompatible activities going on in the  
23 immediate vicinity of each other in the laboratory.  If you have  
24 solvents being handled in the vicinity where you're preparing your  
25 blood alcohol samples, that presents the potential for cross

1 contamination that can be very, very difficult to identify and to  
2 remediate. So, that floor plan is an effort to determine, in lieu  
3 of an actual inspection of the laboratory, whether or not that  
4 potential exists. Number 13 relates to the laboratory's heating  
5 ventilation and air conditioning system. To understand when  
6 somebody is handling a blood alcohol sample at the bench or in a  
7 hood, what is the nature of the air flow. Again, because airborne  
8 contamination is what matters. In laboratories, the, the, um,  
9 costs of a laboratory, when you construct a new lab, typically 50  
10 percent or more of the costs deals with this HVAC system because  
11 they're, they are such demands place on a, uh, laboratory  
12 environment because so much air moves through a laboratory. So,  
13 this is essentially an effort to try to understand how the air is  
14 moving. If the air is moving from a place where contaminants are  
15 present and then into the place where you're handling samples,  
16 that presents a cross contamination concern. Um, number 14 and  
17 number 15 relate to, well, let me do them in order. Number 14  
18 relates to gloves and that is because if an analyst, for example,  
19 hands, handles highly contaminated samples and then they handle  
20 unknown samples wearing the same pair of gloves, they run the risk  
21 of cross contaminating the sample with ethanol and it's  
22 impossible, analytically, to determine ethanol that was present  
23 there intrinsically, or in the sample at the time it was opened,  
24 from ethanol that was introduced as a contaminate. So, this is  
25 sort of a reality check on whether their procurement records even

1 indicate that they're changing gloves with the necessary  
2 frequency.

3 Q Okay, so we really don't, well, how many analysts, we  
4 need to know how many analysts, how many tests were- -

5 A - -How many analysts, how many tests, yeah, and those  
6 details are in all these questions. How many analysts, how many  
7 test and then how many gloves.

8 Q Okay, so just so we know, from a base standpoint, if  
9 they're change their test after every touching the reagents, then  
10 we know how many gloves they need?

11 A Yeah, you know, you know a minimum number of glove  
12 changes essentially.

13 Q Now, if you had, let's go back to 13, if you had an HVAC  
14 system, I'm going to hand you the gas chromatograph negative on  
15 Ms. Poplstein's case, um, that has ethyl alcohol on the negative.  
16 Is that something that would come from airborne contaminates  
17 possibly or other issues? Does the raise quality assurance,  
18 quality control issues?

19 A Certainly. And that is certainly consistent with, I  
20 can't, neither I nor anybody else can tell you whether that was  
21 actually the source of this. This is a negative, or a blank  
22 sample that is introduced to the analytical process specifically  
23 to determine whether the potential for contamination exists. In  
24 this case, it indicates that it does.

25

1 Q Okay. And so the floor plan lays out the airflow so we  
2 know that if (inaudible) or Mr. Fox-Rivera or Kimberly Stevens  
3 (phonetic), uh, is playing with a sample in one portion, it could  
4 affect, be affected by the layout of the lab?

5 A Yeah, operations, different, incompatible operations in  
6 the vicinity.

7 Q Okay. And so storing reagents in the same containers,  
8 or the same fridges as, um, unknown samples- -

9 A - -Yes- -

10 Q - -wouldn't fall within the standards?

11 A Some of the practices that I've seen, that have caused  
12 contamination in this kind of laboratory in the past were storing  
13 incompatible materials in the same hood where they're preparing  
14 samples. So, that while they were actually preparing samples,  
15 fumes were being introduced to those samples. Um, and just a  
16 completely ineffective, uh, HVAC system.

17 Q Okay. Uh, that's takes us to 16. Can we group a, uh, a  
18 set on 16?

19 A Um, no it takes us to 15, if we could there real  
20 quickly?

21 Q Please, let's go to 15.

22 A Um, number 15 is whether or not the laboratory has  
23 actually put in place for their analysts any quality, any quality  
24 control procedures dealing with specifically contamination  
25 control. So, whether or not they specifically put in place

1 physical controls or administrative controls to prevent cross  
2 contamination of samples. There are a whole variety of practices  
3 that that might be. Um, in some cases, if a lab, if an analyst is  
4 working in one section of the laboratory, their clothes can get  
5 permeated with volatile organics and then they can't come into the  
6 low level, um, volatile lab. So, there's a, a, actually an  
7 administrative control to prevent people from moving between those  
8 areas. Um, it can prescribe things like how frequently to change  
9 gloves. It can prescribe things like, um, storing samples and  
10 standards separately. All those kinds of things are procedures  
11 that typically are documented in a contamination control  
12 procedure.

13 Q And is 15, after you're reading the dash 2, I'm going to  
14 call it 5CCR1005-2- -

15 A - -Okay- -

16 Q - -I'm just trying to refer to it as dash 2 because - -  
17 um, in dash 2, would 15 be something that was covered- -

18 A - -No, it's more generic to the laboratory as a whole,  
19 not specifically to this case.

20 Q Okay.

21 **DIRECT EXAMINATION OF MS. JANINE ARVIZU**

22 BY MR. ORR:

23 Q Um, 16.

24 A Number 16 describes environmental monitoring. I  
25 should've added that to my list. That's in the same, um, group as

1 the previous. Whether or not they actually ever monitor the  
2 ambient air in that laboratory, to see whether contaminants are  
3 present.

4 Q And would they have reports on that?

5 A If they ever do it, those reports should exist. If they  
6 don't do it, they're simply trusting that their procedures are  
7 good enough to prevent contamination, if they have procedures.

8 Q Okay. And they should have something that says they do  
9 or don't have procedures?

10 A Presumably they either have them or they don't.

11 Q Okay. Is that a, would that be covered under - -

12 A - - It- -

13 Q - -dash 2?

14 A No.

15 Q Okay.

16 **DIRECT EXAMINATION OF MS. JANINE ARVIZU**

17 BY MR. ORR:

18 Q Uh, number 18.

19 A Um, 17- -

20 Q - -Or 17- -

21 THE COURT: - - 17.

22 A 17, yes. Let's see, there are several of these. Um, 17  
23 and 18 are related. One if for externally prepared material,  
24 reference materials, and one if for internally prepared reference  
25 materials. When we analytically run a method that we're going to



1 test unknown samples, we evaluate whether or not our method is  
2 working by running known solutions, solutions that have known  
3 concentration of ethanol present in those. Those are called  
4 reference materials. Sometimes those materials are prepared in  
5 house, in the laboratory, and sometimes they're purchased from  
6 outside vendors that are accredited suppliers of reference  
7 materials. So, 17 deals with externally prepared ones and 18  
8 deals with internally prepared solutions. The quality of those  
9 solutions is the foundation on which every quantitative measure is  
10 made in the laboratory. If, if those solutions are accurate and  
11 precise and, and have been stored, have been prepared and stored  
12 and maintained and used appropriately, then you can really rely on  
13 the results you get from analyzing those. So, 17 and 18 asks for  
14 when you make these solutions or when you buy these solutions,  
15 what procedure do you use to either prepare them or to verify  
16 them, or actually to both, to prepare those solutions and to  
17 verify those solutions.

18 Q Okay. So, in these cases, um, when we're talking about  
19 a mix, that would be either an internally created or a Restek  
20 (phonetic) or externally purchased material, correct?

21 A That's an, one example, yes.

22 Q And what is the mix all about? Why is that important?

23 A Um, the mix standard is a, an empirical way of actually  
24 testing your method to determine whether or not it is capable of

25

1 separating ethanol from other volatile organics that are also  
2 introduced to that same sample.

3 Q Okay. And so if there are other peaks present in a  
4 ethyl alcohol, um, standard, there's definite problems to a  
5 quality assurance, quality control person?

6 A Non-controlled samples or reference materials can be  
7 used if they're of known and documented purity. Known and  
8 documented purity means like there's a certificate of analysis  
9 that comes from an external provider- -

10 Q - -Okay- -

11 A - - and there should not be anything in that sample that  
12 wasn't specified, or in there at the time that that certificate of  
13 analysis was prepared. If other things are showing up, that's an  
14 indication that one, the sample may be degrading, or 2,  
15 contamination was introduced during processing in the lab. Either  
16 of which means that that no longer is a valid reference material.

17 Q Okay. And that's what we're asking for in 17 and 18?

18 A In 17 and 18, we're just asking for whether they even  
19 have any procedures, any standards that they expect their analysts  
20 to adhere to when they buy them or when they prepare those  
21 materials.

22 Q So, when you looked at the discovery for Ms. Poplstein  
23 you saw 1, 2, 3, 4, 5, 6, um, I was just picking flame ionization  
24 detection 2 on .05, uh, 5 or 6 extra ghost peaks in a .05  
25 solution, that raises a quality assurance, quality control issue?

1 A It does.

2 Q Okay. Please explain 19- -oh, would that, would 17 and  
3 18 be part of the litigation packet under dash 2?

4 A No.

5 Q Okay.

6 **DIRECT EXAMINATION OF MS. JANINE ARVIZU**

7 BY MR. ORR:

8 Q Under 19, what is it?

9 A 19 is a request for the laboratory's production data.  
10 This is asking how many samples per unit time does the laboratory  
11 run. This is so it can reconcile against number of gloves and  
12 number of analysts and also so you can get an indication of just  
13 how high a through-put this laboratory is. Is it a lab that runs  
14 1 batch, um, a month or is it a lab that runs a batch every single  
15 day.

16 Q Okay. And that goes back to that whole production lab  
17 versus- -

18 A - - Correct.

19 Q Okay. And from what we see, uh- -

20 A - -That- -

21 Q - -the Colorado Department of Health, CDPHD lab, is a  
22 (inaudible)?

23 A Yes.

24 Q Okay. Um, would that be part of the litigation packet,  
25 under dash 2?

1 A It would not.

2 Q Okay.

3 **DIRECT EXAMINATION OF MS. JANINE ARVIZU**

4 BY MR. ORR:

5 Q Uh, number 20.

6 A Number 20 is the next step of that. I need to know how  
7 many people. Also, how many instruments in the laboratory,  
8 because there are multiple, in a lot of labs, especially  
9 production labs, there may be multiple GC instruments and, um,  
10 it's necessary to know which specific instrument was used to  
11 calibrate, which was used to run the unknowns, what was the  
12 maintenance history of that record, of that instruments. So, it's  
13 all very instrument specific.

14 Q Okay. Um, number, uh, would that be, 20, would that be  
15 in the litigation- -

16 A - -That would not be expected to be in the litigation  
17 packet, no.

18 **DIRECT EXAMINATION OF MS. JANINE ARVIZU**

19 BY MR. ORR:

20 Q Um, number 21 I know causes a lot of stir when we ask  
21 for it. Can you explain why we're asking for it, what it is and  
22 why it's important?

23 A Number 21 is the resumes of the people responsible for,  
24 for the sample at all stages, um, from receipt through storage  
25 preparation. Sometimes that's 1 person, sometimes it's several

1 people. And the reason we want resumes for all the folks is  
2 because we need to know whether they have training and  
3 qualification commencer with their duties and responsibilities in  
4 the laboratory. Um, I, I would not expect that to be part of a  
5 litigation packet, but it in fact is part of the litigation  
6 packets that we receive.

7 Q So, that is in, that is under CDPHD's definition of a  
8 litigation packet?

9 A In practice, yes.

10 Q Okay. So, uh, and that's 20?

11 THE COURT: No.

12 Q 21.

13 A 21.

14 **DIRECT EXAMINATION OF MS. JANINE ARVIZU**

15 BY MR. ORR:

16 Q 22, please.

17 A Um, 22, uh, blood alcohol, is one of the few areas of  
18 forensic testing where, um, states often issue permits or  
19 certifications specifically to people who are qualified to do that  
20 testing. And so, 22 and 23 relate to the certification status of  
21 the individuals responsible for doing the testing.

22 Q Okay, and that, would that fall under dash 2, for the  
23 litigation packet?

24

25

1           A     No. I should also mention in addition to just the  
2 certification, 23 also requests supporting information, um, from  
3 the individuals', uh, employment files.

4           Q     Okay.

5           A     Um, training records, disciplinary files, that type of  
6 information.

7           Q     And this one always seems to bring up a, a red flag from  
8 the people that we're asking from, for it from, because they're  
9 worried about violating privacy. We don't need the personal  
10 contact information, we don't need the social security, we don't  
11 need their date of birth- -

12          A     - -Um- -

13          Q     - - that type of stuff?

14          A     Absolutely not.

15          Q     Okay. Just their training and- -

16          A     - -Just information relevant to their training and  
17 qualifications to do their job. So, specifically, training  
18 records are very important. If there have been disciplinary  
19 actions relating to their performance or willingness to follow  
20 procedures, for example, that would be relevant.

21          Q     And how hard would this be to get from the lab?

22          A     Making copies.

23          Q     And you get this on a regular basis?

24          A     I do.

25          Q     Okay.

**DIRECT EXAMINATION OF MS. JANINE ARVIZU**

1  
2 BY MR. ORR:

3 Q Uh, since we've done 23, 22 and 23 together, let's look  
4 at 24.

5 A Uh, 24 deals with proficiency testing and proficiency  
6 testing is used in analytical laboratories to objectively  
7 determine whether or not a, an individual analyst is theoretically  
8 capable of getting the right result. And in a proficiency testing  
9 program, an external party, typically if it's an external program,  
10 or even an internal party, prepares a sample of known composition.  
11 So, that sample has ethanol at a known concentration. That sample  
12 is then submitted to the laboratory and the analyst tests that  
13 sample, but they don't know what the true value is. That's what's  
14 known as an open proficiency scheme. They know it's a proficiency  
15 sample, but they don't know what the result is and they have to  
16 send in their answer and see whether or not they passed. The  
17 problem with proficiency testing is that, first, it's generally  
18 practiced open, the labs know they're being tested and the  
19 analysts know they're being tested. And studies have very  
20 consistently shown that, uh, laboratory performance is predictably  
21 better when they know they're being tested than when those samples  
22 come in in a truly blind manner, when they're double blind and  
23 neither the lab nor the analyst knows that it's a proficiency  
24 sample. So, it should not be misinterpreted as an accurate  
25 reflection of how the lab does on unknown samples, but it does

1 represent a best case. So it, and it's also one of the very most  
2 powerful means of empirically demonstrating that an analyst is  
3 capable of getting the right answer.

4 Q Okay.

5 A And so this is a request from the proficiency records  
6 for the analysts involved in this case.

7 Q So, if, uh, if an analyst is testing, let's say an  
8 unknown sample that retested by another analyst prior, is that a,  
9 is that a good (inaudible)?

10 A No, because we don't know the true value of that sample.  
11 Um, unknowns are always unknown and if it was an unknown when it  
12 was originally tested, all you're able to assess is precision, not  
13 accuracy.

14 Q Okay. And how hard it is, is the information to get?

15 A Making copies. It's, it's routinely provided.

16 Q Okay. And all the materials up to 24, are they  
17 significant and relevant to your analysis?

18 A They are.

19 Q Okay. Now, everything up to 25 was general overview,  
20 pretty much, of the lab itself, is that a fair statement?

21 A Well, I consider it a lot more important than general  
22 overview.

23 Q Okay.

24 A It's- -

25 Q - - Please explain.



1           A     Well, because those are, uh, the objective measure of  
2 how well the lab's quality system is working. Whether or not  
3 they're controlling the right things, the things that matter to  
4 data quality and whether or not that is essentially an efficacious  
5 system that works to the benefit to all the unknown samples. Um,  
6 if there are a lot of holes in that system, or if there are a lot  
7 of parts of that system that don't work very well, it dramatically  
8 reduces the reliability of the results.

9           Q     And, in fact, that was one of the American Board of  
10 Forensic Toxicologist's critiques of this lab?

11          A     It was.

12          Q     Okay.

13                           **DIRECT EXAMINATION OF MS. JANINE ARVIZU**

14 BY MR. ORR:

15          Q     25, 26, well, we'll go through them, uh, 25.

16          A     Okay.

17          Q     What is it?

18          A     25 deals with, um, the records in the laboratory related  
19 to the samples received in this particular, in any particular  
20 case, if it's written generically or in this particular case. And  
21 it speaks to the contemporaneous records documenting the receipt  
22 of the sample, the conditions in which that sample was received,  
23 how it was labeled, how it was packaged, under what conditions it  
24 was stored and all the custody transfers that occur both on  
25 initial receipt in the lab and then transfers within the

1 laboratory. So, it's essentially understanding who had that  
2 sample when and what was it like.

3 Q Okay. Um, and that's important to your analysis of- -

4 A - - That's essential for sample integrity.

5 Q Okay.

6 A Because a lot, a laboratory analysis is simply a measure  
7 of what's in this tiny little vial that gets introduced to the  
8 instrument. What's important is how representative of that is of  
9 the blood that was originally collected, and that depends on all  
10 those elements of the sample integrity process being intact.

11 Q Okay. And is this part, what should be in- -

12 A - - It- -

13 Q - -12CCR- -

14 A it is. In order to, it's essentially the key supporting  
15 information addressing the qualitative identification of ethanol  
16 and the quantitation of ethanol in those particular samples.

17 Q Okay. So, under Colorado guidelines and rules and regs,  
18 this should be included in the litigation packet?

19 A As, as best I can interpret those regs, yes.

20 Q Thank you.

21 **DIRECT EXAMINATION OF MS. JANINE ARVIZU**

22 BY MR. ORR:

23 Q 26.

24

25

1           A     Uh, 26 is requesting information about the disposition  
2 of the case samples that were received in this case, including  
3 what their interim storage condition and current status is.

4           THE COURT: (Inaudible). Go ahead, I'm sorry.

5           A     That's okay. Um, this is a request for information  
6 about how the sample was stored and under what conditions and  
7 what's its current status.

8           Q     (by Mr. Orr) Okay. And should that be under 5CCR1005-  
9 2?

10          A     I would expect it to be.

11          Q     Okay. And you didn't get that in either one of these  
12 cases?

13          A     No.

14          Q     Okay. Now, um, and that would be significant to your,  
15 relevant to your analysis?

16          A     Uh, it's, as it's written, it's specific to after the  
17 fact, the disposition after the fact. The previous records dealt  
18 with before testing. This is after testing. This is essentially  
19 addressing whether or not there would be any possibility of being  
20 able to retest the sample afterwards.

21          Q     For example, in Ms. Poplstein's case, the State has said  
22 that there is a small amount of blood left that we possibly could  
23 retest. This information would be incredibly relevant to her  
24 case?

25          A     Absolutely.

1 Q Okay.

2 **DIRECT EXAMINATION OF MS. JANINE ARVIZU**

3 BY MR. ORR:

4 Q 27. What is it?

5 A 27 is a request for all correspondence within the  
6 laboratory, either internally or ex, to external parties,  
7 regarding this particular case. So, um, analysts frequently will  
8 have inquiries about a case from clients. Those are documented,  
9 that would be recorded. Or analysts may, uh, write notes up to  
10 their supervisors asking for direction about a problem encountered  
11 in a particular case. That would documented. So, this is all  
12 case specific records of communication.

13 Q Okay. And do you regularly get that information?

14 A I do.

15 Q And how hard would it be to get?

16 A Making a Xerox copy, typically.

17 Q Would that, or should that be included under dash 2?

18 A Yes.

19 Q And it is critical to your analysis- -

20 A - -It is- -

21 Q - -or evaluation?

22 **DIRECT EXAMINATION OF MS. JANINE ARVIZU**

23 BY MR. ORR:

24 Q 28, please.

25

1           A     28 is a broadly written, sort of generic, cover  
2 everything that doesn't fit in any other category. It's a request  
3 for copies of bench notes, log books or any other records that  
4 relate to these samples. It's written broadly very intentionally  
5 because every laboratory calls, has a different naming convention  
6 in their individual laboratory for how they describe certain forms  
7 or certain data collection devices. This is an attempt to  
8 generically make sure we didn't miss anything.'

9           Q     So, if somebody said you asked for the green book and I  
10 gave you the blue book, or didn't give you a book because it was  
11 blue- -

12          A     - - Exactly- -

13          Q     - -and that happens?

14          A     It does happen.

15          Q     Okay. And should that be part of the litigation packet,  
16 as you've read it, under dash 2?

17          A     Yes, because it specifically relates to these samples  
18 and this work.

19          Q     Okay. And how hard should that be to get?

20          A     Making a copy. Or, in some cases, it's electronically,  
21 depending on the nature of their laboratory information management  
22 system.

23          Q     Which we would've found out on the 1<sup>st</sup> couple of  
24 (inaudible)?

25          A     Correct.

1 Q Okay.

2 **DIRECT EXAMINATION OF MS. JANINE ARVIZU**

3 BY MR. ORR:

4 Q Number 29?

5 A Okay, this is a really big one, um, and it's related to  
6 several that follow, so I'm just going to talk about it fairly  
7 gen, broadly. The, um, this is a request for documents of the,  
8 that demonstrate the traceabilities of the materials that we've  
9 used- -

10 Q - -Okay- -

11 A - -to do the testing.

12 Q Before you go any farther, that's a very big word.

13 A Yes.

14 Q What is traceability?

15 A Traceability is the ability to demonstrate, with an  
16 unbroken chain of, of measurements, a final result determined in  
17 this case back to the National Institute of Standards and  
18 Technologies, which is, it used to be called the National Bureau  
19 of Standards. Uh, now it's NIST and it is how scientifically we  
20 demonstrate the accuracy of our final results. And that's because  
21 we've heard a lot of talk about raw data and chromatograms, we've  
22 got a chromatogram, you've got, you showed me a chromatogram a few  
23 moments, here's a chromatogram of a known solution. And if that  
24 solution says, at the top, under sample ID, that it was .10 and

25

1 look, I got an answer of .10, that proves it's working, right?

2 Wrong. That's insufficient.

3 Q What do you mean?

4 A Because that was a raw data result that was generated  
5 from the instrument. When the analyst typed in the sample ID as  
6 .10, that means they, they prepared a vial that they think had .10  
7 in it and they ran it and they got the expected result. You'd  
8 think they'd be declaring victory and that would be an acceptable  
9 result. The problem is I can't just accept, scientifically, the  
10 fact that they think it was .10, it must be traceable. That means  
11 there should be records that document how they prepare that  
12 solution that went into that little bitty vial and what stock, or  
13 what concentrated solution they prepared it from and there should  
14 be individual lot numbers that relate all these things. If you  
15 start with a very concentrated solution, it has a lot number.  
16 Then when you prepare a more dilute solution, it has a different  
17 lot number. And then when you prepare a more dilute working  
18 solution, it has a different lot number. You should be able to  
19 trace these all the way back to a traceable reference material,  
20 certified reference material.

21 Q By Mr. Restek, or some of the external people?

22 A By NIST, Restek isn't in the same league as- -

23 Q - -By the National Institute of Standard- -

24 A - -Yes. It all has to go back to NIST. Even if it's  
25 prepared by Restek or Cerilliant (phonetic) or one of the other

1 reference material providers. And you got to be able to prove,  
2 and prove means produce the records to show the lot number, the  
3 number of the pipette that you used, the serial number of the  
4 pipette that you used, the calibration status of the pipette that  
5 you used, because it's every bit as important that that pipette  
6 was, was calibrated and verified, as it is that your GC was  
7 calibrated and verified. If you don't have it on every element,  
8 it's like the weak link in the chain. You can't simply assume it  
9 was acceptable, you have to have the records to demonstrate the  
10 traceability. The principle of traceability is just like when  
11 you, when you hear on the news that there's been a, um, a recall  
12 for E-Coli in hamburger. They can, they can tell because they  
13 have traceability documentation. They can tell that that bad lot  
14 of hamburger went to these grocery stores in these states and have  
15 this lot number of them. So, we can go check our refrigerators  
16 and see if we need to throw it away or not. Well, it's the same  
17 principle in the laboratory, that if there's a problem with a  
18 reference standard, you have to be able to trace it all the way.

19 Q Okay. And, from your understanding of 5, 1005-2, this  
20 should be part of that?

21 A Absolutely.

22 Q And was it, in this case?

23 A No.

24 Q In either of these cases?

25 A No.



1 Q Okay. Number 30. Oh, um, that information, obviously  
2 from what you've explained, is important to your analysis?

3 A Yes, it's essential. In the absence of that, it sort of  
4 a, well it's just trust me, we, we're pretty sure we calibrated it  
5 right and that we checked it right.

6 Q It's a wild guess?

7 A It's, it's unsupportable, scientifically, without this  
8 information.

9 Q Okay.

10 **DIRECT EXAMINATION OF MS. JANINE ARVIZU**

11 BY MR. ORR:

12 Q Uh, number, number 30, please.

13 A Um, number 30 is produce, uh, documentation of the  
14 laboratory's storage conditions for the standards and controls  
15 that were used. Remember, if we have the traceability  
16 documentation, we will know specifically which vial was used to  
17 run a known reference material. When, when you ran your .10 known  
18 sample, you'll know specifically which vial was used. But when  
19 you look at the, the certificate of analysis from those  
20 manufacturers, they spec conditions for the storage and use of  
21 that vial. They spec things like it has a shelf life that's good  
22 until 2014, oh, that's great, in its originally sealed condition,  
23 when it's stored under refrigeration, protected from light. So, as  
24 long as that little glass ampule is sealed, it's in the dark and  
25 it's refrigerated, then it's okay. But the problem is labs break

1 those seals. These are prepared in sterile conditions and there's  
2 no microbes, like there are, floating around in the air, right  
3 now. So, they're prepared in sterile conditions. The moment your  
4 break that seal, the shelf life goes from years to days. So, when  
5 you're using these materials, you have to document, not only the  
6 lot number and that it was stored under refrigeration and it's  
7 good until 2014, but also, and I opened that vial on this date and  
8 I used it on these dates. You can't just use it until 2014.  
9 It's, and the example that I give is, is the soy milk that's in my  
10 refrigerator right now. The soy milk has an expiration date  
11 that's a couple of months down, away. It's months, it's a long,  
12 long time. But it's only good 7 days from the time you open it.  
13 Well, people are spiking nasty things into your soy milk in your  
14 refrigerator at home, it's just being exposed to the air and the  
15 microbes in the air. These are biologically active materials.  
16 And so just by opening it up to the atmosphere, the shelf life  
17 drops precipitously. The same things happen with the reference  
18 materials that are used in the laboratory. So, even if the lab  
19 has documentation proving which of those little vial lot numbers  
20 they used, that's insufficient. They also have to be able to  
21 demonstrate that it was stored in the refrigerator for what period  
22 of time and then what date they actually opened it and used it.

23 Q And, obviously, very important to your analysis of the  
24 samples in these cases?

25 A Yes.

1 Q And we never received any of that?

2 A No.

3 Q And, um, in your interpretation of reading 5CCR1005-2,  
4 would that be included?

5 A Yes, it's related to the quantitation. It's the  
6 underlying record for the quantitation- -

7 Q - -So- -

8 A - -for calibration and controls, yes.

9 Q Okay.

10 **DIRECT EXAMINATION OF MS. JANINE ARVIZU**

11 BY MR. ORR:

12 Q Um, 31, what is it?

13 A Uh, produce copies of product inserts provided by  
14 manufacturers for purchase standards. Um, typically when they  
15 provide you, uh, with these materials, um, they provide those  
16 kinds of instructions that I've referred to: that it needs to be  
17 stored in the dark, under refrigeration and, um, the, it makes it  
18 very, very clear that the expiration date is, is for the unopened  
19 tube, not for the tube once it's been opened.

20 Q Okay. And back to 30 real quick, how hard would it be  
21 to get you that information?

22 A I'm sorry, I have to scroll back. 30 was, um, the  
23 storage conditions?

24 Q Yeah.

25

1           A     Um, I frequently get this electronically, if the  
2 laboratory has an electronic system for monitoring temperature in  
3 their refrigerators. If not, sometimes I'll get actual, uh,  
4 hardcopy printouts. But I get this routinely from labs.

5           Q     Okay. And, uh, 31, how hard would that be to get?

6           A     Uh, nothing more than making a Xerox.

7           Q     Okay. And would that be in your interpretation of, uh,  
8 the dash 2?

9           A     Um, if they've given me the lot numbers, I might be able  
10 to get copies of those myself, but, uh, in lieu of that, if they  
11 use a credible supplier, I can probably get copies. But if they,  
12 depending on what supplier they use, I might need to get them this  
13 way.

14          Q     Okay. So, it, it depends?

15          A     It depends.

16          Q     Okay.

17                           **DIRECT EXAMINATION OF MS. JANINE ARVIZU**

18 BY MR. ORR:

19          Q     Number 32. What is it and why is it important?

20          A     Um, these, this is asking for records documenting,  
21 contemporaneous records documenting all the solutions that they've  
22 prepared. So, that's who actually prepared the calibration  
23 solution that was used to ultimately analyze the instrument. Who,  
24 because the, um, the accuracy of that solution defines essentially  
25 the accuracy of the final results. So, who prepared it, when did

1 they prepare it, using what materials? So, that's the actual, the  
2 analyst who's, who's doing the quantitative volumetric work or  
3 (inaudible) work to prepare those solutions should be making a  
4 record of which analytical balance they used or which pipette they  
5 used and which lot number they used, um, at the time they're doing  
6 it. You should never have to rely on anybody's memory of which,  
7 which one of these 9 digit lot numbers did they use 2 years ago on  
8 Tuesday. You should never have to rely on memory. That should  
9 always be con, uh, recorded contemporaneously.

10 Q And how hard are these to, to get?

11 A Um, they're either a Xerox copy of a form, which is the  
12 predominate means or a couple of labs actually have that available  
13 electronically.

14 Q Okay. And they're crucial and relevant- -

15 A - -They are- -

16 Q - -material to our, to our looking at the lab?

17 A They are, for the quantitation and the qualitative  
18 identification.

19 Q Okay. And that's 32?

20 A Yes.

21 **DIRECT EXAMINATION OF MS. JANINE ARVIZU**

22 BY MR. ORR:

23 Q Uh, 33.

24 A 33 is records documenting that you've verified these  
25 solutions after you prepared them, or after you bought them. You

1 have to verify them by testing them before you use them in a  
2 batch, analyzing unknowns. These are records proving that  
3 verification. One of the earlier requests asked for their  
4 procedure for how they verified solutions. This actually asks for  
5 the records resulting from the verification. Prove that that was  
6 a .10 solution before you use it in analyzing my unknown samples.

7 Q Okay. And, um, would that be considered part of a  
8 litigation packet, the way the State has it written there?

9 A Yes.

10 Q Okay. How about number 32?

11 THE COURT: Did she say yes?

12 WITNESS: Yes.

13 Q (by Mr. Orr) And 32, I didn't ask you the question, so  
14 I need to go back and ask you that.

15 A Oh, okay. Um, yes it is, sorry.

16 Q Okay. Um, and that's material information that would be  
17 relevant in analyzing- -

18 A - -It's foundational to whether or not the, the  
19 reference materials that they used were of acceptable quality.

20 **DIRECT EXAMINATION OF MS. JANINE ARVIZU**

21 BY MR. ORR:

22 Q What is number 34?

23 A Number 34 is all records relating to calibration of the  
24 instrument. That's essentially when the analyst teaches the  
25 instrument, how much ethanol gives how much of a, a response.

1 And, um, so this requests all of the calibration records related  
2 to this case. Sometimes, those are included with batch records  
3 and sometimes they're not, that's why it's asked for specifically.

4 Q And would that be part of dash 2?

5 A Absolutely.

6 Q Okay. Um, you said something interesting in that last  
7 paragraph. It was teaches the gas chromatograph. What do you  
8 mean by that?

9 A Um, the instruments are, in some regards, kind of  
10 stupid. They're not making an, uh, a direct measurement like, um,  
11 an, a balance, where you are weighing something and it gives you a  
12 response in that manner. The only way an instrument, or a GC,  
13 understands and is able to give information about quantity is if  
14 you, the analyst, teach that instrument how, what kind of signal  
15 gives what kind of response. So, we run what's called a  
16 calibration curve by running a series of samples at different  
17 concentrations and measuring the instrument's response at those  
18 different concentrations. If, if life is good, and in this  
19 particular kind of an assay, it typically gives a linear response.  
20 And so you can actually draw a line, and that should be a  
21 requirement of their procedure, that they actually specify,  
22 quantitatively, how good that line has to be for an acceptable  
23 calibration curve. And that way you can interpolate or, even if  
24 you get a signal that's between 2 of those standards that you run,  
25

1 you can derive an actual concentration. And I'd have to draw  
2 pictures to do it any better than that, but- -

3 Q - -No, that's fine- -

4 A - -it's basically just teaching the instrument how much  
5 ethanol gives you how much of a response.

6 Q Okay. So, it's the yardstick?

7 A It's the yardstick, but remember, we had to prepare the  
8 solutions that we injected into the instrument, so the quality of  
9 those matter too.

10 Q And is that part of, uh, the litigation packet?

11 A It is, that's essential to the, uh, quantitation.

12 Q So, under dash 2, you've got- -

13 A - -Yes- -

14 Q - - quantitation?

15 A Yes.

16 Q Okay.

17 **DIRECT EXAMINATION OF MS. JANINE ARVIZU**

18 BY MR. ORR:

19 Q 35. What is it?

20 A 35 requests their pipetter calibration and verification  
21 records, or the instrument used to prepare these samples. The  
22 technique that this lab uses, and frankly that's used by labs all  
23 over the country, very successfully, is an internal standard  
24 technique. Where a small, consistent volume of sample is added to  
25 a vial with a larger quantity of an internal standard. Then



1 that's the sample that actually gets tested by the instrument, or  
2 the headspace of that sample actually gets tested by the  
3 instrument. Because of that practice, it's absolutely essential  
4 that you add exactly, precisely the same volume to sample to every  
5 standard, to every sample, to every vial, and the same volume of  
6 internal standard to every vial. If those volumetric  
7 measurements, measuring the quantity of that liquid, are off, your  
8 final results will be off correspondingly.

9 Q Okay.

10 A So, it's- -

11 Q - -And if a lab- -

12 A - -real important.

13 Q And if a lab says they had 1,700 of these tests with bad  
14 pipetting, that would something a quality assurance, quality  
15 control person would find material?

16 A Oh, certainly.

17 Q And relevant?

18 A Certainly.

19 Q And is this something that should be in the litigation  
20 packet?

21 A Yes.

22 Q Okay. And that's under the interpretation of 5CCR1005-  
23 2?

24 A Correct.

25

1                                   **DIRECT EXAMINATION OF MS. JANINE ARVIZU**

2 BY MR. ORR:

3           Q     Number 36. What is it?

4           A     Um, 36 requests information about their maintenance logs  
5 for their instruments. These are, um, maintenance or repair logs  
6 for all the instruments that are used. One is the GC, another is  
7 the pipetter diluter, which is also considered an instrument  
8 because it's a measurement device, essentially. Um, and we're  
9 trying to understand the, the reliability of the performance of  
10 that device. Was it subject to frequent, unexplained breakdowns,  
11 that kind of thing.

12          Q     And I have a little sheet here that you marked LP next  
13 to a bunch of things, saying that they should be in the State's  
14 litigation packet. This one doesn't have an LP next to it. Um,  
15 but would it be important to your analysis for whether it's  
16 relevant or material in these cases, that information?

17          A     Certainly it's important because frequently what happens  
18 with instrumentation is you don't realize you had a problem until  
19 after the fact. So, a, a problem with an instrument may not show  
20 up or be, be recognized by the laboratory until days after the  
21 testing. That's why you need the records surrounding the period  
22 of testing.

23          Q     And just, and, uh, production labs like this one could  
24 go through hundreds of cases at that point? Hundreds of tests?

25          A     Uh, that's happened, yes.

1 Q Okay.

2 **DIRECT EXAMINATION OF MS. JANINE ARVIZU**

3 BY MR. ORR:

4 Q Um, number 37.

5 A Um, number 37 relates to analytical balance calibration  
6 and verification. For exactly the same reason we need calibration  
7 information on their pipetter, we need balance information,  
8 balance calibration information if they prepare their standards  
9 with an analytical balance. Labs can do it either way. They can  
10 either do it gravimetrically, using an analytical balance or a  
11 scale, or they can use it vol, do it volumetrically using  
12 pipettes. I don't know which way they did it, but whichever way  
13 they did it, we need the corresponding calibration verification  
14 information to insure that their solutions were correct, be, that  
15 the instruments that they relied on were operating within  
16 statistical control at the time that they were used. So, this is,  
17 if this says relevant to any balance used in support of blood  
18 alcohol testing, if they have balances they're not using for blood  
19 alcohol, I don't care. This really only relates to balances used  
20 in support of, of the blood alcohol testing.

21 Q Okay, what about mass spec? Because we have mass spec  
22 in these 2 cases.

23 A Same argument. If a balance is used to prepare those  
24 analytical standards, then it would need to be provided.

25

1 Q Okay. And you said we don't know which one we used, but  
2 we covered that on the 1<sup>st</sup> half dozen, what kind of standards are  
3 you using, what protocols are you using. The balance would be  
4 listed in the practices (inaudible)- -

5 A - -Correct.

6 Q And we talked about that on page 1 and 2?

7 A Correct.

8 Q Okay. Uh, how hard would this be to get information  
9 (inaudible)?

10 A Um, this is very straightforward. I get this routinely.  
11 Uh, it, they typically have their analytical balances calibrated  
12 by an external provider once a year and they get a certificate  
13 from those providers and that information can just be copied and  
14 sent on. And then they have, typically, checks performed within  
15 the laboratory on a routine basis and those are available most  
16 commonly by forms.

17 Q And under your interpretation in reading of 5CCR1001-2,  
18 would that, should that be part of the litigation packet?

19 A It should.

20 Q Okay.

21 **DIRECT EXAMINATION OF MS. JANINE ARVIZU**

22 BY MR. ORR:

23 Q What is number 38?

24 A Um, 38? 38 is the, um, instrument run log for the  
25 batch. I've made several references to batch over the course of

1 my testimony. When we run these samples, when we ran the samples  
2 in this case, it wasn't just a case of taking that one sample and,  
3 and injecting it to the instrument. These are run as a batch,  
4 it's a production operation. So, there may have been dozens and  
5 dozens of samples in a, and I don't remember, but I think there  
6 were quite a few in this particular case, that are run at the same  
7 contemporaneously in a given batch. And the instrument run log  
8 essentially describes, sequentially, how those samples were  
9 prepared and how they were analyzed. The reason that that's  
10 important is because things like contamination that can happen  
11 effect things that are close in time and space. So, if you have 2  
12 samples that are prepared in sequence, they can be an issue, with  
13 respect to contamination. Or if you have 2 samples that are  
14 injected into the instrument, side by side, there can a  
15 possibility of carryover. So, the injection log, or the run log,  
16 it's called a variety of things, tells you the sequence that the  
17 entire batch happened. What's also very, very important for a  
18 batch is that batch have, happened without any interruption or  
19 without any changes, without changing conditions because I can  
20 only interpret my unknown samples if every sample in the batch  
21 experiences the same conditions. So, I can't stop the batch in  
22 the middle of the run and fiddle around with the instrument or  
23 tweak things or change operating conditions and then continue on  
24 with the rest of the batch. That invalidates the batch.

25

1 Q That invalidates it. And there are usually about 100  
2 vials running- -

3 A - -Lots and lots. Dozens and dozens, yes, of vials.  
4 And so the injection log, or essentially describes the sequence.  
5 So, you can see, because there's an injection time associated with  
6 each of those samples, you can see whether that run is being  
7 interrupted.

8 Q Okay. And, under your reading of dash 2, that should be  
9 involved in, to be available to us in every one of the cases?

10 A Yes, I would certainly expect that to be available.

11 Q Okay. And how hard is it to get that information?

12 A Uh, it's generally routinely part of the, um, materials  
13 that are printed by the analysts associated with each batch.

14 Q And in your analysis, this is materially relevant  
15 information?

16 A Yes, it is.

17 **DIRECT EXAMINATION OF MS. JANINE ARVIZU**

18 BY MR. ORR:

19 Q What is number 39?

20 A Um, 39 and 40 are related. 39 is essentially the hard  
21 copy and 40 is the electronic copy of the data from this batch.

22 Q I, I think the Court is going to order the raw data in  
23 this case.

24 A Okay.

25

1           Q     Can we just go through, for the record, very quickly,  
2 what is the 39, 39 and 40 and why are they important, why are they  
3 relevant (inaudible)?

4           A     Okay. Um, when you're talking about raw data, you'll  
5 see that this also, um, speaks to, um, let's see, results for all  
6 calibration quality control and unknown samples, including all  
7 data excluded or not reported by the analyst. That's very  
8 important because sometimes what happens is, uh, a sample is run.  
9 For whatever reason, there's a quality control failure and it's  
10 rejected and the sample get rerun. The potential for cross, for  
11 problems increases with each successive running. Um, so you want  
12 to know is it the 1<sup>st</sup> time, if there were quality control failures,  
13 what was the origin of those, how was it fixed before my sample  
14 was run again. Um, so you want also both raw and processed data  
15 because, as we've also heard, there are a lot of, there's a lot of  
16 potential in the analytical arena with these instruments, with the  
17 software that you're given, to manipulate the data. And I don't  
18 mean that in a negative way. It's perfectly acceptable for  
19 analytical chemists to manipulate data in a way that makes it more  
20 meaningful or more useful. But it can also be manipulated in an  
21 adverse manner and in a manner that tends to obscure information.  
22 And so we want both the raw data, the raw, unprocessed electronic  
23 data to determine whether or not that is happening. There are  
24 things you can do, for example, analytically, to alter the base  
25 line, to make it look cleaner, to, but that has the net effect of

1 obscuring information. Uh, there are, there are offsets that you  
2 can apply. There are noise corrections that you can apply. So,  
3 those kinds of things, this simply gives us an idea of what the  
4 raw data looked like. What kinds of manipulations had to be done  
5 by the analyst to get the clean chromatograms that are ultimately  
6 reported? It, there's not anything inherently wrong with  
7 manipulating data as long as it's documented in technically  
8 appropriate.

9 Q And you've heard, (inaudible) read, things about them  
10 using Post-It notes. Post-It notes would fall underneath this  
11 process?

12 A Yeah. Post-It notes and White-Out are the enemy of the  
13 analytical laboratory. They should never be used.

14 Q Okay. Um, and this is all material and relevant to the  
15 cases in front of us?

16 A Yes, very much so.

17 Q And, um, should be readily available?

18 A Uh, or you shouldn't be reporting results.

19 Q Okay. Um, and this, in your interpretation, should be  
20 part of 5CCR1005-2?

21 A Certainly, as I interpret it, yes.

22 Q Okay. And under what section in that, in dash 2,  
23 (inaudible)?

24 A Um, I don't have that in front of me. Just a moment.

25 THE COURT: Do you want mine?



1 MR. ORR: Yeah, thank you, Your Honor.

2 A Thank you. Uh, it should include not just the raw data.

3 Q Okay. So then the worksheets and all that- -

4 A - -Yes- -

5 Q - -information is what we're talking about? Okay.

6 WITNESS: Thank you, sir.

7 **DIRECT EXAMINATION OF MS. JANINE ARVIZU**

8 BY MR. ORR:

9 Q Uh, number 41, please.

10 A Uh, 41, produce any internal investigations or quality  
11 assurance system reviews in 2010, '11 and '12, including, but not  
12 limited to, reports of inaccurate blood test results.

13 Q Okay.

14 A Um, the subsequent ones, these ones at the very end of  
15 the list here, deal primarily with the fact that this laboratory  
16 in particular is recognized as having some very serious quality  
17 control problems that directly influenced the quality of the  
18 results reported by the laboratory. But those were not identified  
19 internally by the laboratory, based on their own internal quality  
20 control system, but it was brought to their attention essentially  
21 by external testing, uh, which is disappointing. You'd like a  
22 laboratory to be able to recognize their own problems. Um, so  
23 this is an attempt to try to capture all the information, the  
24 contemporaneous records of how the laboratory dealt with, um, that

25

1 problem and whether there were any other similar kinds of  
2 investigations going on in the laboratory during this period.

3 Q Okay. And we asked for that in the overview of the lab  
4 earlier, correct?

5 A Correct.

6 Q And we found out we had never got the American Board of  
7 Forensic Toxicology denial for certification?

8 A Correct.

9 Q And that would also fall into these communication, isn't  
10 it?

11 A Yes.

12 Q Okay.

13 A That, specifically, like number 42, communication  
14 between the laboratory and other accrediting agencies- -

15 Q - -Would you walk, and I mean briefly, through 41  
16 through where- -

17 A - -Okay- -

18 Q - -this generality stops.

19 A Okay, that was 41.

20 **DIRECT EXAMINATION OF MS. JANINE ARVIZU**

21 BY MR. ORR:

22 Q 42 requests information between the laboratory and any  
23 accrediting agencies concerning their quality assurance systems.  
24 Um, that clearly would have called for the ABFT report, which I  
25 somehow got otherwise, I don't know, but I have read it- -

1 Q --(Inaudible), we got it?

2 A Yeah, I assume so. Those are generally not difficult to  
3 get.

4 Q No.

5 A Um, but that's clearly the kind of the information being  
6 requested. Number 43 requests communication between the  
7 laboratory and agencies concerning any of these, either internal  
8 or external investigations. When a laboratory has problems of the  
9 severity experienced by this laboratory, that generally  
10 precipitates very direct and very timely communication with your  
11 accrediting ag, agency to inform them of the problem and what  
12 you're doing to address it. And we were looking for that type of  
13 communication.

14 Q The corrective action that was- -

15 A - - Corrective action- -

16 Q --(inaudible) and what was done?

17 A Yeah, because what you're looking for is, uh, the scope  
18 of the problem, the depth and breadth of the problem, the  
19 potentially other impacted, um, users of laboratory data. But  
20 most importantly, the root cause analysis of the problem. And on  
21 the analytical laboratory, um, many problems that are, that are  
22 essentially attributed to, to rogue analysts or analysts' failure  
23 often have their underlying root causes in the scope and ethicisy  
24 of the laboratory's quality system. So, this is an attempt to try

25

1 to understand whether the lab is, is doing a very robust and  
2 effective investigation of their problems.

3 Q Okay, and what number are you on, for (inaudible)- -

4 A - -Uh, number 44 is, um, a request for the inaccurate  
5 blood tests, um, reported by the laboratory during a period of  
6 time that are recognized by the lab as having been in - -

7 Q - -Okay, and- -

8 A - -important- -

9 Q - - now received in- -

10 THE COURT: - - Wait a second. Give me a second.

11 (Recess)

12 THE COURT: Back on the record. We're going to side  
13 issue right now, go ahead.

14 Q (by Mr. Orr) Um, in regards to, the State has produced  
15 a, uh, Excel spreadsheet of, I'm assuming all, but some of the  
16 mis-tests that Mr. Mitchell Fox-Rivera had done, but that's not  
17 what we're looking for, we're looking for systemic issue here with  
18 the lab. I want to know what Kimberly, if there were mis-tests by  
19 Kimberly Stevens, by Monty DePlama (phonetic), by any lab analyst,  
20 by Cindy Burbach, because all of that leads down to the quality  
21 assurance, quality control portions of this. Ms. Arvizu, could  
22 you, am I right about what I'm saying?

23 A Yeah. I'm interested in, in any result that the  
24 laboratory reported and subsequently recognized that it was an  
25 error, regardless of the analyst, I don't attribute them to

1 individual analysts, it's just a failure of the laboratory's  
2 system to recognize that it was in error before it was reported.

3 Q Okay.

4 THE COURT: Am I understanding that in part of the  
5 reports there, out of all those tests that were done, there were  
6 like 10 or some odd, I remember hearing that at the hearing.

7 MR. ORR: There was 140 plus tests that were done that  
8 were lower than MFR's orig- -Mitchell Fox-Rivera's original tests.  
9 I don't remember the exact number because it was being (inaudible)  
10 around the office.

11 MR. OPFER: I'll just get my copy. May I approach, Your  
12 Honor?

13 THE COURT: Sure.

14 MR. ORR: There you go. And of these retests, um, a  
15 substantial number came back down below and in many cases, or in a  
16 couple of our cases I should say, I want to speak from true  
17 knowledge, came back below- -

18 THE COURT: - -Well, this is what I have- -

19 MR. ORR: - -jailable, notailable.

20 THE COURT: Okay, let me have it. This is the  
21 spreadsheet that he got?

22 MR. OPFER: Yes.

23 THE COURT: Okay. I just- -

24 MR. ORR: - -and that is the Mitchell Fox-Rivera mis-  
25 tests.

1 THE COURT: Okay.

2 MR. ORR: So, we know they track them.

3 MR. OPFER: You, you can keep it, if you want, Your  
4 Honor. I- -

5 MR. ORR: - -Your Honor, yeah, we can add that to the  
6 record. Um, we know that they track them. So, we want them for  
7 the lab because it will show the systemic problem that we're  
8 talking about here. They, they're saying that, the lab is saying  
9 it's just that, it's just this one guy when, in fact, and let me  
10 ask you, because you used the word rogue analyst, does this happen  
11 across the country?

12 A Sadly, yes.

13 Q (by Mr. Orr) Please- -

14 A - -It's- -

15 Q - -elaborate.

16 A Um, it's, it's a sad commentary on science, I guess, in  
17 some regards. But when you try to do science on a production  
18 line, it's, it's a challenge and there have been, for decades now,  
19 there have been situations in labs across the country where you've  
20 had either incompetent analysts or, and I'm not saying this in a  
21 legal sense, but fraudulent analysis who cheated, who reported  
22 results that they hadn't, where they hadn't analyzed the samples  
23 or they altered quality control results to make it look like  
24 everything was good when in fact it wasn't. Um, that kind of, of  
25 situation has been recognized in the analytical community for

1 decades and is only apparently recently becoming as visible in the  
2 field of forensics. Uh, it's sadly too common and it's something  
3 that every lab's quality control system needs to recognize and  
4 build in.

5 Q Even our greatest labs in the country have these  
6 problems, like the FBI, is that correct?

7 A Uh, I will agree that the FBI has certainly had, um, a,  
8 a number of these problems over the years, in a number of  
9 different sections of the laboratory, that's very much the case.

10 Q And what number are we on right now? 45?

11 THE COURT: We're on 44.

12 A I'm sorry, I just lost my battery.

13 THE COURT: You're on 44.

14 MR. ORR: It's okay. Your Honor, at this time, um- -

15 THE COURT: - -Do you need- -

16 MR. ORR: - -the People have asked us to take a break.

17 THE COURT: Okay. Well, there's a plug over there.

18 MR. ORR: Yeah. We're going to charge her up - -

19 WITNESS: - - I'll do that- -

20 MR. ORR: - -right now, Your Honor.

21 MR. OPFER: It's my understanding, Your Honor, we have a  
22 couple of cases- -

23 THE COURT: - -For the record, I'm going to take a brief  
24 break from this hearing and hear 12T6739.

25 (Court addresses other cases from 2:32:57 until 2:49:25)

1 THE COURT: We're back on the record on, uh, Dunbar and  
2 Poplstein again. Go ahead, and Ms. Arvizu is still on the stand  
3 when we ended it. We were talking about question 44, is the last  
4 one, about litigation packet etcetera and (inaudible). Okay,  
5 that's what we were talking about.

6 MR. ORR: Thank you.

7 **DIRECT EXAMINATION OF MS. JANINE ARVIZU**

8 BY MR. ORR:

9 Q Okay, what is number 45?

10 A Uh, number 45 requests a copy of any communication  
11 records between the laboratory and either the DA's Office, or any  
12 other external agency, concerning inaccurate blood alcohol  
13 results.

14 Q Okay, and in this case, in these cases we haven't  
15 necessarily received the letter from Cindy Burbach to Chris Houser  
16 at CDAC saying if any of your Deputy District Attorneys have  
17 problems with their blood tests, or they're tested by Mitchell  
18 Fox, that they need to be brought to our attention to be retested.  
19 I don't recall if we got them in this case, these cases, but that  
20 type of information is very important to an analysis, isn't it?

21 A Yes.

22 Q Okay- -

23 A - -Certainly for all those affected samples.

24 Q Okay. And would that be part of the litigation packet?

25 A No.



1 Q Okay. And so, would this information be material and  
2 relevant?

3 A Uh, certainly.

4 **DIRECT EXAMINATION OF MS. JANINE ARVIZU**

5 BY MR. ORR:

6 Q What is number 46?

7 A 46 requests any communication between the laboratory and  
8 its supplier of analytical instrumentation. Agilent Technologies  
9 is a, the company that manufactures the GCs used in the laboratory  
10 and specifically what the objective is there is to address, um,  
11 any performance issues that the laboratory has been having with  
12 their instrument.

13 Q Okay. And, um, possibly any corrections that Agilent  
14 made?

15 A Correct.

16 Q Okay. And Agilent is an open scientific company?

17 A Yes.

18 Q Okay- -

19 A - -One of the largest.

20 Q And if the District Attorney wanted this information, it  
21 would be very easy for them to get, or the lab wanted to get this  
22 information?

23 A I would presume that the laboratory keeps a  
24 correspondence record of all external correspondence, yes.

25

1 Q Okay. And that would be material and relevant to our  
2 analysis in these cases?

3 A It may, in the event that it identifies issues that are  
4 relevant for this machine- -

5 Q - -Okay- -

6 A - -for this instrument.

7 Q And that would not be necessarily part of dash 2?

8 A Correct.

9 **DIRECT EXAMINATION OF MS. JANINE ARVIZU**

10 BY MR. ORR:

11 Q 47 is, oh, long. Could you please explain what 47 is?

12 A This is just a next level of detail for any of the  
13 inaccurate blood test results in, in addition to identifying them,  
14 it asks for specific information, um, regarding the individuals  
15 who, um, handled those samples for the, uh, inaccurate results.  
16 So, this one is sort of a subset of the inaccurate result item  
17 previously.

18 Q Okay. And we still haven't received any other  
19 inaccurate tests, other than the list that is supposedly inclusive  
20 of the Mitchell Fox-Rivera- -

21 A - -Correct, that's just a list. It's not all this kind  
22 of supporting information.

23 Q Okay, but that list does show us that they keep those  
24 information?

25 A At that level, yes.

1 Q Okay. Um, anything else for 47?

2 A No.

3 Q And would that be part of dash 2?

4 A No.

5 Q Okay.

6 **DIRECT EXAMINATION OF MS. JANINE ARVIZU**

7 BY MR. ORR:

8 Q 48.

9 A Uh, 48 asks for all records regarding corrective action,  
10 um, related to the investigation involving Mr. Fox-Rivera. And  
11 the reason that's important is because at this point, uh, frankly,  
12 from trying to follow it and understand the scope of the problem  
13 from the materials we've seen, you can't really understand what,  
14 don't know the basis for the laboratory's attributing it a, an  
15 individual analyst's error or the nature of that specific error.  
16 Um, there should be, um, some evidence that led them to that  
17 conclusion, but that has not ever been disclosed or described in  
18 any of the correspondence that we've been able to read. So, this  
19 asks for the lab's internal records of their investigation, their  
20 corrective action. How did they determine that the scope was  
21 limited just to Mr. Fox-Rivera for, for that period of time on  
22 those instruments and there, there had to be an objective basis  
23 for that, but we don't know what that was.

24

25

1 Q Okay. And that information would be material and  
2 relevant to whether or not these tests were valid or whether the  
3 corrective action (inaudible)?

4 A Yes, whether they really identified the root cause of  
5 the problem, or took the easy answer out and just say it must've  
6 been a mistake by an analyst.

7 Q Okay. And you've seen this across the country, where  
8 they just blame an analyst and then later it comes back and bites  
9 them?

10 A Yes.

11 **DIRECT EXAMINATION OF MS. JANINE ARVIZU**

12 BY MR. ORR:

13 Q Uh, number 49. What is number 49?

14 A Um, 49 asks for any records of, regarding performance  
15 reviews or reports involving the analyst in this case, as well as  
16 any records of responses by him or his representative. And  
17 specifically, that's, um, did they do performance reviews? This  
18 was a relatively recently hired individual. Typically, there are  
19 very frequent assessments of newly hired analysts in a laboratory  
20 to monitor their progress and their performance, uh, and those are  
21 documented. So, this requests a copy of that information to  
22 understand how did the lab even decide that he was qualified to do  
23 analysis independently and how did they monitor his performance  
24 once he began to work. And so we're looking for what the basics  
25 of the lab are, in regards to training, uh, people like Mitchell

1 Fox and then looking back at it as a problem we've seen at least  
2 1,700 on, to see what the problem in their training?

3 A Right, it's not just training, it's also how they  
4 actually, the basis for the qualification determination and for  
5 monitoring their performance after they're a fully qualified  
6 analyst.

7 Q Okay.

8 **DIRECT EXAMINATION OF MS. JANINE ARVIZU**

9 BY MR. ORR:

10 Q What is number 50?

11 A Um, number 50 is, request any correspondence with  
12 agencies or organizations regarding certification, accreditation  
13 or, um, any agency to which they've applied for such  
14 accreditation, reporting the mistakes. This relates to, if you're  
15 in the process of pursuing accreditation or pursuing  
16 certification, this type of failure in this case, with Mr. Rivera,  
17 is an example of the type of thing that would have to be reported  
18 and described, and they would expect a very complete description  
19 of your investigation of the scope and the breadth of that  
20 problem.

21 Q And that goes to the Department of Health in this case,  
22 correct?

23 A Correct.

24 Q Okay. And we weren't provided that in this packet, in  
25 this case?

1 A No.

2 Q And should that be part of the litigation packet?

3 A No.

4 **DIRECT EXAMINATION OF MS. JANINE ARVIZU**

5 BY MR. ORR:

6 Q Number 51.

7 A Produce any protocol of the lab for informing  
8 prosecutors or defense counsel in individual cases when lab errors  
9 are detected. Under national and international quality standards,  
10 whenever a laboratory identifies a problem that may have affected  
11 a reported result, not that necessarily did, but that it may have,  
12 it's incumbent on the lab to have a procedure in place for  
13 informing their clients and the users of their results, as to the  
14 nature of that problem.

15 Q Okay. And, um, if the lab received a amount of blood  
16 less than 3 milligram, micro-liters, milliliters- -

17 A - -Milliliters.

18 Q Milliliters, thank you. I'm doing double (inaudible) in  
19 my head. Milliliters, um, they should have that processed and  
20 inform the District Attorney that they had a problem, or the  
21 Defense?

22 A Um, the actual criterion for a blood collection tube,  
23 for one of these tubes, is 10 plus or minus 0.7 milliliters- -

24 Q - -Okay- -

25

1           A     --so it's the, the nominal range is 9.3 to 10.7  
2 milliliters. As long as you collect within that range, it's  
3 deemed acceptable. The tube manufacturers put out a sheet that  
4 explains that if you have less than that, an under fill, less than  
5 9.3 milliliters, then it may lead to unreliable results.

6           Q     Okay. And that type of information should be, under  
7 this 51, communicated to the District Attorney's Office or- -

8           A     --That is exactly the kind of information. Receipt of  
9 a sample that does not meet specs is the kind of information that  
10 you should inform clients about.

11          Q     Okay. And all of the information we are seeking from  
12 these cases should be readily available to the lab?

13          A     Um, yes. If their quality systems require the  
14 generation of these records, they should be very readily  
15 available.

16          Q     And all this information is material and relevant to,  
17 uh, our 2 cases today?

18          A     I believe so, yes.

19               MR. ORR: If I may have a moment, Your Honor?

20               THE COURT: Uh-huh, you may.

21               MR. ORR: At this time, I have no further questions for  
22 Ms. Arvizu.

23               THE COURT: Mr. Opfer?

24               MR. OPFER: No, Your Honor.

25               THE COURT: Okay.

1 MR. OPFER: I want to, I (inaudible)?

2 THE COURT: Sure.

3 CROSS EXAMINATION OF MS. JANINE ARVIZU

4 BY MR. OPFER:

5 Q Yes, Ms. Arvizu, I think the only question, uh, that I  
6 have for you is when you're referring to national and  
7 international standards, what specific standards are you referring  
8 to?

9 A Um, the most commonly used ones in this particular  
10 discipline are the ASCLD-Lab standards - -

11 THE COURT: - -Do me a favor- -

12 A - -A-S-C-L-D dash- -

13 THE COURT: - -A-F- -

14 WITNESS: - -I'm sorry, A-S, American Society of Crime  
15 Laboratory Directors- -

16 THE COURT: - -A-S- -

17 WITNESS: - -A-S-C-L-D- -

18 THE COURT: - -C-L-V?

19 WITNESS: D.

20 THE COURT: D.

21 WITNESS: Dash L-A-B.

22 THE COURT: L-A-B. And that stands for what?

23 WITNESS: American Society of Crime Laboratory  
24 Directors- -

25 THE COURT: - -So, it's A-S-C-L-D?



1 WITNESS: Yes.

2 THE COURT: Oh, A-S.

3 WITNESS: And it does not suit oral pronunciation.

4 THE COURT: (Inaudible) American, I got Crime- -

5 WITNESS: - -And it's Laboratory Accreditation Bureau,  
6 um, or board.

7 A Um, the other is ISO, I-S-O 17025. That's the  
8 international standard for testing laboratories, general  
9 requirements for the competence of testing laboratories. It's  
10 applicable to everything from an environmental lab, to a food lab,  
11 to a forensic lab. Um, the other consensus standard is the, are  
12 the SOFT guidelines, S-O-F-T, Society of Forensic Toxicology,  
13 jointly released with the American Academy of Forensic Sciences.  
14 And I believe that was published in 2006.

15 MR. OPFER: Nothing else, Your Honor.

16 MR. ORR: Just a quick follow up, Your Honor, for the,  
17 for clarification.

18 **REDIRECT EXAMINATION OF MS. JANINE ARVIZU**

19 BY MR. ORR:

20 Q So, ASCLD is pretty much the standard for blood testing  
21 nationwide?

22 A No, ASCLD is a much more general program for  
23 accreditation of forensic laboratories and it has moved away from  
24 their own in-house document. Now, it relies on ISO17025, which  
25 the other one I referred to- -

1 Q - -Okay- -

2 A - -Um, and it's, it's not specific to blood alcohol. It  
3 won't talk about blood alcohol for example. The SOFT guidelines,  
4 the Society of Forensic Toxicology guidelines that I referred to,  
5 those are specific, uh, to forensic toxicology. So, they actually  
6 address blood alcohol determination specifically.

7 Q And we talked a little bit about the ABFT accreditation-  
8 -

9 A - -Uh-huh- -

10 Q - -Is that under SOFT or is that, what is that?

11 A American Board of Forensic Toxicology, I believe. I'm  
12 not sure if ology or ologists or, yeah. Um, that's a, a third  
13 party accrediting organization.

14 Q That uses one of these 2 standards above?

15 A They, they have their own guidelines that, they have a  
16 checklist themselves that they publish and, and, uh, evaluate labs  
17 in relation to.

18 Q Okay. And we were asking about whether or not they've  
19 applied or, um, been turned down by, throughout our discovery  
20 requests, and that's because these guys will independently look at  
21 stuff and either fail them or approve them, is that correct?

22 A Yeah, there's a, they have their own process, they have  
23 their own, uh, checklist that they evaluate and we have a copy of  
24 one of their reports.

25 Q Thank you.

1 MR. ORR: Uh, no further questions for this witness.

2 MR. OPFER: Nothing, Your Honor.

3 THE COURT: Okay, my understanding, basically, a lot of  
4 what People are standing on is the, the information and the  
5 position taken by the, uh, People in the Jeffco case, am I  
6 correct?

7 MR. OPFER: Yes, Your Honor, and I'd be happy to  
8 supplement, uh, the argument, although it is Defense Counsel's  
9 motion at this point, so.

10 THE COURT: Okay. Um, I guess Ms. Arvizu may step down  
11 and she'll make her (inaudible).

12 MR. ORR: Yes, yes, Your Honor. I believe Mr. Gillum is  
13 going to address the (inaudible).

14 MR. GILLUM: Um, Judge, if I may, um, I didn't know  
15 until today that the People would be filing the, the response that  
16 was filed in Jefferson County in these 2 cases. I do have a  
17 brief, it's like a 3 or 4 page reply to the People's response. I,  
18 uh, if the Court would allow, I'll file that in the next couple of  
19 days.

20 THE COURT: Sure.

21 MR. GILLUM: Stand on the record on, on our argument.

22 THE COURT: And I've got some other questions too, once  
23 Ms. Arvizu steps down.

24 MR. ORR: Yes, Your Honor?

25

1 THE COURT: Well, once I step down, I'm just trying to  
2 figure out what I'm doing. (Inaudible) both of the arguments.  
3 She's not testifying, right? So, she's free to go or do whatever  
4 she needs to do.

5 MR. ORR: Thank you, Your Honor, I, but her ride will  
6 probably be here for a little bit longer.

7 THE COURT: Okay, all right. Well, my understanding is  
8 we are, I'll follow my notes, because I have more notes than I  
9 have paper, um, is the fact that we come down to still what is  
10 mandatory versus discretionary by this Court, pursuant to rule 16,  
11 am I correct?

12 MR. OPFER: Yes, Your Honor.

13 THE COURT: Let me ask you, and here's a problem, I'm  
14 just going to interject in here, because I like to do that  
15 occasionally. Do I need Ms. Burbach to be here? Because what I'm  
16 trying to figure out is when we're all talking about it, I clearly  
17 understand the issue. Um, your issue is basically from the  
18 questions of Ms. Arvizu, the litigation package request that the  
19 Court is going to order like, in the past has ordered, uh, plus,  
20 and I have a copy of Judge, um, Vahle's, uh, order dated, uh,  
21 October 3<sup>rd</sup>, 2012, in the case People versus Joshua Laird, L-A-I-R-  
22 D, case number 12M1465. My understanding this order was prepared  
23 by Mr. Orr's law firm, but signed by the Judge on October 3<sup>rd</sup>. Um,  
24 do you have a copy of it?

25 MR. ORR: I do, Your Honor, thank you.

1 THE COURT: Okay. Did you find out what Judge Murray  
2 did to, in hers? She did something, because I was sitting right  
3 there when she did it too.

4 MR. OPFER: I did, and the thing is, Your Honor, I don't  
5 know that, um, it was much different than what was ordered in  
6 Jeffco. I can go on upstairs and - -

7 THE COURT: - -I don't think it was either, but you have  
8 the, I thought it was something about the, the things they fixed,  
9 they had to disclose that. The, uh, the spreadsheet, yes.

10 MR. OPFER: Right.

11 THE COURT: And I'm trying to think what else.

12 MR. OPFER: The- -

13 THE COURT: - -The raw data analysis is what the order  
14 is coming out of here.

15 MR. OPFER: Right. It was the, I think what you're  
16 talking about, the things that were fixed, the procedures that  
17 were put into place. Um, whatever form they were in at the time,  
18 and I think there's, what we were talking about is there were  
19 procedures put into place, but they were still in rough draft  
20 form. She said just to turn it over.

21 THE COURT: Right. But something else has come out,  
22 because we had a hearing last week and I saw something from April  
23 that was procedures that had changed, or something. I saw a  
24 letter from, uh, oh, it was Mr. Fife's (phonetic) associate, Ms.

25

1 Linell (phonetic), they had a letter from, uh, some corrective  
2 action, because I had let them ask the question- -

3 MR. OPFER: - -Right- -

4 THE COURT: - - was there a corrective action? Yes.  
5 Um, so will you put that together? I'm just trying to figure out  
6 what to do for all of you. Is Ms. Washington, and again I have  
7 some questions, although Jefferson County, I know their hearing  
8 covered a lot of it, I understand it. I also understand Mr., uh,  
9 Orr's passion in wanting some of the information, I guess in his  
10 explanation, they kind of ignored, didn't let him get into.  
11 Again, my greatest concern probably, from listening today, is in,  
12 going back to the litigation package, what we all interpret for  
13 that.

14 MR. OPFER: Right.

15 THE COURT: So, I'm trying to think of a (inaudible),  
16 since Counsel that, in addressing that, that Ms. Burbach address  
17 that information. I'm just trying to think. She's not here, in  
18 all fairness to her, because I think clearly that's the issue and  
19 I don't know, I'm not smart enough, apparently, to figure all this  
20 out, of what they have, what they may not have, may answer Mr.  
21 Orr's questions, especially in light of what Ms. Arvizu brought  
22 up, that she says I need all this. That might be so, but if they  
23 don't have it, and they can't produce it, that answers a lot of  
24 questions. That may solve some questions because I, I don't think  
25 it's fair for me to make a decision based on that. I clearly know

1 where you want to go, but I don't think you know the answers, Mr.  
2 Opfer. I don't think Mr. Orr knows the answers, because I don't  
3 know if the answer has ever posed to Ms. Burbach.

4 MR. OPFER: Well, and I think that's where, Your Honor,  
5 we talked about last Monday, is this is a (inaudible) bifurcated  
6 motion. So, you know, if the Court is going to order 10 items,  
7 then I can go to Ms. Burbach and say do these exist, um, and if  
8 so, yes, are they, are we able to turn these over, yes or no and  
9 why.

10 THE COURT: Okay. Well, why don't we do this, you and  
11 Mr. Orr are smart enough, you've been doing this, and I'm here  
12 too, we're going to go off the record, sit down and go through  
13 this, because I know what Ms. Arvizu has testified to. I know  
14 that the raw data and the litigation package. And I'm trying to  
15 think, in the interim, if you can both go to her or you do it as  
16 the prosecutor with him being there. Oh good, I have paper towels  
17 up here if you need them.

18 MR. ORR: No, we're good. Thank you.

19 MR. GILLUM: (Inaudible) clothes.

20 THE COURT: To find out what, what is there and what  
21 isn't there and then if there are deficiencies, maybe everything  
22 is there that he wants and we're all spinning our wheels. Or if  
23 not, why not or not going to be accorded? And then I can kind of  
24 figure out whether I want to go to Jeffco, if I feel it's still  
25 valid. Based on what I've heard today, and Ms. Arvizu's been a

1 very articulate, and I clearly understood what she's talking  
2 about, which is frightening. Um, just, but I understand, but I  
3 have some questions that I think, I think you do too. You must  
4 have questions regarding the litigation package. Although, there  
5 might be things that Ms. Arvizu feels personally that should be in  
6 there that aren't. That's a separate issue. My feeling is trying  
7 to figure out, mandatorily, under discovery, what is there and  
8 what is discretionary if I make that distinction. But if I know  
9 what they have or don't have or couldn't get, I have a little  
10 better sense of what to do. So, I, I'm trying to think and I, I  
11 hate to do that to both of you, but being fair to you all, and  
12 again I've listened to a fair amount of time, I sat in Jeffco and  
13 listened, it's a, it's an interesting proposition set before me  
14 that I'm trying to figure out whether or not it's discretionary,  
15 mandatory or doesn't exist so it doesn't make any difference.

16 MR. ORR: Your Honor, why don't we do this, I mean why  
17 don't we give the 51 things to Ms. Burbach and have her, because  
18 they can be emailed, and just have- -

19 THE COURT: - -Has she been given this before? I  
20 assumed that was done before Jeffco.

21 MR. OPFER: She's seen it in Jeffco. And, Your Honor,  
22 that's, I'm sorry, I didn't mean to cut you off.

23 MR. ORR: It's good. And just have her go (inaudible)  
24 and say we don't have that, period. Okay, we don't have it. Or

25



1 this is how we had it and this is what the form is that we have it  
2 in.

3           THE COURT: Let me ask you a question. That might set  
4 up a problem with the People in coming back from the Jefferson  
5 County, where the People, from my understanding at this point,  
6 unless there's some changes, and I'm not telling you what to do,  
7 Mr. Opfer, I respect both of you. It, it, I don't know if it puts  
8 you in a funny light, if it puts Ms. Burbach, because my, my guess  
9 was, and I don't know, this is sheer speculation by me, when I sat  
10 at that hearing, the Jefferson County Deputies out there, and I  
11 don't know you can talk to them, whatever professionally you have  
12 to do, that they went through what she had, didn't have, I don't  
13 know. But I'm assuming they did this prior to me asking this to  
14 be done. And, again, not putting her in a box, or you saying we  
15 have this or don't have it, just why they would have it or not  
16 have it or we don't do that sort of thing.

17           MR. OPFER: I think, and with all due respect to Mr.  
18 Orr, I think we need to once again avoid the fishing expedition,  
19 which is what I've been trying to fight this entire time. Is that  
20 this may be their, and that's, that's what we heard a lot of  
21 today, if they have it, this may be there, and if it is, it may  
22 have affect something. So, the problem is we're getting so  
23 attenuated just to say Cindy, here's a list, let me know what you  
24 think of it- -

25

1 THE COURT: - -No, that's not what I'm saying. I agree  
2 with that.

3 MR. OPFER: Yeah.

4 THE COURT: What about the litigation package?

5 MR. OPFER: Well, and that, that's what I was going to  
6 say, Your Honor. So, this would be my proposition to the Court:  
7 um, I, I think what we do is we, is we go through, I tried to keep  
8 tally of all the things that Ms. Arvizu said for, that should be  
9 in the litigation packet, in her opinion.

10 THE COURT: Right.

11 MR. OPFER: I think the Court has to make its own,  
12 independent determination, looking at the definition of litigation  
13 packet, according to CDH, whether or not that fits in there. And  
14 obviously we can argue individually about each one.

15 MR. ORR: I'll even take it a step further. And I'll,  
16 I'll read off right now, (inaudible) numeric (inaudible) what we  
17 believe is truly in the litigation package, should be there, under  
18 dash 2. Um, and that- -

19 THE COURT: - -Well, let me do this, okay- -

20 MR. ORR: - -and then, and then have the Court go  
21 through and look at the one, for example we did it on, we did an  
22 overview to get quality assurance, quality control, we think it's  
23 all material, 1 through, uh, uh, uh, uh, 20. Let the Court go  
24 through and say we don't find this material or whatever the case,  
25 whatever the Court's ruling is on that. 21- -

1 THE COURT: - -Let me ask you a question.

2 MR. ORR: Yeah.

3 THE COURT: We had, we did 41 through, whatever it was,  
4 in Jeffco. Is Jeffco, did they go through (inaudible) or did you  
5 have some agreement or something?

6 MR. ORR: No, Your Honor, it happened, I, for the  
7 record, (inaudible), okay? I put down on a piece of paper an  
8 explanation, in layman's terms of 1 through 41. In the most basic  
9 sense of hey, this is what this is, just because not all of us are  
10 scientists. And they took that as my offer of proof. And that  
11 was what I lost, I, I'm just not happy about. Because the fact is  
12 that what we heard today was very intelligent, very well explained  
13 why 1 through 41 are material and relevant. It's not a 2<sup>nd</sup> grade  
14 explanation of what they are. It is a full explanation and I  
15 thank the Court full heartedly that you let us do this because had  
16 we done this 3 hour hearing on Jeffco, I think things would've  
17 gone a lot smoother. And now I have to deal with, you know,  
18 District Courts and there on up to get whatever damage was done in  
19 Jefferson County fixed. The issue is I'll go through it right  
20 now, the State is giving us, under 21, and, uh, Ms. Arvizu- -

21 THE COURT: - -Well, wait a minute- -

22 MR. ORR: - - did not say that it was part of what she-

23 -

24 THE COURT: - -Do me a favor- -

25

1 MR. ORR: --thought the litigation packet was, but we  
2 do get it. So, we're happy because we get Cindy's, under 21, we  
3 get that already.

4 THE COURT: Okay. 21, when you say 21, what is 21?

5 MR. ORR: 21 is number 21 on page 3 of the motion.

6 THE COURT: Produce resumes for (inaudible) individuals  
7 responsible?

8 MR. ORR: Well, we're getting some of that at least,  
9 Your Honor.

10 MR. OPFER: Because - -

11 MR. ORR: --(inaudible). Right, concurred. Okay, now  
12 the next set we're not getting or we believe is mandatory  
13 disclosure under what the statute says. Okay, we believe all of  
14 this is mandatory disclosures.

15 THE COURT: Well, I understand that.

16 MR. ORR: Okay. But for definition of litigation, 25- -

17 THE COURT: --Hang on. So, this is the Defense B,  
18 which is mandatory, mandatory under 6, rule 16, right?

19 MR. ORR: Okay, the definition, Your Honor, and, uh,  
20 this is from- -

21 THE COURT: --Okay, so- -

22 MR. ORR: --Ms. Arvizu's notes to me.

23 THE COURT: Okay, so- -

24 MR. ORR: --25- -

25 THE COURT: Do me a favor.

1 MR. ORR: Yes, sir.

2 THE COURT: Okay. Our position is the Defendants  
3 believe it was mandatory under rule 16. We've all agreed in my,  
4 let's see, hang on. Where'd my- - did somebody steal my paper so  
5 I'm lost? Ah-ha. This is it right here, we are in agreement, are  
6 we not, the quote, unquote, under the Department of Health rules,  
7 and that's the lab (inaudible) under 5CCR11005-2, that the  
8 litigation, as we've all talked about, the litigation packet, is  
9 certainly 16, 16, is mandatory, right?

10 MR. OPFER: Yes.

11 MR. ORR: Yes.

12 THE COURT: And that includes, just so we're all in same  
13 boat, litigation packet is mandatory. Okay, that is agreed.  
14 Additionally, we've got, uh, plus Judge Vahle's order from October  
15 3<sup>rd</sup>, 2012 directing them to produce the raw data plus, in his  
16 order, is also, at this point, a mandatory disclosure to rule 16,  
17 am I correct?

18 MR. OPFER: Yes, Your Honor.

19 THE COURT: Okay. Let me write a little sticky note, so  
20 I can put this together, because I like sticky notes. Okay.  
21 Mandatory. Okay. Don't laugh, I'm old enough, I have stickies  
22 all over my house and my bench. All right, so we've got this,  
23 I'll make the litigation packet. I think, again, big argument, or  
24 the big discussion, I'm sorry, is what do we believe the

25

1 litigation packet includes, because I know yours, mandatorily, one  
2 sucks the other one right into it. Am I right?

3 MR. ORR: Correct.

4 THE COURT: That's what we're talking about. So, your,  
5 uh, defense is proper to the Court, that the litigation package,  
6 Judge Vahle's order, the raw data is mandatory and then from there  
7 we go to what numbers that she talked about, and I have notes too.

8 MR. ORR: Thank you, Your Honor. And I believe that  
9 Judge Vahle's, um, order follows the rule very specifically, um,  
10 in regards to all this information. So, I'm going to give you the  
11 numbers and then I have to call Ms. Arvizu back for 1 quick  
12 question for the stand. Um, we get 21 already, so that being  
13 said, if we continue to get it, I, that's great, but- -

14 THE COURT: - -So, 21 - -

15 MR. ORR: - -we believe- -

16 THE COURT: - -is already there?

17 MR. ORR: Yes.

18 MR. OPFER: Are you withdrawing 21 then?

19 THE COURT: 21- -

20 MR. ORR: - -No, I'd like to have 21, but I don't think  
21 it's listed as part of that litigation.

22 MR. OPFER: Right.

23 MR. ORR: Right.

24 MR. OPFER: So, when you're saying you get 21 already,  
25 it means you've already received it?

1 MR. ORR: Yeah, we get it in every case you send us.

2 MR. OPFER: Yeah.

3 MR. ORR: Usually.

4 THE COURT: So, already received, right?

5 MR. ORR: Yes. And that's standard litigation packet  
6 material, correct.

7 THE COURT: Lit pack, okay.

8 MR. ORR: Okay- -

9 THE COURT: - - So no lit pack- -

10 MR. ORR: - -so let's then go to 25, 26- -

11 THE COURT: - -25, oh those are the (inaudible) you  
12 started talking about. The, uh, (inaudible) intake controls,  
13 including evidence, field (inaudible), cost to be transferred, she  
14 had, you're talking 25, 26- -

15 MR. ORR: - -27.

16 THE COURT: 26, number 27 you think are mandatory?

17 MR. ORR: Yes, sir.

18 THE COURT: Mandatory. Mandatory. Mandatory, the  
19 Defendant believes. All right, 25, 26, 27, all external  
20 (inaudible) regarding subject case, including- -

21 MR. ORR: Your Honor, I think just for- -

22 THE COURT: - -Wait, that's case specific. I know she  
23 talked about it.

24 MR. ORR: Right. And, Your Honor, we think all of our  
25 request is mandatory.

1 THE COURT: Well, I understand that.

2 MR. ORR: Well, I know, but we're defining, if it  
3 pleases the Court, we're defining what the definition of a  
4 litigation packet is with what we're talking now. So, 25, 26, 27,  
5 28, 29, 30- -

6 THE COURT: - -Hang on. Twenty, this is the lit  
7 package. Okay. 30, (inaudible), the litigation includes, okay,  
8 go ahead, Counsel.

9 MR. ORR: Okay. 32 through 40- -

10 MR. OPFER: - -So, you're not requesting 31?

11 MR. ORR: Hold on, we're going to talk about 31 in a  
12 second.

13 THE COURT: Okay, so you got, well, don't get me mixed  
14 up. I've got number 30, 31 I'll just leave there and I won't say  
15 anything, 32- -

16 MR. ORR: - - Through 40.

17 MR. OPFER: And just so the record is clear, Your Honor,  
18 Defense Counsel, at least according to my notes, Defense Counsel  
19 did not ask Doctor, or Ms. Arvizu, um, whether or not 32 and 33  
20 qualified under the litigation packet, so.

21 THE COURT: I have 32 should, it said should be, I have  
22 should be in there.

23 MR. OPFER: And I, I could've just- -

24 MR. ORR: - -Yeah, Your Honor, I thought I did, so, Your  
25 Honor, if I may call Janine Arvizu to the stand.



1 THE COURT: Okay, okay. Because at 32, I had relevant.  
2 I have a big mark that's, I have a little note, that should be in  
3 it. These are the forms of whatever, right?

4 MR. OPFER: Well, if he got it, then it's not a big  
5 deal.

6 MR. ORR: Yeah, I just want to make sure it's on the  
7 record.

8 THE COURT: Well just, Ms. Arvizu, have a seat. I just  
9 want to make sure I, I take fairly good notes. I just can't find  
10 them. All right, I show, let's back up, we have 25, 26, 27, 28,  
11 29, 30, 31, my notes say copies only, with a question mark.

12 MR. ORR: And I'll get into that, Your Honor, in a  
13 moment, if I may?

14 THE COURT: That's the (inaudible) thing.

15 MR. ORR: 40 is, goes, basically the way to look at it  
16 is mandatory litigation, definition of litigation packet, is 25  
17 through 40, is that fair assessment, Ms. Arvizu?

18 WITNESS: I don't have my numbers in front of me, but if  
19 I could- -

20 MR. ORR: - -May I approach?

21 WITNESS: Um, I don't have 36 as being part of the  
22 litigation package.

23 MR. ORR: Okay.

24 THE COURT: No, um, let's see if you and I agree. 36 is  
25 important, might be - -

1 WITNESS: - -Correct- -

2 THE COURT: - -(inaudible) problems. So, I didn't have  
3 part of the package.

4 WITNESS: Correct.

5 THE COURT: Why not?

6 MR. ORR: And then 31, there was a question on it. Like  
7 I, I had a half moon when I was doing full circles.

8 WITNESS: Yeah.

9 MR. ORR: As my indicator of what was in, so- -

10 WITNESS: - -Yeah, that was a copy of product inserts  
11 provided by the manufacturer. A lot of the credible manufacturers  
12 have the information available online and I can get it, but- -

13 MR. ORR: - -If it's a credible manufacturer- -

14 WITNESS: - -then it's not an issue- -

15 MR. ORR: - -they, they don't need it, if it's not- -

16 WITNESS: - -Correct- -

17 MR. ORR: - -we need it.

18 THE COURT: Credible, no- -

19 WITNESS: - -If it's some low bid supplier- -

20 THE COURT: - -The State of Colorado could low bid  
21 everything. Let's have the same people who did the asphalt out  
22 there do it. So, the 2<sup>nd</sup> little question mark was 31, so I  
23 understand it's credible, no, so I don't, credible no- -

24 WITNESS: - -Yeah, when they're using an accredited  
25 supplier, it's not an issue.

1 THE COURT: Okay. Shouldn't be an issue. All right.  
2 So, that's 31. 32, was pipettes, that was relevant, and then I  
3 had a note should be in the pack, right?

4 MR. ORR: Yep.

5 THE COURT: So, you're thinking yes?

6 MR. ORR: All the way through 40, Your Honor. Except  
7 for 36, sorry.

8 THE COURT: I know, I have 36, no, mandatory. 33, I  
9 have verify records, proper solution should, you know, okay.  
10 Mandatory. 34, I have calibration records. How you teach people  
11 to do it, the gas. This is teaching the gas how to (inaudible),  
12 right?

13 WITNESS: Right.

14 THE COURT: See, I really do listen occasionally.

15 WITNESS: That's very good.

16 THE COURT: 34 is teaching gas to work. Teach my car  
17 too. Teach gas to work, just to put a note, so that's mandatory.  
18 34, and 35, Counsel, I have adds some volume, oh, adding to save  
19 volume to samples, make sure everything is consistent, right?

20 WITNESS: Right.

21 THE COURT: So, that's mandatory. 36 was important.

22 My- -

23 WITNESS: - -But not mandatory.

24 THE COURT: It might not, isn't this basically the bid  
25 red problem I have with Fox-Rivera?

1 MR. ORR: The pipetting issue, Your Honor?

2 THE COURT: They didn't know there was a problem until  
3 somebody else told them?

4 MR. ORR: Yes, Your Honor, until external people told  
5 them.

6 THE COURT: Okay, well- -

7 MR. ORR: - -And I believe it was Mr. Fife's office,  
8 sir.

9 THE COURT: Okay, this is mandatory, this is produced,  
10 this is (inaudible) for instruments, pipette. Well, okay. We'll  
11 get Mr. Opfer back up here. When we're going through this, I, I'm  
12 just thinking out loud, I have a little red mark, 36 is almost the  
13 Fox-Rivera matter.

14 MR. ORR: Right.

15 THE COURT: Okay, that's, okay, that's the Fox-Rivera  
16 matter. 37, Counsel, I had produce all balance, calibration  
17 verifications, quality controls, and I had only support  
18 (inaudible) get certification for providers. Should be part of  
19 it, right?

20 WITNESS: Uh, if they use balances. I don't know how  
21 they prepare their standards.

22 THE COURT: Hmm. Standards, 38 and question mark. 38,  
23 I had contamination possible, batch tests should all be the same,  
24 should, shall, should be part 2. Well, I'm going to ask the  
25 question backwards, but it wouldn't be unusual. 39, produce the,

1 uh, (inaudible) batch run. At 39 and 40, the raw data qual, isn't  
2 that the raw data stuff- -

3 WITNESS: - -Yes- -

4 THE COURT: - -we talked about?

5 MR. ORR: Yes.

6 WITNESS: Yes, sir.

7 MR. OPFER: Your Honor, 39 and 40 are, are confessed, so  
8 we don't have to address those.

9 THE COURT: So, 39 and 40 - -

10 MR. ORR: - -In their entirety- -

11 THE COURT: - -I'm not Catholic, what does that mean,  
12 you confessed? Confessed by the People, all right. So, 40, 40 is  
13 confessed, that's easy, it's okay. 41?

14 WITNESS: None of the rest of them are case specific, or  
15 should be in the litigation packet.

16 THE COURT: Should be- -

17 MR. ORR: - -They're not- -

18 THE COURT: - -shouldn't be- -

19 WITNESS: - -They should not be, I would not be - -

20 MR. ORR: - -They're not in the- -

21 WITNESS: - -I would not expect them in- -

22 THE COURT: - -Yeah- -

23 WITNESS: - -the litigation packet- -

24 THE COURT: - -just in 40- -

25 WITNESS: - -as designed.

1 THE COURT: So, I've got 25 through 40, right?

2 WITNESS: Correct.

3 MR. ORR: Their discovery, everything else in discovery  
4 we feel is material, um, relevant and in the possession and  
5 control of the State. And the issue is they, they become  
6 mandatory at that point, um, disclosure- -

7 THE COURT: - -When you're talking about at this point,  
8 26 through 40 becoming - -

9 MR. ORR: - -No, I'm talking 25 through 40 are, with,  
10 with the, with the caveat on 36- -

11 THE COURT: - -Right- -

12 MR. ORR: - -are, our definition and our understanding  
13 of what the State's litigation packet definition, on page 3, of  
14 CDPHD's, of, uh, sorry, of the regs- -

15 THE COURT: - - Shouldn't - -

16 MR. ORR: - -CR- -

17 THE COURT: - -shouldn't (inaudible)- -

18 MR. ORR: - -uh, 1005-2 says. That's what 25 through 40,  
19 minus 36, minus number 36- -

20 THE COURT: - -Okay- -

21 MR. ORR: - -is. We believe the rest of the requests  
22 are material and relevant and are covered under mandatory  
23 disclosure in, under rule 16.

24 THE COURT: And then, so 40 through 51 you believe are  
25 mandatory too?

1 MR. ORR: Yes, sir.

2 THE COURT: All right. Let me ask you, are the People,  
3 do you want to think about what you want to do? I mean I'm  
4 willing to listen and get a response back and forth and then in  
5 the interim, let me ask you, I don't think it's improper for me,  
6 and I don't know, it's a little bit different, to talk to Ms.  
7 Burbach. You can, whatever, and you might get a feel for  
8 something.

9 MR. OPFER: Your Honor, I, I think we're, we're getting  
10 ahead of ourselves.

11 THE COURT: Okay, that's fine.

12 MR. OPFER: I mean we have been for this, the last 10,  
13 15 minutes.

14 THE COURT: Okay.

15 MR. OPFER: First of all, what we have to decide, and,  
16 and this is obviously going to be the Court's determination, what  
17 is, where in rule 16 this falls, if it falls at all within rule  
18 16- -

19 MR. ORR: - -Okay, and I - -

20 MR. OPFER: - -and- -

21 MR. ORR: - -I agree with the State on that and we have  
22 a, we have something we have to file with it before you want to  
23 pick an argument about it, but - -

24 MR. OPFER: - -It's- -

25

1 THE COURT: --Well, let me ask you. If you're going to  
2 file something, I don't know if you want further argument, because  
3 I assume if (inaudible) have what you have, I think Mr. Opfer is  
4 entitled to file a response. I don't know if it's going to be  
5 written or are we going to have further oral arguments so I can  
6 make a decision.

7 MR. OPFER: And then, and that's the thing, Your Honor,  
8 that's what I'm saying. I think there's a particular process we  
9 have to follow here.

10 THE COURT: Okay.

11 MR. OPFER: First, I think we, obviously, like is said,  
12 we have to determine whether or not this falls within rule 16 and  
13 if so, where. Um, it's obviously the People's contention that  
14 some of this does not, and if it does, it's discretionary, which  
15 Defense Counsel has not meet its burden and, and I will, since  
16 it's their burden, on their end, to show it's discretionary, that  
17 they get it. I will likely file a response to it once we get  
18 that, within 3 to 4 days or whenever, um, Defense Counsel is going  
19 to file that. The 2<sup>nd</sup> step with that, Your Honor, is I think once,  
20 um, once the Court decides that certain items do fall within rule  
21 16, I think what we really have to address is what also falls  
22 within a litigation pack. Now, Defense Counsel is giving you his  
23 definition, what Ms. Arvizu thinks, and, once again, she's using  
24 some very vague language. Um, 31, she used, you know, it depends.  
25 38, I expect it. Um, the, it's this, just a few minutes ago, she



1 said something else and I, I forgot to write it down. The problem  
2 is that it's all qualified and, um, so, Your Honor, I'm asking the  
3 Court to make the determination in reading the language of what  
4 litigation packet says, as plainly as it says, to make that  
5 determination.

6 THE COURT: Well- -

7 MR. OPFER: - -I think once the Court does that, I  
8 don't, it will realize that not everything that Defense Counsel is  
9 asserting falls under the litigation packet, falls under the  
10 litigation packet definition.

11 THE COURT: Well, that's what I, I think we need to have  
12 a discussion on, because I'm going through litigation, you know,  
13 should it include a request for analysis, chain of custody of  
14 documents, I mean the chain runs through a lot of these, that's  
15 the problem. When I start getting into chains of custody- -

16 MR. OPFER: - -Which is why we have a chain of custody  
17 form, which Defense Counsel has.

18 MR. ORR: That's not sufficient, Your Honor.

19 MR. OPFER: Exactly- -

20 MR. ORR: - -And that's the problem.

21 MR. OPFER: And that, that's where I'm saying that what  
22 they're, essentially what they're trying to do, Your Honor, is  
23 expand litigation packet.

24 THE COURT: Well, no, I, I- -

25 MR. OPFER: - - And- -

1 THE COURT: - -or, or, on the other hand, trying to  
2 interpret what's in there says what it says. I understand, you  
3 know I'm trying to walk a little tightrope down through here.

4 MR. OPFER: Right, so I, Your Honor, I think this is  
5 where we need to go with this: the Court, as we've informed it, we  
6 are, uh, standing on the Jeffco, uh, brief. It's very well  
7 written. It actually addresses all these, and even addresses them  
8 line by line. The, uh, we do think the Jeffco one was appropriate  
9 and what we've already agreed to, once again, is a conditionally  
10 bifurcated motion. So, if the Court is going to order anything,  
11 or thinks that anything should be turned over, in addition, aside  
12 from what we've already confessed in 4- -

13 MR. ORR: - - 39 and 40- -

14 MR. OPFER: - -Yes, 39 and 40, them, um, essentially  
15 you're going, you've put us on notice and we get to have another  
16 hearing, if that's the way- -

17 THE COURT: - -Okay- -

18 MR. OPFER: - -it may be confessed, I don't know, the  
19 City may say yes, we're turning it over or it doesn't exist or I  
20 don't know. Um, but we have to- -

21 THE COURT: - -So, that's what I'm trying to figure out  
22 right now. I'm (inaudible) to make a decision now, which is, um-  
23 -

24 MR. OPFER: - -No- -

25

1 THE COURT: - -a little uncomfortable. I just need to  
2 find out something, okay, I think we're still back to where I  
3 talked about before, because I can be jumping ahead. I can make a  
4 decision based on the Jeffco, I understand the Jeffco, as we  
5 talked about, did not incorporate, or I still don't understand it,  
6 1 through, uh- -

7 MR. ORR: - -41.

8 THE COURT: 41.

9 MR. ORR: Yeah, or 1 through 40.

10 THE COURT: That wasn't part of that decision, although  
11 I believe your position is- -

12 MR. ORR: - -Well- -

13 THE COURT: - -still covers those.

14 MR. OPFER: The, our, the brief, the argument still  
15 does- -

16 THE COURT: - -Well, I, I've read, yeah- -

17 MR. OPFER: - -and, yeah, essentially it's the same. I  
18 realize the Jeffco ruling itself is not.

19 THE COURT: Okay.

20 MR. OPFER: Um, but, I, I, regardless, I actually still  
21 think that it's an appropriate ruling. Um, the, and I've said  
22 this over and over again today, Your Honor, the biggest concern is  
23 all of this is a fishing expedition, over and over again. That's  
24 where we stopped the Court this morning because what our, Ms.  
25 Arvizu said is if any of this exists, and I don't even know if it

1 exists, and it may impact something, or it's conditional language  
2 over and over and over again. And that's where we get into this  
3 fishing expedition and Ms. Arvizu said she's an auditor, they're  
4 trying to audit CDH and nobody can slight Mr. Orr for doing that,  
5 um, this is not the proper form for it. And, uh, so, Your Honor,  
6 I think at this point we just need to take it, like I said, one  
7 step at a time. The Court can make a determination whether or not  
8 anything, or first, where we are in rule 16. Has to make a  
9 determination of what a litigation pack is and then also what  
10 could potentially fall within that litigation pack and then  
11 essentially go line by line and say I'm ordering 11, 26, 32 and 48  
12 to be turned over. Um, in which case, we can confess it or set it  
13 for a hearing, in which case we can bring Ms. Burbach in, or  
14 whoever else. And perhaps we bring in, uh, uh, Harold Wells  
15 (phonetic), or we bring in, uh, Bob Zettle (phonetic) to talk  
16 about what a litigation pack is in Colorado, what Defense Counsel  
17 normally receives from their labs when they use their labs. Um,  
18 we may have to go that route. The, um, the reason we bifurcated  
19 it, Your Honor, is you asked for a fairly short hearing and it was  
20 Defense Counsel's burden to show, under, at least in our position,  
21 under, uh, discretionary.

22 MR. ORR: And, Your Honor, just to address something  
23 that Counsel just spoke of, it is absolutely appropriate to fish  
24 when the radar shows that there are fish in the water. And the  
25 fact is that the foren, the denial of certification lays out, the,

1 the denial of the certification that wasn't given to us in  
2 discovery lays out many, many problems that are basically a  
3 burning fire with lots of smoke. We know something is going on in  
4 there. We got to go see it. There are fish in the water. This  
5 is not a fishing expedition, Your Honor. This is trying to catch  
6 the problem.

7 THE COURT: Well, it, it's a problem that I'm not sure,  
8 looking at this problem is as expansive as you believe. I think,  
9 I know your position is there's systemic problem within the  
10 Department, well not the Department of Health, they authorize and  
11 do what they do with the Department of, uh, CDHPD, whatever it is,  
12 the, uh, well goodness, where did it go?

13 MR. ORR: The Colorado Department of Health, Your Honor.

14 THE COURT: Yeah, sorry. I've got too many letters.  
15 The Department of Health and, uh, Environmental, Laboratory  
16 Services Division. Um, they're a State, authorized by statute,  
17 they set up the Department of Health and Environment. Um- -

18 MR. OPFER: - -And, Your Honor, if I may, briefly?

19 THE COURT: Sure.

20 MR. OPFER: And this, this is obviously where we run  
21 into, um, essent, essentially a good faith argument. In Ms.  
22 Poplstein's case, there's, there are, obviously, some issues with  
23 the blood tube and the fact that we only have part of 1 now to  
24 turn over to Defense Counsel. And obviously you can have that

25

1 retested and I know Ms. Arvizu talked about some concerns she has  
2 with that, um- -

3 THE COURT: - -Let me ask you, just to make sure that  
4 I'm understanding Ms. Poplstein's matter too, is that it's because  
5 of her actions, from what I'm understanding, that the 2<sup>nd</sup> sample is  
6 not available, pursuant to the rules, so- -

7 MR. ORR: - -And, Your Honor, we are not sure how an  
8 unconscious person is going to fight back, but we'll get into  
9 that, I guess, as motions, when we actually have the motion to  
10 suppress that blood test.

11 MR. OPFER: Right, and, and, but going along with that,  
12 Your Honor, obviously, you know the blood test, when we did get  
13 it, it came back at .197, is that right?

14 MR. ORR: I, 1 something, 1.9, something.

15 MR. OPFER: I believe it's a .197, Your Honor, and there  
16 you know there was bad driving, there was, um, numerous weaves,  
17 and this is obviously according to the police officer, standard  
18 indicia, she admitted to 3 beers and then 2 drinks. She refused  
19 roads, (inaudible) a blood test- -

20 MR. ORR: - -Your Honor, how is discovery relevant in  
21 this hearing?

22 MR. OPFER: The reason it is, Your Honor, is it's just a  
23 good faith. If, if the whole issue is saying that my client is  
24 absolutely innocent and this blood test is entirely wrong, we also  
25 have to look at everything else surrounding it.

1 MR. ORR: I don't want to correct- -

2 MR. OPFER: - -And- -

3 MR. ORR: - -but my client is absolutely innocent.

4 MR. OPFER: And- -

5 THE COURT: - -Oh, I understand.

6 MR. ORR: Presumptively.

7 MR. OPFER: Just presumptively.

8 THE COURT: I'm not, I'm not a judge or a jury today,  
9 I'm just a judge listening.

10 MR. ORR: Just (inaudible) guilty- -

11 THE COURT: - -Okay.

12 MR. OPFER: And, and pardon me, I misspoke, my concern  
13 is though is that if he's challenging the blood test, and he's  
14 trying to look at this vacuum, but yet say well, I need everything  
15 else that CDH has because I want to, I need to protect my client's  
16 interests, so I don't want to look at this vacuum, then we need to  
17 look at the facts of the case as well.

18 THE COURT: Oh, I understand.

19 MR. OPFER: And so- -

20 MR. ORR: - - Your Honor, that's not relevant to a rule  
21 16 hearing- -

22 MR. OPFER: - -Except I- -

23 MR. ORR: - -by any stretch of imagination- -

24 MR. OPFER: - -Except you're not allowed to support a  
25 motion without a good faith basis in doing so.

1           MR. ORR: And, Your Honor, I think there's a crappy test  
2 and I think the lab is doing it wrong. I have a good faith basis  
3 on that. And that's why we're here.

4           MR. OPFER: And, as the Court knows, you don't need a  
5 test to convict somebody. So- -

6           MR. ORR: - -So, suppress the test, Your Honor- -

7           THE COURT: - -(Inaudible)- -

8           MR. GILLUM: Yeah, so are you going to concede to give  
9 away the test, is that what you're saying?

10          MR. OPFER: No- -

11          MR. GILLUM: - -Oh- -

12          MR. OPFER: - -I'm just saying- -

13          MR. ORR: - -Because under rule 16, I'm sorry, under,  
14 under rule (inaudible), we have a very simple statement that they  
15 have to, they have to have a valid test, otherwise it gets  
16 suppressed, the case is, then we go into Gilette (phonetic), my  
17 client wrapped herself in the protections of rule 16. If they  
18 botched a, or rule 42-4-1301, if they botched her test up, and we  
19 don't have reliable results, the case goes away. And that's what  
20 should happen in these cases. Because they failed to follow  
21 substantial compliance to health rules and regulations. We do not  
22 have a test that can be relied upon. And they are required, it's  
23 a double-edged sword, if my client says no, I'm not going to take  
24 a test, well, there's ramifications for that. But if she asks for  
25 it and they fail to give it to her, suppression is the remedy.



1 So, we actually have a lot to talk about and I have a very good  
2 faith basis to know that this test is botched.

3 THE COURT: Well, I got a, I got a question for you,  
4 because I forgot, I've read enough cases they get lost, if one  
5 were to suppress, because I had a case that (inaudible) to me with  
6 a lady. They couldn't take her blood out of her and I threw it  
7 out and I got reversed by the District Court. Um, if you kept the  
8 blood test (inaudible), they could still use it, you just suppress  
9 the test and use everything else. I, I don't know what judges are  
10 doing if you have, I know, I understand the Gillette argument, but  
11 I didn't know if you do suppress the test why they can't use the  
12 other indicia, allegedly, of alcohol.

13 MR. ORR: If the Court suppresses the test, it's  
14 different than the Court saying they didn't have a valid test upon  
15 request, under rule 16, under 42-4-1301. Because the State has an  
16 obligation to provide exculpatory evidence in regards to defend my  
17 client and that's part of the advisement of the Colorado Express  
18 Consent.

19 THE COURT: Well, it, it's, you know, but, I guess what  
20 Mr. Opfer's saying, obviously it's not exactly exculpatory at a  
21 .197.

22 MR. OPFER: And, and- -

23 MR. ORR: - -We don't know what it would've been, Your  
24 Honor, had it been done correctly.

25

1 MR. OPFER: And with Mr. Dunbar's case, Your Honor,  
2 Defense Counsel did have that retested and it was an .08 to an  
3 .074. So, once, once again, Your Honor, we have a quality  
4 assurance there. I understand what Ms. Arvizu is talking about,  
5 as far as the actual collection of, and the pamphlets and the  
6 blood kits and everything like that, but this is why we have these  
7 measures in place, uh, to ensure, ensure quality. Um- -

8 THE COURT: - -So, again, my main is trying to figure  
9 out the mandatory disclosures they feel is part of the litigation,  
10 is 25 through 40, with 39 and 40 raw data (inaudible). Okay, 36  
11 is no and the, uh, 31 was that strange credibility. If it's a  
12 good company, we don't have to bother, if not, then there's a  
13 question mark, right?

14 MR. ORR: Right.

15 THE COURT: And then 40- -

16 MR. ORR: - -If there's a (inaudible) next it, we don't,  
17 we probably want it and if it has - -

18 THE COURT: - -and 40 through 51, it's your belief it is  
19 part of mandatory already, right?

20 MR. ORR: Yes, sir- -

21 MR. OPFER: - -And- -

22 MR. ORR: - -we believe 1 through 51 are all part of  
23 mandatory.

24 THE COURT: Okay, right, right.  
25

1 MR. OPFER: And just, just so the Court is aware. The  
2 thing about some of those, and I can't, I was looking for them in  
3 the files, if you'll help me, (inaudible) the, I know the, CDPHE  
4 is already, um, said that some of that information is privileged  
5 that Defense Counsel is requesting.

6 THE COURT: That I remember, that's in your brief.

7 MR. OPFER: Isn't that right? Yeah, okay, it's in  
8 there, (inaudible)- -

9 THE COURT: - - That's in your brief.

10 MR. ORR: And, and, Your Honor, what I'm going to ask is  
11 Mr. Gillum has explained quite a bit of what was wrong with the  
12 Jeffco ruling. Uh, we'd like a chance to submit that to the  
13 Court.

14 THE COURT: Okay, do you want to do that and then I need  
15 you to respond to what we're doing today so I have some  
16 information. And if not, I'll contact both of you. We may have  
17 some further clarification and then in the interim- -

18 MR. ORR: - -Look forward to it, Your Honor- -

19 MR. OPFER: - -We can have another 6:00 meeting.

20 MR. ORR: Or noon would be nice.

21 THE COURT: Well, if it's noon, I can do it whenever it  
22 is. So, I've got the information. Uh, Ms. Arvizu, I appreciate  
23 you being here. It's, uh, after 40 years of doing this, there are  
24 issues I've never heard in life. It's interesting and, uh- -

25

1 WITNESS: - -Those were the same words that they judge-

2 -

3 THE COURT: - -Okay, well we're going to (inaudible).  
4 You're going to submit, you're going to submit something I'm going  
5 to read and make sure I get it. And Mr. Opfer is going to reply  
6 to it in addition to what I have. So, make sure I get the  
7 exhibits. Then I will speak to both of you. I have your phone  
8 number- -

9 MR. ORR: - -Absolutely, Your Honor, and I- -

10 THE COURT: - -and Mr. Orr's, because I can't speak to-

11 -

12 MR. ORR: - -have the pleasure of being in front of you  
13 a few times the rest of the week, so.

14 THE COURT: Well, the pleasure- -what are we doing  
15 Wednesday? Are you here? Is that your case?

16 UNKNOWN FEMALE: Uh, I think it's Johnson, uh- -

17 THE COURT: - -Am I, we're going to trial with somebody?

18 MR. ORR: I believe we are set and I believe- -

19 (Microphones turned off at 3:39:38)

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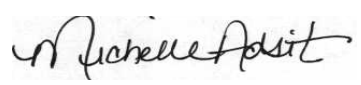
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I, Michelle Adsit, certify that I transcribed this record from the digital recording of the above-entitled matter, which was heard on November 5, 2012, before the Honorable Robert Tobias in Division 306 of the Arapahoe County Combined Court.

I further certify that the aforementioned transcript is a complete and accurate transcript of the FTR proceedings based upon the audio facilities of these CD's and my ability to understand them. Inaudibles are due to microphones not working properly, excessive noises or muffled voices.

Signed this 20<sup>th</sup> day of November, 2012, in Castle Rock, Colorado.

  
Michelle Adsit