

1                   IN THE MUNICIPAL COURT FOR THE CITY OF SEATTLE

2

3                   CITY OF SEATTLE,                   )

4                                   Plaintiff,                   ) Cause No. 633895

5                                   vs.                                   ) Superior Court Appeal

6                   ROOSEVELT WIGGINS,                   ) No. 19-1-03033-6 SEA

7                                   Defendant.                   )

8

9                                   HEARING - VOLUME II

10                   The Honorable Anita Crawford-Willis Presiding

11                                   January 9, 2019

12

13

14

15

16

17

18

19

20

21                   TRANSCRIBED BY: Bonnie Reed, CET

22                                   Reed Jackson Watkins, LLC

23                                   Court-Approved Transcription

24                                   206.624.3005

25

## A P P E A R A N C E S

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

On Behalf of Plaintiff:

GURJOTVIR SRA

CHRISTOPHER T. KARR

Seattle City Attorney's Office

701 Fifth Avenue

Suite 2050

Seattle, Washington 98104

On Behalf of Defendant:

LINDSEY WHYTE

VINCENT BURNTON

King County Department of

Public Defense, TOAD

710 Second Avenue

Suite 700

Seattle, Washington 98104

E X A M I N A T I O N    I N D E X

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

WITNESS:

OFFICER WILLIAM FRITSCH

Recross Examination by Mr. Burnton.....140

Redirect Examination by Ms. Sra.....155

BRIAN CAPRON

Direct Examination by Ms. Sra.....207

Cross-Examination by Ms. Whyte.....219

JANINE ARVIZU

Direct Examination by Ms. Whyte.....244

Voir Dire by Mr. Karr.....252

Direct Examination by Ms. Whyte (Contd.).....255

Direct Examination by Ms. Whyte (Contd.).....284

Cross-Examination by Ms. Sra.....291

Redirect Examination by Ms. Whyte.....298

E X H I B I T    I N D E X

No.	Description	Page
Exhibit 9	Report	222

1 -oOo-

2 January 9, 2019

3

4 MS. SRA: Good morning, Your Honor, Gorry Sra on behalf of  
5 the City. This is the matter of Roosevelt Wiggins, Cause  
6 No. 633895.

7 THE COURT: Good morning, Ms. Sra.

8 MR. BURNTON: And good morning, Your Honor. Vince  
9 Burnton, assisting the attorney of record in this case,  
10 Lindsey Whyte, on behalf of Mr. Roosevelt Wiggins, who is  
11 here in court today.

12 THE COURT: All right. Good morning, Ms. Whyte,  
13 Mr. Burnton, and Mr. Wiggins.

14 MR. WIGGINS: Good morning.

15 THE COURT: All right. Is your witness ready to resume?

16 MS. SRA: Your Honor, my witness is actually stuck in  
17 traffic.

18 THE COURT: Oh, okay. So let's turn to the --

19 MS. SRA: So he's on his way.

20 THE COURT: I think we can -- we had stopped at  
21 Defense's -- we can start off where we left off, which I  
22 believe was No. 15, if I'm correct. I had (inaudible).

23 MR. BURNTON: That's what I have as well, Your Honor.

24 THE COURT: Is that right?

25 MR. BURNTON: That's what I had, yes, that we stopped at

1 15.

2 THE COURT: All right. Go ahead.

3 MR. BURNTON: So, Your Honor, motion No. 15 was Defense  
4 moving to preclude the City from eliciting any testimony  
5 about Defendant's being arrested or booked into a jail, as  
6 such evidence would be not only irrelevant, but prejudicial  
7 and improper reasoning under ER 403 and ER 404.

8 THE COURT: Okay. City, you want to respond?

9 MS. SRA: Yes, Your Honor. The City would not be  
10 eliciting the fact that Mr. Wiggins was booked into jail;  
11 however, the fact that he was arrested is not prejudicial.  
12 It is important. It's part of telling the story of what  
13 happened.

14 After he was arrested, he was transported to the precinct.  
15 If the officer doesn't testify that he was arrested, then  
16 the jury's left to wonder, well, why was he taken to the  
17 precinct? And so the City doesn't believe that the fact of  
18 arrest itself is prejudicial. There's also often the jury  
19 instruction is given where that issue is addressed if the  
20 jury was seeking to consider that.

21 But the City would be seeking to elicit the fact that  
22 Mr. Wiggins was arrested.

23 THE COURT: And, City, are you playing any precinct video?  
24 Is that as part of your case?

25 MS. SRA: No, Your Honor.

1 THE COURT: Okay. Thank you. So I'm going to deny that.  
2 Because I agree with what the City says. And I do give an  
3 instruction in my opening that says just because someone is  
4 arrested doesn't mean they're guilty. I (inaudible).

5 MR. BURNTON: And, Your Honor, and I guess Defense -- oh,  
6 I apologize, Your Honor.

7 THE COURT: You go ahead.

8 MR. BURNTON: Defense would be requesting that an  
9 instruction in closing as well that evidence of arrest is  
10 not in any way (inaudible).

11 THE COURT: We can talk about it at that time. That  
12 sounds good, though, but we'll talk about it when we get  
13 there.

14 Next one.

15 MR. BURNTON: So, Your Honor, Defense Motion No. 16 is  
16 Defense is here moving to disclose any and all evidence  
17 that's material and favorable. If there is any so-called  
18 Brady evidence from the City that has yet to be turned over,  
19 we ask at this time that (inaudible).

20 THE COURT: All right. City, do you have any?

21 MS. SRA: No, Your Honor.

22 THE COURT: So I'm going to grant that. City has said  
23 they don't have any. But if they do come across some, of  
24 course they would be required to turn that over.

25 Next one?

1 MR. BURNTON: And, Your Honor, Motion No. 17 is Defense  
2 would here move to preclude the City from referring to  
3 Mr. Wiggins as "the suspect" or "the arrested." Mr. Wiggins  
4 is a perfectly acceptable way and easy way to refer to him.  
5 And so when witnesses are testifying, they can refer to  
6 Mr. Wiggins as Mr. Wiggins.

7 THE COURT: Okay. City?

8 MS. SRA: So, Your Honor, the City believes that it is  
9 appropriate to address Mr. Wiggins as "the defendant." That  
10 is his role in this proceeding. The City is not going to be  
11 referring to Mr. Wiggins as "the suspect" or "the arrested;"  
12 however, if the officer were to say that, then the City  
13 doesn't want that to be basis for a mistrial.

14 But the City certainly will not be addressing Mr. Wiggins  
15 as such. And typically the officer doesn't, either.

16 THE COURT: So as is my usual, unless there's -- again,  
17 what is what the caption is. That's what we say in the jury  
18 instructions, that everybody's accustomed to using those  
19 words. I try not to use -- I try to use the name, except in  
20 the jury instructions sometimes it's too confusing not to  
21 use the word "defendant."

22 The officers, that's the words that they're (inaudible)  
23 use. So what I don't want to do is put them in a situation  
24 that they slip up and they say "defendant," then we'll be  
25 looking at a mistrial.

1           So I think to the extent that the City and -- I didn't  
2           hear the officer say "suspect" yesterday. But to the extent  
3           that they can, people will refer to Mr. Wiggins as  
4           Mr. Wiggins. But it's not possible in every case, so I'm  
5           going to deny that.

6           Next one?

7           MR. BURNTON: And, Your Honor, moving on to No. 18, here  
8           Defense is moving to strike the phrase "under the influence  
9           of marijuana or any drug" from the reading, either the  
10          complaint or the jury instructions. That's not at issue  
11          here.

12          What's at issue is the reported amount of blood alcohol in  
13          Mr. Wiggins's system, so there's no reason to read it; and  
14          it could be confusing to the jury to hear that in the  
15          instructions. And it would in no way, I think, impair any  
16          proceeding by striking that language.

17          THE COURT: City?

18          MS. SRA: And City doesn't have any objection to that.

19          THE COURT: All right. So I'm going to have to make sure  
20          I review that to make (inaudible). So I'll grant that.

21          All right. Next one?

22          MR. BURNTON: And then, Your Honor, we'll move on to the  
23          next section, which is just the logistics and fair trial  
24          motion. So 19, Defense is moving for the Court to order the  
25          City to disclose all witnesses before starting voir dire.



1 THE COURT: Okay. City?

2 MS. SRA: And, Your Honor, the City has complied with 4.7.

3 THE COURT: All right. That will be granted.

4 Twenty?

5 MR. BURNTON: And then, Your Honor, 20 is moving for the  
6 Court to exclude witnesses. But we addressed this yesterday  
7 with regards to our expert needing to sit in on the  
8 testimony of Mr. Capron.

9 MS. SRA: And, Your Honor, I did want to clarify. I  
10 guess, is Defense requesting Ms. Arvizu sit in for both  
11 motion and trial, or just trial?

12 MR. BURNTON: And, Your Honor, it would be for both  
13 motions and trial.

14 MS. SRA: So the City would object to sitting in at  
15 motions. That's not the practice in motion hearings. I've  
16 never --

17 THE COURT: Okay. So I understood that you wanted her to  
18 sit in to hear the testimony of the other expert. But what  
19 would be the purpose of her being a part of the motion? I  
20 just -- for --

21 MR. BURNTON: And so, Your Honor, the purpose for being  
22 part of the motion is because there are multiple issues  
23 (inaudible) with regard to the integrity of the blood, and  
24 part of what's going to be discussed at motions with the  
25 City's expert is going to be the methods and way in which

1 the testing procedures are followed, are reported to be  
2 followed by state patrol laboratory, as well as, of course,  
3 the individual who will not be testifying, and the ways in  
4 which they do and do not account for what testing did and  
5 didn't take place.

6 And my understanding is that Ms. Arvizu has, in fact,  
7 listened in at other testimony on this matter specifically.

8 MS. WHYTE: Yes. Your Honor, if I could address the  
9 Court.

10 This is a very, very similar question to the one presented  
11 in this case was already heard in this court once. The case  
12 was City v. Gray. I could get the Court the case number if  
13 the Court wishes. Judge Shadid ended up ruling on the  
14 motion.

15 Ms. Arvizu testified in that case. It was also a motion  
16 hearing, and she was permitted to listen to the testimony of  
17 Mr. Capron. And I don't know why the City would be arguing  
18 that -- in fact, Mr. Karr is here and can attest to that,  
19 because he was the prosecuting attorney on that motion.

20 But I don't know why the City would be indicating now that  
21 that's not the practice, when it was, in fact, the practice  
22 at that motion hearing, and that's the only time that this  
23 issue has ever been heard in this court that I'm aware of.

24 But, as Mr. Burnton stated, of course Ms. Arvizu is an  
25 expert, just like I imagine the City will be seeking to

1       qualify Mr. Capron; and she's entitled to form her opinion  
2       based on information that she learned about the case,  
3       including the testimony of other experts.

4       So I'm not sure where the authority is for the City making  
5       a distinction between having her present for the motion  
6       versus having her present for the trial, and why she  
7       shouldn't be allowed to be heard at the motion. Because I  
8       think, if anything, the motion is potentially maybe not  
9       dispositive, but I think is significant for an issue in this  
10      case.

11      THE COURT: All right. Thank you, Counsel. So --

12      MR. KARR: Your Honor, if I could just verify (inaudible).

13      THE COURT: Yes. Let me say something first, though. So,  
14      City, would you want to have your person to be here, too,  
15      for the motion? You can do that.

16      And I guess I -- just what -- I'm not really following you  
17      when you say you don't know why the City is arguing.  
18      Because I mean, each side can argue what they want. I don't  
19      think they have to -- like, I mean, she may not have been  
20      here. So based on her understanding, maybe there wasn't --  
21      maybe there hadn't (inaudible). I don't really -- I'm not  
22      understanding where you're coming with that line of  
23      argument.

24      But it sounds like that it was done in another case like  
25      this. And so maybe Ms. Sra was not aware of that.

1           But in any event, just because it's been done once doesn't  
2 mean they can't -- for you, either -- can't say, well, I  
3 don't think it should be done this time. So I just want to  
4 put that out there.

5           MR. KARR: Your Honor, I can --

6           THE COURT: But go ahead, Mr. Karr.

7           MR. KARR: I can speak to the Rachel Gray case. That was  
8 my case from that motions hearing. That was a factually  
9 different situation.

10           In that case it was whether or not we had to subpoena all  
11 of the testing toxicologists, that is, all the toxicologists  
12 who actually performed the test on the case, which is  
13 factually distinct from this case in which you have a  
14 toxicologist who performed the test who is now unavailable.

15           And the City is asking to -- or moving the Court to allow  
16 us to call Brian Capron, who reviewed all the data, came to  
17 an independent conclusion about his opinions what was in the  
18 defendant's blood in this case. That is factually distinct  
19 from Rachel Gray.

20           THE COURT: Okay. And I think that goes to my point that  
21 no one is bound by they can never make argument because it  
22 was done differently before. So that was my point.

23           Go ahead, Ms. Whyte.

24           MS. WHYTE: So, Your Honor, I guess my point was that the  
25 City hasn't provided any authority for saying that

1 Ms. Arvizu should not be permitted --

2 THE COURT: Okay.

3 MS. WHYTE: -- to listen in on the testimony. This is not  
4 the case. Where typically this motion is made it's because  
5 you have civilian witnesses who you are specifically trying  
6 to prevent from influencing their testimony based on how  
7 things are unfolding at trial because, of course, of all the  
8 rulings that Your Honor may make, and the rules of evidence,  
9 and things that they may not be familiar with, or whatever  
10 the case may be. So it's very regular that we exclude  
11 civilian witnesses from the courtroom on that basis.

12 THE COURT: Right.

13 MS. WHYTE: In this case, of course, because they're  
14 expert witnesses, they are entitled to rely on basing their  
15 opinion on things that may not even be admissible at Court,  
16 including the testimony of other experts.

17 And so if Ms. Sra thinks that that's not the case, I'm  
18 just wondering what the authority is that she has for  
19 suggesting that it would be the case that Ms. Arvizu would  
20 not be entitled to listen to and consider the testimony of  
21 Mr. Capron in the motions hearing, but would be in the  
22 trial, or just wouldn't be in general. I'm just wondering  
23 what --

24 THE COURT: Okay. So I can understand that argument  
25 better, Counsel, than saying that you don't know why they're

1 making the argument.

2 So what authority -- and it does seem different to me, a  
3 civilian with this versus an expert. But what authority  
4 does each side have to say that it can or can't be done?

5 MS. SRA: So, Your Honor, first, since we're on this  
6 issue, I do want to address the motion that the City -- the  
7 Lui motion that the City has brought is an evidentiary  
8 issue. It's a legal issue that the Court has to rule on in  
9 terms of whether the blood will be admissible through the  
10 City's, yes, expert witness, but also, the City's witness,  
11 Brian Capron, who is the toxicologist who works for the  
12 Washington State Patrol Lab.

13 I'm not entirely sure what Ms. Arvizu is going to be  
14 testifying to at a motion hearing. In my interviewing with  
15 her, she --

16 THE COURT: I don't think she's going to testify. I think  
17 they just want her to listen. Is that correct?

18 MS. SRA: No.

19 MS. WHYTE: No, Your Honor. She's going to be testifying.  
20 And Ms. Sra has --

21 THE COURT: Okay.

22 MS. WHYTE: -- has had the opportunity to interview her  
23 specifically about --

24 THE COURT: Okay.

25 MS. WHYTE: -- the motion hearing. So --

1 MS. SRA: So, Your Honor --

2 MS. WHYTE: I think it should be clear what will be the  
3 subject of her testimony.

4 THE COURT: Okay.

5 MS. SRA: So, Your Honor, the City would be moving to  
6 include Ms. Arvizu for the motion hearing. Anything she has  
7 to say is purely speculative. This is a legal issue for the  
8 Court to decide.

9 The reason that Brian Capron is testifying is that so that  
10 the Court is -- as an offer of proof, the Court hears  
11 exactly what he has to say, and that the Court can rule on  
12 that.

13 Ms. Arvizu, being an expert witness, is obviously  
14 appropriate at trial to counter what Mr. Capron might have  
15 to say.

16 But to the City's knowledge, Ms. Arvizu has done no  
17 testing in relation to this blood test of Mr. Wiggins. She  
18 has never set foot in Washington State Patrol Lab. She is  
19 not a toxicologist.

20 So absent an offer of proof, I'm not really sure what she  
21 would be testifying to at the motion hearing.

22 THE COURT: All right. So did you -- did we know that she  
23 was testifying at the motion hearing? I'm talking to City  
24 right now.

25 MS. SRA: Yes.

1 THE COURT: Okay. So you knew she was testifying at the  
2 motion hearing.

3 MS. SRA: Yes.

4 THE COURT: Okay. So --

5 MS. SRA: And I --

6 THE COURT: Now you're saying that you don't think she  
7 should be allowed to testify? So I'm confused now.

8 MS. SRA: Right. I mean, Defense put me on notice that  
9 she would be testifying. After interviewing her, I am not  
10 able to --

11 THE COURT: Okay.

12 MS. SRA: -- connect the dots of what she has to do --

13 THE COURT: All right.

14 MS. SRA: -- to help the Court understand. As an expert  
15 witness, there's -- everything that she has to say seems to  
16 me to be --

17 THE COURT: All right.

18 MS. SRA: -- speculative and removed, as she's not a  
19 toxicologist --

20 THE COURT: All right.

21 MS. SRA: -- and has no direct relation to the blood  
22 testing.

23 THE COURT: All right. And then do you want -- before you  
24 sit down, do you have any authority that says I can't allow  
25 the expert to sit -- it seems if she's testifying, she



1 shouldn't be able -- I thought she was listing for her later  
2 testimony at the trial, but she's listing for her testimony  
3 during the motion.

4 So do you have -- it seems a little bit different with  
5 that. But do you have any specific authority?

6 MS. SRA: Well, Your Honor, if, I guess the --

7 THE COURT: Or any argument further, or argument that you  
8 haven't already made?

9 MS. SRA: Yes. I mean, I guess it depends on whether the  
10 Court would be allowing her to --

11 THE COURT: Well, I'm not sure yet. I'm going to get --  
12 ask Defense when I get to -- when you're finished.

13 MS. SRA: Yes, Your Honor. Typically at a motion hearing,  
14 these are legal issues that the Court is dealing with.

15 I personally, in my years of practice, have never even  
16 seen an expert witness called at a motion hearing.

17 In trial it is the normal practice to have the expert  
18 witness sit in. Then the City has an opportunity to rebut.

19 If we were to do that in motion practice, that's just  
20 simply not how motions go. It's not like Brian Capron's  
21 going to testify, Janine Arvizu is going to sit, then she's  
22 going to take the stand, Brian Capron's going to listen,  
23 then he's going to rebut Janine Arvizu. That's just not,  
24 you know, the flow of how a motion hearing goes.

25 So I don't have any specific cases or anything like that.

1 But I also don't have anything in support.

2 So Defense is saying, well, the City doesn't have any  
3 authority. Well, what authority does Defense have?

4 THE COURT: So, Ms. Whyte, my first question is: What  
5 would Ms. -- what would Dr. -- I think it's doctor, right?

6 MS. WHYTE: It's Ms. Arvizu.

7 THE COURT: Oh, okay. What would she testify to at the  
8 motion hearing that would assist me in deciding whether or  
9 not the blood -- whether or not his testimony would be  
10 sufficient?

11 MS. WHYTE: Well, I guess, first of all, Your Honor, I  
12 would want to make a record, because this is very surprising  
13 to me, indeed, having never heard anything from Ms. Sra  
14 about this issue about her wanting to preclude Ms. Arvizu  
15 from testifying at the motion hearing before today, when I  
16 disclosed Ms. Arvizu to Ms. Sra literally months ago, and  
17 Ms. Sra has had the opportunity to review her CV, get in  
18 contact with her. I made her available for an interview.  
19 Ms. Sra spent an hour talking with Ms. Arvizu.

20 So it's quite surprising to me that she would be making  
21 such an untimely motion to preclude Ms. Arvizu from  
22 testifying at the motion hearing.

23 It's also surprising to me that she would be making the  
24 same argument that the Court just said isn't of much  
25 significance, which is that, well, I've never done it this

1 way in a motion hearing, so why should we be --

2 THE COURT: Your officer's in the back. If you want to  
3 tell them we're not ready for them.

4 MS. WHYTE: There's another motion of similar nature  
5 pending right now before Judge Gregory. Ms. Arvizu has been  
6 accepted as a witness to testify in that case. I'm sure  
7 Ms. Sra is aware of it. That's with Ms. Connell-Flint from  
8 her office, and Ms. Saly from our office.

9 So I mean, this is happening in this courthouse. This is  
10 an issue that has to be litigated.

11 THE COURT: Understand. So, Counsel, what I wanted from  
12 you, though, was just an offer of proof. And then I can --

13 MS. WHYTE: Okay.

14 THE COURT: I have another question for you.

15 MS. WHYTE: So as Ms. Sra is aware, Ms. Arvizu has  
16 significant experience, over 30 years of experience in  
17 auditing toxicology labs. She is an expert in the field of  
18 quality assurance for toxicology labs. She gives testimony  
19 all over the country. She gives presentations to  
20 prosecutors, judges, defense lawyers on how to interpret  
21 toxicology measurements and data.

22 And she has information about why specifically -- the  
23 City, in essence, is going to be arguing that there's really  
24 no reason why we would need the person who performed the  
25 actual tests on Mr. Wiggins's blood here on the stand; we

1 can simply have the person who reviewed the data generated  
2 by that testing toxicologist in order to make any  
3 conclusions that we need, and in order, most importantly, to  
4 guarantee Mr. Wiggins's right to confrontation.

5 Ms. Arvizu is able to provide information about what kinds  
6 of things we might want to know about Mr. Wiggins's blood  
7 that are significant and important to assessing that  
8 everything was done correctly, which is exactly what is  
9 guaranteed by the Constitutional right to confrontation as  
10 interpreted by the Supreme Court of the United States and  
11 our own Supreme Court.

12 That's missing from the report that was generated by  
13 Ms. Mitchell-Mata. That, therefore, is not able to be  
14 reviewed by Mr. Capron.

15 THE COURT: Thank you.

16 MR. KARR: And, Your Honor, (inaudible) --

17 THE COURT: Just a second, Mr. Karr. I want to -- I'm not  
18 done with Defense. So thank you for that offer of proof.

19 And then my next question is: Other than that it's been  
20 done in the courthouse, do you have any authority that the  
21 expert witness is allowed to sit in for the motion?

22 MS. WHYTE: Yes. I mean, I think the rules of evidence  
23 contemplate it . I think that's why it's been the practice.  
24 I think that --

25 THE COURT: Specifically which rule of evidence?

1 MS. WHYTE: Is it 702? So I think 702 -- so 702  
2 contemplates that a witness -- that the normal rules -- I'm  
3 quoting from the rule -- requiring a witness to avoid  
4 opinionated testimony and to testify from first-hand  
5 knowledge are modified to accommodate the testimony of the  
6 expert. And rule --

7 THE COURT: What subsection are you reading from?

8 MS. WHYTE: That's from Rule 702.

9 THE COURT: 702. Is there a subsection?

10 MS. WHYTE: If the Court is on -- in the Tegland's, it's  
11 on page 226, so it's Section 702-1 on expert testimony  
12 generally.

13 And then in ER 703, bases of opinion testimony by experts,  
14 the rule indicates that the facts or data in the particular  
15 case upon which an expert bases an opinion or inference may  
16 be those perceived by or made known to the expert at or  
17 before the hearing.

18 So it not only contemplates proceedings at the actual  
19 hearing, the trial, whatever, but before that. And it not  
20 only contemplates things that the expert has been given or  
21 told, in other words, made known to the expert, but also  
22 things perceived by the expert.

23 The rule goes on to say what I had said before, which is  
24 that experts may rely on things. If they are typically  
25 relied on by experts in their particular field, those facts

1       may need not be admissible in evidence.

2           I mean, I think -- frankly, I think that part of the  
3       nuance of the case law in the motion that's at hand is these  
4       rules which give experts much broader latitude to consider  
5       things than we, one, would typically allow into trial; and  
6       two, than we typically would allow lay witnesses to testify  
7       to.

8           And there's attention between allowing an expert to  
9       testify to things like hearsay, for example, hearsay  
10      evidence that Ms. Arvizu would have heard Mr. Capron testify  
11      to in a motion hearing or at trial. The rules specifically  
12      contemplate that, when she perceives that testimony, she's  
13      entitled to be able to rely on it in forming her opinion if  
14      it's the kind of thing that scientists or experts in her  
15      field typically rely upon.

16          And I think that's -- frankly, I think that's one of the  
17      nuances of this issue, which is that courts have  
18      historically allowed experts to come in and present evidence  
19      that may not be admissible under other circumstances because  
20      they're able to provide extra information for the Court in  
21      areas in which the Court could never possibly have its own  
22      expertise because so many different issues come before the  
23      Court.

24          THE COURT: Okay. I think you're going beyond my question  
25      now. So thank you, though, for that answer. I didn't have

1 anything else just yet.

2 Okay. Mr. Karr, you wanted to respond?

3 MR. KARR: I did, Your Honor. And I appreciate the  
4 opportunity. First of all, I don't know any expert that  
5 typically relies on in-court testimony in forming an expert  
6 opinion. Usually they come into court with that opinion  
7 already formed based on the review of scientific data that  
8 they have reviewed. That is what is specifically  
9 contemplated in Rule 703. It specifically says the facts or  
10 data in a particular case upon which an expert bases an  
11 opinion or inference may be those perceived by or made known  
12 to the expert at or before the hearing, but it also  
13 specifically says that they are forming their opinion on  
14 facts that are not typically in evidence.

15 Now, that is not typically testimony that they hear. They  
16 don't sit in and form an opinion, at least traditionally, in  
17 court. They usually come in with some basis of an opinion.

18 So I don't think that the rules are designed to allow an  
19 expert to sit in court and base their opinion on something  
20 that they hear in court, which, by the way, is not hearsay.  
21 Hearsay is an out-of-court statement that is made by someone  
22 and offered to Court to prove the truth of the matter  
23 asserted.

24 So the rules don't really seem to contemplate what  
25 Ms. Whyte is putting forth.

1           Regarding Rule 702, it basically stands for the  
2           proposition that they can rely on things, knowledge, skill,  
3           experience, training, or education to testify to their  
4           opinions. They can rely on things that they have reviewed,  
5           and they can form an opinion and testify to that.

6           But I don't believe that the rules actually do contemplate  
7           that they are specifically allowed to sit in court and  
8           listen to testimony, and develop their opinion in that  
9           manner.

10          What we're here today to discuss is whether or not Brian  
11          Capron's testimony satisfies the confrontation clause. That  
12          is entirely a legal issue. That is something that  
13          Ms. Arvizu does not have the requisite qualifications to  
14          come to an opinion on. It's not something that she has any  
15          sort of training or knowledge about.

16          In fact, Ms. Sra in her interview asked Ms. Arvizu if she  
17          is knowledgeable or familiar with any of the case law  
18          surrounding confrontation clause, and she responded she is  
19          not. She does not know anything about the subject that we  
20          are here to discuss.

21          I think that, in and of itself, would preclude her  
22          testimony in this motions hearing since that is the only  
23          issue. She couldn't possibly shed light on whether or not  
24          the Court should allow Mr. Capron to testify in an expert  
25          capacity, and whether or not that satisfies the



1 confrontation clause, which is the ultimate issue today.

2 I don't see any possible circumstance in which she would  
3 be able to come to that opinion whether or not that legal  
4 issue is satisfied. So I would argue that her testimony is  
5 just not relevant here.

6 And if the Court is going to entertain it, the only thing  
7 that she should be allowed to testify to is that, yes, these  
8 tests are done by human beings; and yes, they can make  
9 mistakes.

10 THE COURT: Okay. So, thank you.

11 So I think her -- from what I heard in the offer of proof,  
12 it seems like she could shed light on the process, because  
13 that's the whole issue is whether or not your witness, the  
14 one that's not available, actually, in my mind, acted as a  
15 technician or actually ran the test, and whether or not what  
16 the supervisor is going to testify to just consists of a  
17 review of the information and whether or not that's  
18 sufficient.

19 And so it sounds like her testimony just on those  
20 issues -- I think a memory of her before, she does have some  
21 experience with that -- could lend some additional  
22 information to the Court, her factual testimony on that.

23 So I'm going to allow her testimony, but I'm not going to  
24 allow her to sit in on the witness. Because, again, she's  
25 already researched -- I'm sure she already knows all of the

1 information been provided to her by Defense and done her own  
2 research. So she should come in, her testimony, based on  
3 that.

4 And Defense will have a chance to ask her any questions  
5 about what came out during -- is it Mr. Capron?

6 MR. KARR: Yes.

7 MS. WHYTE: Yes, Your Honor.

8 THE COURT: Testimony. So I'm going to allow her  
9 testimony based on the offer of proof that was given by  
10 Defense, but I'm going to exclude her from sitting in during  
11 the motion.

12 So that takes us then to No. 17 -- or no. We did 17. Did  
13 18.

14 MR. BURNTON: I believe we're on 21, Your Honor.

15 THE COURT: Thank you. All right. Go ahead.

16 MR. BURNTON: So, Your Honor, No. 21, Defense is moving  
17 the Court to order the City to advise witnesses of all  
18 applicable pretrial rulings.

19 THE COURT: And I think we did that one already in the  
20 City's.

21 MR. BURNTON: Yes.

22 THE COURT: So that's granted.

23 MR. BURNTON: Then 22, Your Honor, Defense is here moving  
24 for the Court to order City to turn over any witness  
25 statements or discussions the City has had with its

1 witnesses, or notes of witness interviews, and preparation  
2 materials, if it has not done so already.

3 THE COURT: City, have you done that already?

4 MS. SRA: Your Honor, I don't have any notes from --

5 THE COURT: Thank you. Granted.

6 MR. BURNTON: And, Your Honor, No. 23, here Defense is  
7 moving the Court to preclude the City from objecting to  
8 statements as self-serving hearsay, as the objection is  
9 nonsensical and has no basis in law.

10 When a statement is subject to a hearsay exception, it's  
11 subject (inaudible) hearsay exception. And for the City to  
12 object on the basis of self-serving hearsay, if it's  
13 hearsay, that may be beneficial to the Defense. If it is  
14 subject to a hearsay exception, Defense may use that.

15 MR. KARR: Your Honor, I'm not familiar with any authority  
16 that would prevent the City from making an objection --

17 MR. BURNTON: There's case law in here.

18 MR. KARR: -- (inaudible) rules.

19 THE COURT: Okay.

20 MR. BURNTON: And it's actually State v. Pavlik. We hold  
21 that there is no self-serving hearsay bar that excludes  
22 (inaudible).

23 THE COURT: So I guess I didn't read the case, though.  
24 But what -- I guess, what if someone calls an objection,  
25 they use the wrong term or they -- I mean, might be because

1       they just don't know the right one, and then they keep going  
2       until they get the right one. I kind of see that one like  
3       that. And so you would say it's not this anyway, so it's --  
4       so I guess I'm confused about that, how it -- how I can rule  
5       and tell them what they can --

6           MR. BURNTON: So, Your Honor --

7           THE COURT: -- how they can phrase the objection. How is  
8       that -- and I haven't read the case. But it sounds like --  
9       what I'm reading here, it was the person used in their  
10      opening -- I'm reading this -- says in their opening  
11      statement -- oh, that's a different one. I'm sorry.

12         So go ahead and explain that to me, Counsel, how it's them  
13      maybe calling it the wrong thing.

14           MR. BURNTON: So, Your Honor, what Defense is concerned  
15      specifically with is objecting on the basis of what's  
16      called, quote/unquote, self-serving hearsay.

17         In Tegland's, page 373 of the 2017-2018 edition, speaks to  
18      self-serving statements. And Tegland's makes clear the  
19      definition of hearsay has nothing to do with whether the  
20      out-of-court statement is or is not self-serving. Statement  
21      is self-serving within the definition of hearsay is -- just  
22      at that point would be general hearsay.

23         So the self-serving nature is what Defense is concerned  
24      with, is when the City objects to something that's,  
25      quote/unquote, self-serving hearsay, it's in a sense sending

1 a coded message to the jury that Defense wants this in, and  
2 it's helping them, and we don't want it in.

3 And I think there's many hearsay objections that the City  
4 can use that are neutral and within the general list of  
5 objections, many of which are listed at the back of  
6 Tegland's.

7 But the phrase "self-serving hearsay" sends a powerful  
8 message to the jury. It has no basis in law, as Pavlik  
9 squarely on point is saying. And the City should not be  
10 permitted to use that particular objection, because it's not  
11 a valid objection.

12 THE COURT: Where does it say that in Tegland?

13 MR. KARR: Your Honor, I guess I'm still confused about  
14 this. I don't see in Tegland's where that is stated as  
15 Counsel indicated. And I'm looking at a different version,  
16 so it might be on a different page.

17 However, I think anytime the City objects, it  
18 inadvertently will, you know, tell the jury that there's  
19 something that is about to be said that the City doesn't  
20 want to be said. I mean, the purpose of objecting is to  
21 prevent testimony that is in violation of the rules of  
22 evidence.

23 And maybe I'm giving the jury too much credit here. But I  
24 think if -- you know, most people are sitting on the jury,  
25 if they hear an objection, will think, okay, there's

1 something there that, you know, whatever party objected  
2 didn't want us to hear about.

3 THE COURT: I guess --

4 MR. KARR: It's not just self-serving hearsay that would  
5 have that function.

6 THE COURT: Thank you.

7 MR. KARR: It's just functionally prohibiting the City  
8 from objecting.

9 THE COURT: I guess my -- Mr. Burnton, my issue is, I  
10 understand that it's not a real -- it's not the title of it.  
11 But I guess I don't see -- the prejudice would come then if  
12 I allowed it, and allowed it under some kind of self-serving  
13 hearsay. Because otherwise I don't see how that is  
14 different than the other objections. And so that's my  
15 confusion.

16 I mean, I think the City should use the correct term. But  
17 if they say -- like, anybody could say the wrong objection.  
18 So I guess I don't see how that, in and of itself, would be  
19 prejudicial and wouldn't be allowed.

20 MR. BURNTON: And, so, Your Honor, what I would say is  
21 that the phrase itself, "self-serving hearsay" is what I am  
22 concerned with. Pavlik addressed this issue specifically,  
23 because the issue arose in Pavlik when the City objected on  
24 the basis of self-serving hearsay, and that essentially  
25 Defense was not permitted to get to explore what was a valid

1 piece of evidence on --

2 THE COURT: So that's what I say. So the prejudice came  
3 on the judge's ruling that it was self-serving, correct?

4 MR. BURNTON: Correct.

5 THE COURT: But I guess I feel like you would have a  
6 chance to say just what you're saying now. You know, we  
7 would probably take a side bar for this to -- and go out,  
8 and then you would say there's no such thing, and then we'd  
9 say okay, what is your objection, City, and determine if  
10 they had a reason -- objection that fit the case -- the  
11 whatever was said, and then rule based on that.

12 So I guess that's what I -- I see that the prejudice comes  
13 if the judge rules on a self-serving hearsay when there is  
14 no such thing. Otherwise it's like any other objection.  
15 That's --

16 MR. BURNTON: And so --

17 THE COURT: -- my confusion.

18 MR. BURNTON: Your Honor, what I would just say briefly in  
19 response is that we can streamline the process by just  
20 acknowledging here and now there's no such thing as  
21 self-serving hearsay. The City should not just be permitted  
22 to use that phrase.

23 Defense is not saying they cannot object. Of course it is  
24 their right to object, and it is our right to object. But  
25 that particular objection is just not a valid objection.

1 And so there's no reason that the City should be permitted  
2 to say it, because this state's courts --

3 THE COURT: Okay.

4 MR. BURNTON: -- have already said you can't object on the  
5 basis of self-serving hearsay. You can pick another basis,  
6 but that basis will never be right.

7 THE COURT: The basis. But see, again, this gets me to  
8 the point where, if I say somebody -- unless there's really  
9 a reason, if I say you can never say this, and somebody  
10 accidentally says it, maybe somebody that doesn't know yet,  
11 or for whatever reason, then we're looking at a mistrial  
12 based on something that may have been inadvertent.

13 So that's why I'm always reluctant to do these broad, you  
14 can't say this. Because I think there are other remedies,  
15 such as (inaudible) you would object to them objecting about  
16 self-serving hearsay, and then you would have a chance to  
17 say why.

18 So I think, for me, that's a safer remedy than -- and I  
19 think the City is hearing this. And I don't think I have  
20 heard anybody say that during my trials. But I'm sure it  
21 has come up a lot.

22 So I'm just reluctant to do a broad, you can never say  
23 this kind of a thing, just in case something comes up  
24 inadvertently.

25 MR. KARR: And, Your Honor, if I could, I did find the



1 section in Tegland's that Counsel is referring to. And it  
2 essentially cites to Pavlik and says that -- after what  
3 counsel had asserted, it also says that, if the statement is  
4 self-serving and is hearsay, it's still hearsay. If it's  
5 self-serving, it's not hearsay, then it's not hearsay. I  
6 mean, it's --

7 THE COURT: Okay.

8 MR. KARR: I mean, I think that we're all kind of getting  
9 to the same --

10 THE COURT: Yeah.

11 MR. KARR: -- conclusion here that, you know, whether --  
12 the question is whether or not it's hearsay. So if it is a  
13 hearsay statement, the City will just simply object to  
14 hearsay.

15 THE COURT: All right. So I'm, again, I'm not going to  
16 grant that. I'm going to deny. But not saying that the  
17 City can use that -- I mean, that that would be accepted as  
18 an exception.

19 MR. BURNTON: So is Your Honor denying, or I guess  
20 reserving if it comes up later?

21 THE COURT: You know --

22 MR. KARR: I would just ask the Court to reserve.

23 MR. BURNTON: Because it does sound like we are on the  
24 same page in terms of the understanding that it's just a  
25 general hearsay analysis.

1 THE COURT: Yeah. And that's what I was saying. If they  
2 use the wrong terminology, you still would go out and argue  
3 whether it was or not. So I guess we can reserve.

4 All right. So the next one, 37.

5 MR. BURNTON: So Motion 24 on page 36, Your Honor, Defense  
6 is moving to preclude the Court -- or moving for the Court  
7 to preclude the City from making arguments about the impact  
8 substance use and driving under the influence can have on  
9 the community. That's appealing to the passions of the  
10 jury, and it's squarely --

11 THE COURT: Okay.

12 MR. BURNTON: -- under the case law of being improper  
13 argument.

14 THE COURT: City?

15 MS. SRA: Your Honor, I'm not planning on doing that.

16 THE COURT: Okay. I'm going to grant that. I agree with  
17 Defense.

18 Okay. Next one?

19 MR. BURNTON: And, Your Honor, No. 25, Defense is moving  
20 for the Court to preclude the City from arguing to the jury  
21 that this case isn't about finding the defendant to be a bad  
22 person, but having done a bad thing, as the argument  
23 trivializes the burden.

24 And I don't know about the specific case, but I know that  
25 in other cases there have been -- by other prosecutors there

1 have been arguments where the prosecutor might say, we're  
2 not asking you to find that Mr. So-and-so is a bad person,  
3 but that he did a bad thing. And that, for one thing, is  
4 really running against what this Court instructs the jury  
5 on, which is to be careful, because a conviction is  
6 something that carries weight, be careful before you assign  
7 that.

8 And I think, in addition, it does minimize just how  
9 important that decision is generally.

10 It is something where there -- in State v. Lindsay where  
11 they talked about any time you're taking something as grave  
12 as the burden of proof or as grave as the ultimate decision  
13 and comparing it to everyday experiences and making it seem  
14 simple, that is misconduct. And so we are asking the City  
15 not to be able to use that specific argument or line.

16 THE COURT: City?

17 MR. KARR: Just one moment, Your Honor.

18 MS. SRA: So, Your Honor, the case that's been cited by  
19 Defense doesn't actually say that that is misconduct. It  
20 does say in that court, the Supreme Court did hold that it  
21 was error for the government to compare the beyond a  
22 reasonable doubt standard with walking along a traffic  
23 signal.

24 That is very different from what Defense's motion is  
25 about. If the -- and I do not think that it would be

1 prosecutorial misconduct to say such a thing.

2 If the Court is inclined to grant this motion, then the  
3 City would ask that, reciprocally, the Defense be barred  
4 from arguing that Mr. Wiggins is a good person, or asking  
5 the jury, as they frequently do, to imagine Mr. Wiggins to  
6 be a person that is close to them, a family member, et  
7 cetera, essentially appealing to the sympathies of the jury.

8 It would be unfair to bar the City from having any sort of  
9 rebuttal to these sort of statements. And so the City has  
10 no problem not saying this, but in the same vein, the  
11 Defense should also be prohibited from arguing the opposite.

12 THE COURT: Okay. Go ahead.

13 MR. BURNTON: So briefly, Your Honor, there's a couple  
14 things that the City said there that are two different  
15 issues.

16 One, so again, I understand Lindsay is not squarely on  
17 point. But the idea of taking everyday situations and  
18 trying to liken them to the criminal justice system is I  
19 think in the spirit of what Lindsay is getting at. We  
20 should not do that. That we need to understand the gravity  
21 of the decision (inaudible) jury. So that was my citation  
22 to Lindsay.

23 While Defense is not going to argue -- and I believe this  
24 is one of the City's motions in limine -- broad character  
25 pieces of being a wonderful person that weren't admitted in

1 evidence, what City then I think made reference to was a  
2 specific argument that I believe Your Honor has seen me make  
3 before in closing, about how the presumption of innocence  
4 can be likened to the belief you would have if somebody were  
5 accused of a crime, and this is somebody who is close to  
6 you, and your first thought was that is incorrect.

7 So that's a separate issue, I think, than what we're  
8 dealing with here. So we want to address that separately,  
9 we can. Or if Your Honor wants to address that here, we  
10 can. But I think --

11 THE COURT: Well, I think it only -- City's only bringing  
12 it up if they are not allowed to -- so we might not need to.

13 MR. BURNTON: So I think they're two different issues,  
14 though. Because I do think -- we are not saying to say put  
15 him in, you know, the shoes of your family. We're saying,  
16 generally speaking, here's how you understand the  
17 presumption of innocence. The presumption of innocence is  
18 the belief you would have if somebody you looked up to or  
19 admired were accused of a crime, and your first thought was  
20 they didn't do it. That is functionally how the presumption  
21 of innocence works.

22 That's different, I think, than the City getting up here  
23 to say he's not a bad person, but he did a bad thing. So  
24 those are two, I think, separate arguments.

25 THE COURT: So I don't think City could say he did a bad

1 thing, and I don't think the City would say that. I haven't  
2 heard that.

3 I have heard them say that we're not here to determine  
4 whether Mr. So-and-so is a bad person. But I don't think it  
5 would be appropriate for the City to say he did a bad thing,  
6 but could certainly say, but he's been, you know, charged  
7 with doing this, and that's why we're here.

8 So I think your terms here -- the bad thing I don't  
9 think -- totally would not be acceptable. But I don't think  
10 City would plan to say that.

11 MS. SRA: No, Your Honor.

12 THE COURT: Okay.

13 MS. SRA: And if I could briefly respond to the  
14 presumption of innocence, the City would be objecting to  
15 what Defense just proffered. It is inappropriate. The  
16 presumption of innocence has its own legal definition.  
17 Defense is essentially inserting their own definition.

18 And by using that verbiage that Counsel just put forth, it  
19 does appeal to the sympathies of the jury, because now the  
20 jury is imagining their close loved one being accused of a  
21 crime. And it directly -- that's the purpose of using that  
22 definition. There is a million other ways that that could  
23 be characterized.

24 And so choosing to say that, to imagine that the defendant  
25 is somebody that was close to them, and you know, their

1 first thought is, oh, no, this is incorrect, it appeals  
2 directly to the sympathies of the jury, and it is  
3 prejudicial to the City's case.

4 THE COURT: All right. So before we -- because that's a  
5 second part. So let me deal with this, this one first, and  
6 then we can -- if the City wants to add that as one of  
7 their -- so I actually don't think if the City were to say  
8 that they're not saying Mr. Wiggins is a bad person, I don't  
9 find anything wrong with that. I do find, you know, that  
10 he's done a bad thing. I don't know if the City is going  
11 to -- will use that.

12 So in terms of that motion, except this bad -- bad thing,  
13 I'm going to deny that motion.

14 Now, let's talk about -- so, Mr. Burnton, let's talk about  
15 do you plan to use that argument about, you know, imagine a  
16 person in your family, and that's akin to the reasonable  
17 doubt? Because if you do, then we should talk about that  
18 now.

19 MR. BURNTON: So I will defer briefly, Your Honor, because  
20 Ms. Whyte --

21 THE COURT: Okay.

22 MR. BURNTON: -- will be handling closing.

23 THE COURT: Oh, okay.

24 MR. BURNTON: I can address it, or I can let Ms. Whyte  
25 probably more properly address that specific motion.

1 THE COURT: Yes.

2 MR. BURNTON: So, Your Honor, that -- and I believe Your  
3 Honor has seen defense counsel do that before. What I would  
4 say is that this is something that I think has been  
5 discussed at length with other attorneys in my office,  
6 felony attorneys. And understandably, it's a very powerful  
7 argument, and it's powerful because it works.

8 But what works about it is the fact that it is not telling  
9 the jury to imagine themselves in the defendant's place.  
10 It's not saying to the jury, imagine that he is your family  
11 member, imagine that he is this person.

12 What it's saying is, you need to understand that the  
13 presumption of innocence means that, when somebody is  
14 accused of a crime, that you believe from square one that  
15 they didn't do it. It is as if somebody you look up to or  
16 somebody you were close to were accused of a crime, and your  
17 first thought would be they didn't do it. That idea is the  
18 presumption of innocence.

19 I'm not asking them to put themselves in anybody's shoes  
20 or put family members in anybody's shoes. I'm talking  
21 broadly about the presumption of innocence. I do not  
22 believe that that line of argument is improper.

23 THE COURT: Okay. So do we need to -- is that going to be  
24 used? Do we need to rule on that?

25 MR. BURNTON: I would like to rule on it now --



1 THE COURT: All right.

2 MR. BURNTON: Just in case we do use it ultimately.

3 THE COURT: Ms. Sra, did you have anything further to say  
4 regarding that?

5 MS. SRA: And, Your Honor, the using the example and using  
6 somebody that's close to them, and their belief that that  
7 person's innocent has nothing do with the presumption of  
8 innocence.

9 If that -- the presumption of innocence applies to  
10 anybody, whether it's a stranger you've never met before,  
11 whether it's a family member, whether it's your spouse. And  
12 so I don't understand Defense's need to use somebody that  
13 would be in the jury -- in the juror's mind somebody that's  
14 very near and dear to them, and to sort of pull at their  
15 heart strings. So that's the City's issue with this.

16 THE COURT: Okay. So clearly the Defense cannot say,  
17 imagine Mr. Wiggins was your family member, and how would  
18 you -- you know, and he was accused of something, and would  
19 you believe him.

20 Regarding saying the thing that I've heard argued before,  
21 that's similar to what I've heard in voir dire when we talk  
22 about people that have children, and how do you know  
23 (inaudible), and that I've heard both sides use that.

24 So, and I'm not going to -- I don't believe that that  
25 would be prejudicial or would somehow change the presumption

1 of proof definition.

2 And then again, City, you can come back and say, you know,  
3 whatever, whatever you want to say to make sure the jury  
4 understands what the burden of proof is in terms of what  
5 your argument.

6 So I'm going to find that, if that is used, that that  
7 would be allowable. I'm going to put it on Defense then,  
8 since we're talking about Defense now, so I'm going to say  
9 that we're going to grant that, and I'm going to call that  
10 25-B, because we didn't have that previously (inaudible).

11 So the argument of person you -- I'll put look up to or  
12 family, just going to paraphrase, would you believe them, so  
13 I'm making that 25-B.

14 All right. Let's go to the next one, Defense.

15 MR. BURNTON: Your Honor, 26 is Defense moving the Court  
16 to preclude the City from disparaging the role of Defense  
17 counsel, as well as shifting the burden of proof. Now, I'm  
18 not saying here that City's going --

19 THE COURT: All right.

20 MR. BURNTON: -- to disparage role of Defense counsel.  
21 What I am concerned with specifically is with the burden of  
22 proof.

23 THE COURT: Okay.

24 MR. BURNTON: Because in this case, of course Defense is  
25 calling an expert at trial. And it is important for the

1 jury to understand that the Defense -- just because we call  
2 an expert does not have any burden still in that case. The  
3 City's burden remains their burden the entire time.

4 And so what Defense is most concerned with is the City  
5 arguing in any way that, you know, Defense didn't give you  
6 enough; their expert could have given you this, but didn't.

7 It's the City's burden to show you, here's why we have  
8 proven our case.

9 THE COURT: So I guess I need to wait to see what  
10 specifically -- because I don't anticipate the City is going  
11 to say anything that you just said. But they may say  
12 something else that you find is questionable or on the line.  
13 So I think we have to wait and see what comes up.

14 But, Ms. Sra, I'll hear from you.

15 MS. SRA: Yeah. Your Honor, I would ask the Court to  
16 reserve this. Certainly the --

17 THE COURT: The disparaging, of course. And that's --

18 MS. SRA: Right.

19 THE COURT: That's on both sides.

20 MS. SRA: Of course. Since we, you know, we don't know  
21 what Ms. Arvizu is going to say --

22 THE COURT: Right.

23 MS. SRA: -- the City is obviously allowed to attack her  
24 credibility, or what she has to say, or what she doesn't  
25 have to say, et cetera. And so the City certainly doesn't

1 plan to shift burdens or say, oh, well, the Defense didn't  
2 call XYZ --

3 THE COURT: Okay.

4 MS. SRA: -- and only called Ms. Arvizu.

5 So, but just -- I would just ask the Court reserve at this  
6 time.

7 THE COURT: Yeah. And that's what I think is appropriate.

8 MR. BURNTON: I understand, Your Honor.

9 THE COURT: Next one?

10 MS. SRA: And, Your Honor, just before we proceed.

11 THE COURT: Yeah.

12 MS. SRA: I did want to let the Court know that both of my  
13 witnesses are outside.

14 THE COURT: Okay. So that's why I would like -- let us  
15 get through these --

16 MS. SRA: Okay.

17 THE COURT: -- so we can get going.

18 MR. BURNTON: I only have two left, Your Honor.

19 And, Your Honor, 27 is the Defense move to be permitted to  
20 discuss and compare burdens of proof in voir dire and  
21 closing argument. And again, we will not use specific  
22 percentiles beyond for preponderance, 50 and a feather,  
23 which is, I think, commonplace.

24 THE COURT: Thank you.

25 City.

1 MS. SRA: No objection.

2 THE COURT: All right. That's granted.

3 MR. BURNTON: And then, Your Honor, 28 is the 3.5 hearing.

4 THE COURT: Reserved. So we'll reserve that for now. All  
5 right. Let me --

6 MR. BURNTON: Your Honor, I apologize. There is one that  
7 I did not include in here --

8 THE COURT: Oh, I'm sorry.

9 MR. BURNTON: -- that I just briefly want to address. No.  
10 I not included it.

11 THE COURT: Okay.

12 MR. BURNTON: Your Honor, Defense would move to preclude  
13 the City from eliciting testimony at trial about  
14 Mr. Wiggins's refusal to take the portable breath test  
15 specifically.

16 The portable breath test is a voluntary test. Case law  
17 has made abundantly clear it is in no way admissible for  
18 purposes of evidence at trial. And Defense would move to  
19 preclude the fact that he didn't take the voluntary  
20 inadmissible test from being elicited on direct.

21 THE COURT: City?

22 MS. SRA: City would object, Your Honor. There's a case  
23 on point. It's the State v. Sosa case which specifically  
24 addresses this issue.

25 Whether the PBT is admissible or not is a separate issue

1 from whether the refusal can be elicited at trial. And so I  
2 would -- I'm just trying to find that cite here.

3 THE COURT: I think there were some cases prior to that  
4 that said that, also.

5 MS. SRA: Okay. So that the City would be eliciting the  
6 refusal of the PBT, as it's allowed, as the case law has  
7 held.

8 THE COURT: Okay.

9 MR. BURNTON: And, Your Honor, I'm reading State v. Sosa,  
10 and I just pulled it up on Westlaw. And I see -- and, Your  
11 Honor, that was actually based on the issue of trial  
12 counsel's failure to object to the admissibility of the  
13 refusal, which would seem to imply that there was a basis to  
14 object to it to begin with, and that it is something that is  
15 objectionable for it to come in against the defendant. And  
16 back to the issue there, that it was ineffective assistance  
17 of counsel for defense counsel not to object, was whether it  
18 was ineffective assistance of defense counsel not to object  
19 for it to come in.

20 So at this time Defense is objecting on the basis of the  
21 refusal to take the portable breath test to come in.  
22 Because it would seem then that, by holding that it's not, I  
23 guess inadmissible, then the test really, truly is not  
24 voluntary, because it can come against you even if you  
25 refuse this voluntary test.

1 THE COURT: I think there were some cases even -- I'm just  
2 trying to find it real quick.

3 But go ahead, City, if you want to respond while I'm  
4 looking.

5 MS. SRA: Your Honor, as State v. Sosa Court did hold  
6 that, under Washington's implied consent law, an individual  
7 has a choice either to submit to a PBT or permit evidence of  
8 refusal at trial cites the Baird case, which is 187 Wn.2d  
9 at -- let's see here.

10 And anyways, the Sosa Court goes on further to say,  
11 because Mr. Sosa opted not to participate in the PBT, the  
12 State was entitled to elicit evidence of his refusal to take  
13 the test. Defense counsel did not object -- did not perform  
14 deficiently by failing to object to this evidence.

15 So Sosa does address the fact -- the question of whether  
16 the City is permitted to elicit that refusal.

17 THE COURT: Yeah. And I'm reading, too. It says refusal  
18 to submit to a voluntary -- let's see. Just a second. I  
19 think there was another case that said that it was  
20 (inaudible) admissible because it's voluntary.

21 MS. SRA: (Inaudible).

22 THE COURT: Okay. So let me come back to that one. I'm  
23 inclined to allow the City to do it. I just wanted to find  
24 that real quick. There was another case (inaudible). So  
25 we'll come back to that one.

1 I want to get started with the testimony since the  
2 witnesses are here, so we can try to stay on track. So  
3 we'll call that -- your last one was twenty --

4 MR. BURNTON: The last one was I believe 28 with the  
5 hearing.

6 THE COURT: So we'll make this 29, and then we'll reserve  
7 it for now.

8 MR. BURNTON: So we are reserving on that for now,  
9 correct, Your Honor?

10 THE COURT: Uh-huh.

11 MR. BURNTON: Thank you. And, Your Honor, may --  
12 because are we starting the 3.5?

13 THE COURT: Yes. We'll start off where we left off  
14 yesterday.

15 MR. BURNTON: May I please queue up the TV set?

16 THE COURT: Yes. Please do.

17 MR. BURNTON: Thank you.

18 MS. WHYTE: And, Your Honor, while we're getting set up,  
19 may I ask for just a moment for Mr. Wiggins to step out?

20 THE COURT: Oh, sure.

21 MR. BURNTON: And, Your Honor, while that's loading, may I  
22 just step outside for just one brief moment?

23 THE COURT: Uh-huh.

24 MR. BURNTON: Thank you.

25 UNIDENTIFIED FEMALE: And, Your Honor, if the Court is



1 ready, may I --

2 THE COURT: Okay.

3 UNIDENTIFIED FEMALE: -- go and get Officer Fritsch?

4 THE COURT: Yes.

5 MS. SRA: Your Honor, the City would call Officer Fritsch  
6 to the stand.

7 THE COURT: Do you solemnly swear or affirm that the  
8 testimony you give this morning will be the truth  
9 (inaudible)?

10 OFFICER FRITSCH: I do.

11

12 OFFICER WILLIAM FRITSCH Witness herein, having first been  
13 duly sworn on oath, was examined  
14 and testified as follows:

15

16 THE COURT: Thank you. And would you like water?

17 OFFICER FRITSCH: Yes, please.

18 MR. BURNTON: And, Your Honor, just briefly, does City  
19 have any additional 3.5 questioning they wish to engage in,  
20 or may Defense begin?

21 MS. SRA: City has no further questions.

22

23 R E C R O S S E X A M I N A T I O N

24 BY MR. BURNTON:

25 Q. Good morning, Officer.

## REXCROSS BURNTON/FRITSCH

1 A. Morning.

2 Q. So, Officer, I'd like to just briefly start by talking about  
3 when you first pulled up behind Mr. Wiggins's car. So you  
4 were driving the patrol car that evening?

5 A. Yes.

6 Q. And your patrol car was equipped with the Seattle Police  
7 logo?

8 A. Yes.

9 Q. And the car you were in was equipped with overhead lights?

10 A. Yes.

11 Q. And you turned those lights on?

12 A. Yes.

13 Q. In order to get Mr. Wiggins to stop?

14 A. Yes.

15 Q. His lights were on when you pulled up behind Mr. Wiggins's  
16 car?

17 A. My lights, yes.

18 Q. And they were on when you got out of the car?

19 A. Yes.

20 Q. And they were on when you approached his window?

21 A. Yes.

22 Q. Briefly, I know we addressed this yesterday. I would like  
23 to talk about what you were wearing that day. So you were  
24 in your uniform that night?

25 A. Yes.

## REXCROSS BURNTON/FRITSCH

1 Q. You had your badge on?

2 A. Yes.

3 Q. Your vest?

4 A. Yes. I was wearing all of my standard police equipment. I  
5 was wearing handcuffs. I carry a gun. I have Mace. I have  
6 a taser. I have all of those things.

7 Q. Let me just clarify (inaudible) you didn't mention. You had  
8 your flashlight with you that night?

9 A. Yes. I have a flashlight. I'm required to carry a  
10 flashlight.

11 Q. And your flashlight was on that night?

12 A. Not the whole time. But I'm sure at some point I turned it  
13 on, yes.

14 Q. You used your flashlight at some point that night?

15 A. Yes, I did. It was dark.

16 Q. And you had your arm propped up against Mr. Wiggins's car at  
17 one point?

18 A. I'm sure I did.

19 Q. Now, you were working with Officer Baughman that night,  
20 correct?

21 A. Yes, that's correct.

22 Q. And he was, for lack of a better phrase, riding shotgun?

23 A. Yes. We worked a two-man partner car. So in this situation  
24 he was providing cover.

25 Q. So he got out of the patrol car as well?

## REXCROSS BURNTON/FRITSCH

- 1 A. Yes. That's standard procedure.
- 2 Q. And he approached the passenger side of Mr. Wiggins's car?
- 3 A. Yes. That's the standard procedure.
- 4 Q. And he had his flashlight out, too?
- 5 A. Yes. That's also standard.
- 6 Q. And he was shining it in Mr. Wiggins's car?
- 7 A. Yes. That's what the flashlight's for.
- 8 Q. Now, I want to talk briefly about your discussion with
- 9 Mr. Wiggins inside of his car. You asked Mr. Wiggins for
- 10 his driver's license?
- 11 A. Yes.
- 12 Q. And he handed it to you?
- 13 A. Yes.
- 14 Q. You took it from him?
- 15 A. Yes.
- 16 Q. You went back to your patrol car?
- 17 A. Yes.
- 18 Q. And you looked up his information?
- 19 A. Yes.
- 20 Q. This was on your MDT?
- 21 A. Yes.
- 22 Q. And you read that his license was suspended?
- 23 A. Yes.
- 24 Q. You went back then to Mr. Wiggins's side door?
- 25 A. Yes.

## REXCROSS BURNTON/FRITSCH

1 Q. And you told him that his license was suspended?

2 A. Yes.

3 Q. You told him you thought this was from a DUI earlier?

4 A. Yes.

5 Q. And then Mr. Wiggins asked you if he could get away with a  
6 ticket right now?

7 A. Yes.

8 Q. And you told him that the headlights would be a ticket?

9 A. Yes.

10 Q. But this would be a criminal citation?

11 A. Driving while suspended is a criminal citation, yes.

12 Q. Now, I want to talk briefly about the atmosphere around you  
13 during your interaction. So you previously testified that  
14 there was somebody screaming there that night?

15 A. Yes.

16 Q. This was a man's voice?

17 A. Uh-huh.

18 Q. And his voice could be heard while you were talking with  
19 Mr. Wiggins?

20 A. Yes.

21 Q. He sounded upset?

22 A. Yes.

23 Q. And at one point Mr. Wiggins stuck his head out to look at  
24 what was going on?

25 A. Yes.

## REXCROSS BURNTON/FRITSCH

1 Q. And at some point this man shouted, "You raped my fucking  
2 family"?

3 A. I wasn't aware of that.

4 Q. Okay. And so you were wearing body-worn video that night?

5 A. Yes.

6 Q. And it would have captured your interaction with  
7 Mr. Wiggins?

8 A. Yes.

9 Q. And it would have captured your voice?

10 A. Yes.

11 Q. And it would have captured Mr. Wiggins's voice?

12 A. Yes.

13 Q. And sounds that were around you?

14 A. Yes.

15 Q. Okay.

16 A. Just because the body cam captures something, though,  
17 doesn't mean that I hear it. There -- it's obviously a  
18 microphone that's not connected to my brain. So --

19 Q. So, Officer Fritsch, I have here what's been previously  
20 marked as Defense Exhibit 2. And, Officer Fritsch, as you  
21 previously identified, this is your body-worn video?

22 A. Yes.

23 Q. Thank you.

24 (Defense Exhibit 2 - video played)

25 Q. (By Mr. Burnton) And, Officer, you can confirm this is

## REXCROSS BURNTON/FRITSCH

1 Mr. Wiggins?

2 A. Yes.

3 Q. And this is your body-worn video?

4 A. Yes.

5 Q. Thank you.

6 MR. BURNTON: So, Your Honor, just for the record, I'm  
7 going to turn up the volume on the TV.

8 THE COURT: All right.

9 (Defense Exhibit 2 - video played)

10 Q. (By Mr. Burnton) So, Officer Fritsch, you heard the man  
11 shout, "You raped my fucking family"?

12 A. I believe you. I'm -- I'm sure that's what he shouted. I  
13 can't tell what he's saying, but I believe that's what he's  
14 saying.

15 Q. So, Officer Fritsch, I will just go ahead and rewind,  
16 because I know it's a little hard to hear.

17 (Defense Exhibit 2 - video played)

18 A. That, that sounds right. Sounds like you're correct.

19 Q. (By Mr. Burnton) And so this man, he continued to shout  
20 throughout the interaction?

21 A. Yes. This is Capitol Hill. I'm not sure if you're aware,  
22 but in this city and in this country we have a big issue  
23 with mental health and drug abuse issues, and a lot of that  
24 is centered in Capitol Hill in Seattle.

25 It's quite usual for there to be people standing on the

## REXCROSS BURNTON/FRITSCH

1 street, shouting. It's not illegal. It's not a crime.  
2 It's not illegal to have mental health issues. It's not  
3 illegal to be addicted to drugs. It's not illegal to yell  
4 in the street like that.

5 It's pretty standard for 2:00 in the morning on Capitol  
6 Hill, unfortunately.

7 Q. And so in this case he did continue to shout during your  
8 interaction?

9 A. He did.

10 MS. SRA: Your Honor, I'm going to object as to the  
11 relevance of this line of questioning.

12 THE COURT: Yes. And could you give -- can you make me an  
13 offer of proof as to this line of questioning, Mr. Burnton?

14 MR. BURNTON: I'd be happy to, Your Honor.

15 So again, the purpose of a 3.5 hearing, of course, to  
16 establish, of course whether Mr. Wiggins was in some form of  
17 custody and whether his -- part of that is going to be  
18 assessing the totality of the circumstances, what was going  
19 on, and what his understanding was, and what a reasonable  
20 observer would believe going on.

21 I will note that I am almost done with this line of  
22 questioning.

23 THE COURT: Okay. So I guess I don't see the connection  
24 to the other person's yelling with what was happening with  
25 Mr. Wiggins.



## REXCROSS BURNTON/FRITSCH

1 MR. BURNTON: And so, Your Honor, what I would argue --  
2 and again, if Your Honor wishes, I guess (inaudible) argue  
3 it now.

4 The fact is, is that Mr. Wiggins was pulled over at 2:00  
5 in the morning, and there was this person -- and again, I  
6 hadn't finished my questioning -- that he had never met  
7 before, had never seen before, shouting on a corner,  
8 screaming these very powerful, violent, angry words, which  
9 he continues to do over the course of this interaction.

10 He is seeing this happen. He has two law enforcement  
11 individuals who are with him.

12 Instead of making the decision to go over to this person,  
13 they stay by Mr. Wiggins's car.

14 THE COURT: Okay. So I think you established so. And I  
15 think the officer even -- he testified yesterday that he was  
16 familiar with this person. So I think that you  
17 established -- if that's what you're trying to get at, I  
18 think you have done so.

19 So I would ask that you -- if you would move on.

20 MR. BURNTON: And, Your Honor, I have just a couple  
21 more that are I think separate from establishing that fact.

22 THE COURT: Okay.

23 Q. (By Mr. Burnton) And so Mr. Wiggins at one point expressed  
24 that he was wondering what was happening?

25 A. Yes.

## REXCROSS BURNTON/FRITSCH

1 Q. And at one point he told you that he couldn't even  
2 concentrate with what was going on?

3 A. Yes.

4 Q. But while this was going on, you didn't leave Mr. Wiggins's  
5 window to investigate this?

6 A. No. At the time I was investigating a crime involving  
7 Mr. Wiggins.

8 As I said before, it's not a crime to suffer from mental  
9 health issues. It's not a crime to be loud. It's not a  
10 crime to suffer from substance abuse addiction.

11 I think it would be inappropriate to leave a criminal  
12 investigation in order to violate the civil rights of  
13 someone who's just standing out on the street, not  
14 committing any crime.

15 Q. And to clarify, Mr. Wiggins didn't appear to know this  
16 person?

17 A. I have no idea if he knew him or not.

18 Q. Okay. He didn't appear to know this person? He didn't --

19 A. (Inaudible).

20 Q. -- tell you he knew this person?

21 A. He did not tell me he knew the person.

22 MS. SRA: Objection; asked and answered.

23 MR. BURNTON: And, Your Honor, I'm happy to move on.

24 THE COURT: Thank you.

25 Q. (By Mr. Burnton) And so to clarify, Officer Baughman was

## REXCROSS BURNTON/FRITSCH

1 working with you that night?

2 A. Yes.

3 Q. And --

4 A. As you've (inaudible).

5 Q. -- Officer Daniel Auderer was also there that night?

6 A. Yes.

7 Q. And in addition, I believe Officer Wohlwend was there that  
8 night as well?

9 A. Yes.

10 Q. And there were multiple patrol cars that were on scene as  
11 well, correct?

12 A. Yes. That's very normal. We like to send backup officers  
13 to everything. It makes it safer for us. It makes it safer  
14 for everyone else.

15 And they could hear someone shouting over the radio, so I  
16 would imagine that they were curious as to what was going  
17 on.

18 Q. So that's a yes, there were multiple patrol cars there that  
19 night?

20 A. Yes, there were multiple patrol cars.

21 Q. So briefly, I want to move back on to the testing. Now, we  
22 already established you had Mr. Wiggins do the HGN test,  
23 correct?

24 A. Yes. He voluntarily did the HGN test.

25 Q. And he did this in front of your patrol car?

## REXCROSS BURNTON/FRITSCH

1 A. Yes.

2 Q. Facing you?

3 A. Yes.

4 Q. And Officer Baughman was there?

5 A. I believe he was there.

6 Q. And Officer --

7 A. I don't --

8 Q. -- Auderer was there?

9 A. Yes.

10 Q. And Officer Wohlwend was there?

11 A. Yes.

12 Q. And there was a car that was parked beside that patrol car?

13 A. Probably, yes.

14 Q. And so, Officer, you were wearing -- your body-worn video  
15 would have captured this interaction?

16 A. I assume it would have.

17 (Defense Exhibit 2 - video played)

18 Q. (By Mr. Burnton) And so, Officer, that's your body-worn  
19 camera, correct?

20 A. Yes, it is.

21 Q. And that is a car that is next to your patrol car, correct?

22 A. Yes.

23 Q. Now, briefly I want to talk about the walk-and-turn test.

24 So you administered the walk-and-turn test to Mr. Wiggins?

25 A. Yes.

## REXCROSS BURNTON/FRITSCH

1 MS. SRA: Your Honor, I'm going to object to this line of  
2 questioning. This is a 3.5 (inaudible).

3 THE COURT: And I am -- Mr. Burnton, could you help me  
4 understand? Because we did -- Ms. Whyte crossed fully on  
5 all of those tests for the 3.6, so I'm trying to understand  
6 how this connects with the 3.5.

7 MR. BURNTON: And, Your Honor, because, of course, one of  
8 the central issues of a 3.5 is the defendant's being in  
9 custody, being under the control, I think it is important to  
10 establish his environmental factors. This is why I haven't  
11 asked about the performance on those tests.

12 THE COURT: Right.

13 MR. BURNTON: But simply where the individuals were.

14 THE COURT: But Ms. Whyte did already cover that in hers.  
15 So I think that you could just incorporate the answers that  
16 were given.

17 Because I think -- I know the way we did it was kind of to  
18 split it up for the two of you. But I don't think that that  
19 should allow you to go back on those same questions that she  
20 already covered for your 3.5.

21 So I think I'm going to ask you to rely on the testimony  
22 that we already -- because she thoroughly asked about all of  
23 these tests yesterday. And so --

24 MR. BURNTON: And so --

25 THE COURT: -- if there are any answers that you need --

## REXCROSS BURNTON/FRITSCH

1 any information that you need to use for your 3.5, we have  
2 those on record from yesterday.

3 MR. BURNTON: And so, Your Honor, just briefly, again, I'm  
4 not talking about the performance of the walk-and turn. I'm  
5 not going into those things, which again, I understand would  
6 be 3.6-specific.

7 I wanted to just highlight the environmental circumstances  
8 and what was happening where. I will note that I only have  
9 about ten more questions.

10 THE COURT: All right. Go ahead.

11 MR. BURNTON: Thank you.

12 Q. (By Mr. Burnton) So you had told Mr. Wiggins that you wanted  
13 to go to a flatter ground?

14 A. Yes.

15 Q. Okay. And --

16 THE COURT: That you wanted to go? I didn't hear the  
17 question.

18 MR. BURNTON: To a flatter ground, Your Honor.

19 THE COURT: Oh, okay.

20 A. The walk-and-turn is ideally performed on flat ground. It  
21 gives the subject the best place to perform the test, as  
22 opposed to doing it on a slope. I wanted it to be as fair  
23 as possible for Mr. Wiggins.

24 Q. (By Mr. Burnton) So you directed Mr. Wiggins to the  
25 sidewalk?

## REXCROSS BURNTON/FRITSCH

1 A. Yes.

2 Q. And you signaled with your flashlight where you wanted him  
3 to walk?

4 A. Yes.

5 Q. And there were, of course, police cars that were parked near  
6 the sidewalk?

7 A. Yes.

8 Q. And there was actually another police car pulling up as you  
9 were walking?

10 A. Probably, yes.

11 MR. BURNTON: Let's see.

12 (Defense Exhibit 2 - video played)

13 Q. (By Mr. Burnton) So, Your Honor -- or, Officer, this is your  
14 body-worn video, correct?

15 A. Yes.

16 Q. And that is a Seattle Police car --

17 A. Yes.

18 Q. -- that is pulling up?

19 A. Yes.

20 Q. Okay. And you didn't ask if Mr. Wiggins wanted to have his  
21 passengers come with you, correct?

22 THE COURT: Have his passengers what?

23 MR. BURNTON: Come with him to the sidewalk.

24 THE COURT: Oh, okay.

25 A. I would never ask that.

## REXCROSS BURNTON/FRITSCH

1 Q. (By Mr. Burnton) So no?

2 A. That would be highly unusual. I would not do that. No one  
3 would do that. That's very strange.

4 Q. So understanding that you think it's strange, you did not  
5 ask him that, correct?

6 A. I would never ask him that.

7 Q. Okay. And you didn't tell Mr. Wiggins whether he could or  
8 could not have his passengers come with him, correct?

9 A. No. Because that's so far out of any kind of safe procedure  
10 to add four -- three random people that I've never met  
11 watching -- coming over to the tests to be part of them.  
12 It's -- no.

13 Q. And I want to clarify. While you were administering these  
14 tests, there were other police officers there at that time,  
15 correct?

16 A. Yes.

17 MR. BURNTON: Okay. Your Honor, I have no further  
18 questions.

19 THE COURT: Thank you. City?

20 MS. SRA: Your Honor, just briefly.

21

22 R E D I R E C T E X A M I N A T I O N

23 BY MS. SRA:

24 Q. Officer Fritsch, what was the purpose of your interaction  
25 with Mr. Wiggins leading up to the arrest?



## REDIRECT SRA/FRITSCH

1 A. To gather as much information as possible in order to make a  
2 correct decision about whether or not he was -- had been  
3 driving under the influence.

4 Q. And was this investigation done in a -- done in a public  
5 place?

6 A. Yes, it was.

7 Q. And at any time did -- let's talk a little bit about the  
8 number of officers that were present. What were the roles  
9 of those officers, including yourself?

10 A. I was conducting the investigation. The other officers  
11 were -- we'd call it providing cover. Generally multiple  
12 officers would come to back on traffic stop; and the idea is  
13 that, if there are passengers in the car, they can keep an  
14 eye on the passengers to ensure that nothing happens.

15 If there are people walking around, they can ensure the  
16 officer who's conducting the investigation whose attention  
17 is generally very focused on the person that they're  
18 investigating, that nothing happens to that officer, because  
19 they might not be paying the attention that they normally  
20 would be to the surrounding environment.

21 They're there for all of those kinds of things. And to be  
22 honest, a lot of times officers are just bored at 2:00 in  
23 the morning, and someone else is out doing something, and  
24 they're human beings, and they want to come see what their  
25 friend is doing. So --

## REDIRECT SRA/FRITSCH

1 Q. Okay. And during this -- during your investigation for DUI  
2 of Mr. Wiggins, did the other officers come and join you in  
3 those duties, or were those duties entirely your own?

4 A. They were my own.

5 MS. SRA: Okay. I have no further questions, Your Honor.

6 THE COURT: Anything else, Mr. Burnton?

7 MR. BURNTON: Not at this time Your Honor, no.

8 THE COURT: So are you done with your --

9 MR. BURNTON: I'm done, Your Honor, yes.

10 MS. SRA: And so, Your Honor, the witness may be excused.

11 THE COURT: Thank you.

12 OFFICER FRITSCH: Thank you, Your Honor.

13 THE COURT: So I think this would be a good time for us to  
14 take a recess, and then we'll come back and hear arguments.

15 MS. SRA: Thank you, Your Honor.

16 THE COURT: Thank you.

17 UNIDENTIFIED FEMALE: (Inaudible).

18 THE COURT: Yes. Thank you.

19 (Recess)

20 THE BAILIFF: (Inaudible) Anita Crawford-Willis, Judge  
21 presiding.

22 THE COURT: Thank you.

23 THE BAILIFF: You may be seated.

24 THE COURT: We need to wait for Ms. Sra?

25 MR. KARR: She just stepped down the hall. I can go get

## REDIRECT SRA/FRITSCH

1 her.

2 THE COURT: All right. So should we start with the  
3 argument for the 3.6?

4 MS. SRA: Sure, Your Honor. And I'm not sure how this  
5 Court likes to do it. I guess it is Defense's motion.  
6 So --

7 THE COURT: Defense can start.

8 MS. WHYTE: It is Defense's motion, Your Honor. I believe  
9 it's the City's burden, but I'm happy to start.

10 So when an officer conducts an investigatory stop, he or  
11 she needs specific articulable facts that a crime has been  
12 committed before that happens. Officer Fritsch didn't have  
13 that here.

14 This is true for traffic stops in particular. Case law  
15 and state statute govern the scope of traffic stops, and  
16 they note that the officer's entitled to perform tasks  
17 related to the mission of the stop, but that then the stop  
18 must end.

19 So particularly relevant here are Rodriguez v. United  
20 States, which was decided in 2015. It's a Supreme Court  
21 case of the United States. It's absolutely crystal clear on  
22 this point. The police officer can achieve the purpose of  
23 the stop for the traffic infraction, and then the stop has  
24 to end.

25 And I can quote to the Court from Rodriguez, quote,

1       Because addressing the infraction is the purpose of the  
2       stop, it may last no longer than is necessary to effectuate  
3       that purpose. Authority for the seizure thus ends when  
4       tasks tied to the traffic infraction are or reasonably  
5       should have been completed. As it --

6       THE COURT: Let me ask you this, Counsel. So far that's  
7       true what you said. But are you suggesting that after --  
8       that a police officer, if they stop someone for traffic, if  
9       then while they're investigate the traffic, they notice  
10      something else, that they're not allowed to continue? Are  
11      you getting to that point?

12      MS. WHYTE: I am, Your Honor.

13      THE COURT: Okay.

14      MS. WHYTE: But I can attempt to address that question --

15      THE COURT: Thank you.

16      MS. WHYTE: -- now. So what I'm saying is that the --  
17      obviously, you know, I'm not going to bore the Court with do  
18      they have to have exceptions to the warrant requirement and  
19      all that. I think Court's very familiar with that.

20      What I'm saying is that, if they want to stop for a  
21      traffic stop, the statute gives them authority to do that  
22      and to ask for specific things so that officers are allowed  
23      to make traffic stops basically, so that they have that  
24      authority required by law that's required under our state  
25      constitution.

1           If the officer, in the middle of doing that stuff, starts  
2           to develop a suspicion, then he can extend the stop as long  
3           as what he has is reasonable articulable suspicion that a  
4           crime has been committed based on particularized,  
5           individualized facts, about the person; in other words, not  
6           just what time of night it was or where it was. I mean, the  
7           case law is very clear on this, that the officer can't just  
8           say, well, it was very late at night, so I knew, you know,  
9           that this must have been a DUI. Or this was in a bar zone,  
10          so I knew it was a DUI.

11          THE COURT: All right. Thank you.

12          MS. WHYTE: Right. So I'm just saying that the point at  
13          which the statutory authority ends, the officer at that  
14          point has to terminate the stop, unless at that moment in  
15          time he has enough individualized, particularized facts to  
16          rise to the level of reasonable articulable suspicion of a  
17          crime.

18          And what happened here was, we know that the officer -- so  
19          the statute -- I guess I'll just give this background --  
20          allows the officer to identify the person, check for  
21          outstanding warrants, check the status of the person's  
22          license, insurance identification card, and the vehicle's  
23          registration, and complete and issue a notice of traffic  
24          infraction. So that's RCW 46.61.021, subsection 2.

25          And then Rodriguez further informs that, you know, it has

1 to -- they have to complete that within the time it takes  
2 them, or which it reasonably could have taken them. So they  
3 can't just make it take a really long time to check  
4 insurance so they can continue to get reasonable articulable  
5 suspicion and rise to that level that Terry requires.

6 We know what happened is the officer here. He identified  
7 Mr. Wiggins. He got his driver's license right away, and  
8 Mr. Wiggins gave it to him right away. He didn't fumble for  
9 it. He didn't forget where it was. He didn't hand the  
10 officer his library card, or a coupon, or something when the  
11 officer actually asked for his license.

12 We know the officer checked for warrants and Mr. Wiggins's  
13 license status, because he testified to that. And then we  
14 know that he asked for Mr. Wiggins's insurance, and that  
15 Mr. Wiggins was very forthcoming with him immediately; I  
16 know I don't have that.

17 Under Rodriguez and its line of cases, as well as the  
18 statute, the stop should have ended there, but it didn't.  
19 Instead, the officer starts asking Mr. Wiggins how much he  
20 had to drink, and whether he'll, quote, do the PBT or FSTs  
21 or something.

22 That's the critical moment that we're looking at, because  
23 that's the moment that Officer Fritsch takes this from a  
24 traffic infraction stop to a DUI investigation, so we need  
25 to look at what he had at that point and determine if at

1           that point what he had was reasonable articulable suspicion  
2           of a crime.

3           And the officer even testified, when Mr. Burnton was  
4           asking him questions about this gentleman who was shouting  
5           and causing a disruption, he said, I didn't go talk to that  
6           guy, even though other officers heard it and responded, and  
7           there were five of us there, because I was investigating a  
8           crime.

9           But we know that the headlight infraction isn't a crime.  
10          Officer Fritsch very clearly testified to that. It is a  
11          traffic infraction.

12          Now, the officer said that he thought the headlight  
13          infraction was his big indicator, and that made it more  
14          likely that Mr. Wiggins was DUI, but he cited no authority  
15          or statistics, and he acknowledged that this is one of the  
16          busiest, most well-lit parts of the City. It's in Capitol  
17          Hill. It's not on a dark residential street with no  
18          streetlights where it would be potentially very obvious to  
19          somebody that they're driving without their headlights on.

20          Mr. -- Officer Fritsch, rather, also said that he noticed  
21          an odor of alcohol. But he also said he can't, quote, smell  
22          in stereo. He didn't know which of the people in the  
23          four-person car that smell was coming from. And when the  
24          window was open, the officer acknowledged that the smell  
25          dissipated.

1           Even if the officer did smell alcohol only on Mr. Wiggins,  
2           and had proof that everybody else in the car was stone-cold  
3           sober, an odor of alcohol, at best, indicates consumption.  
4           It's not a crime to consume alcohol and drive a car.

5           And in any event, when Mr. Wiggins is in the car,  
6           Officer Fritsch acknowledges he can't tell where that odor  
7           of alcohol is coming from. And by the time Mr. Wiggins is  
8           out of the car, at that point there is no question under the  
9           case law *State v. Mecham*, 186 Washington 2nd 128, that the  
10          stop has been affected at that point, that that is now a  
11          Terry investigation for DUI.

12          So by the time -- if what he's trying to say is, well, by  
13          the time he was out of the car, then I noticed the odor of  
14          alcohol was just coming from him, again, I say, so he has  
15          consumption. He needs other stuff to prove impairment,  
16          which is the crime. But at that point it's already too  
17          late.

18          And then the third thing that the officer claims  
19          Mr. Wiggins had was red, watery eyes. Again, at best, this  
20          indicates consumption of alcohol, which is not a crime. It  
21          could also be a lot of other things; allergies, medical  
22          conditions, recent crying. That is all the officer said.

23          And he testified explicitly to that, Your Honor. I asked  
24          him on cross, did you notice any other sign of impairment?  
25          And he said nope; headlights, odor of intoxicants, and red,



1           watery eyes. That's it.

2           Let's acknowledge what he didn't have, which, I mean, I  
3 know the Court sees many DUI cases. I feel like I see many  
4 DUI cases. We see impaired driving. There was no impaired  
5 driving here whatsoever.

6           Officer Fritsch testified that he noticed Mr. Wiggins and  
7 sped up at about 53 seconds into his in-car video, so that  
8 53 seconds can be kind of our reference point for how  
9 quickly this stop happened.

10          Seven seconds after that, he'd activated his headlights --  
11 or I'm sorry, his overhead lights to initiate the traffic  
12 stop. Mr. Wiggins braked two seconds after that, signaled  
13 right three seconds after that, and was completely pulled  
14 over to a stop off the road on the right side of the street  
15 within seven seconds after that. So we're talking 20  
16 seconds between when Officer Fritsch is activating his  
17 headlights -- I'm sorry, between when Officer Fritsch is  
18 speeding up to close the distance between his vehicle and  
19 Mr. Wiggins's vehicle, and the time when Mr. Wiggins is off  
20 on the side of the road, car comes to a complete stop.

21          So, you know, at no point did Officer Fritsch see anything  
22 that might have indicated to him that it would be dangerous  
23 to allow Mr. Wiggins to continue to drive a little bit more  
24 so that he could develop that reasonable articulable  
25 suspicion if, in his mind, headlights are such a big

1 indicator, and that's why he's got to investigate a DUI.

2 He didn't observe any swerving, any weaving, any drifting,  
3 any near misses. He didn't observe any speeding. He saw a  
4 car driving down the road with no headlights.

5 So I would argue, Your Honor, one, he could have -- he had  
6 nothing to indicate that he couldn't safely give Mr. Wiggins  
7 a little more time to see if he might pick up some of this  
8 stuff so that the Court would have that in front of it to  
9 say, well, he had the no headlights, but he was also  
10 weaving. He almost hit a guy. I mean, you know, he was  
11 drifting in and out of thing, he was braking  
12 inappropriately, the kinds of things that we often hear from  
13 officers who are investigating DUI, because officers know  
14 how important it is to collect that information.

15 This officer didn't even give it seven more seconds to see  
16 whether there was something here. If he thinks headlights  
17 are such a tip-off, why didn't he do that?

18 We know Mr. Wiggins didn't have any slurred speech.  
19 Again, this is very typical that we hear in DUI cases.  
20 Well, his speech was really slurred. If his speech is  
21 slurred, then that's a sign of potential impairment.  
22 Potentially even if it's slurred due to a medical condition,  
23 like if a person's having a stroke or something, that could  
24 also potentially make them unsafe to drive.

25 There was no slurred speech here at all. And the Court

1 heard Mr. Wiggins on the video, and I think the Court could  
2 hear that.

3 But regardless, if the Court wasn't able to hear that, the  
4 officer testified there was no slurred speech. There was  
5 not even slow speech or delayed speech, just Mr. Wiggins  
6 answering the officer's questions, correcting the officer  
7 when the officer made a mistake about a prior conviction,  
8 readily acknowledging that he didn't have insurance.

9 We also know that Mr. Wiggins performed well on divided  
10 attention tasks, which again, the officer testified, yeah,  
11 we asked him for license and insurance. But as the Court  
12 noticed, he's also -- maybe he's got some suspicion. He's  
13 trying to build reasonable articulable suspicion. One of  
14 the ways officers do that is, when they're asking the  
15 questions that are authorized by statute, they're asking  
16 other questions. They're doing other things. They're  
17 trying to get the defendant to do things that will divide  
18 their attention to see how they do.

19 If the officer's asking the statutorily authorized  
20 question, let me see your driver's license and your  
21 registration, and then they're starting to ask him other  
22 questions, like where you coming from? How many people you  
23 got in the car? Where you been tonight? That's splitting  
24 the defendant's attention in order to be able to see, can  
25 they keep up?

1           Are they able to compartmentalize and say, I'm still  
2           getting you my driver's license. This is a stressful  
3           situation. I have a cop with a flashlight in my face, but  
4           I'm also able to answer your questions and tell you where  
5           I'm going and coming from tonight, or whatever the question  
6           might be.

7           And that is -- the officer testified those are divided  
8           attention tasks. That's the reason they ask those  
9           questions, because they're trying to get that reasonable  
10          articulable suspicion.

11          And the officer didn't get them here. We know that not  
12          even -- not only was there the typical divided attention  
13          tasks going on to distract Mr. Wiggins, but there was also a  
14          gentleman shouting violent and aggressive statements.

15          Now, the cops may have been well familiar with this  
16          gentleman and his, you know, his challenges that he was  
17          struggling with. But as the officer testified, nothing to  
18          indicate that Mr. Wiggins was familiar with that.

19          And in fact, Mr. Wiggins indicated, like I think many  
20          people would, that was distracting, and potentially quite  
21          scary. But he still was able to perform on these divided  
22          attention tasks.

23          So the fact of the matter here is that Officer Fritsch  
24          simply moved too quickly into his seizure for DUI before he  
25          had the required information. A traffic infraction, an odor

1 of alcohol from a car with four people in it, and red,  
2 watery eyes are simply not enough for a DUI, the crime of  
3 driving impaired, not just driving, having consumed some  
4 alcohol.

5 The City argues a couple of things, and I want to address  
6 those points in advance.

7 One, they argue that an officer need not have specific  
8 crime in mind when they're developing reasonable articulable  
9 suspicion. But the law is clear, and the City has to  
10 acknowledge this. He must have a crime in mind, and he must  
11 be investigating a crime.

12 A traffic infraction is not a crime. The only crime that  
13 was investigated here that could have been investigated  
14 about which the officer could have gathered facts in order  
15 to determine, is someone doing this crime or not, is the  
16 crime of DUI.

17 The City also argues that an officer is able to make  
18 judgment calls based on experience, and they cite State v.  
19 Kennedy, which is a case from, I think 1986, in which the  
20 officer had 20 years of experience, unlike Officer Fritsch's  
21 year and a half; but which, importantly, State v. Kennedy  
22 also reaffirms the Terry standard, that no matter what kind  
23 of training the officer has, no matter what kind of  
24 experience he has, he needs reasonable articulable suspicion  
25 based on particularized, individualized facts.

1           And indeed, I think in Terry itself you had an extremely  
2           seasoned officer who was milling about somewhere in Ohio,  
3           and he sees some guys, and based on his training and  
4           experience, they looked suspicious to him. But he also  
5           needed to have those particularized, individualized facts,  
6           and they need to indicate a crime.

7           Finally, the City cites to State v. Mercer, which is a  
8           Division III case again from 1986, for the proposition that  
9           officers can detain people for 30 minutes under Terry while  
10          they develop probable cause to arrest.

11          But as I noted, nearly 30 years after Mercer, in 2015, the  
12          U.S. Supreme Court addressed Terry stops evolving from  
13          traffic stops specifically, which Mercer did not. Mercer  
14          was a bunch of kids in a -- I think a schoolyard -- and took  
15          exception to the fact that only seven minutes in that case  
16          of additional detention after the purposes of the traffic  
17          stop had been fulfilled was the defendant detained so that  
18          they could execute a sniff of the car.

19          I would note that the City also cites to Glossbrenner.  
20          And in that case, as well as the case it relies on, which is  
21          State v. Lemus, which is a Division III case, those cases  
22          the City -- for the proposition the City advances are  
23          consistent with these principles, which are: If you have  
24          reasonable articulable suspicion that a crime -- that  
25          particularly an alcohol or a drug-related crime is

1 occurring, or you are confronted with suspicious  
2 circumstances that give rise to reasonable articulable  
3 suspicion that a crime has occurred, then you can extend a  
4 stop. If you don't, and you aren't, you can't.

5 And I would add that the holding of Glossbrenner actually  
6 was that the officer didn't have a valid stop extension  
7 under Terry, or any other exception to the firm warrant  
8 requirement, and so the Court of Appeals was reversed in  
9 that case, and the drugs in that case were suppressed.

10 The reality comes down to, did the officer have reasonable  
11 articulable suspicion of a crime at the time that he  
12 extended the stop, at the time that the traffic infraction  
13 situation was concluded, and he moved to a DUI  
14 investigation?

15 And here we know within seconds he had Mr. Wiggins pulled  
16 over. He was, in his own words, investigating a crime, and  
17 he didn't have the authority of law required, either by our  
18 state Constitution or by the Fourth Amendment as interpreted  
19 by Terry in its (inaudible).

20 THE COURT: Thank you. And just so I'm clear, Counsel,  
21 you're arguing that the Terry's the extension of the Terry  
22 stop? You're not arguing about the probable cause of the  
23 arrest; is that right?

24 MS. WHYTE: Your Honor, I think that --

25 THE COURT: (Inaudible).

1 MS. WHYTE: -- if the Court -- if we reach that question,  
2 then I can certainly answer any questions that the Court  
3 has.

4 THE COURT: But that was in your --

5 MS. WHYTE: Yes. But I think -- I mean, I just think it's  
6 very important to be clear that, if the officer didn't have  
7 reasonable articulable suspicion to expand the stop from a  
8 traffic infraction to a Terry stop for DUI, then --

9 THE COURT: Right. But you're not arguing about -- if, if  
10 I find that he did, your argument is not about the arrest;  
11 is that right?

12 MS. WHYTE: I mean, I have an argument, Your Honor, that  
13 he -- that Mr. Wiggins was arguably coerced into doing the  
14 field sobriety tests.

15 THE COURT: But you didn't -- I don't recall seeing that  
16 in your motion to dismiss.

17 MS. WHYTE: That was, I think, Section C. So Section B  
18 was about the DUI conviction -- the prior DUI, because the  
19 City may have argued that that provided justification for  
20 him expanding the scope. The case law is very clear it  
21 doesn't.

22 THE COURT: Section C talks about that.

23 MS. WHYTE: Section C is that --

24 THE COURT: Field sobriety tests.

25 MS. WHYTE: Yes. So --



1 THE COURT: Okay.

2 MS. WHYTE: All the officer had, to be clear, is, once he  
3 moves from the traffic infraction to the Terry stop for DUI,  
4 all he has at that point are traffic infraction, not a  
5 crime; odor of alcohol, possible evidence of consumption,  
6 but not a crime; red, watery eyes, possible consumption, not  
7 a --

8 THE COURT: I just wanted to be clear, though, that you  
9 didn't include in there PC to arrest if we got beyond the  
10 Terry. That's all I was trying to (inaudible).

11 MS. WHYTE: Well, while I'm seeing that, I think I have.

12 THE COURT: Okay.

13 MS. WHYTE: So after you get -- that's the point of the  
14 Terry stop. That's what he has. And the Court would have  
15 to find that those three things alone constitute reasonable  
16 articulable suspicion.

17 THE COURT: Right. I got that part.

18 MS. WHYTE: If the Court --

19 THE COURT: But I don't see anything in your brief that  
20 talks about whether the arrest was lawful if I get past  
21 the --

22 MS. WHYTE: Well, the --

23 THE COURT: -- other.

24 MS. WHYTE: The arrest is not lawful, Your Honor, if the  
25 officer doesn't have probable cause.

1 THE COURT: But you didn't address probable cause in your  
2 brief. You just talked about the Terry stop. So that's my  
3 question.

4 MS. WHYTE: So Section C, with regard to the field  
5 sobriety tests, which is the only additional thing that the  
6 officer had to develop probable cause to make an arrest.

7 THE COURT: But you haven't been arguing about probable  
8 cause to make the arrest. That's where I'm trying to  
9 clarify. You've only been arguing that he didn't have  
10 authority to extend the Terry investigation, to extend the  
11 Terry stop.

12 You haven't argued about probable cause to arrest. So  
13 that's why I was clarifying.

14 MS. WHYTE: And so that's why I'm trying to answer the  
15 Court's question that, I think if the Court reaches the  
16 question -- if the Court finds that he had reasonable  
17 articulable suspicion, then the Court could reach the  
18 question of whether he then later had probable cause to make  
19 the arrest. And at that point I am arguing that what his  
20 determination was based on --

21 THE COURT: Okay.

22 MS. WHYTE: -- would only have been the field sobriety  
23 tests.

24 THE COURT: All right. So I guess that I was expecting to  
25 see the probable cause to arrest as a separate thing. But

1 we'll come back to that.

2 MR. KARR: Your Honor, the City would have a serious and  
3 strenuous objection to any argument about probable cause.  
4 It's not raised in Counsel's brief, and it's not before the  
5 Court today.

6 THE COURT: That's what I was clarifying. But let me hear  
7 from the City.

8 MS. SRA: Yes, Your Honor. So what we're dealing with  
9 here is whether or not Officer Fritsch had lawful authority  
10 to expand the scope of the traffic infraction.

11 As Officer Fritsch testified, it was 2:00 a.m. He was  
12 patrolling Capitol Hill, an area which he is very familiar  
13 with. At the time he was working as an SPD officer for the  
14 East Precinct.

15 Officer Fritsch testified that he saw Mr. Wiggins's  
16 vehicle without headlights on. He noted that this was in  
17 violation of -- a traffic infraction. He made a traffic  
18 stop. And he approached the driver's side window, and upon  
19 contact with Mr. Wiggins, noted an odor of intoxicants  
20 coming from the vehicle, as well as observed bloodshot,  
21 watery eyes.

22 At that time Officer Fritsch asked for license and  
23 insurance. The officer took the license back. He ran it,  
24 noted that Mr. Wiggins's license was suspended, went back to  
25 the vehicle, and further inquired of Mr. Wiggins --

1 specifically he asked Mr. Wiggins if he had been drinking  
2 tonight, as we saw on the in-car video. Mr. Wiggins said  
3 that he had not.

4 When Officer Fritsch further asked questions about why it  
5 smelled like alcohol, then Mr. Wiggins stated that that was  
6 chips, which Officer Fritsch testified that that certainly  
7 wasn't chips, that what he was smelling was alcohol.

8 It was at that time that the expansion of the scope  
9 happened. At that time that's the pivotal moment where  
10 Officer Fritsch concluded the traffic infraction; concluded  
11 the fact that his license was suspended, which is a crime;  
12 and asked Mr. Wiggins to step out of the vehicle so that he  
13 could further conduct an investigation as to whether  
14 Mr. Wiggins was DUI.

15 Now, all that is needed in order for an officer to do that  
16 is reasonable and articulable suspicion, but it is a very  
17 low standard. It is not PC. Officer Fritsch doesn't have  
18 to know exactly which person in the vehicle the odor is  
19 emanating from.

20 The officer doesn't have to ask Mr. Wiggins hundreds of  
21 questions saying, oh, are your eyes normally red and watery?  
22 Do you have allergies? How many hours of sleep have you  
23 had? The officer is not required to dispel every possible  
24 scenario before conducting a DUI investigation.

25 And this is particularly important because DUIs, as the

1 Court knows, are time sensitive. Alcohol dissipates pretty  
2 quickly from the human body, and so the officers have to  
3 work fast.

4 I want to talk a little bit about the experience of the  
5 officer as well. The case law is quite clear that  
6 circumstances that might appear innocuous to the average  
7 person may appear incriminating to a police officer in light  
8 of that past experience, and the officer is not required to  
9 ignore that experience.

10 Officer Fritsch testified that he's done at least 55 DUI  
11 investigations, that he is familiar with the Capitol Hill  
12 area, that he knows that at 2:00 a.m. in the morning the  
13 bars are closed down, you're going to have more drivers who  
14 are leaving the bars, there's going to be more -- it's going  
15 to be more likely that there's DUI drivers on the road.

16 And so here Officer Fritsch is applying his training and  
17 experience when he's evaluating the situation at hand.

18 And what's important is that Officer Fritsch asked  
19 Mr. Wiggins to step out of his car so that he could  
20 investigate this DUI. And the purpose of this DUI is what  
21 the case law -- or the investigation is what the case law  
22 supports, is that the lawful scope of a Terry stop may be  
23 enlarged or prolonged as needed to investigate unrelated  
24 suspicions that crop up during the stop.

25 And in order to prolong a detention beyond the reason for

1 an initial traffic stop -- so here the headlights being  
2 out -- the officer must be able to articulate specific facts  
3 from which it could be -- reasonably be suspected that the  
4 person was engaged in criminal activity.

5 And here the specific articulable facts are the odor of  
6 intoxicants; the bloodshot, watery eyes; denying any alcohol  
7 consumption, and saying it's chips, which is unusual; the  
8 fact that it's 2:00 a.m. in the morning; the fact that the  
9 driver is operating a car without his headlights on.

10 And so Officer Fritsch takes all of this into account when  
11 he decides to expand the scope of the traffic infraction, a  
12 DWLS 3 that cropped up, and shifts his investigation to that  
13 of DUI. And thereafter, Officer Fritsch does not detain  
14 Mr. Wiggins any longer than is necessary to either dispel or  
15 confirm that suspicion.

16 And so the City would argue that here there was reasonable  
17 articulable suspicion to expand that scope for DUI. The  
18 officer had enough information.

19 The City would also add that the Court's analysis hinges  
20 on what is in front of it, and not the lack of what might be  
21 missing, like Defense's argument that Officer Fritsch could  
22 have followed Mr. Wiggins's car longer, together -- more  
23 evidence of perhaps swerving or other sort of driving  
24 patterns, or the fact that Mr. Wiggins wasn't slurring his  
25 words, et cetera. These are highly speculative. I mean,

1 everybody tolerates alcohol very differently.

2 At a .08 you do not -- or above a .08 you don't have to be  
3 falling-down drunk to be violating the law, as the Court  
4 knows.

5 And so I would just ask the Court to limit its analysis to  
6 what is in front, and not consider the lack of other  
7 indicators for the analysis.

8 I do not have anything further.

9 THE COURT: Thank you.

10 MS. WHYTE: May I respond?

11 THE COURT: Yes.

12 MS. WHYTE: Thank you, Your Honor.

13 So first of all, the City says that, you know,  
14 Officer Fritsch also took additional information into  
15 account, like the fact that Mr. Wiggins indicated he was not  
16 drinking, and that -- the fact that Mr. Wiggins had maybe  
17 indicated the scent of the -- whatever was in the car was  
18 chips.

19 The City identifies -- adds those factors to what the  
20 officer considered in determining whether or not he had  
21 reasonable articulable suspicion, and then marks that as,  
22 quote, the pivotal moment, was what Ms. Sra said.

23 The City says that the officer took those things into  
24 account, but that's not what the officer said. When the  
25 officer testified for the Court as to what he took into

1 account for signs of impairment in determining whether he  
2 was investigating the DUI, he said three things: Headlight  
3 infraction; odor of alcohol; and red, watery eyes. That's  
4 it.

5 And the Court has to rely on what the officer said,  
6 because Ms. Sra is not in his head. He is the witness who  
7 was here. That's the point of a 3.6 hearing, is to provide  
8 that testimony to the Court so that the Court knows, what  
9 did the officer base his decision on?

10 This business about drinking or not drinking and chips was  
11 never mentioned by the officer when he was asked both by my  
12 investigator and here in front of the Court.

13 He had the opportunity to clarify what other things he may  
14 have taken into account and give the Court that information,  
15 and he didn't do that.

16 The City also argues that reasonable articulable suspicion  
17 is a very low standard. I acknowledge it's not a probable  
18 cause standard, but it's an important standard that  
19 interposes a neutral magistrate between the citizens and the  
20 police to ensure that the police are not abusing the warrant  
21 requirement.

22 Nobody's saying here he had to ask hundreds of questions.  
23 Nobody's saying he's required to dispel any little suspicion  
24 that he has. But the fact of the matter is the officer  
25 didn't even ask him one question.



1 MS. SRA: Yes, he did.

2 MS. WHYTE: He didn't even ask him one thing about, you  
3 know, you been up late? Or you have allergies? He  
4 didn't -- not in the first question. Not one.

5 We're certainly not saying that the officer has to  
6 interrogate Mr. Wiggins and spend, you know, ten minutes or  
7 even five minutes asking him questions. But the reality is,  
8 he didn't do any investigation here.

9 The City argues that, in light of his experience, things  
10 that might appear suspicious to him but not to a layperson,  
11 he's allowed to incorporate that.

12 And, you know, I would acknowledge that the case law has  
13 some support for that, but I would also say that these  
14 things that the City specifically points to, like the fact  
15 that it was 2:00 a.m.; so therefore, there are more drivers,  
16 more people out on the road, more people leaving bars, the  
17 fact that the neighborhood was Capitol Hill, these are  
18 things that have specifically been rejected by our Supreme  
19 Court when our Supreme Court is defining what the contours  
20 of reasonable articulable suspicion is.

21 And I think neighborhoods in particular are something that  
22 the Court has been very sensitive to because of the kinds of  
23 conclusions that can emanate from an officer making  
24 generalizations about a neighborhood.

25 And I'm not just talking about innocuous facts. I'm

1 talking about cases that the City I'm sure is familiar with  
2 because they are well-worn and oft-cited cases, like  
3 Fuentes, where people are in late at night, high-drug and  
4 crime area, people are getting into unfamiliar cars, giving  
5 stories that don't make any sense, shaking, looking impaired  
6 to the officers. And the Court is looking at that and  
7 suppressing because they're determining that that's not  
8 enough.

9 That's too much about the neighborhood using to kind of  
10 bolster the observations that the officer made. And the  
11 Court is drawing a bright line there and saying, you can't  
12 make up for gaps in your investigation by making  
13 generalizations about the time of night, you know, the  
14 activity in the neighborhood that's going on, what kind of  
15 neighborhood it is, the fact that there's bars there, the  
16 fact that it's a high-drug area, and the fact that it's  
17 late. The Court has specifically rejected that numerous  
18 times.

19 And then I would also, finally, I guess I would rebut the  
20 point that, you know, the City acknowledged that the officer  
21 needs specific facts that Mr. Wiggins was engaged in  
22 criminal activity, and the City says, well, you know, just  
23 being over .08, you don't have to look impaired, but you  
24 could still be violating the law.

25 But the reality is the officers have to have some

1           indication they're violating the law. And yeah, maybe that  
2           means that, as a matter of policy, the case law is going to  
3           allow some people who are over .08 who don't look impaired  
4           to go so that officers aren't arresting people who aren't  
5           impaired, and just calling it reasonable articulable  
6           suspicion, and expecting the Court's rubber stamp on that.

7           The officer doesn't have any way of knowing whether  
8           somebody's above .08 or not at the scene. And I think we  
9           can all agree on that.

10          So what they have to do is rely on these myriad other  
11          tools that we all know they have to make that assessment to  
12          a degree of reasonable articulable suspicion. And the  
13          officer didn't do that here.

14          We're not saying they got to give everybody a PBT first  
15          thing, right off the bat. But I think we can all  
16          acknowledge that there are tools that they have available to  
17          them that can turn up clues that say yea or nay, this is  
18          moving the needle in the direction of reasonable articulable  
19          suspicion. And the needle just didn't get far enough here.

20          THE COURT: All right. Thank you.

21          So I guess I want to start with something that Counsel  
22          just ended with, that there are tools to determine whether  
23          the needle adjusts. And so I guess in this case I feel like  
24          that's what the officer used, because we know that he had a  
25          right to stop Mr. Wiggins because of the headlight. He

1 noticed the headlight.

2 And I don't think it matters that -- I don't think he has  
3 to follow him any length of time. If the officer observes  
4 somebody breaking the law or committing an infraction, I'm  
5 not aware of any case that says they have to follow them  
6 (inaudible) seconds or one minute before pulling them over.

7 So the officer had a right to get behind him and pull him  
8 over. I think you said it was within 20 seconds he observed  
9 he had no headlights.

10 The officer did say that that was something that he had in  
11 the back of his mind. Even though he didn't cite the  
12 authority, he said that in his training oftentimes people  
13 that are impaired are out when -- without headlights when  
14 they're supposed to have headlights.

15 The next one is that when the officer stopped Mr. Wiggins,  
16 he properly was able to ask for his identification, his  
17 insurance, registration, the very things that Defense  
18 acknowledged that he could do. He immediately did that.  
19 That's the first thing he did was ask about those things.

20 (Inaudible) back and checked for any warrants, and found  
21 that Mr. Wiggins was DWLS, and thought that it was due to a  
22 DUI. Turns out it was a DUI that had been amended. So then  
23 he came back to inquire about that, which is all fine.

24 Next, while he was doing that, he did smell alcohol on  
25 Mr. Wiggins, but he also said that he noticed that his eyes

1           were red and watery, or bloodshot, red. So at this point  
2           when the officer observes that, then he can, as you said, he  
3           can continue investigating to see if there's something else  
4           going on, which is what he did.

5           And then he asked Mr. Wiggins if he had been drinking.  
6           Because I think Counsel said he didn't ask him any  
7           questions, but he did. He asked him if he had been  
8           drinking.

9           And Mr. Wiggins stated no. Mr. Wiggins explained that it  
10          was his birthday. He had been out celebrating with his  
11          friends.

12          Officer said, well, I can smell something.

13          Mr. Wiggins said, well, it might be the chips that we  
14          have.

15          So at that point the officer asked -- and he could have  
16          even asked him to step out of the vehicle prior to that,  
17          just stopping him for the headlights. There's case law that  
18          says that that is okay to ask someone to step out of the  
19          vehicle.

20          At that point he asked him if he wanted to do the field  
21          sobriety tests. And Mr. Wiggins indicated -- not only he  
22          indicated he would, but he told the officer that, yes, and  
23          then he would pass (inaudible) exact words officer said.  
24          But anyway, indicated that he would be able to pass those  
25          tests.

1           So I think the Terry stop can be enlarged (inaudible) as  
2 long as it's -- the officer has identified a reasonable and  
3 articulable suspicion. With this case he doesn't have to  
4 have 17 things. He doesn't have to have -- he can have one  
5 or two things, and in this case that's what he had. The  
6 smell of alcohol, he had the eyes, he had the headlight.

7           And then also, he had information that he found out when  
8 he went to (inaudible) warrants about the DWLS. That gave  
9 him the right to expand the scope of his initial Terry stop.

10          The other thing is the reasonableness. I think Counsel  
11 argued this earlier that, from start to finish, this took  
12 about 18 minutes. So that's another thing, that the stop  
13 has to be reasonable. So I'm going to say that that's a  
14 reasonable time.

15          I think when you combine these things with the officer's  
16 experience -- and again, even though he'd only been there a  
17 year and a half, he had done 51 DUIs. Even if he had only  
18 done two, that's something -- he still had things that he  
19 could point out what he was looking at, articulate what he  
20 was looking at that made him believe that there was  
21 something further for him to investigate.

22          So I do believe that the stop was -- the Terry stop was  
23 lawful. The extension of it was lawful, to continue to  
24 investigate what the officer believed was a DUI.

25          Counsel also noted in her brief that the issue of whether

1 or not the officer had Mr. Wiggins perform the field  
2 sobriety tests, whether he was coerced some way.

3 I think Counsel argued that, since he wasn't told they  
4 were -- he wasn't said they were -- wasn't told they were  
5 voluntary, and I think also Counsel argued since there were,  
6 I think other people around, that this may have played some  
7 fact into that.

8 Again, looking at the facts as to whether or not this was  
9 voluntary, there still -- I didn't find any cases, and I  
10 didn't see any Counsel's brief that say that the magic words  
11 voluntary have to be spoken as it relates to field sobriety  
12 tests.

13 The officer asked -- as I said, he asked Mr. Wiggins if he  
14 wanted to do it. Not only did he say he wanted to do it,  
15 but he said he would pass them. And then he did do them.

16 So after he did them, the officer then had further  
17 information to use in order to determine whether there was  
18 probable cause. It included all of those things. Once he  
19 observed Mr. Wiggins's performance on the field sobriety  
20 tests, and he observed, too -- the officer noted a number of  
21 things, that was not able to keep his balance, that he  
22 swayed. Let's see. That in the one he kept putting his  
23 arms up instead of keeping them by his side. So those are  
24 also things that the officer could use moving forward in  
25 order to base his -- that he had probable cause to

1 effectuate the arrest.

2 Another thing I think that goes to the voluntariness of  
3 Mr. Wiggins doing the field sobriety tests is that, when he  
4 was asked again for the portable breath test, he declined.  
5 So to me, that shows that Mr. Wiggins understood it was  
6 voluntary. He said yes to the field sobriety tests; but to  
7 the PBT, which also was voluntary, he (inaudible) declined.

8 There was no evidence that he was forced to do it, no  
9 evidence that the officer suggested that the test was not  
10 voluntary. There was no evidence -- I know that Counsel  
11 brought up there were a lot of other police officers that  
12 were on the scene -- that any of them even approached  
13 Mr. Wiggins. The officer testified that they were there in  
14 their role as backup, mainly watching for people around, and  
15 also the passengers of the car, but that they didn't even  
16 interact with Mr. Wiggins. It was just basically  
17 Officer Fritsch and his partner standing by.

18 So there's no evidence to show that there was any coercion  
19 on the officer's part to require Mr. Wiggins to do the field  
20 sobriety tests. And as I said, he declined on the portable  
21 breath test.

22 I wanted to address a couple -- let's move this over  
23 (inaudible). And maybe -- I'll reserve about the person  
24 (inaudible) Mr. Burnton is going to talk about that, but --  
25 since he asked those questions.



1           Let me just look at Counsel's. I think Counsel is arguing  
2           that we have to have a -- I understood Counsel to argue that  
3           there had to be some, like, individualized consideration in  
4           terms of the reasonable suspicion, but that (inaudible)  
5           probable cause, I believe. And I think in this case the  
6           officer was able to do that (inaudible) probable cause.  
7           Yeah. Individualized facts is what Counsel stated.

8           The officer did cite his training. I think Counsel  
9           mentioned something about, because of the officer's short  
10          time, that he may not have had the experience necessary to  
11          base his reasonable and articulable facts. But the officer  
12          did talk about his training, and how many DUIs he had done  
13          in his investigation. And the headlight is something that  
14          they learned in their training.

15          Counsel argued, too, that it is not a crime to consume and  
16          drive, and that is true. It is not a crime to (inaudible),  
17          but it is a crime to be impaired. And that's what the  
18          officer was investigating, whether or not Mr. Wiggins was  
19          impaired, and so not to have him drive on the roads.

20          Also, I'm just -- Counsel mentioned that there was no  
21          impaired driving, and that he pulled him over after 20  
22          seconds, and why did he stop him so fast?

23          Again, the officer is not required to watch a person drive  
24          for any length of time. That could be another factor that  
25          (inaudible), but they're not required to do that, not

1 required to have impaired driving before they can pull  
2 someone over, because again, he had the headlight.

3 Counsel talked about no slurred speech. But again, every  
4 case -- every case is not going to have all the different  
5 factors (inaudible). I think, as Counsel argued, there  
6 could be a lot of things. And also, the officer is not  
7 required to go through the litany of things that it could  
8 not be. That's for a later time if the case goes to trial.  
9 But the officer is not required to ask all of those  
10 questions.

11 And then I guess Counsel did bring up about the person  
12 that was screaming in the background. And while I'm sure  
13 that did alarm Mr. Wiggins -- I think any of us that are lay  
14 people, that would probably alarm us -- but again, it was  
15 not connected with the reason that Mr. Wiggins was stopped.  
16 And the fact that he had bloodshot eyes and smell of alcohol  
17 on his breath was not connected with the person in the --  
18 screaming.

19 But I acknowledge that it probably was disturbing -- would  
20 be disturbing to any of us that weren't accustomed to that.

21 I think that -- and then Counsel had one more -- I just  
22 want to make sure I cover. (Inaudible) and then see, what  
23 was B? B was his conviction for -- also did not provide --  
24 and I found that that is a fact that he could consider.  
25 Because I think the case that Counsel cited said that that

1           could not be the sole reason. But there were other things  
2           that were combined with that that gave Officer Fritsch  
3           articulable reason to expand the search.

4           And then I talked about the last issue, the field sobriety  
5           tests, and that I believe that they were voluntary.

6           So based on that, I am going to deny Defense's motion to  
7           suppress the evidence in this case and -- for that part.

8           So now for the 3.5, Mr. Burnton and Ms. Whyte, the City --  
9           I don't think the City did -- are you offering any  
10          statements? I don't know which statements we're talking  
11          about.

12          MS. SRA: So, Your Honor, the City has not made a list of  
13          statements.

14          THE COURT: Okay.

15          MS. SRA: The City's -- the 3.5 motion, the City's posture  
16          is that everything leading up to the arrest and after the  
17          arrest --

18          THE COURT: Okay.

19          MS. SRA: -- is admissible because it was not coerced.  
20          Well, the pre Miranda would be admissible because it was not  
21          coerced. Mr. Wiggins was not in custody. He was not  
22          threatened. Surely he was being detained because he was  
23          being investigated for a DUI investigation.

24          Post Miranda he understood -- he stated that he understood  
25          his Miranda rights, and so anything that he stated after

1 Miranda would also be admissible.

2 As to specific statements, I think we ought to reserve  
3 that and deal with those as the trial goes or, you know,  
4 specific body-worn video, et cetera. At this time I don't  
5 have, like, a list or anything like that.

6 THE COURT: All right. Mr. Burnton?

7 MR. BURNTON: So, Your Honor, just practically speaking, I  
8 would think that we should identify before the trial starts  
9 the individual statements, that there might be other issues  
10 that go into that.

11 THE COURT: Right. So are you mostly concerned with the  
12 post Miranda, or do you want to argue about the pre?  
13 Because we know what those are.

14 MR. BURNTON: I'm concerned with the pre Miranda  
15 statements, Your Honor.

16 THE COURT: You're okay with what she said?

17 MR. BURNTON: No. I'm concerned with the pre Miranda.

18 THE COURT: Okay. So why don't we talk about that.  
19 Because we did see those.

20 MR. BURNTON: Yes. So, Your Honor, of course, understands  
21 that there are three parts to the analysis of whether the  
22 statements were coerced. Custody, interrogation, by a state  
23 agent. State agent is not an issue here, so we're focused  
24 on custody and interrogation.

25 And Defense is here arguing that Mr. Wiggins was, in

1 effect, placed into custody well before the time of formal  
2 arrest.

3 Now, custody is an issue of fact and the facts available,  
4 as well as whether a reasonable person would believe that he  
5 was free to leave at the time of the investigation.

6 So (inaudible) the facts were that came out of the 3.5.  
7 The officer made clear that he had stopped Mr. Wiggins's car  
8 with his lights on. He was in full uniform, as was his  
9 partner. His partner was at one side of the vehicle.  
10 Officer Fritsch was at the other side of the vehicle. And  
11 within moments we heard that a third officer, Officer Daniel  
12 Auderer, came to the vehicle and was behind the vehicle; and  
13 then a fourth officer, Officer Wohlwend, arrived shortly  
14 thereafter.

15 So focusing on the fact that there are four officers,  
16 named officers who were there at the scene with three patrol  
17 cars. Now, when he was question -- when Officer Fritsch was  
18 in questioning Mr. Wiggins, he made clear that he had his  
19 flashlight. He was shining it in Mr. Wiggins's face. The  
20 other officer was also shining the lights in Mr. Wiggins's  
21 vehicle. And Officer Fritsch said he actually had his arm  
22 pressed up against Mr. Wiggins's car as well. The  
23 (inaudible) gesturing somebody's (inaudible) literally I'm  
24 holding you here while I talk to you about this.

25 And so he spoke with Mr. Wiggins about the fact that his

1 headlights weren't on, and he had asked him if the  
2 headlights were working, and Mr. Wiggins showed him that  
3 they were.

4 And then he asked for Mr. Wiggins's license, which he  
5 complied with. And then Officer Fritsch went away for a  
6 couple of minutes and then came back. And then he told  
7 him -- he told Mr. Wiggins that your license is suspended.  
8 At that point he's told Mr. Wiggins, your headlights were a  
9 problem.

10 And then Mr. Wiggins had asked him, well, can I just  
11 please get off with a ticket? I just -- I want to go home.  
12 I'll pay whatever fine I have to, Officer, I just want to be  
13 able to move forward.

14 And the officer at that point says to him, well, now it's  
15 a criminal citation. Mr. Wiggins has just asked if he could  
16 just go and pay the fine. And the officer has said no, now  
17 it's a criminal citation.

18 At that point, when he said that, a reasonable person  
19 would not believe that he was free to leave that scene. The  
20 arm was back on the car. He had his flashlight on. He was  
21 saying now it's a criminal citation, after Mr. Wiggins had  
22 just asked if he could drive away and pay the fine. A  
23 reasonable person would not believe that they were free to  
24 leave at that point.

25 Now, I want to briefly add in the fact that this

1 (inaudible) person, because I understand that -- I spent  
2 quite a bit of time going over that on the 3.5, and I played  
3 some clips from that, and I had intended to play some  
4 additional clips. But I do believe Your Honor understood  
5 that in the background while this was going on was an  
6 individual who sounded as if they were in immense pain,  
7 torment, and was shouting violent epithets about the police  
8 officers that appeared, at points about people dying, about  
9 rape.

10 And Mr. Wiggins, at two separate occasions, actually stuck  
11 his head out of the car to check what was going on. And the  
12 officer didn't budge.

13 And I understand the officer talked about mental health  
14 crises being a problem here in the city of Seattle. But as  
15 an officer, he is far more familiar with that than  
16 Mr. Wiggins would be. And Officer Fritsch just stood there  
17 while this shouting got louder, and louder, and more  
18 violent. And Mr. Wiggins didn't know what was going on.

19 But what he did know was that, despite the fact that there  
20 was this person shouting about rape and death, that these  
21 officers were so focused on him that Baughman -- Officer  
22 Baughman did not leave the car, Officer Fritsch didn't even  
23 turn, because we saw his body-worn video, and at no point do  
24 we see him even turn to look at who was shouting. There was  
25 no investigation of that going on.

1           And so with all of that happening, and then of course  
2           Mr. Wiggins literally saying, I can't even concentrate, the  
3           officer's not leaving the vehicle, the shouting in the  
4           background, a reasonable person would be saying to  
5           themselves, I've just been told that at this time it's a  
6           criminal citation, these officers have not left, there are  
7           actually more officers than there were before as they  
8           arrived, and there's literally somebody shouting about rape  
9           and death, and the officers are not even touching them  
10          because they are so focused on me.

11          At that point in time no reasonable person would believe  
12          that they were free to leave. Mr. Wiggins -- as a result,  
13          anything he said there has to be suppressed, because he was,  
14          in effect, in custody.

15          The Court is to consider all those facts available and the  
16          proceedings of how those facts came to be. And in light of  
17          what came out here, that is when he was in custody, so  
18          everything from that point needs to be suppressed.

19          THE COURT: City?

20          MS. SRA: So, Your Honor, whether Mr. Wiggins was free to  
21          leave or not is not the standard when the Court looks at  
22          whether one is in custody. The standard is custody -- and  
23          this is State v. Ferguson, as cited in my trial brief,  
24          custody for the purpose of Miranda is narrowly circumscribed  
25          and requires formal arrest or restraint on freedom of



1 movement to a degree associated with formal arrest would --  
2 that a reasonable person would believe that he or she was in  
3 police custody to the degree associated with a formal  
4 arrest.

5 Here at no time was Mr. Wiggins placed in handcuffs, and  
6 no time was he threatened, or coerced, or anything of that  
7 nature.

8 Defense's argument seems to hinge on whether Mr. Wiggins  
9 believed he was free to leave or not. He wasn't free to  
10 leave. He was being detained. He was being detained for a  
11 DUI investigation. That does not equate in custody for  
12 purposes of the 3.5 analysis.

13 The courts have repeatedly held that pre-arrest statements  
14 that are pre formal arrest are admissible at a trial.  
15 Obviously, after arrest the law requires one to be  
16 Mirandized. The law requires that that person understand  
17 those Miranda rights, and then we go from there.

18 But for purposes of pre -- pre formal arrest or pre-arrest  
19 statements, I believe they are admissible in this case.

20 As to the man shouting things in the background, I'm not  
21 really sure how that relates to whether Mr. Wiggins would  
22 believe he was free to leave or not. That is beyond SPD's  
23 control.

24 As Officer Fritsch testified, sure, that man shouting in  
25 the back is being a nuisance. He's disturbing people at

1 2:00 a.m. in the morning. But Officer Fritsch says he  
2 actually recognized that individual, that he's seen him  
3 shouting, that that's his baseline behavior.

4 So the City would respectfully ask that the pre-arrest  
5 statements be admitted.

6 THE COURT: Thank you.

7 MR. BURNTON: May I briefly respond, Your Honor?

8 So, Your Honor, an individual is considered in custody  
9 when he has been arrested or otherwise deprived of liberty  
10 of action in any significant way.

11 And again, I think what the Court has to consider is the  
12 fact that Mr. Wiggins's movement was restricted in a  
13 meaningful way. When that officer came back, there was a  
14 physical demonstration of holding that car there. There  
15 were multiple officers around.

16 At no point -- if Mr. Wiggins had driven away, I think the  
17 test is simply this: The officers would have very quickly  
18 stopped him and said you are under arrest at that point in  
19 time.

20 THE COURT: Well, let me ask you this, Mr. Burnton. Under  
21 the analogy that you've just given me, then any time the  
22 officers stopped for a Terry, then that would be -- because  
23 when you're stopped for a Terry stop, you're not free to go,  
24 because the officer is doing investigation. So then it  
25 seems like every stop, Terry stop would be an arrest,

1       because how can they investigate if they let you go? I'm --  
2       so I don't see how that could be. Then the officer could  
3       never do a Terry stop. Because when you're stopped to be  
4       investigated, you're not free to go at that moment. And so  
5       the officers are allowed to have reasonable time to  
6       investigate whatever it is they're investigating before they  
7       decide whether to arrest you. So I'm kind of having a  
8       problem following what you just argued.

9       MR. BURNTON: So, Your Honor, what I would argue there is  
10      a right (inaudible). In the Terry case, for example, that  
11      was a seasoned officer who had stopped people just briefly,  
12      and really he did essentially a pat down of them, I believe  
13      it was, for weapons to see whether they were casing the  
14      store or not.

15      I think what's different here is the fact that the  
16      officers came up to Mr. Wiggins, and they told him point  
17      blank at this point, this is a criminal citation. They  
18      clarified it's not just a headlight stop; now it's a  
19      criminal matter, and they are holding him there.

20      And so I think this is already beyond the scope of that  
21      stop, and they are already at this point deciding that they  
22      have enough for a criminal matter.

23      THE COURT: Criminal citation -- again, people are given  
24      criminal citations all the time, and they're allowed to  
25      leave, and they just come back for their court date. So a

1 criminal citation doesn't mean you're going to be arrested.

2 MR. BURNTON: Well, and so, Your Honor, what I would say  
3 is that Mr. Wiggins had just asked the officers if he could  
4 drive away, and the officer said, well, at this point it's a  
5 criminal citation. That was a no. I mean --

6 THE COURT: I don't recall him saying could he drive away.  
7 He asked him could they just give him a ticket.

8 MR. BURNTON: He had asked him -- you're right. Correct,  
9 Your Honor. Yeah. I want to clarify. He had asked if I  
10 could have a ticket and just pay the fine. But --

11 THE COURT: But they were still investigating at that  
12 point, so informed him that now you're DWLS, so that's  
13 criminal citation. That's not the same as being arrested.  
14 Because again, people are given citations, but they're not  
15 arrested.

16 MR. BURNTON: Then (inaudible), Your Honor, what I would  
17 say is, one, that's something that the people in this  
18 courtroom might know, but that is not necessarily something  
19 that lay citizens know.

20 Once a lay citizen is told this is a criminal citation,  
21 again, part of the analysis is understanding whether a  
22 reasonable person would understand they were free to leave.  
23 And a reasonable person would not have understood at that  
24 point, given what was happening in the environment around,  
25 that he was free to leave.

1 THE COURT: All right. Go ahead with your argument.

2 MR. BURNTON: And so just briefly, Your Honor, what I  
3 wanted to indicate is that, when questioning takes place  
4 under circumstances likely to substantially affect the  
5 individual's will to resist and would compel him to speak, I  
6 think again at that point the compulsion comes from the fact  
7 that him asking if he can just pay the ticket and move on,  
8 the officer said, well, this is a criminal citation, and  
9 that's when the additional questioning began. And at this  
10 point it's, again, moved several stages away from what the  
11 original basis of the stop was, where it was for that  
12 headlight check.

13 And so the reasonable person in this situation would be  
14 assessing it as an officer is against my car, there are  
15 multiple police cars around me, there are flashlights  
16 shining into my car, an officer physically has his hand  
17 against my vehicle, he has my driver's license, he had  
18 already addressed the initial matter, he's just told me  
19 there's now a criminal citation here, and now he's going to  
20 start asking me about these other things. At this point in  
21 time I don't feel like I'm free to go, and the officer is  
22 physically keeping me here because there are multiple  
23 officers all around me.

24 That is constructively holding Mr. Wiggins there for  
25 purposes of custody, and all of these questions were asked

1 at that point in an interrogatory manner.

2 THE COURT: Thank you. All right. So I don't find that  
3 the time prior to Miranda that Mr. Wiggins was in custody,  
4 that would require him to be Mirandized. I think this was,  
5 again, an extension of the Terry stop. The officer was  
6 asking additional questions regarding what he observed once  
7 he came up to the car.

8 The fact that -- the officer, too, testified that this was  
9 all standard procedure. They do that. They have a  
10 flashlight. They shine it in when there are people in the  
11 car.

12 He was talking to Mr. Wiggins, so I didn't -- I mean, I  
13 heard him say he had his arm against the car; but he didn't  
14 say, I had my hand on the car so he couldn't open the door,  
15 because Mr. Wiggins had been out of the car previously.

16 The fact that multiple officers responded, again, that was  
17 explained that they do that for safety, especially in this  
18 case because there were passengers in the car. It was a  
19 busy area. They do it for officer safety.

20 There was no testimony or any indication that any of those  
21 officers approached Mr. Wiggins or came up to the car.  
22 Officer Fritsch testified that he was the sole one doing the  
23 investigation. His partner was standing by the car.  
24 There's no indication that the other officers in any way  
25 approached Mr. Wiggins, or said anything to him, or seemed

1 to be there to impede him from going. Officer testified  
2 that it was more for safety and (inaudible) him.

3 And also, the people around there who also said the --  
4 talked about the person that was yelling, again, I don't see  
5 what that has to do with what was going on (inaudible).

6 I know that it probably was disturbing, because if you're  
7 not accustomed to that, it's something that's odd.

8 But it wouldn't be reasonable for Officer Fritsch to leave  
9 the investigation that he was conducting to go and check on  
10 someone that was screaming that he said he was familiar  
11 with. So it wouldn't be reasonable.

12 But even if it were, I don't see what that has to do with  
13 Mr. Wiggins and his belief that somehow he was under arrest  
14 at that point because somebody was screaming. We didn't  
15 hear from Mr. Wiggins, but it seems -- I'm not sure what  
16 that has to do with that.

17 So I think up until the point that he was given Miranda,  
18 the officer was still doing a Terry stop. Under Terry, you  
19 can detain somebody for a reasonable time to investigate.  
20 And I think this whole thing took less than 20 minutes, so I  
21 would say that that was reasonable time.

22 So I'm going to find that the pre Miranda statements are  
23 admissible.

24 And I think maybe we should talk about -- I'm concerned  
25 about not discussing the post Miranda; because then, if

1 something comes up, we'll have to stop and talk about it  
2 then.

3 Is there a way that we can just -- are there specific post  
4 Miranda that you were concerned with? Because I don't want  
5 to have to stop if, like, you might want to -- either side  
6 might want to talk about certain statements, and we'll have  
7 to stop each time.

8 Are there any that you were specifically concerned with?

9 MR. BURNTON: So, Your Honor, there are a few that I am  
10 specifically concerned with.

11 THE COURT: Okay.

12 MR. BURNTON: Again, because City has not indicated which  
13 statements specifically they're --

14 THE COURT: Okay.

15 MR. BURNTON: -- intending to offer, it makes it a little  
16 more difficult.

17 THE COURT: City, are there -- I mean, do you know, or  
18 just all of the post Miranda? Because it would be benefit  
19 to handle that, talk about it now so that we don't have  
20 to --

21 MS. SRA: Yes, Your Honor. City would be moving to admit  
22 at trial all post Miranda, which I think just encompasses  
23 essentially --

24 THE COURT: What was in the --

25 MS. SRA: -- the refusal, and what Officer Fritsch already



1 testified to.

2 THE COURT: What was in the body-worn?

3 MS. SRA: No. This was the refusal of the BAC.

4 THE COURT: Oh, so at the precinct?

5 MS. SRA: Yes, Your Honor.

6 THE COURT: Okay.

7 MR. BURNTON: So, Your Honor, I guess the subject of the  
8 refusal itself is something that we have yet to address.  
9 Under Baird/Adams we would be moving to address (inaudible).

10 THE COURT: So we will reserve that.

11 MR. BURNTON: Yeah.

12 THE COURT: Is there any other?

13 MS. SRA: Not post Miranda, Your Honor.

14 THE COURT: Okay. So that concludes this portion,  
15 correct? In my mind.

16 Anything else from the parties?

17 MS. SRA: No, Your Honor.

18 THE COURT: All right. I think we should -- this would be  
19 a good time to break, and then we need to start with the Lui  
20 motion as soon as we come back. And why don't we come back  
21 at 1:00.

22 Does that work for everybody?

23 MS. SRA: Yes.

24 MR. BURNTON: Yes, it does, Your Honor.

25 THE COURT: Thank you.

1 UNIDENTIFIED FEMALE: (Inaudible).

2 THE COURT: Yes. Thank you.

3 (Lunch recess)

4 THE BAILIFF: (Inaudible) Anita Crawford-Willis, Judge  
5 presiding.

6 THE COURT: Thank you.

7 THE BAILIFF: You may be seated.

8 THE COURT: All right. Are we ready to begin with the  
9 next portion?

10 MS. SRA: Yes, Your Honor.

11 And, Your Honor, I just wanted to let the Court know that  
12 Mr. Capron probably has to be out of here by 1:40-ish. He  
13 does have a doctor's appointment in Puyallup. I understand  
14 that we are running a little behind. But you know, he was  
15 here at 9:00 a.m. today, and he was here yesterday as well.

16 Other than that, I guess I'm wondering, since it's  
17 1:06 p.m. on Wednesday, Ms. Arvizu, as Defense stated, is  
18 set to leave tomorrow at noon.

19 I think that the City's suggestion would be that we do the  
20 Lui motion and set over trial, because I just don't see us  
21 getting to her testimony because we're so far behind.

22 THE COURT: Okay. So I guess I was going to ask about  
23 that. I don't know if Ms. Arvizu would be coming -- able to  
24 come back if we set over the trial.

25 MS. SRA: Right.

1 THE COURT: Because I'm concerned, too, because I have to  
2 be at the jail next week, so I was kind of worried about how  
3 we would get all this done. But I'm going to try to push  
4 forward.

5 MS. WHYTE: I think it would be good if we could push  
6 forward at this point just because Mr. Arvizu has flown in.  
7 We've gotten funding for that. It was very difficult to get  
8 the funding for that.

9 THE COURT: All right.

10 MS. WHYTE: Yeah.

11 THE COURT: But I mean, in reality, Counsel, we might not  
12 get to her. So I just want you to be thinking about that.  
13 So --

14 MS. WHYTE: Thank you.

15 THE COURT: I do want to try to push forward, but I do  
16 have concerns about not being able to get to her by tomorrow  
17 when she -- is it 1:30 she needs to leave?

18 MS. WHYTE: I believe it's -- I believe her flight might  
19 be around that time. I'm not sure. I think she said she  
20 (inaudible).

21 THE COURT: (Inaudible).

22 MS. WHYTE: But yeah.

23 THE COURT: So we'll push forward, and it might end up  
24 having to be continued. But for now, we'll push forward, and  
25 then if we have to, unfortunately -- hopefully we could finish

1 with him. But if not, we'll have to ask her to come back

2 MS. SRA: Okay. And so with that then, I'll call him to  
3 the stand.

4 THE COURT: All right. Thank you.

5 Hi there. Do you solemnly swear or affirm that the testimony you  
6 give this afternoon will be the truth?

7 THE WITNESS: I do.

8 THE COURT: Thank you. Would you like water before you begin?

9 THE WITNESS: Yes, I would certainly --

10 THE COURT: Absolutely. There you go.

11

12 BRIAN CAPRON Witness herein, having first been  
13 duly sworn on oath, was examined  
14 and testified as follows:

15

16 D I R E C T E X A M I N A T I O N

17 BY MS. SRA:

18 Q. And good afternoon, Mr. Capron. Would you please state  
19 your names and spell your last name for the record.

20 A. Brian Capron, last name C-A-P-R-O-N.

21 Q. And, Mr. Capron, how are you currently employed?

22 A. By the Washington State Patrol Toxicology Laboratory.

23 Q. And what is your current position there?

24 A. I'm a forensic scientist five, which is a toxicology  
25 supervisor.

1 Q. And would you please explain your education, training,  
2 and experience that qualifies you to hold this position.

3 A. I graduated with -- from Pacific Lutheran University with  
4 a bachelor's degree in biology, and then I worked at a  
5 forensic laboratory in Tacoma, Washington for about seven  
6 and a half years. It was a forensic urine drug testing  
7 laboratory. I spent about five years supervising there.

8 And then I took a job with the State Patrol here in  
9 Seattle. I was a bench level scientist, a forensic  
10 scientist three for about a little over two years I  
11 guess. And then I've been a supervisor since and spent a  
12 year as the interim laboratory manager as well.

13 Q. And what are your duties as a supervisor?

14 A. So normal supervision of forensic scientists so, you  
15 know, employee reviews, et cetera, those type of things.  
16 Most of my time is spent reviewing toxicology reports.  
17 We get about 16,000 cases a year at the lab. So  
18 everything we do has to be peer-reviewed. So a great  
19 deal of my time is spent reviewing supporting data and  
20 then reviewing an entire case file and signing out a  
21 final report as well.

22 Q. And are you familiar with how the testing is conducted --  
23 how blood testing is conducted at the tox lab?

24 A. Yes, I am.

25 Q. And when blood vials are received at the tox lab, how are

1           they assigned to a primary analyst?

2    A.    So typically we have toxicologists that are on a  
3           rotation.  So property and evidence custodians receive  
4           the evidence, they process the evidence, and when they've  
5           received a set of 40 cases, then they let the next  
6           toxicologist that's ready for cases know.

7           Then they'll do a transaction through the laboratory  
8           information management system, which tracks chain of  
9           custody.  And then that toxicologist would then get the  
10          data -- or, I'm sorry, the evidence and the request for  
11          analysis forms and the folders, and then they would start  
12          being able to conduct their testing.

13   Q.    And who determines all the testing that must be conducted  
14          on a -- on the defendant's blood?

15   A.    We have kind of flow sheets.  So, you know, for a death  
16          investigation we do a certain type of testing.  For  
17          suspected DUI's we do a certain type of testing as well.  
18          So it's kind of uniform.

19   Q.    Okay.  And other than the primary analyst, who, if anyone  
20          else, has all the facts and information about an  
21          individual's blood testing?

22   A.    Whoever does the final review would have that information  
23          as well.

24   Q.    Okay.  And is it fair to break the testing out into three  
25          phases so the EMIT --

DIRECT BY SRA/CAPRON

1 MS. WHYTE: Objection. Leading.

2 THE COURT: What was the objection?

3 MS. WHYTE: Leading.

4 MS. SRA: And, Your Honor, I believe leading questions  
5 are allowed when you have an expert witness, and we're  
6 doing a motions hearing.

7 THE COURT: I'll overrule for now but kind of keep your  
8 questions more open-ended. Go ahead.

9 Q. (By Ms. Sra) So can you take me through the phases of a  
10 blood testing on a particular case.

11 A. Okay. So for a suspected DUI case, the first thing that  
12 we do is we test for the presence of ethanol --

13 Q. Uh-huh.

14 A. -- or any other volatile substance. We also do an EMIT  
15 screen, so that's just a quick chemical lock-and-key test  
16 to determine whether or not a drug class may be present.  
17 If we do get something positive during that test, then we  
18 have to go to further testing, whether it be another  
19 screening test using GCMS, which is more specific, or  
20 using some sort of confirmation.

21 Q. And can you start with that first test that's done, the  
22 ethanol test, and explain what it is and how it's done.

23 A. Sure. So the toxicologist would take a small sampling of  
24 the blood, and they would dilute it with some internal  
25 standard, a known concentration, and they would put it

DIRECT BY SRA/CAPRON

1           into a vial and cap it. They calibrate the instrument.  
2           They also run controls, blanks and negatives and unknown  
3           samples.

4           So the first thing that goes through is the blank, and  
5           the calibration kind of trains the instrument to say,  
6           hey, when you see a response of this amount, it's equal  
7           to this concentration, et cetera.

8           And then the controls are at known concentrations, and  
9           those are to ensure that the calibration is correct. If  
10          all of that is correct, then any unknown samples are  
11          going to be correct as well. So that's typically what  
12          happens.

13          And so then on that first test if something is  
14          positive, then it would lead to then the individual would  
15          have to go back to the original blood vial and do that  
16          whole process over again a second time because you have  
17          to have two independent results.

18        Q.     Okay. And is the procedure that you just described  
19                approved by the State Toxicologist?

20        A.     Yes, it is.

21        Q.     And after the ethanol testing is complete, what occurs  
22                next?

23        A.     Testing-wise?

24        Q.     Yes.

25        A.     They would go -- move to the EMIT screen.



DIRECT BY SRA/CAPRON

1 Q. And who does this testing?

2 A. Typically the primary analyst that's assigned the case.

3 Q. And are you familiar with how this test is conducted?

4 A. Yes, I am.

5 Q. And would you please explain it.

6 A. So again a small portion of blood is removed from the  
7 unknown tube -- or from the known tube. Again  
8 calibrators or controls are run. And they're just  
9 looking for an absorbance -- a difference in absorbance,  
10 so they're looking to see -- the more color change, the  
11 more intense it is and the bigger the change.

12 So then if something screens positive doing that test,  
13 then it's not specific at that point in time. If it just  
14 screens positive for opiates, it doesn't tell us what  
15 opiate. So our internal procedures say that then we have  
16 to move to additional testing to find out exactly what it  
17 is and what concentration.

18 Q. And is this procedure approved by the State Toxicologist?

19 A. Yes, every -- all testing is approved by the State  
20 Toxicologist.

21 Q. And would you please describe the raw data that is  
22 received from the instrument.

23 A. So it's just printouts. It's numbers essentially. And  
24 if it's over the threshold, it will have a P next to it,  
25 which means positive, which prompts us to then go and do

DIRECT BY SRA/CAPRON

1 confirmatory testing.

2 Q. And who interprets this data?

3 A. The primary analyst and then whoever reviews the data  
4 after the primary analyst has reviewed.

5 Q. And what is the next phase after this, or what happens  
6 after the --

7 A. So depending upon what it screens positive for, there are  
8 a number of different things that can happen. We could  
9 go to a more in-depth drug screen.

10 MS. WHYTE: Your Honor, I guess I would object to any  
11 drug testimony as drugs aren't at issue in this case.

12 THE COURT: Did you want to respond, Counsel?

13 MS. SRA: Your Honor, I think this is more foundational  
14 and goes to Mr. Capron's knowledge of blood testing in  
15 general.

16 THE COURT: All right. I'll allow it for those  
17 purposes.

18 Go ahead.

19 A. So we could move to something using a gas chromatograph  
20 mass spectrometer where we can identify, you know, 100 or  
21 so, 125 different drugs. So doing that testing if we  
22 identify something through that, then we have specific  
23 confirmatory tests for different drug classes. So  
24 depending on what screens positive would dictate what we  
25 do next.

DIRECT BY SRA/CAPRON

1 Q. (By Ms. Sra) Uh-huh. And are you -- were you the  
2 reviewer on case file ST-17-14680?

3 A. I was.

4 Q. And have you reviewed that case file prior to testifying  
5 here in court today?

6 A. I have.

7 MS. WHYTE: Your Honor, I guess I would object at this  
8 point as to foundation. The City has not yet attempted  
9 to qualify Mr. Capron as an expert who would be someone  
10 who would be entitled to rely on otherwise hearsay  
11 statements and give opinions.

12 MS. SRA: And, Your Honor --

13 THE COURT: You can respond.

14 MS. SRA: Your Honor, the City has laid the foundation  
15 for what Mr. Capron's role is at the tox lab. I'm not  
16 really sure --

17 MS. WHYTE: The City has never made a motion,  
18 Your Honor, to admit him as an expert. And it's at that  
19 point that I think -- I mean, there's a lot of questions  
20 that lay the foundation for an expert. I think the City  
21 has asked about his educational qualifications, but  
22 there's -- in any event there's been no motion to qualify  
23 him as an expert, which needs to happen before he can  
24 rely on hearsay.

25 MS. SRA: So the City's making that motion then.

DIRECT BY SRA/CAPRON

1 THE COURT: Okay.

2 MS. WHYTE: I mean, I -- as I said, I think there are  
3 other questions that need to be asked.

4 MS. SRA: So, Your Honor, the City would ask the Court  
5 to qualify Mr. Capron as an expert in the field of  
6 toxicology at the Washington State Patrol. He's  
7 testified extensively as to his training and background,  
8 his duties at the tox lab.

9 THE COURT: Thank you.

10 Defense.

11 MS. WHYTE: Nothing further, Your Honor.

12 THE COURT: All right. So I will so certify him.

13 Go ahead.

14 Q. (By Ms. Sra) And in reviewing that case file, would you  
15 please take us through the steps that you went through  
16 before signing off as a reviewer.

17 A. So I grabbed the case file, and inside the case file is  
18 the request for analysis form from whatever agency  
19 submitted the case.

20 So the first thing I do is kind of an administrative  
21 review making sure the defendant's names are spelled  
22 correctly, the agency case number that's on -- the way we  
23 -- the request for analysis form, that is correct and on  
24 the report, make sure the report's going to the right,  
25 you know, officer, deputy, or whoever submitted it.

DIRECT BY SRA/CAPRON

1           Then I'm looking at the evidence section to make sure  
2           that all the evidence we received is on the report, it's,  
3           you know, properly labeled if it's blood, the type of  
4           tube, if there's a lot number on that tube, et cetera.

5           Once that's completed, then I start looking at the  
6           actual raw data. So I start looking at the volatile  
7           analysis first to see is it positive, is it not positive.  
8           I look at all the subsequent Q C that is attached with  
9           that as well.

10          If it is positive let's say, then I'm going to have two  
11          results there. I'm going to make sure to do the math,  
12          make sure that the results agree within plus or minus  
13          10 percent of the mean. I also do a calculation on the  
14          uncertainty to make sure that the correct uncertainty  
15          shows up on the report.

16          Then I just kind of work my way through. I would then  
17          go to the EMIT screening and do the exact type of stuff,  
18          make sure that anything that is positive shows up there.  
19          That then there's a second test that identifies what the  
20          substance is and what the quantity is.

21   Q.     And in your role as a reviewer for this case file, what  
22           conclusion did you reach?

23   A.     That it was positive for ethanol.

24   Q.     And what quantity of ethanol?

25   A.     It was reported as a .11.

DIRECT BY SRA/CAPRON

1 Q. And do you do your independent review before the report  
2 is published -- or leaves the tox lab?

3 A. The report is in the file, but if I find a discrepancy,  
4 if there's a transcription error, if I feel that there's  
5 more testing that needs to be performed, or if  
6 chromatography doesn't meet acceptability. I'll send it  
7 back. I won't sign it. So I'll give it back to the  
8 toxicologist.

9 They either have to do a correction, do additional  
10 testing, whatever it may be. Only when that's satisfied  
11 will I then go ahead and sign the report. And then it  
12 can be distributed to the ordering agency.

13 Q. Okay. And in reaching your independent conclusion that  
14 there -- this blood -- the defendant's blood was positive  
15 for ethanol at a level of .11, what exactly did you rely  
16 on, what documents?

17 A. All of the analytical raw data that was generated in our  
18 laboratory through testing.

19 Q. So is it fair to say then that you did not rely on the  
20 report that you'd signed off on?

21 A. No.

22 Q. Okay. And did you sign the report before or after  
23 reaching your independent conclusion?

24 A. After.

25 Q. Okay. And how do you know that Christie Mitchell-Mata,

DIRECT BY SRA/CAPRON

1 who obviously is no longer with the tox lab, didn't  
2 commit any grave errors that would lead these results to  
3 be inaccurate?

4 A. Again there's a number of different ways. Everything is  
5 peer reviewed. So when testing is conducted, it is  
6 generated. The primary analyst will then look through  
7 it. And then they'll submit it for review. So there's  
8 that review process.

9 So in this case she had two separate alcohol tests, so  
10 two separate sets of data had to be submitted and then  
11 reviewed. She had a (inaudible) that needed to be  
12 reviewed, and then she had some additional testing that  
13 needed to be reviewed. So she had at least four  
14 different tests that had to be submitted for review  
15 before she could even produce her final report.

16 At that point in time, then the final report is  
17 produced. And so then I grab this case, and then I go  
18 through, and I do a review again.

19 Q. Uh-huh.

20 A. But I have all of the data in there. So I have all of  
21 the results of all the quality control that was used. I  
22 know what lot number of calibrators or controls were  
23 used, et cetera. So I go through, and I do all of that.

24 If something had happened, let's say there was  
25 something wrong with the calibration, the results from

## DIRECT BY SRA/CAPRON

1           that test would not be used.  If there was a Q C error,  
2           if the Q C was outside acceptable range, those results  
3           would not be used.

4    Q.    Uh-huh.

5    A.    She would, you know, just basically line through it, keep  
6           the data in the file, but then would have to go and  
7           repeat that test on another day or maybe that same day  
8           but do the whole process over again.

9    Q.    Okay.  Just a moment.  And is there anything that  
10           Ms. Mitchell-Mata would have seen or that you would not  
11           be privy from -- which is -- by looking at the case file?

12   A.    By looking at the case file alone, no.

13           MS. SRA:  Okay.  Your Honor, I don't believe I have any  
14           further questions.

15           THE COURT:  Thank you.

16           All right.  Cross.

17           MS. WHYTE:  Thank you, Your Honor.

18

19                           C R O S S - E X A M I N A T I O N

20  BY MS. WHYTE:

21   Q.    Good afternoon, Mr. Capron.

22   A.    Good afternoon.

23   Q.    Christie Mitchell-Mata performed all the tests that  
24           Washington State Patrol conducted on Mr. Wiggins's blood;  
25           is that right?



DIRECT BY SRA/CAPRON

1 A. That's correct.

2 Q. There were no other analysts at your lab who performed  
3 any of the tests on Mr. Wiggins's blood?

4 A. I don't believe so, no.

5 Q. And indeed you, yourself, did not perform any of the  
6 tests on Mr. Wiggins's blood at the time?

7 A. That's correct.

8 Q. And you did not go back yourself and test Mr. Wiggins's  
9 blood at a later time?

10 A. No, we did not.

11 Q. So Ms. Mitchell-Mata is the one who signed off on all the  
12 results in this case?

13 A. I mean, essentially we both did, but she signed off that  
14 she conducted the testing. I signed off that I reviewed  
15 the data that she generated, and that it met our  
16 requirements.

17 Q. Okay. I'm going to hand you what's been previously  
18 marked for identification as Defense Exhibit 9.

19 A. Okay.

20 Q. Do you recognize what that is?

21 A. I do.

22 Q. Can you tell me what it is.

23 A. It's a photocopy of our final report.

24 Q. The final report that was produced in Mr. Wiggins's case?

25 A. That's correct.

DIRECT BY SRA/CAPRON

1 Q. And that's the report that indicates what the ultimate  
2 blood alcohol concentration for Mr. Wiggins was?

3 A. Correct.

4 Q. Now, at the bottom of that page is there a statement?

5 A. There is.

6 Q. Can you read that statement for me.

7 A. Christie Mitchell-Mata, MFS, certifies under penalty of  
8 perjury under the law of the state of Washington that the  
9 foregoing is true and correct. Unless indicated  
10 otherwise, I performed all testing reported above for the  
11 submitted evidence. The document on which this  
12 certification appears is a true and complete copy of my  
13 official report, and I have technically reviewed all  
14 relevant (inaudible) testing documentation (inaudible) in  
15 the case (inaudible). The tests were administered  
16 according to the best methods approved by the State  
17 Toxicologist pursuant to WAC 43.14.010, 020, 030, and/or  
18 RCW 46.61.5063 by an analyst possessing a valid  
19 (inaudible) issued by the State Toxicologist.

20 Q. Thank you. Can you turn to the second page.

21 A. Uh-huh.

22 Q. Can you tell me is -- has Ms. Mitchell-Mata signed off on  
23 there?

24 A. She has.

25 Q. And has -- her name appears below her signature, correct?

## CROSS BY WHYTE/CAPRON

1 A. That's correct.

2 Q. Your signature appears next to her name?

3 A. Yes.

4 Q. Does your name appear anywhere on that document?

5 A. No, because we have six different supervisors or  
6 management that can review data so --

7 Q. Okay. So your name does not appear anywhere there?

8 A. No, just my signature.

9 Q. And if you had tested, then your name would appear on the  
10 first (inaudible), correct?

11 A. Yeah, under any testing I would have performed, my name  
12 would have showed up under there.

13 Q. Okay.

14 MS. WHYTE: And, Your Honor, if the City has no  
15 objection, I would move to have this admitted --

16 THE COURT: Okay.

17 MS. WHYTE: -- into evidence --

18 THE COURT: City.

19 MS. WHYTE: -- so that it could be part of the record.

20 MS. SRA: No objection.

21 THE COURT: Okay. It will be admitted. You said nine?

22 MS. WHYTE: Yes, that's Defense 9.

23 THE COURT: So 9 will be admitted.

24 (Defendant's Exhibit 9 admitted into evidence.)

25 Q. (By Ms. Whyte) Now, Mr. Capron, we also established --

## CROSS BY WHYTE/CAPRON

1 we established that you didn't perform any of the tests,  
2 but you also did not watch Ms. Mitchell-Mata perform  
3 these tests on Mr. Wiggins's blood, correct?

4 A. No, I did not.

5 Q. And to be clear, that includes not only in person but  
6 even by video or anything like that?

7 A. No.

8 Q. And in fact once an analyst is fully trained and has been  
9 signed off by the State Toxicologist, you typically don't  
10 watch that person?

11 A. No, we don't.

12 Q. And so instead you're relying to a certain extent on the  
13 fact that there are procedures -- standard operating  
14 procedures and a review process to ensure that people are  
15 doing things correctly; is that right?

16 A. That's correct. That's why we have them in place.

17 Q. So you testified that your role instead was to review the  
18 work that Ms. Mitchell-Mata did?

19 A. That's correct.

20 Q. And in the course of her work, she generated a paper case  
21 file?

22 A. Yes.

23 Q. And that is what you reviewed?

24 A. Correct.

25 Q. Just paper?

## CROSS BY WHYTE/CAPRON

1 A. The results of the testing so chromatograms and printouts  
2 from instrumentation on tests that she performed.

3 Q. And that was all just paper?

4 A. That's paper.

5 Q. Now, with regard to the testing that Ms. Mitchell-Mata  
6 did, it's the practice in your lab and many labs to do  
7 batch testing?

8 A. Yes.

9 Q. That means generally that one testing analyst is running  
10 many different samples in one batch at one time?

11 A. That's correct.

12 Q. And in the case of Washington State Patrol, you testified  
13 that analysts get about 40 cases each time they get  
14 assigned a new set?

15 A. Yes.

16 Q. Each of those cases represents one person?

17 A. That's correct.

18 Q. So a defendant in a criminal case or a decedent usually?

19 A. That's correct.

20 Q. Now, of that set of 40 cases that the analyst gets,  
21 pretty much all of those cases are tested for the  
22 presence of alcohol, right?

23 A. I would say 99 percent of cases are, yes.

24 Q. Okay. And that's usually the first test that's run on  
25 these cases?

## CROSS BY WHYTE/CAPRON

- 1 A. Typically, yes.
- 2 Q. Okay. And the virtue of batch testing, or one of them at  
3 least, is that it allows the analyst to prepare one set  
4 of calibraters and controls for all 40 vials?
- 5 A. That's correct.
- 6 Q. So all of those vials are being tested with the same  
7 tubes of known samples and calibraters?
- 8 A. Yes.
- 9 Q. Instead of the analyst having to prepare all of those  
10 vials of calibraters and controls individually for each  
11 person or case?
- 12 A. Yes.
- 13 Q. And that saves time?
- 14 A. It's an efficiency thing, yes.
- 15 Q. But it also means that if there's a failure of one of  
16 those controls or calibraters, it affects not just one  
17 person's testing but the testing for every single person  
18 in the batch?
- 19 A. That entire -- the results from that entire batch would  
20 not be used, correct.
- 21 Q. And the importance of those calibraters and controls is  
22 that they help to ensure that the data produced are  
23 reliable and accurate?
- 24 A. That's correct.
- 25 Q. Let's talk a little bit about the gas chromatography

## CROSS BY WHYTE/CAPRON

1 test.

2 A. Sure.

3 Q. As you testified, nearly all the batches of cases gets  
4 tested for alcohol?

5 A. Yes.

6 Q. And the test that you use, the technique that you use to  
7 determine that is called head space gas chromatography?

8 A. Correct.

9 Q. And so in order to test using this technique, the analyst  
10 takes a small sample of a person's blood?

11 A. Yes.

12 Q. And they add something called internal standard to that  
13 blood?

14 A. Correct.

15 Q. And what the analyst is doing there is putting a known  
16 concentration of this internal standard into the vial?

17 A. Correct.

18 Q. And then they're looking at the data that are generated  
19 to see if more or less than the full amount of internal  
20 standard was recovered on the back end?

21 A. You're looking for recovery. If you put something in,  
22 then you should recover it. You're not going to get 100  
23 percent recovery every single time --

24 Q. Sure.

25 A. -- when you do an extraction, but you're looking to see

## CROSS BY WHYTE/CAPRON

1 I've put n-propanol in there, then I should see it when  
2 it comes out after being analyzed.

3 Q. Of course. So n-propanol to be clear is the internal  
4 standard?

5 A. It is, yes.

6 Q. So you put the known amount of internal standard of  
7 n-propanol into the tube?

8 A. In a known concentration -- or a known amount of blood  
9 from the blood tube.

10 Q. Correct. And then you're looking in the end to make sure  
11 that more or less that same amount of n-propanol comes  
12 out?

13 A. Correct.

14 Q. And the purpose of that in essence is to ensure the  
15 analyst that her extraction worked?

16 A. Correct.

17 Q. In your words if you put it in, and then it doesn't come  
18 out full, something's wrong?

19 A. There's something wrong with your extraction, correct.

20 Q. Meaning you should see the same -- if you put a certain  
21 amount of internal standard into your vial, you should  
22 see that same amount more or less come out at the end?

23 A. Yeah, if you put internal standard in your vial, and you  
24 get a report that has no internal standard, then there's  
25 an issue. Is it a clogged needle? Is it the cap wasn't



## CROSS BY WHYTE/CAPRON

1 on tight enough, and so the volatile substance  
2 evaporated? Then you have to start doing trouble  
3 shooting.

4 Q. Okay. And so it's important that the same amount of  
5 internal standard go into each and every vial that is a  
6 part of the testing batch?

7 A. Correct. And we use an automatic diluted that dispenses  
8 two mils of that to every single tube that we use --

9 Q. Okay. And that --

10 A. -- except for the blank.

11 Q. Okay. And that's a person that's using that --

12 A. It is.

13 Q. -- instrument?

14 A. Yep.

15 Q. And in your words if you were to look at all 40 of the  
16 cases, the internal standard should be consistent  
17 throughout?

18 A. It should, yes.

19 Q. I'd like to also ask you a general point about how your  
20 lab handles these samples, Mr. Capron. Is it the  
21 practice at the State Patrol lab that the samples are  
22 always refrigerated --

23 A. Except for --

24 Q. -- when they're --

25 A. Except for when they're not -- except for when they're

## CROSS BY WHYTE/CAPRON

1 out for testing, correct.

2 Q. Of course. Unless they're being tested, they're in the  
3 frig.

4 A. They are.

5 Q. And the refrigerator is a stable environment?

6 A. Yes, we have an evidence vault which is limited access  
7 which property and evidence custodians and then  
8 supervisors who serve as back-up property and evidence  
9 custodians have access to.

10 Q. Okay. And through -- putting things in the "refrig"  
11 helps protect the tube from accidents like being knocked  
12 over and broken, stuff like that?

13 A. Correct, stability of certain drugs that may be present  
14 in the blood.

15 Q. Right. So I have actually a point for you about that.  
16 It can also effect the vials in that when vials aren't  
17 refrigerated, that can affect the concentration of  
18 certain drugs or substances that might be in the blood?

19 A. Yeah, there are certain types of drugs that continue to  
20 be metabolized or can be lost during just sitting.

21 Q. So the refrigeration can help ensure that what's in the  
22 blood at the time of testing accurately reflects what was  
23 in the person at the time the blood was drawn?

24 A. Yes. It's a stability issue.

25 Q. You don't know what happened to Mr. Wiggins's blood

## CROSS BY WHYTE/CAPRON

1 before it got to Washington State Patrol?

2 A. Not -- I don't know about any blood before it comes to  
3 us.

4 Q. You don't know if any of the blood is refrigerated during  
5 that time?

6 A. You'd have to ask the agency. I don't know the answer to  
7 that.

8 Q. You do know from your records that SPD had this blood in  
9 its possession from about six days?

10 A. That sounds about right, yes.

11 Q. So getting back to the work that the testing analyst do  
12 when they're assigned a set of cases, as you said they  
13 typically get about 40 at a time?

14 A. Correct.

15 Q. And they don't get a specific time frame in which they  
16 need to have those completed?

17 A. No. It's not like I -- they get them, and I say this  
18 needs to be done in a week --

19 Q. Okay.

20 A. -- no. Each case is different. The more drugs you find,  
21 the more tests have to be run. So if they can -- we have  
22 cases that we find 15 or 16 different drugs, so we have  
23 to do at least that many tests.

24 Q. Sure.

25 A. So it can take months.

## CROSS BY WHYTE/CAPRON

1 Q. Right. So depending on the complexity, would you agree  
2 that it can take an analyst three weeks, maybe even a  
3 month to finish her 40 cases, maybe even more?

4 A. Maybe more, maybe less, correct.

5 Q. Okay. But during that time the analyst might get  
6 assigned another set of 40 cases?

7 A. It's possible.

8 Q. Even before she's completed all the testing on her  
9 initial set?

10 A. Correct.

11 Q. Now, in this case it looks like one of the first tests  
12 that Ms. Mitchell-Mata did was on January 22nd; is that  
13 right?

14 A. I would have to look at the actual report again?

15 MS. SRA: And, Your Honor, sorry to interrupt, but it  
16 is almost 1:40, and Mr. Capron did have to leave for that  
17 appointment.

18 THE COURT: Okay. Can -- are you free --

19 THE WITNESS: Can I just check something for --

20 THE COURT: Yes.

21 THE WITNESS: -- traffic?

22 Sorry. Probably got another ten minutes at least.

23 THE COURT: Okay. Thank you.

24 MS. WHYTE: Thank you, Your Honor.

25 Q. (By Whyte) So you said that you don't remember offhand

## CROSS BY WHYTE/CAPRON

1           when -- one of the first tests that Ms. Mitchell-Mata  
2           did?

3    A.    No.  If I saw the report, I could -- it shows each test  
4           that was conducted.

5    Q.    When -- and when you say report, are you indicating this  
6           document, Defense 9?

7    A.    That, or I could look in the case file that has all the  
8           raw data in it.

9           (Defendant's Exhibit 10 marked for identification.)

10   Q.    So, Mr. Capron, showing you what's been marked for  
11           identification as Defendant's 10 --

12   A.    Okay.

13   Q.    -- do you recognize that?

14   A.    Yes.

15   Q.    What is it?

16   A.    It's the raw data to the case.

17   Q.    So that's what's commonly referred to as a case file?

18   A.    Correct.

19   Q.    And it's the case file for Mr. Roosevelt Wiggins?

20   A.    That is correct.

21   Q.    So looking at page 4, including the cover page of that  
22           file, it appears that one of the first tests that  
23           Ms. Mitchell-Mata did was on 12/2/18?

24   A.    Correct, the EMIT screen.

25   Q.    And the last test that she did was possibly on 2/6/18?

## CROSS BY WHYTE/CAPRON

- 1 A. That's correct, confirmation test.
- 2 Q. And it seems like she didn't actually get the results  
3 from that test until 2/7; is that right? I'd refer you  
4 to page 17.
- 5 A. Yes, it was acquired on 2/7 at four o'clock in the  
6 morning.
- 7 Q. Okay. So between 1/22/18 and 2/7/18, that's about 17  
8 days to finish up?
- 9 A. For this particular case, yes.
- 10 Q. Okay. Now, once these tests are set up, it can take  
11 hours for them to run all the way through the machine?
- 12 A. Yes.
- 13 Q. And then once the testing is complete, the analyst comes  
14 back up and pulls the data that were generated?
- 15 A. That's correct.
- 16 Q. I'll take that back from you.
- 17 A. Yep.
- 18 Q. Let's talk about what an analyst is doing specifically  
19 with regard to the gas chromatography technique to be  
20 able to collect that data. So the setup for gas  
21 chromatography is in your words person-driven?
- 22 A. Everything that we do is person-driven. A person has to  
23 set up a calibration. They have to do aliquoting. They  
24 have to do an extraction.
- 25 Q. Okay. So, as you said, they have to open up the blood

## CROSS BY WHYTE/CAPRON

- 1 tube?
- 2 A. Correct.
- 3 Q. They have to remove the right amount of blood?
- 4 A. That's correct.
- 5 Q. They have to place it into a clean, labeled vial?
- 6 A. That's correct.
- 7 Q. They have to put in the correct amount of internal
- 8 standard?
- 9 A. Correct.
- 10 Q. And they have to cap or crimp the tube I think you said?
- 11 A. Yes.
- 12 Q. They're also responsible for preparing all of the
- 13 calibraters?
- 14 A. Correct.
- 15 Q. And they're responsible for preparing all of the
- 16 controls?
- 17 A. Correct.
- 18 Q. And they're responsible for putting those into the
- 19 machine as well?
- 20 A. That's correct.
- 21 Q. And then they're making sure that everything is going
- 22 into the right tubes?
- 23 A. That's correct.
- 24 Q. And they're making sure that the tubes are going in and
- 25 coming out in the correct order?

## CROSS BY WHYTE/CAPRON

- 1 A. That's correct.
- 2 Q. And then all that gets run through the machines?
- 3 A. Yes.
- 4 Q. And the machine produces some data when it's done  
5 testing?
- 6 A. Correct.
- 7 Q. And at that point, in your words, the human comes back  
8 and analyzes the data that was generated?
- 9 A. That's correct.
- 10 Q. And to be clear, as this data is being generated from the  
11 testing over the course of days, it's Ms. Mitchell-Mata  
12 who's pulling out the paperwork, seeing what's positive  
13 and negative, what needs to be sent for further testing?
- 14 A. That's correct.
- 15 Q. So she's making those decisions based on her analyses?
- 16 A. Correct. So if it's negative, then she does haven't to  
17 do a second alcohol test. If the EMIT is negative, then  
18 she's done testing.
- 19 Q. Correct. So one of the decisions is about whether to  
20 pursue further testing?
- 21 A. Correct.
- 22 Q. And she's making those decisions based on her  
23 contemporaneous review of data that are being produced?
- 24 A. And the type of case, yes.
- 25 Q. Okay. So she's also taking the type of case into



## CROSS BY WHYTE/CAPRON

1 account?

2 A. Correct.

3 Q. Now, there was a decision that she did make in this case  
4 based on Mr. Wiggins's initial EMIT test for drugs. She  
5 determined that she would go and do a deeper dive for  
6 cannabinoids?

7 A. That's correct.

8 Q. She did ultimately do that test?

9 A. Yes.

10 Q. She personally performed it?

11 A. Correct.

12 Q. And she also had to make a decision in this case to  
13 discard an entire run due to a control failure; is that  
14 right?

15 A. Correct.

16 Q. So she actually ran the alcohol test for Mr. Wiggins's  
17 blood three times?

18 A. She did.

19 Q. You weren't there helping her make these decisions?

20 A. No. She could have come to me, and I could have said,  
21 yeah, you have to repeat that but no.

22 Q. Okay.

23 A. She's a trained toxicologist that had over 12 years of  
24 experience. She can handle that.

25 Q. Yeah. So those were her decisions?

## CROSS BY WHYTE/CAPRON

1 A. Correct.

2 Q. And she's also deciding when it makes sense to run those  
3 tests, for example, depending on how many cases she might  
4 have in the batch?

5 A. I don't understand your question there.

6 Q. Well, for example, if she found only three presumptive  
7 positive for cannabinoids, she might decide whether to  
8 run those tests right now or wait --

9 A. Yes, that's correct.

10 Q. -- and see if she could collect --

11 A. That's correct.

12 Q. -- a few more?

13 Thank you.

14 She might also make a discretionary decision such as  
15 whether to dilute a sample if the concentration of a  
16 particular substance is too high for the machine to read?

17 A. That's correct. And that's part of the SOP. It has to  
18 be within the dynamic range --

19 Q. Okay.

20 A. -- of calibration.

21 Q. Now, of course in a person-driven process, there can be  
22 errors?

23 A. Sure.

24 Q. For example, as we said, in this case it appears there  
25 was a control failure?

## CROSS BY WHYTE/CAPRON

- 1 A. Correct.
- 2 Q. And I'd like to talk a little bit more about that. What  
3 happened was on 1/23 Ms. Mitchell-Mata ran a batch of  
4 alcohol testing, correct?
- 5 A. Yes.
- 6 Q. And that batch included Mr. Wiggins's blood sample?
- 7 A. It did.
- 8 Q. One of the controls or known samples that  
9 Ms. Mitchell-Mata was using to help ensure the  
10 reliability of the data was what you call a .20 control?
- 11 A. Correct.
- 12 Q. And that means a sample where you believe the known  
13 alcohol content is about equal to a .20 blood alcohol  
14 concentration?
- 15 A. Correct.
- 16 Q. But it appears that instead of drawing or I guess  
17 aliquoting the .20 control, Ms. Mitchell-Mata  
18 accidentally drew a .10 control?
- 19 A. That's what appears to have happened, yes.
- 20 Q. So none of the results in that batch met the criteria for  
21 acceptance?
- 22 A. Nope, because you have to have all controls within  
23 acceptable ranges.
- 24 Q. So none of the results were used from that batch?
- 25 A. They were not.

## CROSS BY WHYTE/CAPRON

- 1 Q. And as a result, Mr. Wiggins's blood actually had to be  
2 tested at least three times?
- 3 A. Two -- yes, total.
- 4 Q. Instead of just two if there had been no control failure?
- 5 A. Correct.
- 6 Q. So Ms. Mitchell-Mata's case file culminated in this  
7 two-page report; is that correct?
- 8 A. Yes.
- 9 Q. And this is Defense Exhibit 9 for the record. So I say  
10 two pages, but all the data are really contained on one  
11 page in this case, correct?
- 12 A. Second page is signatures, yes.
- 13 Q. Okay. And so the result of all this testing, and these  
14 may be 16 or 17 days of work, was a number, correct?
- 15 A. Correct.
- 16 Q. And that number in this case was the blood alcohol  
17 content?
- 18 A. Correct.
- 19 Q. And to be clear, Ms. Mitchell-Mata's work was what  
20 produced that number?
- 21 A. That's correct.
- 22 Q. You didn't come up with that number?
- 23 A. No.
- 24 Q. Now, we talked about your role was to review the  
25 (inaudible) that she generated?

## CROSS BY WHYTE/CAPRON

1 THE COURT: Counsel, just so you know, we have about  
2 two minutes.

3 MS. WHYTE: I'm very close to done, Your Honor.

4 THE COURT: Thank you.

5 Q. (By Ms. Whyte) That review included things like looking  
6 for typographical errors?

7 A. Correct.

8 Q. Making sure names are spelled correctly?

9 A. Yes.

10 Q. Making sure the law enforcement agency is listed?

11 A. Yes.

12 Q. Making sure lot numbers match?

13 A. Correct.

14 Q. Making sure that the analyst did all the tests they  
15 should have done?

16 A. Correct.

17 Q. Making sure they repeated the test the right number of  
18 times?

19 A. Correct.

20 Q. And as we discussed, an analyst will spend days or even  
21 weeks running these tests?

22 A. That is correct.

23 Q. There are more analysts in the labs than there are  
24 supervisors?

25 A. Way more.

## CROSS BY WHYTE/CAPRON

- 1 Q. Supervisors have to review every case?
- 2 A. Yes.
- 3 Q. To the tune of 16,000 cases a year?
- 4 A. Correct.
- 5 Q. In addition to their regular duties?
- 6 A. That's correct.
- 7 Q. Including time-consuming duties like testifying in court?
- 8 A. Yes.
- 9 Q. As of last week, you had reviewed 51,645 cases just in  
10 the past seven years?
- 11 A. That's correct.
- 12 Q. That's more than 7,000 cases a year?
- 13 A. Yep.
- 14 Q. Mr. Wiggins's case, as cases go, is pretty easy for you?
- 15 A. I would say that it's an easy case, yes.
- 16 Q. And you estimate that when you review an easy case like  
17 this case, it takes you five to ten minutes?
- 18 A. Generally, yes.
- 19 Q. That's the time you spend reviewing before you sign off?
- 20 A. Yes.
- 21 Q. And in light of that sheer volume of cases that come  
22 across your desk, you have no independent memory of your  
23 review in this case?
- 24 A. No, it's just another one of the 51,000. It doesn't  
25 stick out in my mind, no.

## CROSS BY WHYTE/CAPRON

1 MS. WHYTE: Thank you. No further questions.

2 THE COURT: Thank you.

3 THE WITNESS: You're welcome.

4 THE COURT: So I think we should let Mr. Capron go,  
5 because he indulged us by staying --

6 MS. Sra: Yes.

7 THE COURT: -- a little longer. Will you have additional?

8 MS. SRA: I will, Your Honor.

9 THE COURT: So we'll start with that.

10 MS. WHYTE: We can pick up tomorrow with that.

11 THE COURT: All right. Thank you so much.

12 MR. CAPRON: What time should I (inaudible)?

13 THE COURT: So I think we'll start up again at -- is --

14 MS. SRA: I can let Mr. Capron know, so we don't have to  
15 decide that right now.

16 THE COURT: Okay. All right. Thank you.

17 MR. CAPRON: Thank you.

18 THE COURT: All right. Drive safely.

19 MR. CAPRON: Appreciate it. Thank you.

20 THE COURT: Do we want to start with your witness kind of  
21 out of order so we could use the time?

22 MS. WHYTE: Yeah. I'm not sure what -- I think we would  
23 have her testify -- rather than you mean wait until he has  
24 recross -- or redirect? I'm sorry.

25 THE COURT: Uh-huh.

## CROSS BY WHYTE/CAPRON

1 MS. WHYTE: Yes, Your Honor. I think that would --

2 THE COURT: Because you can always call her back if you  
3 have some more after there.

4 MS. WHYTE: Yes. I will go get her.

5 THE COURT: Thank you.

6 MS. WHYTE: So at this time, Your Honor, the Defense would  
7 call Ms. Janine Arvizu to the stand.

8 THE COURT: Do you solemnly swear or affirm that the  
9 testimony you give this afternoon will be the truth?

10 THE WITNESS: I do.

11 THE COURT: Would you like some water before you start?

12 THE WITNESS: That would be wonderful.

13 MS. WHYTE: Your Honor, may I move the white board?

14 THE COURT: Yes.

15 MR. KARR: And, Your Honor, I'm actually going to ask that  
16 if there is going to be a demonstrative exhibit used, that  
17 we actually do use the paper so that we can mark that and  
18 keep that with the record.

19 THE COURT: Okay, sounds good. Do you have (inaudible),  
20 Counsel?

21 MS. WHYTE: I do, Your Honor.

22

23 JANINE ARVIZU, Witness herein, having first been  
24 duly sworn on oath, was examined  
25 and testified as follows:



## 1                   D I R E C T   E X A M I N A T I O N

2 BY MS. WHYTE:

3 Q.     Can you please state and spell your name for the record.

4 A.     Janine Arvizu, J-A-N-I-N-E, A-R-V-I-Z-U.

5 Q.     And, Ms. Arvizu, what is your profession?

6 A.     I am a chemist, and I work in the field of measurement  
7         quality as an auditor.

8 Q.     How long have you been working in this field?

9 A.     More than 30 years.

10 Q.    Could you please describe your educational background  
11        including any degrees you've received.12 A.    I have a Bachelor of Science degree in biochemistry from  
13        Cal Poly University in San Luis Obispo and an ABD in  
14        chemistry from University of New Mexico.  It's not a  
15        degree.  It's stands for all but dissertation meaning  
16        that I completed all the graduate-level course work and  
17        all the qualifying examinations where I reached a  
18        candidacy for a Ph.D. degree, but I did not defend a  
19        dissertation.20 Q.    And in addition to those degree -- or that degree, do you  
21        hold any professional certificates or licenses?22 A.    I am certified by the American Society for Quality as a  
23        certified quality auditor.24 Q.    What professional associations or committees do you  
25        belong to, if any?

1 A. I'm a member of the American Chemical Society. I am a  
2 senior member of the American Society for Quality.  
3 That's the same organization that certifies me as a  
4 quality auditor. And I'm a member of ASTM International,  
5 which is a standard-setting organization. And I'm a  
6 voting member of two committees, the Committee on Quality  
7 and Statistics and the Committee on Forensic Sciences.

8 Q. You mentioned you were a certified quality auditor. What  
9 are the requirements for becoming a certified quality  
10 auditor?

11 A. It requires eight years of professional practice in the  
12 discipline of quality assurance. At least three of those  
13 years must have been in a decision-making role. And if  
14 you meet those requirements, you're eligible to sit for  
15 an examination that they offer twice a year. It's an  
16 all-day exam. And if you successfully complete that  
17 exam, then you're certified, and you have to recertify  
18 every three years thereafter.

19 Q. Now, aside from the educational background you described,  
20 do you have any training in auditing testing  
21 laboratories?

22 A. I do. I've been trained as a lead auditor to the ISO  
23 international standard that applies to testing and  
24 calibration laboratories. And I have provided training  
25 for auditing members.

1 Q. Have you provided trainings to anybody else over the  
2 course of your career in this field?

3 A. I've been providing training throughout my career. I've  
4 trained the people who collect samples in the field in  
5 field quality control practices. I've trained people in  
6 the laboratory, the bench chemists who actually do the  
7 analytical work. And I've trained people who use test  
8 results in how to understand the laboratory records and  
9 the laboratory data, principles of forensic quality.

10 In the last couple decades I've been providing a lot of  
11 training within the legal community to -- at CLE seminars  
12 in addition to the presentations I make at technical  
13 conferences.

14 Q. What kinds of legal professionals do you provide training  
15 to?

16 A. I've provided training to groups of defense lawyers, to  
17 bar associations that were open to everybody. I've  
18 provided training to a group of Federal and State  
19 appellate judges that do a judging science seminar. I've  
20 provided training on a couple of occasions to groups of  
21 lawyers at CLE seminars. And I've trained a group of  
22 prosecutors in Texas, that's a three-day class, in  
23 measurement and science metrology and specifically used  
24 blood alcohol as a teaching device to instruct them in  
25 the principles of measurement.

1 Q. What is your employment background?

2 A. I started my career after graduate school working for one  
3 of the national laboratories operated by the Department  
4 of Energy. And I was there for about a decade. And  
5 during that time I set up and managed a full-service  
6 analytical laboratory.

7 And I became involved in quality assurance programs and  
8 worked on large nationwide (inaudible) projects  
9 specifically from a quality assurance perspective.

10 Q. Have you done any publishing or presentations in this  
11 field?

12 A. I wrote the standard that served as the basis for the  
13 U.S. Navy's quality assurance program. I was the program  
14 manager for that contract and audited the likes for  
15 compliance with the standard. Once a lab was approved,  
16 on an ongoing basis reviewed their work to see that it  
17 continued to meet standards. I've also made  
18 presentations on forensic quality issues at technical  
19 conferences in this country and abroad.

20 Q. Have you ever provided testimony as a laboratory quality  
21 assurance expert in court?

22 A. I have.

23 Q. About how many times?

24 A. More than 250 last time I counted.

25 Q. In addition to your expertise in the area of laboratory

DIRECT BY WHYTE/ARVIZU

1 quality assurance, do you have any expertise in the  
2 measurement process more generally including handling of  
3 samples before they reach the lab?

4 A. Yes, because the measurement process is broader than what  
5 happens within the confines of the laboratory. Because  
6 the quality of the laboratory measurement is inherently  
7 limited by the quality of the sample that comes in the  
8 door, as the result the entire admission process includes  
9 the collection of the sample and all the measures that  
10 are necessary to ensure the integrity of that specimen  
11 from the point at which its first identified and  
12 collected, stored, through testing and ultimately  
13 recorded. And as an auditor, there are scientific  
14 standards in place that address that entire process.

15 Q. In what fields have you been accepted in court as an  
16 expert?

17 A. They don't always use those terms, but when they do, it's  
18 been everything from sample collection to testing to  
19 laboratory quality assurance to measurement quality to  
20 just quite a variety of scopes. I've testified in  
21 everything from DNA to gunshot residue and toxicology,  
22 the full suite of tests performed by forensic labs.

23 MS. WHYTE: At this time Defense would move to qualify  
24 Ms. Arvizu as an expert in the field of quality  
25 assessment of laboratories in the measurement process.

DIRECT BY WHYTE/ARVIZU

1 THE COURT: City.

2 MR. KARR: Your Honor, I would ask counsel to narrow  
3 that to her actual expertise here. That's a pretty wide  
4 range of things. I don't believe Ms. Arvizu has been  
5 qualified to testify to collection of samples. There's  
6 been very little questions asked about that. She has not  
7 been qualified to testify to how samples are collected or  
8 stored. That's -- those are things that we've heard  
9 nothing about.

10 THE COURT: Okay. And so, Counsel, do you intend to  
11 ask her as an expert about those issues?

12 MS. WHYTE: I did intend to ask her questions about the  
13 measurement process. As Ms. Arvizu indicated, that's not  
14 only a core area of her work, but it's also a core area  
15 of the accuracy for samples.

16 THE COURT: Well, I meant the collection process and  
17 the storing? Those are the two that he mentioned.

18 MS. WHYTE: Uh-huh. Yes, Your Honor.

19 THE COURT: Okay. And so could you ask a few more  
20 questions to qualify her regarding those two things.

21 MS. WHYTE: Sure, Your Honor.

22 Q. (By Ms. Whyte) So, Ms. Arvizu, regarding the collection  
23 process, can you tell me more about your experience with  
24 -- your scientific background in the collection process.

25 A. Because our ability as scientists to interpret a result

DIRECT BY WHYTE/ARVIZU

1 depends on understanding what that result represents,  
2 I've been looking at the sample collection process and  
3 the integrity of samples throughout my career. I started  
4 sharing (inaudible) session in an analytical conference  
5 on field quality control practices nearly 30 years ago.

6 And the process for collection and storage and handling  
7 of samples is addressed scientifically in much the same  
8 way that analytical testing is addressed. There are  
9 published consensus standards that represent the  
10 consensus of the relevant scientific community as to the  
11 quality control practices which are necessary to ensure  
12 that a sample has integrity.

13 In the case of a blood toxicology specimen, these are  
14 standards that are designed to ensure that there are no  
15 physical chemical or biological changes that occur in the  
16 blood that's inside the tube as a result of that  
17 collection and storage process so that what's tested by  
18 the laboratory can represent what was in the person  
19 instead of simply representing what was in the tube.

20 As an auditor, I'm trained to evaluate the records to  
21 determine whether or not they indicate that compliance  
22 with those standards was met in a given case.

23 Q. And then you referenced also the published consensus  
24 standards that govern the collection process and the  
25 storage of samples. Can you talk a little bit more about

DIRECT BY WHYTE/ARVIZU

1           how you're familiar with those standards.

2       A.     I brought copies of them with me to have available.

3           These are essentially the common working tools of people  
4           in this field.  These are documents that are generated by  
5           the relevant scientific community.  They are disseminated  
6           in the scientific community for comment and resolution of  
7           those comments.  And then once they are approved, they  
8           are published and made available to the scientific  
9           community for use.

10           The ones, for example, that I'll be referencing are  
11           documents that are accepted by the Food and Drug  
12           Administration as consensus standards, published in the  
13           Federal register as such, and made available to the  
14           scientific community for use.

15       Q.     How long have you been working with standards like these  
16           in the area of the collection processes and storage of  
17           samples?

18       A.     Decades.

19       Q.     And in addition to what you've already described, do you  
20           have any additional trainings or presentations that you  
21           give regarding the collection process and the storage of  
22           samples specifically?

23       A.     I teach it.  I teach at classes in how to conduct blood  
24           alcohol samples that are delivered to practicing  
25           attorneys, and so I teach the proper collection of blood



DIRECT BY WHYTE/ARVIZU

1 specimens.

2 I'm not a phlebotomist. I don't have any expertise in  
3 how medically a sample is drawn. My expertise lends to  
4 the parts of the standard that address sample integrity,  
5 those practices necessary to ensure that the sample as  
6 collected is unchanged by the collection and sorting  
7 process.

8 Q. Thank you.

9 MS. WHYTE: So at this time, Your Honor, the Defense  
10 would move to qualify Ms. Arvizu as an expert in the  
11 field of quality assessment of laboratories and of sample  
12 integrity.

13 THE COURT: Thank you.

14 MR. KARR: Your Honor, if I could just voir dire  
15 briefly.

16 THE COURT: Okay.

17

18 V O I R D I R E

19 BY MR. KARR:

20 Q. Ms. Arvizu, you said you're not a phlebotomist, correct?

21 A. That's correct.

22 Q. And you have no medical training in the drawing of blood?

23 A. I do not.

24 Q. And you're not familiar with the actual process and  
25 procedure of drawing blood for the purposes of forensic

DIRECT BY WHYTE/ARVIZU

1 testing, correct? You've never actually done that?

2 A. I have not done it. I'm certainly very familiar with it.  
3 I've audited that practice via video on numerous  
4 occasions.

5 Q. Have you ever audited it in person?

6 A. Not directly. I've witnessed it on myself, and when it  
7 was done in a manner that did not comply to standards, I  
8 let the supervising physician know.

9 Q. And your expertise, as you put it, lies in the integrity  
10 of the sample, not the actual process by which it's  
11 drawn, correct?

12 A. That is correct. There are parts of the collection  
13 process that directly affect the integrity of the  
14 specimen. They may or may not be related to patient  
15 protection and the medical aspects, but my expertise is  
16 only with respect to those practices that are necessary  
17 to protect the integrity of the blood specimen itself.

18 Q. Right. In that you're talking about the blood tube with  
19 the anti-coagulate and the enzyme killer and those sort  
20 of things, correct?

21 A. That's part of. It's also the actual disinfection  
22 process of the collection site, those types of things.

23 MR. KARR: Okay. Thank you. I have no further  
24 questions.

25 THE COURT: All right.

DIRECT BY WHYTE/ARVIZU

1 MR. KARR: No objection.

2 THE COURT: Thank you. She'll be so certified.

3 MS. WHYTE: Thank you, Your Honor.

4 ///

5 ///

6 DIRECT EXAMINATION (continued)

7

8 BY MS. WHYTE:

9 Q. So, Ms. Arvizu, are you familiar with the work that  
10 forensic toxicologists perform in general?

11 A. I am.

12 Q. And can you elaborate on what kind of work the forensic  
13 toxicologist does?

14 A. The field of toxicology includes two major categories of  
15 work. One is the analysis of biological specimens,  
16 specimens from people like a blood specimen in this case  
17 for the presence of drugs. That is basically analytical  
18 chemistry on samples that happen to be from humans. That  
19 corresponds to my area of expertise. The collection of  
20 those samples and the testing of those samples is  
21 basically analytical chemistry.

22 The second part of a toxicologist's field of work  
23 relates to the behavioral effects of drugs, and that is  
24 not my area of expertise. I don't have any expertise in,  
25 you know, what degree of impairment would be affected --

DIRECT BY WHYTE/ARVIZU

1 associated, you know, with a particular concentration.

2 That's not my area of expertise.

3 My area of expertise deals solely with whether a  
4 particular toxicology measurement was made in a  
5 scientifically-reliable manner.

6 Q. Thank you. Are there standards, techniques, or best  
7 practices that most accredited toxicology labs tend to  
8 follow in general?

9 A. Yes, there are.

10 Q. Can you elaborate on those.

11 A. There are a series of standards for accredited labs such  
12 as the Washington State Patrol toxicology lab. From this  
13 country forensic toxicology labs are accredited to an  
14 international standard, ISO/IPC 17025. And that's a 2005  
15 document.

16 It's general requirements for the competence of testing  
17 in calibration laboratories. As a condition of their  
18 accreditation, laboratories are required to comply with  
19 every requirement in those -- in that standard.

20 In addition the accrediting agency has issued  
21 supplemental requirements that clarify the ISO  
22 requirements, and they're required to comply with those.

23 In those documents, the ISO standards are very general.  
24 They're written at a very high level. You won't see the  
25 word toxicology or the word blood alcohol in that

DIRECT BY WHYTE/ARVIZU

1 document because it applies to all different kinds of  
2 testing labs. It applies to labs that test environmental  
3 samples and food samples and manufacturing and forensic  
4 samples.

5 But it's written at a very high level, and it simply  
6 puts the responsibility on the lab to produce records  
7 demonstrating the reliability of its test results.

8 But when you step down into the field of toxicology,  
9 there are guidance documents that are published by  
10 toxicology organizations, by groups of practicing  
11 toxicologists, and in the case of collection of specimens  
12 by people practicing in the clinical field. And those  
13 standards are very specific to the collection of blood  
14 specimens and to the testing of blood specimens.

15 And they're published by organizations -- like in the  
16 case of vein puncture or collection of blood, those are  
17 things -- organizations that -- like CLSI, Clinical  
18 Laboratory Standards Institute, and in the case of the  
19 laboratory the Society of Forensic Toxicology and the  
20 American Academy of Forensic Sciences.

21 Q. Now, are you familiar with how Washington State Patrol's  
22 toxicology laboratory is accredited?

23 A. I am.

24 Q. And how do they fit with what you've just described?

25 A. They are accredited by an organization now known as ANAB

## VOIR DIRE BY CARR/ARVIZU

1 to the ISO 1725 standard. ANAB is a joint venture of  
2 ANSI and ASQ, the same organization that accredited --  
3 that certifies me.

4 Q. And are you familiar with the policies and practices of  
5 the Washington State Patrol toxicology lab specifically?

6 A. I am.

7 Q. Now, to be clear, have you ever worked directly for the  
8 Washington State Patrol?

9 A. I have not.

10 Q. Have you ever been to the Washington State Patrol  
11 toxicology lab to observe their toxicologists?

12 A. I have not.

13 Q. So how did you come to be familiar with their policies  
14 and practices then?

15 A. Because I have conducted what are known as data audits on  
16 work produced by the laboratory in a number of cases.

17 Q. Do you have a rough estimate of how many times you've  
18 performed that auditing work?

19 A. Dozens of cases.

20 Q. And when you say dozens, you're talking about the  
21 Washington State Patrol toxicology laboratory  
22 specifically?

23 A. That's correct, for both alcohol and for drugs.

24 Q. Are you familiar with the case file for Mr. Wiggins that  
25 was generated by the Washington State Patrol toxicology

DIRECT BY WHYTE/ARVIZU

1 lab?

2 A. I am.

3 Q. Did you rely on any of this material in reaching your  
4 expert opinions or conclusions in this case?

5 A. I did. If you're referring to the case file, that was  
6 part of what I relied on, yes.

7 Q. And is that the kind of thing -- the kind of material  
8 upon which experts in your field typically rely?

9 A. Very routinely, yes.

10 Q. Did you rely on any other materials in reaching your  
11 expert opinions or conclusions in this case?

12 A. I relied on a number of materials. I received a lot of  
13 records from the Washington State Patrol toxicology lab,  
14 records that describe their policies and procedures and  
15 records that just are generated during the normal course  
16 of business to monitor laboratory operations. It's a  
17 fairly extensive list.

18 Q. And are those the kinds of materials upon which experts  
19 in your field typically rely on in forming their  
20 opinions?

21 A. Yes, they are.

22 Q. Now, earlier we heard a little bit from the City's  
23 forensic toxicologist about how the gas chromatography  
24 process works. That -- you referred to that just for  
25 shorthand as the G C process; is that right?

DIRECT BY WHYTE/ARVIZU

1 A. Yes.

2 Q. Thank you. Is that the test at issue in Mr. Wiggins's  
3 case?

4 A. It is.

5 Q. Can you describe for the Court, and if you -- if you need  
6 to use a visual aid, briefly how the G C technique works.

7 A. Sure. If I can step up to the board. Okay. G C or gas  
8 chromatography is basically a bench-top device. It's an  
9 oven that sits on the bench in the laboratory. And  
10 inside that oven is what I've drawn here as a spiral.  
11 It's (inaudible).

12 And if we look at it, it will look like a very thin  
13 wire, but it's actually hollow on the inside. It's about  
14 100 meters long. And it's coiled up, so it will fit  
15 inside this oven. It's hollow on the inside. And it's  
16 been chemically treated on the inside.

17 So then a sample that (inaudible) is introduced to this  
18 column. It's pushed by gas through the column. And if  
19 you have a mixture of compounds, different compounds will  
20 interact with the walls of the top of the column to a  
21 different degree.

22 Small molecules that don't interact very much get  
23 pushed through very quickly. And when they hit this  
24 detector -- this is called a flame ionization detector.  
25 It's basically just a flame, and it burns it up.



## DIRECT BY WHYTE/ARVIZU

1           When the small molecules that don't interact much come  
2 out and hit the detector, you get a signal on the  
3 chromatogram when they hit that detector, the first small  
4 compounds that go through. In this case those are little  
5 blue dots. So when the little blue dots hit it, you get  
6 a peak.

7           If there was a second compound present in this sample  
8 that was a little bit bigger, and so it interacted more  
9 with the walls of the column chemically, it would take  
10 longer for that column to go -- that compound to go  
11 through, and so it would take longer and come out of the  
12 column later. This time it's characteristic of an  
13 individual compound.

14          So ethanol would tend to come out earlier than an  
15 internal standard and at a predictable time for a  
16 particular instrument in a particular location. That's  
17 the chromatography. That's the separation part of the  
18 science.

19          This instrument, this G C instrument is a very well  
20 characterized, very well understood instrument. It's the  
21 single-most common analytical instrument in the world.  
22 It's used in a lot of different applications. So it's --  
23 the hardware associated with all this is pretty well  
24 fixed and understood.

25          The biggest issue in doing this kind of test doesn't

DIRECT BY WHYTE/ARVIZU

1 have to do with the hardware of this. It has to do with  
2 what happens before you ever get to the point of  
3 injecting the sample. That's the part that's done by the  
4 person.

5 The person doesn't control this. They just hit go on a  
6 computer, and it automatically runs through the  
7 instrument. The -- you spend most of your time doing  
8 your G C analysis getting a sample ready to put it into  
9 the instrument, and that's the part run by a person,  
10 which is more of a hands-on involving tubes.

11 Q. Thank you. And just to be clear, this is testing for the  
12 presence of alcohol ethanol?

13 A. Yes.

14 Q. And this is the test that's at issue in this case?

15 A. It is.

16 Q. Now, just for the record, do you recall the name of the  
17 Washington State Patrol toxicologist who performed the  
18 G C process on Mr. Wiggins's blood sample?

19 A. It was an analyst named Christie Mitchell-Mata. I'm not  
20 sure I'm pronouncing that right.

21 Q. And then do you recall whether it was that person or a  
22 different person who ultimately did the review of the  
23 file?

24 A. It would have had to have been a different person that  
25 did the technical review, and there was a different

DIRECT BY WHYTE/ARVIZU

1 signature on the record.

2 Q. Okay. Thank you. Do you know the name of the person who  
3 did that review?

4 A. It's my understanding that that was Mr. Capron. Again I  
5 don't -- I'm not sure I'm pronouncing it properly.

6 Q. Okay. Now, to be clear, you didn't watch  
7 Ms. Mitchell-Mata do the testing that's at issue in this  
8 case?

9 A. I did not.

10 Q. Do you have any expertise with regard to gas  
11 chromatography in particular?

12 A. I do.

13 Q. Can you describe that.

14 A. I have been dealing with gas chromatography since --  
15 really throughout my career since the early '80s. First  
16 I was involved in researching and writing specifications  
17 for purchase of equipment. Then installed it and brought  
18 it operational online, and there were procedures for it.  
19 And we had samples using it.

20 And then as my role changed into more a quality  
21 assurance and oversight role, I began reviewing G C  
22 results and conducting audits on G C data. And in my  
23 role as a laboratory manager, I reviewed and approved G C  
24 results for release from the laboratory.

25 And as an independent user of laboratory data, I

DIRECT BY WHYTE/ARVIZU

1 reviewed and evaluated the quality of G C results. And  
2 I've been doing that for decades from government and  
3 commercial labs and from every instrument manufacturer in  
4 this country.

5 Q. Now, you referenced this a little bit, Ms. Arvizu, but I  
6 wanted to talk more directly about this. In your opinion  
7 as an expert in this field, what role, if any, does the  
8 human being who's actually performing the G C technique  
9 play in the results or raw data that are produced?

10 A. Oh, they're essential. We're not quite to the point yet  
11 where artificial intelligence and robotics have replaced  
12 trained analytical scientists in a laboratory  
13 environment.

14 There are -- there have been surveys of the types of  
15 errors produced in a G C instrument, and the single-most  
16 -- you spend most of your time when you're doing a G C  
17 preparing the samples. Working on the samples is the  
18 most time-consuming part of the analytical process for  
19 the person that's doing it.

20 And data indicate that the single-most common source of  
21 errors -- or the most common sources of errors in a  
22 chromatography test like this are the human being who's  
23 the operator and the samples. The samples and the person  
24 are the two most error-prone parts of the analytical  
25 process in a G C test.

DIRECT BY WHYTE/ARVIZU

1 Q. Can you describe in detail -- you've described how the  
2 machine itself works. Now can you describe in detail  
3 what parts of the process the human forensic toxicologist  
4 is doing in running a G C test.

5 A. Can I draw again? That might be helpful.

6 Q. Please, if -- come forward.

7 A. Okay. When samples come into a toxicology laboratory --  
8 it's a production laboratory. They're not just running  
9 one sample at a time. They're running batches of samples  
10 -- lots of subject samples. And that's actually a good  
11 thing. That's not a problem.

12 But it poses demands on the person that's doing the  
13 work to keep all that straight and to keep exercising  
14 good sight and judgment, because what happens is you have  
15 a whole stack of blood kits -- a couple of dozen blood  
16 kits that you've got to run. And inside each of those  
17 blood kits there are a couple of tubes of blood.

18 So the analyst when they come in on the first day when  
19 they're going to run a set of samples, they go get a work  
20 list, and it says here's the, say, 40 samples that you're  
21 going to go -- be responsible for running today. So they  
22 go to the refrigerator, and they check those out of  
23 evidence, and they accept custody of those samples, and  
24 they're in their custody.

25 Then those samples actually equilibrate at room

DIRECT BY WHYTE/ARVIZU

1 temperature before they can do anything with them. They  
2 can't just start right away. They have to come to room  
3 temperature because you can't make a good, reliable  
4 measurement on a cold sample. So they've got to keep  
5 track of the time that they're doing all of these things  
6 and make sure they leave long enough for the samples to  
7 sit at room temperature before they start processing it.

8 So while they're letting those things warm up, then  
9 they're doing the necessary paperwork, because they've  
10 got to put information into the computer to tell the  
11 system which sample is going to be run first, second,  
12 third, fourth, fifth, and all the way down through the  
13 sequence.

14 So they have what they in this lab call a work list,  
15 and it lists all 40 consecutive samples or so that are  
16 going to be run in that batch. And so they write down  
17 the sample numbers for all 40 of those. And the tech  
18 goes and gets all of these kits.

19 And they have calibrator solutions and control  
20 solutions that they also have to go get out of a  
21 different refrigerator and let those come to room  
22 temperature, and they've got to keep a record of those  
23 numbers and which ones they're using. So there's a lot  
24 of paperwork here to reconcile.

25 Once enough time has elapsed, then -- and they've got

DIRECT BY WHYTE/ARVIZU

1 all their paperwork ready to go, then they can start  
2 opening up the kits. So they break the evidence -- they  
3 verify that the kit is still intact. Its evidence seals  
4 are still intact. And then they break the seal, open it  
5 up, and then they've got more paperwork to deal with.  
6 They've got two tubes and more paperwork.

7 So they're checking all the information on the  
8 paperwork inside the box. I'm really not a very good  
9 artist. But there's paperwork, and then there's two  
10 tubes inside the box. So they're checking all the  
11 information on the paperwork against the tubes to make  
12 sure it all matches and documenting any discrepancies and  
13 resolving any discrepancies that they identify.

14 And then there's -- they're inspecting the tubes to be  
15 able to understand the condition of the blood specimen  
16 that they're receiving. They're looking at the color of  
17 the blood. They're looking at the volume of blood, and  
18 they actually make a measurement of the volume, how much  
19 blood is present inside the tube by comparing it to a  
20 known set. And they document all this.

21 And they're looking to see if the blood is a  
22 free-flowing liquid or if there's any evidence of  
23 clotting in the blood sample because that would be an  
24 indication that the blood sample had changed from the  
25 time it was collected. So they're doing observations of

DIRECT BY WHYTE/ARVIZU

1 each sample.

2 And then the next step is -- if this is my blood tube  
3 with about nine mililiters of blood in it, and it's got a  
4 gray stopper in the top of the tube, you don't just take  
5 that stopper off and put it on the instrument to test it.  
6 You have to take a small portion of this blood and  
7 measure it into an analytical vial.

8 So I have an analytical vial. And I put in this case  
9 200 microliters of blood and 2,000 microliters of  
10 internal standard. So they're taking out about four  
11 drops of blood and measuring that very accurately with a  
12 device that's called a diluter.

13 This is being done in a hood because this is a  
14 biological hazard, and so you have to do this in a  
15 controlled environment. And this is a device that has  
16 two syringes on it, and it has a little Picktep tip they  
17 can stick into the tube to measure out 200 microliters of  
18 blood, dispense it in here along with 2,000 microliters  
19 of internal standard. That's one sample that then gets  
20 halved.

21 At some point, really important, and we don't know when  
22 this happens because the procedure doesn't say it, it's  
23 up to each individual analyst and conditions, is this  
24 work list says -- has numbers next to each of these  
25 samples all the way up to however many samples are in the



DIRECT BY WHYTE/ARVIZU

1 batch. Sample No. 1 is SG 17 number, number, number,  
2 number all the way down.

3 But that doesn't mean that sample No. 1 is the first  
4 sample that gets run on the instrument. There's a  
5 different sequence list for what's on the instrument. So  
6 you've got to be able to keep all this straight of which  
7 sample is which.

8 At some point a number gets put on this vial.  
9 Different analysts have different practices for what  
10 number they use. Some of them will write the -- I don't  
11 remember the number in this case but the actual S P  
12 number for the sample vial, but that's long, and it's  
13 easy to mix up and get them mixed up, so that might be  
14 difficult, and some analysts just use this number.

15 This is one of the things that it's real important to  
16 get information from a specific person about how they do  
17 this to know the possibility of mixing things up. But  
18 this number needs to correspond to the number of the  
19 sample that's actually being tested.

20 It gets packed. We do this twice because we do -- at  
21 this point this sample gets a crimp cap put on it, and  
22 the stopper gets put back on this one. And I've got a  
23 vial now that I can put over into my auto sampler trays.  
24 We have these lots of positions, and we put this one in  
25 its corresponding position on the auto sampler tray. Put

DIRECT BY WHYTE/ARVIZU

1           this on -- the other tube back in the tubes, pack it up,  
2           seal it, move it away. And now I'm ready to go the  
3           second step.

4           I do that for every sample in the batch. You don't  
5           start it (inaudible). But what I'm doing is sampling  
6           four drops of blood not by dropping but by using a device  
7           to measure it accurately over and over and over and over  
8           until I prepare the whole batch.

9           During that process, the analyst is -- needs to be  
10          inspecting the tip of this to make sure there are no air  
11          bubbles and there are no extra drops on the outside  
12          because those kinds of things alter the amount of liquid  
13          that's put -- the amount of blood or liquid that's put  
14          into the sample.

15          And if you put in too much blood, the results will be  
16          too high. If you put in too little blood, the results  
17          will be too low.

18          And so the analyst's practice for how they arrange  
19          these things and how they've got this sort of automated  
20          system set up to inspect the samples, to check for the  
21          presence of clots is real, real important in the  
22          analytical process because when you're trying to insert  
23          this diluter that measures out the blood, it's basically  
24          a fancy electronic turkey baster that sucks up the  
25          liquid, and if it hits a clot, then that interferes with

DIRECT BY WHYTE/ARVIZU

1 the accurate measurement of the sample.

2 So there are things that an analyst can do to address  
3 that problem, but that depends on their attention to  
4 detail.

5 Q. Thank you. Now, are all of -- are you able to glean what  
6 happened with regard to all of these processes you just  
7 described in Mr. Wiggins's case just by looking at the  
8 case file?

9 A. I can tell how many samples were in the batch, and I can  
10 tell the lot numbers from the paperwork. That's pretty  
11 much it.

12 Q. And are there particular techniques -- you touched on  
13 this a little bit, but are there particular techniques  
14 that a testing analyst might have or use when they're  
15 doing this work that could impact a sample?

16 A. Yes, there are.

17 Q. Can you explain briefly.

18 A. There's technique involved in using the diluter to  
19 acquire and deliver the measured volumes of liquids.  
20 There's technique in how you arrange and process the  
21 samples to make sure you don't have mix-ups. There's  
22 techniques in terms of insuring that you've allowed the  
23 samples to come to room temperature in enough time, for  
24 how you inspect the samples. Do you inspect them while  
25 they're closed, or do you -- do you wait until they're

DIRECT BY WHYTE/ARVIZU

1 opened to inspect the actual blood specimen itself. So  
2 there's techniques throughout this process.

3 Q. So just to be clear, can you give kind of a list of what  
4 sorts of things might have happened during this process  
5 that we -- that you did not see in your review of  
6 Mr. Wiggins's case file?

7 A. I did not see any observations of clotting in the sample.  
8 That's important because a clotted sample will actually  
9 alter the water content of the liquid fraction and thus  
10 alter the ethanol concentration of the measured sample.

11 So when you sample a -- collect a sample from a blood  
12 sample that's been clotted, you'll get a different result  
13 than from a sample that was not clotted. So the whole  
14 identification documentation and addressing clots is a  
15 very important element.

16 Q. And to be clear, you're saying that you saw the analyst  
17 had checked that and didn't find it, or you don't see  
18 anything about whether the analyst even checked for that?

19 A. No records at all. No indication that that was  
20 addressed, identified, checked, anything.

21 Q. Okay. Thank you. Anything else?

22 A. As -- well, as I said, the techniques for how they number  
23 the samples or their practices for how they actually --  
24 the sequence that they actually do the work. I can tell  
25 the sequence that samples went on the instrument because

DIRECT BY WHYTE/ARVIZU

1 the instrument gives me a time and date stamp. It tells  
2 me this sample was run at this time, and eight minutes  
3 later the next sample was run, and eight minutes later  
4 the next sample was run.

5 But I can't tell the order in which these samples were  
6 prepared. That's important because of potential  
7 cross-contamination issues being able to know which  
8 sample was prepared first, second, and third.

9 Q. Is there anything else with regards to a specific process  
10 (inaudible)?

11 A. That's the big one with respect to the prep.

12 Q. Thank you. Now, we heard earlier Mr. Capron, you weren't  
13 here for his testimony, but he offered testimony that if  
14 the testing analyst makes a mistake, there will be a  
15 record of that that appears in the individual's case  
16 file.

17 Can you describe whether or not there are other kinds  
18 of mistakes or errors that are unlikely to be visible in  
19 the case file produced by the testing analyst.

20 A. Yes. The case file is not actually, for example, the  
21 original record. It actually has been processed by the  
22 analyst before it's printed and accepted. So when we're  
23 -- I can go back to that first picture again.

24 When we're measuring -- if this is the ethanol peak  
25 right here, and we're measuring how much ethanol is in

DIRECT BY WHYTE/ARVIZU

1           that sample, we do that by doing what's called  
2           integrating the area under the curve, measuring the size  
3           of that peak.

4           In the old days we did that by printing this out on a  
5           strip chart recorder and then cutting out the peak and  
6           weighing it to see how big the peak was. But now  
7           computers do that for us.

8           The reason that's important in this particular case,  
9           the separation that the laboratory achieves is not  
10          necessarily complete. So if you look at the  
11          chromatograms, they can kind of go like this where there  
12          is another peak next to this peak that didn't quite get  
13          separated.

14          Now, depending -- the amount of ethanol that's  
15          determined will be measured default by the computer, or  
16          the analyst can change it. The analyst can essentially  
17          move the line. They can integrate the peak of this area,  
18          or they can integrate the area under the peak for example  
19          by adding in that area.

20          We can't tell what they did from looking at the data  
21          that's in the case file. The only way to be able to tell  
22          that would be go -- to go back to the original electronic  
23          record and reprocess it and see if you got the same  
24          answer.

25          So from the case -- the case file information we've

DIRECT BY WHYTE/ARVIZU

1 received, we can't tell how the area under this curve was  
2 actually computed. And that area, that number is used to  
3 report the ethanol concentration. And that's an issue in  
4 this particular case.

5 Q. Thank you. How is what the testing toxicologist does in  
6 a case like this different from what the reviewing  
7 toxicologist does?

8 A. The analyst who does the work is the one who makes the  
9 decision to either accept the instrument's default,  
10 whichever that is, or to adjust the calibration -- or to  
11 adjust the integration to decide how big that peak should  
12 be. That's a decision that's made by the analyst. And  
13 from the information that the reviewer gets, it's not  
14 evident which of those was done. So that's something  
15 only the analyst would know.

16 Q. So in your expert opinion, are analysts just facilitating  
17 getting the raw data out of a machine, or are they  
18 analyzing the information as they go along?

19 A. The reason that the ISO standards requires that they have  
20 the education and competence commensurate with their  
21 duties and the reason that a toxicologist is required to  
22 have a science degree and scientific training is that at  
23 this point in the field of science we still expect these  
24 analysts to be scientists who are judging the data and  
25 observations within the context of their scientific

DIRECT BY WHYTE/ARVIZU

1 understanding.

2 So it's more than just the clerical function of putting  
3 the right sample data in the right file. That's an  
4 important task. Making sure that everything that was  
5 asked for was delivered is clerically very important, but  
6 it's not the science.

7 We require scientists to make observations because labs  
8 have procedures for how they do this work, step-by-step  
9 procedures, but those procedures can never identify all  
10 the anomalies that are going to occur during analysis.  
11 And so we rely on the individual's technical judgment to  
12 recognize those situations and to respond accordingly.

13 Q. And to be clear, that's because, in your opinion, all of  
14 these things are not being reflected in the case file for  
15 someone else to see?

16 A. That's correct. It's -- the material in the case file is  
17 a much smaller subset of the information that's available  
18 then what the analyst has at their disposal to see and  
19 interpret.

20 Q. So you mean the information that's available in the case  
21 file is a much more subset of what the analyst sees or  
22 what the reviewer sees?

23 A. What the analyst sees. The analyst is looking at all the  
24 information for the whole batch. When a reviewer gets a  
25 case file, they're only looking at that processed data



DIRECT BY WHYTE/ARVIZU

1 set for just that one sample. And only the analyst is  
2 evaluating the batch as a whole to determine whether the  
3 batch passed.

4 When you evaluate a batch of data, the first thing you  
5 have to look at is is the batch as a whole acceptable.  
6 And only after that passes do you move to the next step  
7 and say now is this individual sample acceptable.

8 Q. Why is that important?

9 A. Because that's what quality control provides for us in  
10 ensuring the reliability of a test result.

11 Q. Now, you drew a picture of a peak on the demonstrative,  
12 and you've colored it blue and red. I believe you called  
13 that a chromatograph?

14 A. That's a peak on a chromatogram.

15 Q. On a chromatogram. And you said that that was  
16 particularly relevant in this case --

17 A. It is.

18 Q. -- whether or not that's accurate?

19 Can you explain more about why that's particularly  
20 relevant in Mr. Wiggins's case?

21 A. Can I show a copy -- do you have a copy of the case file  
22 that I can look at a chromatogram for?

23 MS. WHYTE: Your Honor, may I approach?

24 Q. (By Ms. Whyte) I can show you what's previously been  
25 marked for identification as Defense Exhibit N. Do you

DIRECT BY WHYTE/ARVIZU

1 recognize that document?

2 A. I do. This looks like the case file for this case. On  
3 (inaudible). There's a page in this case file that was  
4 generated on January 24th from head space G C No. 5. And  
5 this particular chromatogram is showing at 12:40 p.m.  
6 It's toward the end of this case file.

7 This shows an example of the chromatogram in this case,  
8 and it experiences the -- a problem that I've drawn here  
9 in that there is not what's referred to as baseline  
10 resolution between two peaks. The big one just sort of  
11 tails off.

12 And from just looking at this, I can see the number  
13 that reflects the size of the peak that the analyst  
14 determined, but I can't tell how the analyst made that  
15 determination, whether it was just the default that the  
16 computer did automatically or whether the analyst  
17 adjusted it. It's not evident on this record.

18 Q. Is that the kind of thing that the analyst would know?

19 A. Yes.

20 Q. In your expert opinion then and from your perspective as  
21 a scientist, can a reviewing toxicologist draw a  
22 scientifically-accurate independent conclusion about a  
23 person's blood alcohol content solely based on his review  
24 of a case file such as that one?

25 A. I don't believe they can. I think they can conclude that

DIRECT BY WHYTE/ARVIZU

1 the records either do support or don't support the  
2 reported value, but at some level as scientists we always  
3 depend on the person who made the measurements to be able  
4 to attest to the fact that that data came from that  
5 sample.

6 Q. Why isn't it enough -- why isn't it enough that there are  
7 standard operating procedures and checks and reviews in  
8 an accredited lab such as the Washington State Patrol to  
9 ensure accuracy and reliability?

10 A. They're great, but quality assurance can never guarantee  
11 that everything the laboratory does is going to be  
12 perfect. And accreditation certainly doesn't ensure that  
13 everything that a laboratory does is going to be correct.  
14 Quality control measures are put in place, but every  
15 laboratory makes mistakes. And so we just have to do our  
16 best to try to identify and address them.

17 Q. Are you familiar with the declaration under penalty of  
18 perjury that the analyst signs in Washington State Patrol  
19 toxicology reports?

20 A. I am.

21 Q. And are you familiar with what kinds of things the  
22 analyst is attesting to as part of that declaration?

23 A. Yes.

24 Q. How?

25 A. Because I've read them.

DIRECT BY WHYTE/ARVIZU

1 Q. In your expert opinion, is there anyone else besides  
2 Ms. Mitchell-Mata who could look at this case file and  
3 testify to whether Ms. Mitchell-Mata did what she  
4 attested to have done in her declaration under penalty of  
5 perjury?

6 A. As an independent reviewer, I would never do such a  
7 thing. I don't know if anyone would feel comfortable.  
8 But scientifically I don't think anyone but the person  
9 who actually performed the work can attest to the fact  
10 that that was done.

11 Q. Now, you've talked a little bit about one issue that you  
12 noticed specifically in Mr. Wiggins's file, and so I'd  
13 like to spend the final portion exploring some other  
14 things that you noted in Mr. Wiggins's case file.

15 A. Okay.

16 Q. So earlier you testified that you'd reviewed the case  
17 file for Mr. Wiggins?

18 A. Yes.

19 Q. And that's the report that Ms. Mitchell-Mata prepared; is  
20 that right?

21 A. That's part of it.

22 Q. Now, as a scientist, what in that case file, if anything,  
23 besides what you've already identified would you identify  
24 as an area where you would need to know more directly  
25 from Ms. Mitchell-Mata and not simply Mr. Capron?

DIRECT BY WHYTE/ARVIZU

1           And I know earlier you talked about the parts of the  
2           initial human process with regard to the G C technique  
3           that you would want to know from her. Now I'm talking  
4           about her testing process and the things that you would  
5           want to know from her that you could not know from  
6           Mr. Capron or whoever reviewed the file.

7    A.    I would want to know how she determined the integrated  
8           values of the peaks, whether she accepted the default  
9           values from the instrument or whether she integrated them  
10          herself.

11   Q.    And is there anything you would want to know regarding  
12          the internal standard in the case file?

13   A.    That was evident not just from the case file. That was a  
14          concern that was raised when I have -- because I had  
15          access to the chromatograms for all the samples in the  
16          batch.

17                The peak on the right, that red peak, is the internal  
18                standard. And under the laboratory's procedure, they add  
19                the same volume of internal standard, 2,000 microliters  
20                of internal standard to each and every analytical vial in  
21                the batch. And it's supposed to serve essentially as an  
22                internal yardstick to be able to measure against and to  
23                be able to correct for some things. It's best practice  
24                to use an internal standard, so it's good that they did.

25                But the problem in this particular batch on this -- the

DIRECT BY WHYTE/ARVIZU

1 date that both batches where Mr. Wiggins's sample was  
2 tested is that when you enter the size of the internal  
3 standard peak in all the samples of the batch, they're  
4 unusually variable.

5 I do this for samples from the Washington State Patrol  
6 quite frequently. And most often when you look at the  
7 areas (inaudible) that internal standard peak, because  
8 they put the same amount in every sample, it only varies  
9 by about 5 percent. That's quite typical. And good  
10 analytical labs routinely achieve that all across the  
11 country, good toxicology labs.

12 In this case the two batches that included the  
13 subject's sample were unusually variable, the internal  
14 standard area. In one case it was I believe 16 percent,  
15 in the other 25 percent variability observed. That's  
16 unusual for this laboratory, and it's unusual in forensic  
17 toxicology to experience that much variability for an  
18 internal standard.

19 Q. And to be clear, that's something that you wouldn't  
20 necessarily see in the case file? It's just something  
21 that you had seen because you had access in -- to the  
22 records from the entire batch?

23 A. That's correct.

24 Q. And those are records to which Ms. Mitchell-Mata would  
25 have had access in your understanding?

DIRECT BY WHYTE/ARVIZU

1 A. That is correct. It's my understanding that the analyst  
2 has access to those records, but the technical reviewer  
3 reviews individual cases, and it would not have been  
4 evident on an individual case.

5 Q. Thank you. Any issues with regard to the chromatograms  
6 for unknown and known samples?

7 A. Well, there's this problem with not being able to tell  
8 how the peaks were integrated. I did receive  
9 chromatograms for both knowns and the subject sample in  
10 this case, and they -- they were all provided and  
11 available for review. So I'm not sure --

12 Q. Where -- where -- is it --

13 THE COURT: So, Counsel, just so you know, we're going  
14 to take a break at 3:00, so you can determine when you  
15 want to stop your questions and resume.

16 MS. WHYTE: Okay. Thank you, Your Honor.

17 Q. (By Ms. Whyte) Is it your understanding that the  
18 reviewing toxicologist has access to both known and  
19 unknown samples data in the case file for the entire  
20 batch?

21 A. The problem is that the person who's doing the review of  
22 a case file such as this one has access to only that one  
23 subject sample. They don't have access to all the  
24 samples for the batch.

25 In my experience reviewing batch data, there are some

DIRECT BY WHYTE/ARVIZU

1 anomalies that can only be identified when you look at  
2 the batch as a whole. And as structured at the  
3 Washington State Patrol, the reviewer would not have  
4 access to that information.

5 Q. Thank you. And is there any issue that you've identified  
6 with regards to the reviewer's access to information  
7 about the ampules used in this case?

8 A. Yes. The laboratory uses materials that are known as  
9 certified reference materials as their known samples.  
10 They're known samples of ethanol and water. These are  
11 purchased from a very reputable accredited producer of  
12 these materials.

13 And they are provided in small glass ampules that only  
14 hold about a milliliter of liquid. And you can't unscrew  
15 the lid to access the solution. You actually have to  
16 break the glass seal to access the solution.

17 And the manufacturer gives you a certificate analysis  
18 when you buy these materials that explains that they need  
19 to be used immediately after opening. You can't open  
20 those and use them and then save it and use more another  
21 day. They must -- they're essentially a single-use  
22 solution.

23 This laboratory understands that in some cases. In the  
24 drugs testing section, they will document when they open  
25 a new ampule of the certified reference material. But in



DIRECT BY WHYTE/ARVIZU

1 the alcohol section, there is no such record, so you  
2 can't tell when their known solution of ethanol that were  
3 used as controls were opened. You can't tell whether or  
4 not they complied with the manufacturer's instructions.  
5 Their accrediting agency requires that they comply with  
6 the manufacturer's instructions of use.

7 Q. Is that information that Ms. Mitchell-Mata would have  
8 had?

9 A. Yes, she would know her practice for opening those or  
10 whether she'd go get already-opened ones.

11 Q. But that was not apparent in the case file?

12 A. It was not.

13 (Excerpt testimony of Janine Arvizu concludes.)

14 (Excerpt testimony of Janine Arvizu begins.)

15

16 D I R E C T E X A M I N A T I O N (continued)

17 BY MS. WHYTE:

18 Q. So, Ms. Arvizu, you've testified to your expertise and  
19 your background and also to the level of depth in which  
20 you reviewed not only the case file in this case but  
21 the other data that was provided by Washington State  
22 Patrol, data that you indicated was outside of what was  
23 in the case file. Given all of that, could you attest  
24 to how the sample was run -- the samples were run in  
25 Mr. Wiggins's case?

DIRECT BY WHYTE/ARVIZU

1     A.     I could draw a conclusion that the records in a case -- I  
2            can conclude how the result was obtained.  I can't attest  
3            to that result coming from any particular sample.  Only  
4            the person who actually identifies the sample and makes  
5            the determination and processes it is in a position to  
6            attest that that result came from that specimen.

7            An independent scientist such as myself can audit and  
8            determine whether the reported result is in fact  
9            supported by the underlying data, but only the person who  
10           physically identifies it and processes it can make that  
11           kind of attestation.

12     Q.     Thank you.  I wanted to ask you a few questions about DNA  
13            analysis.  Are there any differences between the testing  
14            that happens in a DNA testing lab and the G C technique  
15            that happened in Mr. Wiggins's case?  And if so, can you  
16            describe how those two things are different.

17           MR. KARR:  Objection to relevance.

18           THE COURT:  Go ahead.  You can answer.

19           MS. WHYTE:  Thank you, Your Honor.  A number of the  
20           cases that the City cited referenced DNA, as well as the  
21           brief.  In this case the City's brief referenced DNA, so  
22           I think it's important for the Court to have information  
23           before it about how those processes are different and why  
24           courts make that distinction.

25           MR. KARR:  And, Your Honor, that's asking this witness

DIRECT BY WHYTE/ARVIZU

1 to make a legal conclusion, which I don't think she's  
2 qualified to make.

3 THE COURT: Okay.

4 MS. WHYTE: And, no, we're not asking for a legal  
5 conclusion, Your Honor. We're asking her to provide the  
6 factual basis upon which the Court can make the legal  
7 conclusion.

8 MR. KARR: What evidence is she going to testify that's  
9 relevant on a factual basis?

10 THE COURT: Well, stepping back, I'm not sure that I  
11 heard her say that she had experience with DNA. But  
12 outside of that, I think it could be relevant because I  
13 think the argument -- part of the argument is that DNA  
14 testing is different than blood testing in that DNA  
15 testing you don't -- the person who gathers the data  
16 isn't necessarily the person who presents the report and  
17 does the analysis. So I think if she has that kind of  
18 background to know factually the difference, that it  
19 would be relevant. And I don't recall that there was a  
20 foundation laid for that, but maybe there was.

21 MS. WHYTE: I think there was testimony about that,  
22 Your Honor, but I can inquire again if you like.

23 THE COURT: Okay.

24 Q. (By Ms. Whyte) Ms. Arvizu, do you have any experience  
25 with the DNA testing process?

DIRECT BY WHYTE/ARVIZU

1 A. I have audited numerous DNA cases, and under court order  
2 I've been allowed to go into laboratories and observe DNA  
3 case work in three separate forensic cases.

4 MS. WHYTE: Thank you.

5 THE COURT: Okay.

6 MS. WHYTE: Thank you, Your Honor.

7 THE COURT: Did you have another objection other than  
8 the ones previously?

9 MR. KARR: No, Your Honor. The City will just maintain  
10 its objection.

11 THE COURT: All right. Thank you.

12 Go ahead.

13 Q. (By Ms. Whyte) So, Ms. Arvizu, the question was are  
14 there any differences between the testing that happens in  
15 a DNA testing situation and the G C testing that happened  
16 for blood alcohol in Mr. Wiggins's case? And if so, can  
17 you describe what those differences are.

18 A. They are greatly different. There -- the real only  
19 similarity is that they both occur in a laboratory. The  
20 underlying theoretical principles are different. The  
21 analytical instrumentation is completely different. The  
22 techniques are different. The practical process is  
23 different.

24 In the case of a blood alcohol test, typically it's a  
25 single analyst who receives the specimen, prepares the

DIRECT BY WHYTE/ARVIZU

1 specimen, analyzes it on the instrument.

2 In the case of DNA testing, it's common to have one  
3 person do the extraction, another person to do the  
4 quantitation, another person to do amplification, another  
5 person to run the electric (inaudible), so it involves  
6 typically many more people doing discrete parts of the  
7 process.

8 And both the practical processing of those samples and  
9 the underlying technical principles are vastly different.

10 Q. Before a DNA profile is compared to I guess what's called  
11 a reference profile, what forensic value does it have?

12 A. Forensically it essentially can't be used. It has no  
13 value until you're able to compare it to a reference  
14 profile. It's simply a listing of alleles. And that  
15 doesn't have any intrinsic information that would be  
16 forensically material until it is compared to a reference  
17 spectrum from the evidence.

18 Q. And so just to be clear, what's a reference profile or a  
19 reference spectrum?

20 A. A DNA profile obtained from a known person. So I have  
21 had a sample collected for DNA testing, and so my  
22 reference profile would be obtained from that sample.

23 Q. Okay. How, if at all, does that differ from the testing  
24 work product that was obtained in this case?

25 A. Well, the report, which is included in this case file,

DIRECT BY WHYTE/ARVIZU

1 provides a result, which is a number, a concentration of  
2 ethanol. And that is information that even a lay person  
3 can read and understand its forensic significance because  
4 most people in the lay community are aware of what the  
5 legal limit is.

6 Q. Thank you. Mr. Capron testified that he reviewed raw  
7 data in the case file and drew from that his own  
8 independent conclusions in this case. In your expert  
9 opinion, is there any raw data in this case file?

10 A. There is not. There are no original records here when it  
11 comes to the chromatography. These are pictures or  
12 graphs that have been generated after the analyst applied  
13 the data collection and the data processing and the  
14 reporting parameters that are completely subject to the  
15 analyst's control.

16 The actual raw data in a chromatographic test is an  
17 electronic file. And that file is processed under  
18 parameters that are defined by the analyst. So this is  
19 processed data. This is not raw data.

20 The raw data could be processed by another analyst and  
21 get a completely different result from the same original  
22 data.

23 Q. Sorry. You were saying that the -- I'm sorry. Please  
24 continue. You were saying the raw data could be --

25 A. The raw data is the electronic information collected by

DIRECT BY WHYTE/ARVIZU

1 the instrument when it's generating what you saw as a  
2 picture on that flip chart. But that picture is only  
3 generated after the electronic data has been processed  
4 using parameters assigned by the analyst.

5 So what that means is that the raw data is fixed. An  
6 analyst can't change the raw data. But that raw data  
7 file could be processed by a different analyst using  
8 different parameters, and they would get a different  
9 analytical result.

10 Q. Does Washington State Patrol lab produce raw data?

11 A. They absolutely do. If they generate results, they must  
12 produce raw data. It's the electronic instrument files.

13 Q. And inside these electronic instrument files, what is it?  
14 Can you describe it a little bit more.

15 A. There's actually a sampling routine. You collect a lot  
16 of data points every few milliseconds to relate the  
17 intensity of that peak. That information is collected  
18 and stored in an electronic file that is then processed  
19 using parameters that the instrument -- that the analyst  
20 set. For example, the analyst tells the instrument how  
21 they want that data to be analyzed and how they want the  
22 graph to be presented.

23 Q. And those are decisions the analyst makes?

24 A. They are.

25 Q. So in other words Ms. Mitchell-Mata?

## DIRECT BY WHYTE/ARVIZU

1 A. In this case, yes.

2 Q. Now, you said that you received not only the case file in  
3 this case which Mr. Capron reviewed but other data that  
4 was not in the case file, correct?

5 A. Yes.

6 Q. Did you get any raw data?

7 A. I did not.

8 Q. Have you ever gotten raw data from other labs?

9 A. Oh, quite commonly, yes.

10 MS. WHYTE: Thank you. I think at this time,  
11 Your Honor, I have no further questions.

12 (Discussion concerning releasing jury pool.)

13

14 C R O S S - E X A M I N A T I O N

15 BY MS. SRA:

16 Q. Ms. Arvizu, you're not a forensic toxicologist, correct?

17 A. I'm not. I'm an analytical chemist who works in the  
18 field of forensics.

19 Q. Okay. And you've never actually visited the Washington  
20 State Patrol lab?

21 A. I have not, correct.

22 Q. Okay. And you have no forensic toxicology background or  
23 experience?

24 A. My experience in the field of forensics relates to the  
25 analytical chemistry part of toxicology, not the



DIRECT BY WHYTE/ARVIZU

1 behavioral effects part. So I wouldn't just generically  
2 refer to it as forensic toxicology experience without  
3 clarifying that it was only on the analytical side.

4 Q. And do you have any experience or have you in the past  
5 had any experience regularly testing blood, running these  
6 tests that we're talking about here?

7 A. No.

8 Q. Okay. And you didn't test the blood in this case?

9 A. No.

10 Q. Are you aware that there were two vials obtained in this  
11 case?

12 A. I am. That was on the laboratory records I reviewed.

13 Q. Okay. And have you seen these -- have you seen the  
14 additional vial in person and seen to check if the blood  
15 is free flowing, not coagulated, et cetera?

16 A. I have not.

17 Q. Okay. And are you familiar with the Washington State  
18 Patrol's standard operating procedures as they relate to  
19 all of these -- all of the stuff that you testified about  
20 such as ensuring -- picking up the vial to ensure that  
21 the blood is free flowing, free of coagulants, ensuring  
22 all of the different decisions and techniques, specific  
23 methods, are you familiar with the tox lab's standard  
24 operating procedures?

25 A. I am.

DIRECT BY WHYTE/ARVIZU

1 Q. Okay. And are these procedures -- and what are those  
2 procedures as they relate to I guess the information  
3 that you stated was missing such as no indication of  
4 Ms. Mitchell-Mata notating anywhere what the condition of  
5 the blood was? Do you know what the Washington State  
6 Patrol's standard operating policy is in regards to that?

7 A. Yes -- well, in some regards.

8 Q. Okay.

9 A. If the analyst actually homogenizes the sample, actually  
10 has to take aggressive physical action to liquidity the  
11 specimen, I know they're supposed to document that fact.

12 Q. Uh-huh.

13 A. I'm not sure which procedure it's in. I'd have to look  
14 it up to be able to tell you actually which one it was  
15 in.

16 Q. Okay. So is it fair to say that the Washington State  
17 Patrol's standard policy when it comes to, you know,  
18 picking up a blood vial and before testing it ensuring  
19 that the blood is in fact in good condition to be tested  
20 as you stated, that if there were something wrong, it  
21 should be noted?

22 A. Yeah, the instructions are that anomalies are supposed to  
23 be noted.

24 Q. Okay. And let's talk about the accreditations. You had  
25 testified that the lab is ISO accredited, and then also I

DIRECT BY WHYTE/ARVIZU

1 believe it was ANAB? Correct me if I'm wrong.

2 A. ANAB is the accrediting agency.

3 Q. Okay.

4 A. They accredit the lab for compliance to the ISO standard.  
5 ISO doesn't accredit laboratories.

6 Q. Got you. And so this is the same agency that accredits  
7 you to be an expert?

8 A. Almost. They don't accredit me. They certify me. They  
9 accredit laboratories. And ASQ is the organization that  
10 certifies me. ASQ is half of the ANAB organization.

11 Q. Okay. And is it fair to say that in being -- in  
12 maintaining this accreditation, the Washington State  
13 Patrol has to -- the Washington State Patrol tox lab has  
14 to comply with specific conditions?

15 A. Yes. As a condition of their accreditation, they're  
16 required to comply with all the ISO requirements and all  
17 the accrediting agency's requirements.

18 Q. Okay. And have you -- have you ever met Christie  
19 Mitchell-Mata?

20 A. I don't recall. If I have, it would have been several  
21 years ago.

22 Q. Okay. Do you know how long she's worked for the tox lab?

23 A. I have reviewed her resume. I know it's been a number of  
24 years. And I've reviewed her work for several years.

25 Q. Okay. And have you ever spoken with Ms. Mitchell-Mata

DIRECT BY WHYTE/ARVIZU

1 regarding her testing of cases and how she performs  
2 testing or how many tests she's ran in the course of her  
3 career?

4 A. No.

5 Q. Do you know -- or have you met Mr. Brian Capron?

6 A. No.

7 MS. WHYTE: Objection. Relevance.

8 THE COURT: Counsel.

9 MS. SRA: Your Honor, it is relevant.

10 THE COURT: In what way?

11 MS. SRA: Well, Ms. Arvizu is -- has opined in her  
12 direct examination as to both of these individuals and  
13 has -- there's been a lot of assumptions made indirectly  
14 such as what exactly Mr. Capron reviewed, et cetera, and  
15 so I do believe it is relevant.

16 THE COURT: All right. Thank you. I'll allow it. Go  
17 ahead.

18 Q. (By Ms. Sra) So, Ms. Arvizu, as I was saying, you just  
19 stated that you've never met Mr. Capron?

20 A. I don't believe so.

21 Q. Okay. Have you spoken with him -- have you ever spoken  
22 with him?

23 A. Not that I recall, no.

24 Q. Okay. Is it fair to say then that you don't know what he  
25 reviewed in -- to reach his independent conclusion as a

## CROSS BY SRA/ARVIZU

1 reviewer?

2 MS. WHYTE: Objection, Your Honor. I mean, I think I  
3 would object to this on the grounds that the City  
4 strenuously opposed our motion to have Ms. Arvizu sit in  
5 on Mr. Capron's testimony. Mr. Capron testified that he  
6 reviewed the case file --

7 MR. KARR: Objection.

8 MS. WHYTE: -- in this case.

9 THE COURT: Just a second. Just one person at a time.

10 MR. KARR: I know, Your Honor, but I think that the  
11 presentation here is going to inform the witness of --

12 THE COURT: Okay.

13 MR. KARR: -- additional facts. So either we need to  
14 have the witness step out in the hall or go to side bar.

15 THE COURT: All right.

16 MS. WHYTE: And the witness -- so, one, the witness  
17 is --

18 THE COURT: So just one moment. All right. So let's  
19 go into side bar and talk about it.

20 You can stay there.

21 THE WITNESS: Okay.

22 (In camera side bar)

23 THE COURT: All right. You can answer. Do you need  
24 her to repeat the question?

25 THE WITNESS: Yes, please.

## CROSS BY SRA/ARVIZU

1 THE COURT: Go ahead.

2 Q. (By Ms. Sra) Where I left off, Ms. Arvizu, are you  
3 familiar -- or do you know exactly what Mr. Capron  
4 reviewed in forming his independent conclusion as it  
5 relates to this case?

6 A. I know what their practice is as described in their  
7 procedure and from previous testimony by supervisors. I  
8 can't speak to whether Mr. Capron essentially completed  
9 exactly that process of their procedure in this  
10 particular case. But I know what their procedure and  
11 their normal practice is.

12 Q. Okay. So you don't know if he ever reviewed the internal  
13 standards that you had testified to earlier?

14 A. The information necessary to do that does not exist in  
15 the case file, and it's my understanding that that is not  
16 material that is reviewed during the course of a  
17 technical review in this laboratory.

18 Q. Okay. But it's fair to say that if Mr. -- or if  
19 Mr. Capron had reviewed that before doing this technical  
20 review, you're not -- you don't know because you weren't  
21 there?

22 A. I don't know. There's no record of it in the technical  
23 review.

24 Q. And, Ms. Arvizu, are you -- are you trained in analyzing  
25 the data from blood testing such as the data in the case

## CROSS BY SRA/ARVIZU

1 file?

2 A. Yes. As an auditor I conduct what are known as data  
3 audits based on the available records.

4 Q. Is it fair to say then that other individuals can also  
5 look at that same case file and reach their own  
6 analytical conclusions?

7 A. Sure.

8 MS. SRA: Okay. I don't have any other questions for  
9 this witness.

10 THE COURT: All right. Thank you.

11 Any redirect?

12 MS. WHYTE: Yes, Your Honor. Thank you.

13

14 R E D I R E C T - E X A M I N A T I O N

15 BY MS. WHYTE:

16 Q. Ms. Arvizu, the attorney for the City just asked you if  
17 you can look at the case file and draw your own  
18 conclusion, something to that effect.

19 A. Yes, I can draw conclusions as to whether or not the  
20 reported result is supported by the underlying data in  
21 the record.

22 Q. Does that mean that you can draw your own conclusion  
23 about whether that result is accurate?

24 A. I cannot based on the review of the records draw a  
25 conclusion for that individual person that processed that

## CROSS BY SRA/ARVIZU

1 specific sample. Essentially that these records  
2 represent an accurate reflection of that individual's  
3 work, I can't draw that conclusion. But I can draw a  
4 conclusion as to whether the records that exist support  
5 the reported result.

6 Q. So how is -- how are those two things different?

7 A. Records -- our obligations as professional scientists is  
8 to produce -- contemporaneously while we're doing work  
9 produce (inaudible) of our work that is accurate and  
10 complete such that another analyst could come in and  
11 evaluate the work and repeat the work in conditions as  
12 close as possible to the original work. That's so that  
13 we don't have to rely on our memory of what was done,  
14 that the records support it.

15 However, we depend on that individual honestly and  
16 completely documenting what they did in an accurate  
17 manner. I can't say whether or not a person does that as  
18 an independent reviewer. Only that person can tell you  
19 that this -- yes, this is an accurate and complete  
20 representation of my work. I physically picked up that  
21 sample and processed it. As an independent reviewer, all  
22 I can say is that these records indicate that a sample  
23 with that identification was processed.

24 Q. Can I also ask you just two quick questions, one about  
25 raw data. To clarify is that always only electronic?



## CROSS BY SRA/ARVIZU

- 1 A. For this particular type of technique, yes.
- 2 Q. You never have raw data on paper?
- 3 A. Oh, yes, there are techniques that are done in a  
4 laboratory where --
- 5 Q. I'm sorry.
- 6 A. -- you have raw data on paper.
- 7 Q. For in the case of the G C technique?
- 8 A. At this point in analytical chemistry, G C instruments  
9 always generate an electronic data set, always. I don't  
10 know of any laboratory in the country that's not using a  
11 computer-controlled system.
- 12 Q. Okay. So if someone was only reviewing paper and not an  
13 electronic file, they can't possibly be reviewing raw  
14 data?
- 15 A. That's correct.
- 16 Q. You also mentioned really quickly -- Ms. Sra had  
17 cross-examined you on some accreditation and ISO  
18 requirements. Does the fact that a lab requires -- is  
19 accredited and supposed to comply with ISO requirements  
20 mean that a lab always does?
- 21 A. No. The burden of proof is always on the laboratory to  
22 prove that they're complying with requirements. And as a  
23 practical matter accreditation doesn't ensure that  
24 everything that a laboratory does is in compliance with  
25 the requirements.

## CROSS BY SRA/ARVIZU

1 Many of the labs that have been closed, forensic labs  
2 that have been closed for fraud or incompetence in recent  
3 years were accredited at the time they closed.

4 But accreditation does put in place the systems that a  
5 lab should be able to produce the records and the  
6 competent people to prove that their work is acceptable.

7 Q. Are there any cases that you're familiar with in which  
8 the Washington State Patrol toxicology lab in particular  
9 doesn't quite meet the -- all of the requirements that  
10 it's supposed to under its accreditation standards?

11 A. Oh, absolutely, yes, very important requirements.

12 Q. Can you give a brief example of what some of those  
13 requirements are where the Washington State Patrol  
14 laboratory is required to do things by its accreditation  
15 standard but isn't doing them.

16 MR. KARR: Objection to relevance.

17 THE COURT: Counsel.

18 MS. WHYTE: Your Honor, this -- the City had crossed --  
19 devoted a significant portion of its cross to whether or  
20 not Ms. Arvizu was aware that the Washington State Patrol  
21 lab was subject to accreditation, that as a result there  
22 were standards that came along with that, and so I think  
23 it's important for Ms. Arvizu to be able to provide  
24 information that just because it -- she answered yes to  
25 those questions asked by the City doesn't mean that the

CROSS BY SRA/ARVIZU

1 Washington State Patrol lab is in fact in full compliance  
2 with its accreditation standards, and on the contrary in  
3 her personal experience and her professional experience  
4 it is not.

5 THE COURT: Okay. So I think that she did answer that  
6 question that just because the lab is accredited doesn't  
7 mean that they're in compliance with the requirements, so  
8 I don't -- I don't see that we need to go further for her  
9 to list the areas where they're not in compliance because  
10 the issue is more with whether or not the person who did  
11 the testing versus the reviewer, so I don't see how going  
12 further into the lab's efficiency -- you've established  
13 that the lab -- she says that they haven't always been in  
14 compliance, so I'm going to say that we should move on.

15 MS. WHYTE: Well, if I could just briefly (inaudible)  
16 just it would be that I think a lot of what the City has  
17 argued in its briefing is -- and also from Mr. Capron's  
18 testimony was that because there are standards in place,  
19 we know that that's how the samples are reliable.

20 THE COURT: But I think she's testified exclusively --  
21 extensively that that's not the case.

22 MS. WHYTE: Okay. Thank you, Your Honor. No further  
23 questions.

24

25

## REDIRECT BY WHYTE/ARVIZU

1

2

3

4

5

6

THE COURT: All right. So I want to do your arguments.

7

But are we going to be able to -- I don't know how long you

8

all have anticipated.

9

Are you able to get them done by 4:30?

10

MR. KARR: Well, Your Honor, we haven't concluded

11

Mr. Capron's testimony yet, so the City's not (inaudible).

12

THE COURT: Oh, that's right.

13

MR. KARR: -- actually present arguments until

14

(inaudible).

15

THE COURT: That's right. Because you didn't get a chance

16

to -- you crossed him, but you wanted to have more redirect.

17

MR. KARR: That's correct, Your Honor.

18

THE COURT: Okay. So I think this is a good time to end

19

then. Forgotten about that. So this is a good time for us

20

to recess, because there's nothing else that we can do this

21

morning. Are we doing -- are we done with this witness for

22

today?

23

MS. SRA: Yes, Your Honor.

24

THE COURT: All right. And we need her back in the

25

morning or afternoon? Figure out what's going on with the

REDIRECT BY WHYTE/ARVIZU

1 rest of the trial.

2 MS. WHYTE: I think since we've split the testimony, then  
3 we may potentially need her back.

4 THE COURT: So you want her in the morning? All right.  
5 So we're going to reconvene at 9:00.

6 I think the parties -- I don't think there is any way that  
7 we're going to be able to finish the trial by tomorrow.

8 And your witness isn't available, right, after 1:30 if she  
9 were needed for the trial; is that right?

10 MS. WHYTE: That's right, Your Honor.

11 THE COURT: Okay.

12 MS. SRA: And, Your Honor, just so the Court is also  
13 aware, Mr. Capron is not available after noon tomorrow, and  
14 he is unavailable on Friday. So the City has some  
15 scheduling issues as well.

16 THE COURT: All right. So it sounds like that -- I'm  
17 always reluctant to pick a jury if we know they're going to  
18 have to come back another week. Because generally we lose a  
19 lot of people for that -- for that reason. They don't want  
20 to come back. So they would have to come back next week,  
21 which I don't know how that would work, because we're at the  
22 jail.

23 MR. KARR: Your Honor, that would be -- that's what the  
24 City was referring to earlier. It would make sense, given  
25 the scheduling issues for both of the City's expert

REDIRECT BY WHYTE/ARVIZU

1 witnesses, and since we've already started motions in  
2 limine, to set this over to a time in which Ms. Arvizu would  
3 be able to be present again. I know that she's coming in  
4 from out of state.

5 THE COURT: So let's finish up tomorrow. We'll finish up  
6 the motion part, and then we'll talk after that further  
7 about the rescheduling portion. Okay?

8 MS. SRA: Thank you, Your Honor.

9 MS. WHYTE: Thank you, Your Honor.

10 MR. KARR: Thank you, Your Honor.

11 THE COURT: Then we'll just come back at 9:00 tomorrow,  
12 because it's not going to make a difference to go faster.

13 UNIDENTIFIED FEMALE: (Inaudible).

14 (January 9, 2019, conclusion of hearing)

15

16

17

18

19

20

21

22

23

24

25

C E R T I F I C A T E

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

STATE OF WASHINGTON )  
 )  
COUNTY OF SNOHOMISH )

I, the undersigned, do hereby certify under penalty of perjury that the foregoing court proceedings, recorded statements, hearings and/or interviews were transcribed under my direction as a certified transcriptionist; and that the transcript is true and accurate to the best of my knowledge and ability, including any changes made by the trial judge reviewing the transcript; that I am not a relative or employee of any attorney or counsel employed by the parties hereto, nor financially interested in its outcome.

IN WITNESS WHEREOF, I have hereunto set my hand this 13th day of March, 2019.

\_\_\_\_\_  
Bonnie Reed, CET