

1 IN THE MUNICIPAL COURT FOR THE CITY OF SEATTLE

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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 III

10 The Honorable Anita Crawford-Willis Presiding

11 January 10, 2019
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21 TRANSCRIBED BY: Bonnie Reed, CET
22 Reed Jackson Watkins, LLC
23 Court-Approved Transcription
24 206.624.3005
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WITNESS:

BRIAN CAPRON

Redirect Examination by Ms. Sra.....314

Recross Examination by Ms. Whyte.....338

Further Redirect Examination by Ms. Sra.....349

JANINE ARVIZU

Further Redirect Examination by Ms. Whyte.....352

Further Recross Examination by Ms. Sra.....362

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January 10, 2019

THE COURT: Thank you. Good morning.

MS. SRA: Morning, Your Honor.

MS. WHYTE: Good morning.

MR. KARR: Good morning, Your Honor.

MR. BURNTON: Good morning, Your Honor.

THE COURT: Ms. Sra?

MS. SRA: Good morning, Your Honor. Gory Sra on behalf of
the City, alongside Chris Karr.

This is the matter of Roosevelt Wiggins, Cause No. 633895.
We are continuing with motions from yesterday.

What we did forget to do yesterday was put that side bar
on the record.

THE COURT: Yes.

MS. SRA: So I just wanted to --

THE COURT: Thank you.

MS. SRA: -- remind the Court of that --

THE COURT: We'll do that.

MS. SRA: -- before we proceeded.

THE COURT: Thank you.

MS. SRA: Mr. Capron is here, and so we can proceed with
motions --

THE COURT: Right.

1 MS. SRA: -- right after that.

2 THE COURT: All right.

3 MR. KARR: Your Honor, just -- Christopher Karr on behalf
4 of the City.

5 Just put the side bar on the record, it happened at
6 approximately 3:50 yesterday afternoon. There was an
7 objection by Defense to a line of questioning from the City
8 asking Ms. Arvizu if she was aware of what Mr. Capron had
9 reviewed in coming to his own independent opinion about
10 contents of Mr. Wiggins's blood.

11 During the objection the City had noted a (inaudible)
12 objection to informing the defendant -- or I'm sorry,
13 informing Ms. Arvizu of some of the additional facts. We
14 took a side bar to discuss that.

15 At the side bar the Defense had objected based on the fact
16 that Ms. Arvizu was not allowed to be in the room to hear
17 the testimony, and otherwise would have known what
18 Mr. Capron had reviewed in his analysis.

19 The Court had suggested that the reason that we exclude
20 witnesses during this type of hearing is so that they
21 testify to their personal knowledge while they are
22 testifying, and that ultimately the City's motion was going
23 to be -- or the line of questioning the City was asking was
24 sufficient, and overruled the objection.

25 THE COURT: Thank you.

1 MS. WHYTE: Thank you, Judge. I would just add that
2 Defense did note that, while it is true that typically lay
3 witnesses are restricted by the rules of evidence to
4 testifying just to matters within their personal knowledge,
5 that prohibition does not apply to expert witnesses, and
6 that there had been some confusion, but Defense's
7 understanding was that previously the Court's ruling had
8 been to allow Ms. Arvizu to sit in on testimony -- Defense's
9 understanding was for both the motion and the trial, but
10 either way, it was on this idea that experts can base their
11 opinions on things that they hear, including the testimony
12 of other experts, so that they can be able to respond and
13 provide the factual information for the Court.

14 And so then after the City had made a new motion the next
15 day to exclude her from the courtroom, that Defense felt
16 that then to inquire into things that she didn't know by
17 virtue of her being excluded (inaudible). Thank you.

18 THE COURT: Thank you. Just to add further, so my intent,
19 when we talked about her sitting in, I wasn't at that point
20 thinking about the motion. It was just for the trial.

21 And the question that asked, I felt that it didn't matter
22 whether she had been in or not; it was just asking whether
23 or not she knew. And so based on that, too, I felt that it
24 was appropriate.

25 So thank you, parties, for putting that on.

1 So my understanding now is that we're going to have Mr. --
2 finish Mr. Capron, and I believe -- was it redirect?

3 MS. SRA: That's --

4 MR. KARR: That's -- go ahead.

5 MS. SRA: That is correct, Your Honor.

6 THE COURT: All right. Then if --

7 MS. SRA: City would also be calling him as rebuttal at
8 this time. So just (inaudible).

9 THE COURT: And then is your witness still here to, if you
10 wanted to call her again?

11 MS. WHYTE: Yes, Your Honor. Since the City's recalling
12 Mr. Capron, I think there might be -- we are reserving the
13 right to recall --

14 THE COURT: Great.

15 MS. WHYTE: -- Ms. Arvizu, yeah. Thank you.

16 THE COURT: All right. Thank you.

17 MS. WHYTE: She is outside.

18 THE COURT: All right. Great.

19 MS. SRA: City will call Brian Capron to the stand. I
20 will go and get him.

21 THE COURT: Thank you. And good morning to the parties,
22 by the way, Mr. Burnton, Mr. Wiggins, Ms. Whyte.

23 MR. BURNTON: Good morning, Your Honor.

24 MS. WHYTE: Good morning, Your Honor.

25 MR. WIGGINS: Good morning.

1 THE COURT: Mr. Karr.

2 MR. KARR: Good morning, Your Honor. I think at some
3 point we should have a conversation about filling this with
4 coffee instead of water.

5 THE COURT: That's a good idea.

6 MR. KARR: Want to fill these up with coffee next time?

7 MS. SRA: Especially in the morning. Just, just till
8 noon, then we can switch over to water.

9 THE COURT: You've been previously sworn. So you're
10 (inaudible). Thank you. Would you like water, sir?

11 MR. CAPRON: I would.

12 THE COURT: All right.

13

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

15 BY MS. SRA:

16 Q. And good morning, Mr. Capron.

17 A. Good morning.

18 Q. In your review of the case file of Mr. Wiggins and your
19 review as an independent reviewer, do you have knowledge
20 regarding when the ampules were -- the ampules that are
21 used for the calibrators, when they were opened?

22 A. That is data that is available at the laboratory, yes.
23 All that stuff is tracked.

24 Q. And in this specific case, do you know when those ampules
25 would have been opened?

1 A. In this particular case the calibraters were prepared
2 seven days before the test on Mr. Wiggins's blood.

3 Q. Okay. And can you describe the difference between the
4 data that is collected between the confirmatory tests
5 versus the chromatogram for the difference between those
6 two?

7 A. The -- I mean, the confirmatory test creates the
8 chromatograph.

9 Q. Uh-huh.

10 A. So are you talking about the different type of testing
11 and what they produce, like volatile testing versus EMIT
12 testing versus confirmation testing?

13 Q. So the -- I guess for ethanol testing, are we dealing
14 with confirmatory tests or chromatograms?

15 A. The first one is considered like a screen test because
16 you're looking to see is it positive or negative.

17 Q. Uh-huh.

18 A. If it's positive, then you would do a second test. So
19 then you look at those two results. And if those two
20 results agree within plus or minus 10 percent of the
21 mean, then you're done as far as ethanol testing is
22 concerned.

23 Q. Okay. Let's talk a little bit about the accreditation --
24 the accreditations that the tox lab has.

25 A. Okay.

1 Q. What are those accreditations?

2 A. We're accredited by the American Board of Forensic
3 Toxicology, ABFT, and we are accredited by ASCLD Lab,
4 which has been bought out by ANAB.

5 Q. Okay. And under any of those accreditations and to keep
6 those accreditations, do you have to have records that
7 support conclusions that in the absence of a
8 toxicologist, such as in this case the absence of
9 Ms. Mitchell-Mata who now resides in Ohio --

10 MS. WHYTE: Objection. Counsel is testifying.

11 THE COURT: So, Counsel, could you rephrase your
12 question.

13 MS. SRA: Sure.

14 THE COURT: Thank you.

15 Q. (By Ms. Sra) Do you have records that -- or do you have
16 requirements that under any of these accreditations, that
17 you have to have records kept that in the absence of a
18 toxicologist, that another competent reviewer can analyze
19 that data and come to their own independent conclusion?

20 A. Yes.

21 Q. And what specifically is that accreditation?

22 A. That would be in the supplement requirements for the
23 ASCLD Lab.

24 Q. Okay. And does Washington State tox lab comply with that
25 requirement?

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1 A. Yes, we do because we're accredited by that entity.

2 We've been subjected to inspections as well.

3 Q. And, Mr. Capron, do you have any -- do you have any
4 training or experience in being a technical assessor and
5 auditor for labs?

6 A. I do.

7 Q. And would you please expand on that.

8 A. So I went through training with ASCLD Lab to be an
9 internal auditor and also a technical assessor meaning
10 that I went to the training, passed the exam, and now I'm
11 able to go out and assess other laboratories on an
12 as-needed basis.

13 Q. Okay.

14 MS. WHYTE: Your Honor, I guess I would object to this
15 line of questioning as being outside the scope of cross.

16 MS. SRA: And, Your Honor, the City did note that we
17 were recalling Mr. Capron as both redirect and rebuttal
18 for efficiency sake.

19 MS. WHYTE: And, Your Honor, I'm not sure that -- I'm
20 not sure what authority the City has to be able to call
21 him for rebuttal at a motion hearing.

22 MR. KARR: Your Honor, the -- and this might be a
23 situation where Mr. Capron should step off --

24 THE COURT: Can we --

25 MS. SRA: -- the stand.

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1 (Mr. Capron leaves the stand.)

2 MS. WHYTE: I guess I would also note, Your Honor, an
3 objection to the City not following the one lawyer one
4 witness rule. I think in the spirit of, kind of, you
5 know, letting things kind of move along, I didn't object
6 to this yesterday, but there's been a lot of -- with
7 Mr. Karr jumping onto this motion, kind of Ms. Sra asking
8 questions, but then Mr. Karr jumping in to offer
9 argument, and Mr. Karr jumping in to make objections and
10 offer his opinion.

11 And Mr. Burton and I are co-counseling for Mr. Wiggins
12 and have tried to observe the practice that is typically
13 required of one lawyer dealing with argument, objections,
14 cross on a witness, and then the other lawyer kind of
15 dealing with their individual piece of the trial. So I
16 would ask that the City be required to follow that rule
17 as well.

18 MR. KARR: Your Honor, I believe it's been pretty well
19 documented on the record that I haven't asked a single
20 question of any witness. I've offered limited objection
21 when necessary.

22 But if the Court or counsel has a problem with me
23 objecting, I can leave that to Ms. Sra. However, when it
24 comes to legal argument, I think the City is well within
25 its right to provide legal argument from any attorney who

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1 is sitting on the case, and that would be me as well at
2 this point.

3 THE COURT: Okay. So first of all I guess we didn't
4 talk about it at the beginning because actually Mr. Karr
5 wasn't here at the beginning, and so I didn't impose the
6 one lawyer per witness type of rule. And it's -- so that
7 was my fault, because I didn't -- I didn't address it
8 because he wasn't here the first day I don't believe.

9 But I -- I didn't hear you say that you were acting as
10 co-counsel, so I assumed your role was more assisting as
11 a -- in the supervisory role, so that's why I didn't --

12 MR. KARR: Yes and no, Your Honor.

13 THE COURT: -- really have an issue with you helping
14 with the arguments.

15 I think on the Defense side too when people have sat --
16 when there's been a supervisor that has sat with someone,
17 and they wanted to stand up and do the argument, I always
18 let them.

19 But we didn't talk about the ground rules here, so I
20 didn't understand that Mr. Karr was actually co-trying
21 the case, more as a --

22 MR. KARR: I'm not co-trying the --

23 THE COURT: -- supervisor.

24 MR. KARR: Your Honor, I'm not co-trying the case. I
25 am assisting with the motion. And that's my only role

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1 here is to assist with this part of the proceedings.

2 THE COURT: So, Mr. Karr, if you could just I think --
3 and again when I've had both sides that had someone like
4 a supervisor, I do allow the supervisor to step in and
5 help. But if we're co-trying, then I do ask to have --
6 to know who's going to do what.

7 MR. KARR: Certainly, Your Honor, I --

8 THE COURT: So I didn't have an issue with you jumping
9 in because again I didn't think you were co-trying the
10 case.

11 MR. KARR: And I'm not, Your Honor, but just for the
12 sake I think of -- in the spirit of what counsel is
13 talking about, I'll refrain from objecting. And I'm
14 obviously not questioning any of the witnesses.

15 THE COURT: Right.

16 MR. KARR: But when it comes to argument, I do think
17 that the City can offer arguments from either of the
18 attorneys since we are not in front of a jury, and it's
19 just at this point a preliminary hearing.

20 THE COURT: Okay. So let's get back to the original
21 reason we sent Mr. Capron out.

22 MR. KARR: And, Your Honor, I think counsel raised an
23 argument about calling him as a rebuttal witness. There
24 was a number of things that Ms. Arvizu testified to
25 yesterday regarding that a Washington state toxicology

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1 lab -- which frankly she doesn't have a sufficient basis
2 to testify to having never worked there and never
3 interviewed or spoken with anyone. Frankly a lot of the
4 things that she has testified to are not correct in the
5 way the toxicology lab functions and were actually
6 incorrect in terms of their standard operating procedure.

7 I think the City is within its right to call Mr. Capron
8 back to the stand to clarify what the standard operating
9 procedure actually directs them to do and rebut
10 Ms. Arvizu's testimony that there is a great amount of
11 discretion on the testing toxicologist, which actually
12 under the standard procedure they do not have the amount
13 of discretion that Ms. Arvizu had testified to.

14 THE COURT: All right. Thank you.

15 Go ahead, Counsel.

16 MS. WHYTE: Thank you, Your Honor. I guess first of
17 all the City hasn't provided any authority for stating
18 that they have the right to call Mr. Capron as a rebuttal
19 witness.

20 On the contrary, the Washington Practice Manual,
21 section 6.11.16 about rebuttal witnesses indicates that
22 it's only allowed to enable the Plaintiff to answer a new
23 matter presented by the Defense. Genuine rebuttal
24 evidence is not simply a reiteration of evidence in chief
25 but consists of evidence offered in reply to new matters.

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1 The Plaintiff therefore is not allowed to withhold
2 substantial evidence supporting any of the issues which
3 it has the burden of proving in its case in chief merely
4 in order to present this evidence cumulatively at the end
5 of Defendant's case.

6 Your Honor, the City had ample opportunity -- this
7 witness, Ms. Arvizu, was disclosed in October. The City
8 has had ample opportunity to interview her and find out
9 what it is that she's going to testify about. It's not a
10 surprise. She's testified to the exact same things in
11 other cases.

12 She did lay a foundation for how it is that she knows
13 what the policies and practices are of the Washington
14 State Patrol toxicology lab. As she indicated, those
15 policies and practices are available. They have been
16 disclosed by the Washington State Patrol to her. She has
17 audited literally dozen of cases that have come out of
18 the lab.

19 I don't think it's at issue here what Mr. Karr's
20 opinion is of how the toxicology lab presents its data or
21 trains its analysts or operates or whether it operates in
22 accordance with the standard operating procedures or not.

23 I think the City has a couple of times attempted to
24 offer its opinion about what Ms. Arvizu knows or what she
25 could possibly inform the Court of or what -- how things

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1 work.

2 But the fact of the matter is in an evidentiary hearing
3 like this one where the Court is gathering facts in order
4 to draw a legal conclusion, that those issues are to be
5 addressed by the witnesses only and not by the parties in
6 the form of testifying or offering their opinions, and
7 by parties I mean counsel, subject to the rules of
8 evidence and the local rules and the rules of practice.

9 So I think, you know, for the City -- the City would
10 have to claim that this is -- in order to offer him as a
11 rebuttal witness that this is in response to new
12 information that has just come out.

13 And the fact of the matter is Ms. Sra interviewed
14 Ms. Arvizu at length and had the opportunity to hear all
15 of this, every single thing that Ms. Arvizu testified to.
16 So it's not new evidence for them.

17 They could have prepared their witness to talk about
18 anything that they wanted to talk about. And I think --
19 I think that it really needs to just be the Court that
20 makes its decision based on the evidence that comes in
21 through the witnesses only in accordance to the rules.

22 MR. KARR: And, Your Honor, first of all I'll point the
23 Court to Evidence Rule 11.01(C), which does allow for a
24 relaxed standard of evidence. I think counsel's
25 referencing Evidence Rule 6.11, which states essentially

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1 that rebuttal evidence is for new evidence. However, at
2 a motions hearing that's pre-trial, the Court has a
3 vested interest in getting all of the information to make
4 that legal determination.

5 Now, there is new information that Ms. Arvizu said in
6 her testimony here and frankly things that were -- and
7 this is not my opinion. This is based almost entirely on
8 the standard operating procedure and what Mr. Capron can
9 testify to in rebuttal, that the testing analyst does not
10 have the amount of discretion that Ms. Arvizu suggested
11 in her direct examination when counsel had her on the
12 stand.

13 The only way the City can rebut that and give the Court
14 a clear picture of exactly what we're dealing with here,
15 whether or not Mr. Capron actually has the ability to
16 testify and satisfy the confrontation clause, that's the
17 only way the City can rebut that and give the Court a
18 clear idea.

19 And I would ask the Court to allow him to provide that
20 evidence so that we can all have a pretty clear
21 understanding of what he can and cannot do in this case.

22 THE COURT: Thank you. All right. So I'm going to --
23 I'm going to allow him to give that testimony. And let's
24 call him back in, so we can keep moving.

25 (Mr. Capron returns to the stand.)

REDIRECT BY SRA/CAPRON

1 THE COURT: Go ahead.

2 MS. SRA: Thank you, Your Honor.

3 Q. (By Ms. Sra) So, Mr. Capron, are there standard
4 operating procedures for how the -- how every
5 toxicologist that's working at the lab is supposed to do
6 the testing?

7 A. Yeah, each test that we perform, there's a separate SOP
8 for each one.

9 Q. And so is it fair to say that every toxicologist is
10 instructed to perform --

11 MS. WHYTE: Objection.

12 Q. (By Ms. Sra) -- the tests the same way?

13 MS. WHYTE: Leading.

14 THE COURT: Okay. You can respond.

15 MS. SRA: Your Honor, I'll just rephrase the question.

16 THE COURT: All right. Thank you.

17 Q. (By Ms. Sra) Mr. Capron, is every toxicologist
18 instructed to perform the test in the same way?

19 A. Yes, because there's a standard operating procedure that
20 details with how each test is performed, what steps you
21 do to extract the sample, things of that nature.

22 Q. And are you familiar with exactly what Ms. Mitchell-Mata
23 would have done in this particular case?

24 A. She would have followed the SOP for volatile testing for
25 EMIT screening and for cannabinoids confirmation testing.

REDIRECT BY SRA/CAPRON

1 Q. And let's talk a little bit about Ms. Mitchell-Mata. How
2 long did she work for the tox lab?

3 A. Ten-plus years.

4 MS. WHYTE: Objection. Relevance. Hearsay.

5 MS. SRA: And, Your Honor, I -- it is highly relevant.
6 That's the individual that we're dealing with that
7 Ms. Arvizu testified at length about.

8 THE COURT: All right. Thank you. Overruled.

9 Q. (By Ms. Sra) And during her -- strike that. Does your
10 lab engage in any proficiency testing as it relates to
11 toxicologists?

12 A. Yes.

13 Q. And was Ms. Mitchell-Mata subject to this proficiency
14 testing?

15 A. Yes, she was.

16 Q. And can you elaborate on what this testing is.

17 A. So we do proficiency testing for volatile substances so
18 alcohol, methanol, ethanol, acetone, et cetera, and then
19 we also do drug proficiencies.

20 So we are sent proficiencies by outside providers.
21 They're unknown. We don't know what the results are, so
22 we subject them to testing just like we would any other
23 case that we receive. When we're done with the testing
24 and the review, then we submit those results to the
25 agency that sent it to us.

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1 And then generally these are agencies -- an entity
2 sends proficiency tests out to numerous toxicology labs,
3 and they compile all that data, and then they report back
4 to allow you (inaudible).

5 Q. And do you know how Ms. Mitchell-Mata performed on these
6 proficiency tests?

7 MS. WHYTE: Objection. Foundation. Lack of personal
8 knowledge.

9 THE COURT: Okay. I would agree with that, Counsel,
10 regarding foundation.

11 MS. SRA: Okay.

12 Q. (By Ms. Sra) And, Mr. Capron, do you know if in this
13 case the blood was free-flowing and without issue?

14 MS. WHYTE: Objection. Foundation. Lack of personal
15 knowledge. The witness has already testified that he did
16 not observe the testing.

17 MS. SRA: And, Your Honor, that's not the same thing.
18 The witness has not testified that he's not aware. If he
19 has knowledge, he may answer. He's certainly laid the
20 foundation.

21 THE COURT: All right. So I guess the foundation, are
22 you talking about previously in the -- in his earlier
23 testimony?

24 MS. SRA: That's correct, Your Honor.

25 THE COURT: Okay. Go ahead. You may answer if you

REDIRECT BY SRA/CAPRON

1 know.

2 A. If there are any observations made when the sample
3 arrives in the laboratory either by the property and
4 evidence custodian or the toxicologists themselves, it's
5 notated. There's a section on the request form which is
6 for lab use only.

7 So if a sample comes in, and it's not evidence sealed,
8 that would be notated. If something comes in, and, you
9 know, the evidence tape is broken or whatever, that is
10 notated. If the sample was clotted, that would be noted
11 as well.

12 So there are different types of things that would be
13 notated. So the lack of notation means that there was
14 nothing out of the ordinary with that sample.

15 Q. (By Ms. Sra) And is that in comport with the -- with
16 your standard operating procedures that you would note if
17 something was amiss but otherwise not note it?

18 A. Yeah, any discrepancy is notated.

19 Q. Okay. And before you review -- before you reviewed this
20 particular case file, had the batch that this particular
21 test came from been reviewed?

22 A. Yes.

23 Q. And who had that been reviewed by?

24 A. I would have to look. She performed four different
25 tests, so she had two ethanol results. Those batches

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1 would have been reviewed by somebody. She had EMIT
2 screening, which would have been reviewed by somebody.
3 And then she had confirmatory testing that was reviewed
4 by Dr. Peterson actually.

5 Q. Okay. And is that in comport with your procedures when
6 it comes to reviewing a case file that the batches must
7 be reviewed?

8 A. Yeah, batches are reviewed before a final report is even
9 produced.

10 Q. Okay. Does the lab have checks in place to ensure that
11 errors are caught in testing?

12 A. That's why we have the multi-tier review system. So
13 you've got the actual toxicologist doing the test. They
14 review their data. That's then subjected to review by
15 another person. And then you've got final review of the
16 entire case contents and the final report. So there are
17 different levels of review along the way before it
18 actually gets signed out.

19 Q. Okay. And is the information in the case file such as
20 the chromatograms processed data?

21 A. Essentially, yes. It's data that's either generated by
22 the -- for volatiles we program the instrument after
23 we've done the aliquoting. And then we hit go. And
24 every two or three, four minutes a result prints out.
25 And that's all done three or four hours later. Then the

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1 toxicologist grabs that and goes through and reviews
2 their data.

3 On the EMIT screening, again you do the extraction.
4 You program the instruments. The instrument does the
5 analyzing and prints out data. When that's done, the
6 toxicologist reviews it.

7 Same thing with confirmatory testing. You do the
8 extraction, program the instruments. The instrument does
9 the analyzing of the sample. And then the toxicologist
10 will come and then generate the data that -- from that
11 batch. Then they would review it.

12 Q. So the chromatograms and the data, is that -- is that
13 then being processed by the instrument?

14 A. Some stuff is processed by the instrument and some is
15 processed -- I mean, they're all being processed by the
16 instrument. Some of it just automatically prints out.
17 Other stuff the analyst has to actually go and pull up
18 that batch and then print that batch.

19 Q. Okay.

20 A. Hit a button and print all the results from that batch.

21 Q. And so essentially the processed data is the raw data
22 because it's being automatically printed?

23 MS. WHYTE: Objection. I think counsel is testifying,
24 and I think that's not what the witness has --

25 THE COURT: Sustained. Rephrase the question.

REDIRECT BY SRA/CAPRON

1 Q. (By Ms. Sra) So is the processed data essentially raw
2 data?

3 MS. WHYTE: Objection. That's the same question.

4 MS. SRA: Your Honor, it's --

5 THE COURT: It was -- it's a different question, but
6 it's still bordering on --

7 But go ahead, you can answer.

8 A. The raw data -- I mean, there's data that is still housed
9 on the computers at the laboratory. So I could go back
10 today, and I could pull up a particular batch, a
11 particular S T number, and I could reprint that, and it
12 would match whatever's in that particular case file.

13 Q. (By Ms. Sra) Okay. So if you were to go back today to
14 the instrument that -- the data that is stored in the
15 instrument on the computer, what would you -- what would
16 you get? What would you see?

17 A. If we're talking about, let's say, the ethanol results, I
18 would go to the date that their test was performed. I
19 would go find exactly what number this particular case
20 was, in, you know, a set of 50 cases or whatever. I
21 could pull that up, print it out. And those results
22 would match what the results are in here.

23 Q. So you --

24 A. There's no additional data analysis. There's nothing
25 else I have to do. That data has been generated. It's

REDIRECT BY SRA/CAPRON

1 just simply me reprinting the data.

2 So if I were to drop my file on the way to the car, and
3 it went down into a sewer, I could go back to the
4 laboratory, pull up this particular case number. I know
5 each day that a test was performed. I could back to the
6 batch. I could get all that data. And then I could go
7 to the instrument and reprint all that data.

8 Q. So is it fair to say then the data that's stored is
9 identical to the data in the case file?

10 A. Correct. I wouldn't have to do anything different to it
11 or process it or anything. It's already been processed.
12 It's there.

13 Q. Okay. And when you're doing your technical review, what
14 parameters are you using?

15 A. I'm making -- you know, I'm doing my technical and
16 administrative review. I'm making sure the SOP's are
17 followed, so we've got criteria built into those SOP's as
18 far as control values, et cetera. They have to meet
19 that.

20 I've got to make sure that that batch -- that the
21 documentation for that batch says that all criteria was
22 met. I've got to make sure that there's two independent
23 tests for each result that ends up on the report. That's
24 what I'm using.

25 Q. Okay. And are these the same parameters that

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1 Ms. Mitchell-Mata would have used?

2 A. Yes.

3 Q. And let's talk a little bit about peaks in a
4 chromatogram.

5 A. Okay.

6 Q. So how would you know if Ms. Mitchell-Mata used the
7 default or integrated the peaks in this specific case?

8 A. If you do any type of manual integration on a peak, our
9 requirement is that you have the printout -- the original
10 printout. And then if you do a manual integration, then
11 you have to print out the manual integration.

12 So if something like that happens on the original data,
13 it may say see manual integration, and then the next page
14 would be the manually-integrated data.

15 Some of the conservatory tests we'll actually put a
16 little M next to it to show that it's been manually
17 integrated, but that's what we require before and after.

18 Q. And was there any manual integration in this particular
19 case?

20 A. No.

21 Q. Okay. Does -- let's go back to the standard operating
22 procedures that you have at the lab. Does the standard
23 operating procedure dictate calibration levels and how a
24 calibration is to be done?

25 A. Yes.

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1 Q. And would you please elaborate.

2 A. Each method that we have has been a validated method, so
3 we've done extensive testing. We've done carry-over
4 studies. We've done interference studies. We've done
5 how far or low we can actually detect, how high we can
6 actually detect.

7 So we produce calibrators, it depends on what test
8 you're doing, for a whole range. If you're doing opiate
9 testing, our lowest calibrator is 10 nanograms. Our
10 highest calibrator is 1,000 nanograms.

11 So we have a calibration that has been determined in
12 the laboratory through validation to be acceptable. We
13 run control values in that dynamic range.

14 Q. Uh-huh.

15 A. So each SOP has that. So for THC it has its own
16 calibration. For cocaine it has its own calibration.
17 Different levels depending on what drug.

18 Q. And does your standard operating procedure also dictate
19 when there's a need to test further -- or when further
20 testing is required in any given --

21 A. I mean, that's -- further testing is driven by what you
22 get off of your screening results.

23 Q. Okay.

24 A. So again, like, if a suspected DUI case comes in, and the
25 ethanol is negative, and the drug screen is negative,

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1 we're done. But if it lists a specific drug like Ambien,
2 then we know we have to do a more broad-based screening
3 in order to see that.

4 So cases -- again you have driving cases that have a
5 minimum of alcohol and ethanol -- or EMIT screen, and
6 then based off of those results it kind of dictates what
7 you do next.

8 Q. Okay. And does standard operating procedure dictate the
9 amount of a sample that's used for testing?

10 A. Yes, each extraction method has it's own different amount
11 that is used for the extraction. One extraction may be a
12 mil of a sample. Another may be 200 microliters.
13 Another may be a half a mil of a sample. And that again
14 is all driven by the validation and verification of the
15 method while it's in development.

16 Q. And so is it fair to say that every toxicologist is using
17 the same extracting technique or method?

18 MS. WHYTE: Objection. Foundation. Personal
19 knowledge.

20 MS. SRA: Your Honor, I believe --

21 THE COURT: I think the phrase -- I'm going to sustain
22 to the form of the question. I think there's another --
23 if you want to rephrase the question.

24 Q. (By Ms. Sra) Does your standard operating procedure
25 require that every toxicologist use the same technique

REDIRECT BY SRA/CAPRON

1 and method?

2 A. Yes. So I can't do my own method for a THC confirmation
3 and then a colleague of mine do a different one. We have
4 one THC extraction method. The individual has to be
5 certified to perform that test, so they've gone through a
6 certification process kind of like proficiency testing.
7 Usually it's anywhere from one, two, maybe even a
8 four-step certification process. Once they pass that
9 successfully, then the State Toxicologist authorizes them
10 to be able to perform that test.

11 Q. Okay. And does standard operating procedure also require
12 that any deviations be notated or --

13 MS. WHYTE: Objection. Asked and answered.

14 MS. SRA: I don't believe I've asked that.

15 THE COURT: I think you did. You asked about if there
16 was something out of the ordinary or different but --

17 MS. SRA: Okay. I can move on.

18 Q. (By Ms. Sra) Mr. Capron, does the testing toxicologist
19 have discretion to change these standard operating
20 procedures or not follow them?

21 A. No. There are instances when, let's say, the sample that
22 has come in, and we have a lot of testing to do on it, so
23 maybe when you get to that eighth or ninth test you don't
24 have a whole volume if it's a one mil sample volume to do
25 extraction. So at that point in time they can do

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1 dilutions. So they can use a half a mil. That's notated
2 on the work list.

3 Q. Uh-huh.

4 A. Any result would then be multiplied by two, et cetera.
5 So, I mean, I guess there's some discretion in very
6 limited instances. But for the most part, no. If it
7 calls for one mil to do an extract, that's what you use.

8 Q. And, Mr. Capron, in your review of this case file of
9 Mr. Wiggins, did you -- did you flag any deviations or
10 anomalies --

11 A. Other than --

12 Q. -- from your standard operating procedure?

13 A. Other than the one ethanol screen that didn't meet
14 criteria so the results were not used, and it was
15 properly documented, no.

16 Q. Okay. And in your own independent review as the
17 technical reviewer of this case file, were you able to
18 make -- come to your own independent conclusion as to the
19 contents of the defendant's blood?

20 A. Yes.

21 MS. SRA: And I don't have any further questions.

22 THE COURT: Thank you.

23 Counsel.

24 MS. WHYTE: Thank you, Your Honor.

25

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1 R E C R O S S - E X A M I N A T I O N

2 BY MS. WHYTE:

3 Q. Good morning, Mr. Capron.

4 A. Good morning.

5 Q. We appreciate you being here for three days. I know it
6 can't --

7 A. You got to do what you got to do.

8 Q. It can't have been easy.

9 THE COURT: Just one moment. That reminds me. I'm
10 just confirming that we are not going to be pushing
11 forward for trial today, so I'm going to have
12 Madam Bailiff let the jurors know so that they can be
13 released.

14 MS. SRA: No objection.

15 MS. WHYTE: I think we understand. I think we'll want
16 to address it later, but I understand given the
17 circumstances. Thank you.

18 THE COURT: Go ahead. I'm sorry.

19 MS. WHYTE: Thanks.

20 Q. (By Ms. Whyte) So, Mr. Capron, you have a lot of
21 policies and procedures in place in your lab?

22 A. We do.

23 Q. But your toxicologists -- your forensic toxicologists are
24 human beings?

25 A. They are.

REDIRECT BY SRA/CAPRON

1 Q. And they have training?

2 A. They do.

3 Q. You require college degrees?

4 A. We do.

5 Q. In specific disciplines?

6 A. Yes.

7 Q. And that's because you need training to do this testing?

8 A. That's correct.

9 Q. So if someone like me who -- or someone who doesn't have
10 a degree in hard science walks into your lab, grabs a
11 couple samples, tries to run a gas chromatograph, it's
12 not going to produce very good results; fair to say that?

13 A. Probably not.

14 Q. Is it your testimony today that every forensic
15 toxicologist in your lab has always followed every
16 standard operating procedure simply because that standard
17 operating procedure was in place?

18 A. There have been errors that have been made, but that's
19 why we have the multi-tiered review system in place, to
20 catch those errors.

21 Q. Uh-huh.

22 A. So it could be -- you know, you have your standard
23 operating procedure, but you accidentally instead of
24 pipetting 20 microliters of something in a control, you
25 accidentally pipetted 40 microliters. Did you not follow

RECROSS BY WHYTE/CAPRON

1 the SOP? Yeah, you didn't.

2 But then again that is caught upon review by the
3 toxicologist when they get their data back, and their
4 control value is out. And then when it's reviewed, the
5 batch itself is reviewed.

6 Q. Uh-huh. So my question, Mr. Capron, is that just because
7 a policy is in place doesn't mean that those policies are
8 always followed every time; is that correct?

9 A. Yes. There are errors that occur, correct.

10 Q. And it's the case that sometimes errors aren't caught; is
11 that right?

12 A. That's why we do two independent tests, to make sure that
13 the results agree within plus or minus 10 percent for an
14 ethanol screen. That's why we have a screen positive
15 for, you know, amphetamines, and then we have
16 confirmatory data showing that we saw the presence of
17 amphetamine and meth and then a quantity. So we build in
18 these safeguards to ensure stuff like that doesn't
19 happen.

20 Q. So understanding that the toxicology lab has procedures
21 in place and has checks and reviews, it's your testimony
22 that your laboratory has always caught every single error
23 that has ever been made?

24 A. I don't think that there's probably any lab --

25 MS. SRA: Objection, Your Honor.

RECROSS BY WHYTE/CAPRON

1 A. -- in the world that can say that. Maybe there is
2 something that has gone --

3 THE COURT: Just one second.

4 MS. SRA: It's been asked and answered. It's
5 belaboring the point. This is now the fourth question
6 along this --

7 THE COURT: Okay. I think it was a different question.
8 You can answer, sir.

9 A. I think I did. Sorry.

10 THE COURT: Okay. I'm sorry. So we just need to wait
11 when there's an objection --

12 THE WITNESS: Okay.

13 THE COURT: -- so I can hear what it is.

14 But do you want him to repeat it?

15 MS. WHYTE: Yes, please, Your Honor.

16 A. Is -- ask it again. I'm sorry.

17 Q. (By Ms. Whyte) Understanding no one is disputing here
18 that you have procedures in place, you're toxicologists
19 who are trying to do your best job. You're scientists.
20 You're professionals. You've got your standards in
21 place, and you've got people reviewing them trying to
22 catch mistakes.

23 But what my question is is it your testimony that just
24 by virtue of that, you can guarantee that you and your
25 lab -- you as a collective have caught every single error

RECROSS BY WHYTE/CAPRON

1 that the human beings in your lab have ever made?

2 A. I can't say that that -- I don't know. I can't say that
3 an error went out, and we missed it. That's why we do
4 duplicate testing. That's why we have those things in
5 place. We can do a retest of the sample. There are a
6 number of things that could happen.

7 Q. Now, you noted -- for example, the City asked you
8 questions like did you -- whether you knew whether the
9 blood was coagulated or had any issues or that kind of
10 thing, and you indicated that you did know that because
11 there were no notations?

12 A. Correct.

13 Q. So in those cases, for example, you're relying on the
14 fact that Ms. Mitchell-Mata would have noted that in
15 accordance with standard operating procedures if it had
16 been the case, correct?

17 A. That's correct. The property and evidence custodians
18 could have noted it. Christie could have noted it. I
19 could go back to the blood tube if we still retain it and
20 look at it and inspect it as well.

21 Q. Okay. But you didn't have any knowledge of what the
22 blood vial looks like at the time that it was tested,
23 personal knowledge?

24 A. I can pull up a picture in our laboratory information
25 system to look at it. I could go into the laboratory,

RECROSS BY WHYTE/CAPRON

1 into the vault, and check it myself, but that's not a
2 requirement of signing out a case report, no.

3 Q. Okay. So my question is you don't have any personal
4 knowledge of what that tube looked like?

5 A. I can't say that I've looked at that tube or not.

6 Q. Okay. And it wouldn't be part of your review according
7 to your procedures to look at that?

8 A. No.

9 Q. Yesterday you testified that you reviewed Mr. Wiggins's
10 case like you review, you know, 7,000 cases a year?

11 A. Correct.

12 Q. And it probably took you five to ten minutes?

13 A. Yeah. I don't time myself but --

14 Q. Sure. But understanding that, you know, 7,000 cases a
15 year is a lot for someone who doesn't work seven days a
16 week I assume?

17 A. There's times I take stuff home --

18 Q. Okay.

19 A. -- and work at home too so six days.

20 Q. Okay. Still a fair amount of cases; is that fair to say?

21 A. A lot.

22 Q. And you testified yesterday that you only reviewed paper
23 documents for this case, correct?

24 A. Yes.

25 Q. You didn't review anything electronic?

RE CROSS BY WHYTE/CAPRON

1 A. No. We don't have that luxury. I mean, it would be
2 great if I could pull up everything electronically. But,
3 no, it's not a requirement for me to go to the head space
4 that was used and pull it up because that batch data has
5 already been reviewed. The EMIT data has already been
6 reviewed. Confirmatory stuff's already been reviewed.

7 Q. Sure. Now, you also testified earlier that in the
8 volatiles -- in the case of volatiles like alcohol, like
9 ethanol --

10 A. Uh-huh.

11 Q. -- they are using the G C machine, the gas chromatograph?

12 A. Correct.

13 Q. That machine you said that the analyst, in other words
14 the testing analyst, programs that machine?

15 A. Yeah. Basically you just -- you go -- there's a
16 template, and it's sample one is your blank, so you type
17 in blank. Sample two is your .079 calibrator. And you
18 go through, and you program everything. You produce a
19 sequence parameter. You have your sequence parameter.
20 And then you load your samples onto the instrument one by
21 one verifying that vial one spot one you're putting in
22 the blank, et cetera.

23 Q. So that's the analyst who does that?

24 A. Correct.

25 Q. And that impacts the data that comes out of the machine,

RECROSS BY WHYTE/CAPRON

1 correct?

2 A. Correct. If you put your .079 control first and your
3 blank second, the data is going to come out, and your
4 blank is going to have ethanol, which it shouldn't. So
5 at that point in time you could go back to the vial
6 placement and look and see, oh, those vials -- I put the
7 wrong vial in the wrong spot.

8 Q. Uh-huh. And my question is that how the analyst programs
9 the machine affects how the data comes out of the
10 machine; is that correct?

11 MS. SRA: Objection as to asked and answered.

12 THE COURT: You can answer.

13 A. It's a template we use, so everybody uses the same
14 sequence, blank, three calibraters, negative, controls,
15 negative, ten samples, control, negative. So you don't
16 -- it's not -- I can't run my samples all of my unknowns
17 up front, run my calibraters at the bottom. In the SOP
18 it states how your sequence is to be programed.

19 Q. (By Ms. Whyte) But perhaps my question is not clear.
20 I'm saying the analyst inputs some kind of programming
21 into the machine as you described --

22 A. Correct.

23 Q. -- what they do, and that action impacts the data that
24 are generated by the machine?

25 A. The vial placement would impact where -- the data that's

RE CROSS BY WHYTE/CAPRON

1 generated by the machine.

2 Q. And --

3 A. So if you put -- if you typed everything correctly, but
4 you put -- vial placement was different, then the data is
5 going to be different.

6 Q. Okay.

7 A. You can program the instrument exactly how it's supposed
8 to be, but if you flip your first three vials, one, two
9 three, it's actually, three, two, one --

10 Q. Uh-huh.

11 A. -- that's what affects the data, because you've got the
12 actual what's being analyzed in the wrong sequence.

13 Q. Compared to how the analyst has programmed the machine,
14 correct?

15 A. Yes, because the machine is supposed to be blank, .079,
16 .158. But if you got your .158 in position one and your
17 blank in position two and your .079 in position three,
18 yes, the data is going to be off, and that's going to be
19 notated.

20 Q. Okay. So when you say that you could drop your file in
21 the sewer and go back to this computer and just print off
22 another file --

23 A. Uh-huh.

24 Q. -- you mean that you could print off another copy of the
25 data that has already been generated by the analyst?

RECROSS BY WHYTE/CAPRON

1 A. That's correct. We have to store -- the data is stored
2 electronically, yes.

3 Q. Okay. You're not at that point, you know, rerunning any
4 tests or reanalyzing that raw data that's stored on the
5 machine?

6 A. No, because that raw data, and that is what's -- the raw
7 data is there. It's been processed. So I would just be
8 reprinting the processed data, which is what's -- the
9 data that's contained in this file.

10 Q. Okay. So it's the processed data that's contained in the
11 case file?

12 A. If you want to call that processed data. Some people
13 call this raw data. I mean, it just depends on the
14 person I guess.

15 Q. Now --

16 A. There's electronic data, and there's paper data. There's
17 some laboratories that are completely paperless. We're
18 not one of them, so we've got stuff stored
19 electronically, which is the same results as what we
20 print out here.

21 Q. Uh-huh. Now, you -- yesterday I showed you a document,
22 and I marked it as Defense Exhibit 10. It was a thicker
23 document with a picture of a manila folder on the front.
24 It had an S T number. Do you remember that document?

25 A. Yes.

RECROSS BY WHYTE/CAPRON

1 Q. That's the document that you reviewed for Mr. Wiggins?

2 A. Not in that format but yes.

3 Q. That was a copy of the case file?

4 A. Correct.

5 Q. So when you say that you reviewed the case file, you mean
6 you reviewed the document that Defense Exhibit 10 is a
7 copy of?

8 A. That's correct.

9 Q. Okay. And you -- as part of your review for Mr. Wiggins,
10 you didn't review any other documents?

11 A. I only review the documents that are contained within
12 there, so it's just the request for analysis form and
13 then the data.

14 Q. Okay. Thank you.

15 MS. WHYTE: I don't have any further questions.

16 THE COURT: Ms. Sra, anything else?

17 MS. SRA: Yes.

18

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

20 BY MS. SRA:

21 Q. Mr. Capron, in this case do you know if the calibration
22 was done correctly?

23 A. Yes.

24 MS. WHYTE: Objection. Outside of the scope.

25 MS. SRA: Your Honor, it's directly within the scope.

RECROSS BY WHYTE/CAPRON

1 Ms. Whyte asked questions extensively regarding
2 calibration, and if you don't calibrate it properly,
3 you're going to get different results, et cetera.

4 THE COURT: Okay. You may answer.

5 A. Yes, calibration was correct.

6 Q. (By Ms. Sra) And how do you know this?

7 A. Because we run the controls to ensure that the
8 calibration's correct. Now, she did have one -- or
9 control failure, but that wasn't the calibration. It was
10 she simply mispipetted a .20 control. It's supposed to
11 be .20. She pipetted a .10 control. But the calibration
12 was acceptable.

13 If your calibration is off, your control values are
14 going to be off as well. So control values are checking
15 to make sure that the calibration is correct.

16 Q. Okay. And the pipetting that you just talked about, was
17 that discarded then, that error? After that error was
18 made, what was the next step?

19 A. None of the --

20 MS. WHYTE: Objection. Outside the scope.

21 THE COURT: You want to respond?

22 MS. SRA: And, Your Honor, it's directly related to
23 what Mr. Capron just answered in response to my question
24 regarding the calibration errors, so I'm just clarifying
25 what he means.

RECROSS BY WHYTE/CAPRON

1 THE COURT: All right. I'll allow him to finish that
2 answer.

3 Go ahead, sir.

4 A. So on the first run, it was performed on 1/23, she
5 mispipetted a control. So all of the data from that
6 entire batch cannot be used because it didn't meet the
7 requirements of our SOP that all controls be within the
8 acceptable range. So that data is put into each case
9 file with a line through it, and it's not used in the
10 final calculation of somebody's blood ethanol content.

11 MS. SRA: I don't have any further questions.

12 THE COURT: Thank you.

13 THE COURT: Can we release this witness?

14 MS. SRA: Yes, Your Honor.

15 MR. CAPRON: Thank you.

16 THE COURT: Thank you.

17 MR. CAPRON: Thanks for working with me yesterday.

18 THE COURT: Thank you.

19 MS. WHYTE: And, Your Honor, I think Defense asking to
20 call Ms. Arvizu again, but we would just ask for a short
21 recess first.

22 THE COURT: Sure. So we will take a brief recess, and
23 then we'll come back for that testimony.

24 THE BAILIFF: All rise.

25 (Recess)

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1 MS. SRA: So is the Court ready?

2 THE COURT: We are.

3 MS. WHYTE: Thank you, Your Honor. At this time Defense
4 would recall Janine Arvizu to the stand.

5 UNIDENTIFIED FEMALE: (Inaudible).

6 THE COURT: Good morning.

7 MS. ARVIZU: Good morning.

8 THE COURT: You have been previously sworn. Would you
9 like some water?

10 MS. ARVIZU: I'm good. Thank you.

11 THE COURT: You're good. Okay. Thanks. You may begin.

12 MS. WHYTE: Thank you.

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

14 BY MS. WHYTE:

15 Q. Just a few questions for you this morning, Ms. Arvizu.
16 Yesterday you testified that gas chromatograph machines
17 -- gas chromatography machines produce raw data in the
18 form of electronic data; is that right?

19 A. That's correct.

20 Q. And that this data is always in electronic format,
21 correct?

22 A. Yes, it is.

23 Q. That it can't -- I guess can you explain why it's always
24 electronic?

25 A. Because the mechanism of action of this instrument is to

REDIRECT BY SRA/CAPRON

1 acquire data electronically and to store it as electronic
2 files.

3 Q. Okay. Is there anything that you're familiar with in the
4 policies and procedures specific to the Washington State
5 Patrol regarding electronic data generated by their gas
6 chromatogram machines?

7 A. There is.

8 Q. What is that?

9 A. The laboratory's testing quality assurance manual which
10 defines their policies specifically addresses the fact
11 that instrumental data is acquired and stored
12 electronically.

13 Q. Okay.

14 A. And that that's the original record of the testing, the
15 original examination record.

16 Q. Okay. But earlier you said that that raw data, that
17 electronic data can't be printed -- or, I'm sorry, it
18 can't be printed in the exact format that it's stored; it
19 can only be stored electronically?

20 A. That's correct. If you click on one of those files with
21 your computer, it will ask you what program do you want
22 to use to open it. It can't open it and display it by
23 the types of programs that you use in a working
24 environment. You have to have the operating software
25 from the instrument manufacturer that's specifically

1 designed to open and process those files.

2 And then that electronic file gets opened, and you, the
3 user, whether you're the original analyst or whether
4 you're an independent analyst after the fact, you have to
5 tell the instrument the parameters or set the variables
6 for how it should process the data to print the results.

7 Q. So to get the data from the electronic data that's stored
8 on the machines at the Washington State Patrol, in other
9 words the data that was generated by Ms. Mitchell-Mata
10 when she's doing her tests, from that to the case file
11 that you reviewed, is there some processing that
12 Ms. Mitchell-Mata had to do?

13 A. There is. It's data analysis.

14 MS. SRA: Objection as to lack of personal knowledge.

15 THE COURT: Okay. Could you ask the question again.

16 MS. WHYTE: I'm sorry.

17 THE COURT: What was your question?

18 MS. WHYTE: My question was whether there was --

19 Ms. Arvizu has just testified that there's electronic
20 data that's only --

21 THE COURT: Uh-huh.

22 MS. WHYTE: -- that can only exist in electronic
23 format.

24 THE COURT: Uh-huh.

25 MS. WHYTE: And yet there's a case file that exists in

1 paper. And so my question to her is how does it get from
2 That electronic data that can only be electronic to a case
3 file that is a paper record that Ms. Mitchell-Mata --

4 THE COURT: And are you speaking specifically for the
5 Washington State lab?

6 MS. WHYTE: I mean, if -- my understanding -- but
7 perhaps, Ms. Arvizu, we can --

8 THE COURT: Well, no, that's what -- I'm asking if
9 that's what your question is because then the foundation
10 objection would be --

11 MS. WHYTE: I can lay additional foundation,
12 Your Honor.

13 THE COURT: All right. So I'm going to sustain.

14 MS. WHYTE: Okay.

15 Q. (By Ms. Whyte) So, Ms. Arvizu, are you familiar with
16 what kind of gas chromatograph machine the Washington
17 State Patrol uses?

18 A. Yes. It's manufactured by a company called Agilent,
19 A-G-I-L-E-N-T.

20 Q. Is that a machine that is used in more than just the
21 Washington State Patrol lab, or do they only use --

22 A. It's probably the most commonly-used G C for toxicology
23 testing in this country.

24 Q. Okay. And so what's your personal experience with that
25 machine in particular?

1 A. I've operated -- Agilent is a new company. It used to be
2 Hewlett Packard. I've operated those instruments. I
3 have a copy of the Agilent software that allows me on my
4 computer to open these electronic files, these raw data
5 files, and process them to generate chromatograms. And I
6 have been reviewing these data for decades.

7 Q. Okay. Is there any reason to -- that you know of that
8 Washington State Patrol would get the data off their
9 machine and put it into paper format any differently than
10 any other people that use this machine?

11 MS. SRA: Objection as to personal knowledge.

12 MS. WHYTE: The question, Your Honor, gets to whether
13 she has personal knowledge of this.

14 THE COURT: Okay. You can answer.

15 A. They in their procedure describe the use of the program
16 to process the data, the data analysis program.

17 Q. (By Ms. Whyte) That's in the Washington State Patrol
18 procedure?

19 A. Yes.

20 Q. And you've read those procedures?

21 A. Yes.

22 Q. So how is it that they get the electronic data off the
23 machine and produce a case file with it? Is there some
24 -- does the analyst do some processing for that, or is it
25 automatic?

1 MS. SRA: Objection as to personal knowledge.

2 THE COURT: Okay. I think just rephrase your question.

3 I think --

4 MS. WHYTE: Well, this is the -

5 THE COURT: She doesn't have personal knowledge but
6 based on her understanding maybe of reading the manual.

7 Q. (By Ms. Whyte) So based on your understanding of having
8 worked with the machine -- how long -- I'm sorry. How
9 long have you worked with this machine?

10 A. This one and previous manufacturers more than 30 years.

11 Q. Okay. So based on your more-than 30 years of working
12 with this machine and your understanding of the policies
13 and practices and procedures that are set forth by the
14 Washington State Patrol for their lab specifically, how
15 do they take the raw data that is on the machine and turn
16 it into a case file? Is there some processing that the
17 analyst does, or is it automatic?

18 A. There is processing that the analyst does using a program
19 that includes user-defined variables. The person doing
20 the processing has the ability to alter any of the
21 parameters associated with that analysis program.

22 Q. And if the person alters any of those parameters, does
23 that impact what data comes out of the machine in the
24 form of the chromatograms?

25 MS. SRA: Objection. This has been asked and answered.

REDIRECT BY WHYTE/ARVIZU

1 In fact the previous question has also been asked and
2 answered. Yesterday Ms. Arvizu testified extensively to
3 these same questions.

4 MS. WHYTE: I don't believe that this question has been
5 asked and answered, Your Honor. We just laid the
6 foundation for her even being able to talk about this
7 so --

8 MS. SRA: Your Honor, yesterday Ms. Arvizu did
9 extensively testify about the electronically-stored data,
10 how this is raw data, how these data is different.

11 THE COURT: Okay. And so, Counsel, do you intend to go
12 back over all of that again, or is this just --

13 MS. WHYTE: No.

14 THE COURT: -- a one question --

15 MS. WHYTE: No, Your Honor. I think this --

16 THE COURT: Go ahead. You may answer.

17 Overruled.

18 A. I'm sorry. Can you repeat the question.

19 Q. (By Ms. Whyte) Yes, if I can remember myself. It's been
20 that kind of morning. You said that user-defined
21 variables can -- are part of the processing of getting
22 that electronic data off of the machine and onto paper
23 that ends up being the case file?

24 A. Correct.

25 Q. And so my question I think was can -- can it impact if an

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1 analyst puts in a different variable or makes some kind
2 of changes to that or -- depending on what that analyst
3 puts in as what you're calling the user-defined
4 variables, will that impact the data that is then in the
5 print form such as, for example, the chromatographs or
6 the numbers that come out of the machine?

7 A. Yes, it will.

8 Q. Thank you. How many years again have you spent auditing
9 labs?

10 A. More --

11 MS. SRA: Objection as to asked and answered yesterday.

12 THE COURT: Okay.

13 MS. WHYTE: I'm just --

14 THE COURT: You can go ahead and answer as long as
15 we're not going to rehash all of the rest of the
16 territory yesterday.

17 MS. WHYTE: We aren't, Your Honor. I promise.

18 A. More than 30.

19 Q. (By Ms. Whyte) Okay. Now, in that experience, have you
20 -- is it your experience that laboratories typically have
21 both standard operating procedures and systems in place
22 to review and check and confirm and --

23 A. Yes.

24 Q. -- data?

25 Okay. And is it -- have you had any experience in your

REDIRECT BY WHYTE/ARVIZU

1 experience auditing labs for over 30 years that
2 laboratories have those standard operating procedures and
3 their checks and reviews, and yet sometimes those
4 policies, those standard operating procedures aren't
5 followed?

6 MS. SRA: Objection as to relevance.

7 MS. WHYTE: And, Your Honor, the City's entire redirect
8 of Mr. Capron focused on the fact that Washington State
9 Patrol has numerous standard operating procedures in
10 place, that they have checks and reviews, and that the
11 implication was that because those are in place, they are
12 followed in every case.

13 THE COURT: Okay.

14 MS. WHYTE: So I'm just offering -- I have a few
15 questions. I understand -- I'm mindful of the Court's
16 time. I just have a few questions about this.

17 THE COURT: I'll overrule.

18 You may answer.

19 A. They routinely have such policies, procedures, and
20 quality control practices.

21 Q. (By Ms. Whyte) And is it -- has it ever been your
22 experience that despite having the quality control
23 practices and standard operating procedures that
24 sometimes they're not followed?

25 A. Absolutely.

REDIRECT BY WHYTE/ARVIZU

1 Q. And has it ever been your experience that sometimes they
2 have these standard operating procedures, and they have
3 not followed them, and those mistakes have not been
4 caught?

5 A. Oh, certainly.

6 Q. Can you explain briefly what you mean by that.

7 A. Depends on the kind of the problem. Sometimes failing to
8 comply with the procedural requirement will result in
9 something that is evident in the record, and that can be
10 caught in the independent review.

11 But sometimes the nature of the problem or the nature
12 of the failure to comply with the requirement is
13 essentially a silent error. It is a problem that does
14 not manifest itself in a written record.

15 You can't tell that a step was missed or that the wrong
16 material was used or the wrong quantity was used because
17 it doesn't show up in the written record, so it's a
18 silent error.

19 Q. I see. Can you -- do you think that -- I know that this
20 is kind of your world being a scientist. I think it's at
21 least not my area of expertise. Do you have, like, an
22 analogy for what you mean by that? What's a silent
23 error?

24 A. It's one that exists in my world as a baker. I can
25 follow a recipe, but sometimes even when I think I'm

REDIRECT BY WHYTE/ARVIZU

1 following the recipe, I make mistakes. Sometimes I
2 forget to put the salt in. Sometimes I pick up baking
3 soda instead of baking powder. Even though I would think
4 I'm following the procedure, I'm not in fact executing it
5 in exact conformance with requirements.

6 Sometimes I can then bake a cake, and it looks really
7 good, or cookies look really good. But once you taste
8 them there's something off. And it's because of the
9 mistakes that I've made.

10 The same kind of thing can happen in a laboratory. You
11 think you're following the procedure, but frankly these
12 procedures are very long, very complicated, they include
13 a lot of information, and it's not hard to forget steps
14 or requirements.

15 MS. WHYTE: Thank you. No further questions.

16 MR. KARR: Just a moment, Your Honor.

17 THE COURT: Uh-huh.

18

19 R E C R O S S - E X A M I N A T I O N

20 BY MS. SRA:

21 Q. Ms. Arvizu, let's talk about the electronic data. When
22 you open the data or -- and extract it from the computer,
23 that is after the parameters have been set, the user --

24 A. There are --

25 Q. -- information?

REDIRECT BY WHYTE/ARVIZU

1 A. There are different requirements. There are data
2 acquisition parameters that essentially define how the
3 data are collected, for example the sampling rate and
4 those types of things, and there are data processing
5 parameters that are applied to the collected data file.

6 Q. So these parameters are set prior to printing off the
7 electronic data, correct?

8 A. Yes. They must be.

9 Q. Okay.

10 A. In order to print the data, the instrument must be told
11 how to process that data.

12 Q. And when that electronic data is open, the software
13 doesn't change the data that is retained on the computer,
14 correct?

15 A. That's correct, the original electronic data files are
16 unchanged.

17 Q. So if it's a function of creating a paper copy, opening
18 the data and printing it would print the same data that
19 is unchanged on the computer, correct?

20 A. Only if you use all exactly the same parameters.

21 Q. Okay.

22 A. If all the variables are set to all the same parameters.

23 Q. You didn't review the electronic data in this particular
24 case file, correct?

25 A. It was not in this case file, so it was not available for

REDIRECT BY WHYTE/ARVIZU

1 review.

2 Q. And in your review of the case file, you didn't notice
3 any errors other than the documented one where the pipet
4 was off, and that data was discarded; other than that
5 error, you did not notice any other errors, correct?

6 A. There were a number of other issues that I identified
7 with this batch. But not solely based on what was in the
8 case file. It required additional supporting
9 information.

10 Q. What pertained to this particular case file? Other than
11 that one error, were there any other errors that you
12 noted?

13 A. Yes. I haven't been asked about all of the issues with
14 this case file yet in my testimony.

15 MS. SRA: Okay. I have no further questions.

16 THE COURT: Anything else?

17 MS. WHYTE: No, thank you, Your Honor.

18 THE COURT: All right. I think maybe release --

19 MS. WHYTE: Yes. I think we can release Ms. Arvizu. I
20 think she's got a plane to catch.

21 THE COURT: City?

22 MS. SRA: No objection.

23 THE COURT: All right. Thank you.

24 MS. ARVIZU: Thank you, ma'am.

25 THE COURT: Have a good flight.

REDIRECT BY WHYTE/ARVIZU

1 MS. ARVIZU: Thank you, ma'am.

2 THE COURT: Okay. So anything else from (inaudible)
3 regarding testimony, or is it just argument that's left?

4 MS. SRA: I believe we're just at the argument stage at
5 this point, Your Honor.

6 THE COURT: Okay. So let's talk a little bit. I know
7 that Defense said you had some -- you wanted to make a
8 record about us not being able to continue with the trial.
9 So let's do that now.

10 MS. WHYTE: Thank you, Your Honor. And I understand this
11 is definitely not an issue with the Court. I know that the
12 Court has tried to move us along, and has accommodated us at
13 the last minute, and so forth.

14 I just wanted to, I guess, make a record that it was quite
15 difficult for us to obtain funding to have Ms. Arvizu here,
16 and there was an indication from the Presiding Judge that we
17 would -- it could be difficult to obtain funding in the
18 future if we continued for any reason.

19 And so I guess what I'm wanting to make clear is, it
20 sounds like -- and I guess put on the record just that it
21 sounds like the City has witness availability issues for
22 this afternoon and for tomorrow, and then the Court has been
23 assigned to KCJ 2 next week.

24 So it seems to me that, practically speaking, impaneling a
25 jury now -- well, the Court has to make a ruling on the

REDIRECT BY WHYTE/ARVIZU

1 motion, and I certainly -- we want to give the Court as much
2 time as the Court needs to make the ruling, because I think
3 that the Court should have all the time it wants.

4 So impaneling a jury now, or tomorrow, or whenever, and
5 then having an officer testify, and then potentially having
6 a one-week recess just seems to me to be logistically
7 undesirable and difficult.

8 THE COURT: And I think your witness wouldn't have been
9 available either, right? After (inaudible).

10 MS. WHYTE: Well, so our witness had to leave because she
11 only had the money for so long --

12 THE COURT: Right.

13 MS. WHYTE: -- to be here. But our hope had been to put
14 her on, and not to continue the case.

15 So I guess what I'm saying is that Defense is not asking
16 to continue the case. We were expecting to be able to
17 present her testimony both for the purpose of motion and for
18 trial, and it kind of just didn't work out that way. We had
19 the fire alarm that got things very delayed coming out of
20 master and so forth.

21 So Defense is putting on the record essentially that we
22 are not asking for the continuance. We were ready to
23 proceed. We had hoped to be able to use the money that was
24 allocated for Ms. Arvizu to testify both for this case, and
25 for the motion, and for the trial.

REDIRECT BY WHYTE/ARVIZU

1 THE COURT: All right.

2 MS. WHYTE: Thank you.

3 THE COURT: So I understand your argument, Counsel, though
4 I think in reality, even if we were to have picked a jury
5 and tried to start, we wouldn't have been able to make the
6 time lines of any -- either side's witness. But that --
7 even if we got to that, I think it would have been very
8 difficult to have that schedule, because the case came with
9 basically three motions. So we kind of had a mini trial
10 before we could even get to the real trial. So, and I think
11 master is aware of that since they sent it.

12 So hopefully then that wouldn't be held against you in
13 terms of getting money to bring her back. Because there was
14 no way, even if I could have -- I maybe could have stayed
15 here to do the trial, but the witnesses wouldn't have been
16 able to come tomorrow anyway.

17 So, City?

18 MR. KARR: Your Honor, I'm not going to speak to the
19 funding portion, because I don't think the City really has
20 much to say about that.

21 THE COURT: Yeah.

22 MR. KARR: But as far as impaneling a jury, I agree with
23 Counsel that at this point I don't think impaneling a jury
24 would make much sense, because I don't think that there's
25 really much of a guarantee at all that we would get them all

RECROSS BY SRA/ARVIZU

1 to come back in two weeks.

2 THE COURT: That's true.

3 MR. KARR: So I think just functionally, I -- the
4 City's -- and understanding this is not Defense's motion to
5 continue. This seems to be more of a function of court
6 economy, and that's fine with the City. No objection just
7 to setting it over on that basis.

8 THE COURT: So I think what happens is that it will --
9 actually will go, after the motion for (inaudible) think
10 you'll go back to master.

11 Do you have an idea of when your witnesses would next be
12 available? Because then we can kind have of an idea of how
13 far out that it needed to go.

14 MS. WHYTE: My understanding was that it was -- the next
15 availability was sometime in February.

16 THE COURT: For your witness?

17 MS. WHYTE: Yes.

18 THE COURT: And what about -- I know your witness wasn't
19 available, either, tomorrow.

20 MS. SRA: Yes. Just pulling it up now, Your Honor. I
21 think -- let's see here. Yeah. It looks like February
22 would work for the City.

23 THE COURT: Okay. So --

24 MS. SRA: And I think, Your Honor, Mr. Burnton had
25 indicated to me that he actually is trying to also have

RECROSS BY SRA/ARVIZU

1 Ms. Arvizu come out here, but it's the week of the 12th,
2 which appears to be the week Your Honor is again scheduled
3 to be in KCJ 2. So I'm not really sure how that --

4 THE COURT: Well, I think the trial wouldn't need to be in
5 front of me. It would go back to -- it would go back to
6 master, and they could reassign it. So the trial doesn't
7 have to --

8 MS. SRA: Okay.

9 THE COURT: Because we --

10 MS. SRA: We did do motions in limine.

11 MR. KARR: We did do motions in limine, Your Honor.

12 MS. SRA: So that's the only question I have.

13 THE COURT: Yeah. Sometimes still it can go to someone
14 else. But that kind of -- that would be kind of a good use
15 of -- you'd know for sure that you could --

16 MS. SRA: Right. Well, that was -- that would be --

17 THE COURT: -- that you could have her here. So it's
18 something for us to consider, because then you wouldn't have
19 to worry about getting the money.

20 So she's (inaudible) on which day? With those numbers --

21 UNIDENTIFIED FEMALE: (Inaudible) is 26, February 26.

22 THE COURT: Okay. But we could maybe -- it's not open.
23 So again, master would have to approve it. But I think
24 that's something that we should bring up is that she's
25 already going to be here, and if there's a way to have --

1 use her for both trials, that might be good. But that's
2 something they can talk about, but that's a good point to
3 note. And I'll note it in my -- put it in my notes.

4 MS. SRA: Your Honor, just so that the Court is aware, I'm
5 actually not available the week of the 12th.

6 THE COURT: Okay.

7 MS. SRA: The week that would work for me would be either
8 the 5th --

9 THE COURT: Okay.

10 MS. SRA: -- or the 26th.

11 THE COURT: All right.

12 UNIDENTIFIED FEMALE: All of those dates (inaudible).

13 THE COURT: Those are all full until the 26th. So it
14 would have to be special set.

15 MS. SRA: Okay.

16 THE COURT: Okay. So in any event, let's go ahead and do
17 argument, and then we will (inaudible) information
18 (inaudible).

19 MS. SRA: Yes, Your Honor. So this motion that the City
20 is bringing is to allow Mr. Capron, who reviewed the tox --
21 the case file of Mr. Wiggins to testify in lieu of Christie
22 Mitchell-Mata, who was the primary analyst in this case, but
23 is unavailable because she no longer works for the tox lab,
24 and is relocated in Ohio.

25 And so what the City is asking of the Court is to allow

1 Mr. Capron to testify, because he independently reviewed the
2 data and came to his own independent conclusion. And this
3 data that I'm talking about is what Mr. Capron testified to
4 at this motion hearing. These are the chromatograms. These
5 are things that the instrument produced. These are, as
6 Mr. Capron extensively testified to, the data that's stored
7 on the computer. The electronic data is essentially -- I
8 mean, not essentially. It literally is the same thing as
9 what is printed out.

10 Mr. Capron said that, if you were to lose his case file,
11 that he could simply go back and print out that data, and
12 that there are parameters that are used that are set out by
13 the standard operating procedures. So it's not like each
14 individual toxicologist is going in there, setting their own
15 parameters, and printing out something different.

16 And the leading case that the City relies upon in making
17 this argument is the Washington Supreme Court case State v.
18 Lui. That's a 2014 case where the Supreme Court answered
19 the question of when the confrontation clause requires
20 testimony from lab analysts who conduct forensic tests on
21 evidence, and that is the exact, same issue that we are
22 dealing with here.

23 And so in Lui, the state's medical examiner testified at
24 trial that, even though he hadn't performed an autopsy on
25 the deceased victim, nor had he performed or even supervised

1 the toxicology testing, he relied on photos, notes, reports
2 prepared by another medical examiner; and pertaining to the
3 toxicology testing, relied on notes, reports, et cetera,
4 from the employees of the state tox lab.

5 And the medical examiner, he opined as to his own
6 independent conclusion based on the data that was available
7 to him, much like Mr. Capron would be doing.

8 And the Supreme Court, in answering this question, relied
9 on multiple U.S. Supreme Court decisions, including the
10 Bullcoming v. New Mexico case, as well as the Melendez-Diaz
11 v. Massachusetts case, in forming a rule to determine
12 whether the confrontation clause is being violated.

13 And that rule is twofold. So the first -- so essentially
14 the rule is to determine whether an expert comes within the
15 scope of the confrontation clause if two conditions are
16 satisfied. So first, the person must be a witness by virtue
17 of making a statement of fact to the tribunal; and second,
18 the person must be a witness against the defendant by making
19 a statement that tends to inculcate the accused.

20 So the Lui Court applied this test, and held that there
21 was no violation of the confrontation clause when the
22 medical examiner testified in lieu of the employee who
23 actually did the toxicology testing, and that there was no
24 error when the trial Court admitted the results of the DNA
25 testing on samples taken from Lui and the crime scene, and

1 when it introduced other such evidence through the medical
2 examiner.

3 The expert witness who testified as to the conclusions of
4 the toxicology report in Lui did not personally participate
5 or observe the testing. She used electronic data produced
6 during the testing process by another individual to create a
7 DNA profile reflecting her own independent conclusions.

8 Lui objected to the medical examiner's testimony on
9 grounds of both hearsay and confrontation; but the trial
10 Court overruled the objection because, under ER 702, experts
11 may rely on hearsay in forming their opinions. And
12 furthermore, the expert witness was available for cross
13 examination.

14 Lui appealed, and the Court of Appeals affirmed the Trial
15 Court and noted that, while the expert witness did testify
16 about the contents of a report that they did not prepare,
17 the underlying reports were offered to explain their basis
18 for their opinion under ER 703, and, as such, were not
19 subject to the confrontation clause.

20 So likewise here, Mr. Capron did not personally run the
21 testing on the blood. That was done by Ms. Mitchell-Mata.
22 And he did not personally observe Ms. Mitchell-Mata doing
23 this testing.

24 But under ER 703, and in line with Lui, he may, as an
25 expert, rely on the toxicology case file, independently

1 review it, and form his own independent conclusion of the
2 contents of Mr. Wiggins's blood.

3 Another case that I did print out for the Court, which is
4 an unpublished case, the State v. Jones case is directly on
5 point. It is a case where in -- that is a Court of Appeals
6 Division III case where the issue at hand was the same issue
7 that we're dealing with, and the Court held that the
8 independent reviewer could testify in lieu of the primary
9 analyst. And I'm not sure if the Court has had a chance to
10 read that at all.

11 And in Defense's briefing, they rely heavily on the
12 Melendez-Diaz and Bullcoming matters.

13 So Melendez-Diaz is distinguishable, and the reason that
14 is distinguishable is because in that case the State offered
15 a testimonial -- offered testimonial evidence without
16 calling the witness. So that would be the same as, for
17 example, the City offering an abstract of driving from the
18 department of licensing without calling a DOL records
19 custodian. And that would clearly be in violation of the
20 confrontation clause, because the defendant can obviously
21 not cross examine a piece of paper.

22 And in Melendez-Diaz, the document that was put forth was
23 a conclusion by the toxicologist, that the substance found
24 was what it purported to be. And so here it is
25 distinguishable because that's not what the City is doing.

1 The City is not putting forth, for example, Christie
2 Mitchell-Mata's toxicology report with her certification
3 and -- because that is her own conclusion. That is hearsay.
4 The certification is hearsay. And so the City is not trying
5 to do that through Brian Capron, because, obviously, that
6 would be in violation of the confrontation clause.

7 And now, moving on to the Bullcoming v. New Mexico case,
8 that case is distinguishable because there the State also
9 submitted the certification of the toxicologist who was
10 absent into evidence, thereby violating confrontation.
11 Again, that's not what the City's doing here.

12 Second, the surrogate toxicologist that was called in
13 Bullcoming had testified that he had actually not reviewed
14 the initial toxicologist's analysis. So here it's very
15 distinguishable, because Mr. Capron did his own independent
16 analysis, came to his own independent conclusion.

17 And the question that was being asked in Bullcoming was
18 whether the confrontation clause permits the prosecution to
19 introduce a forensic lab report containing a testimonial
20 certification made in order to prove a fact at a criminal
21 trial through the in-court testimony of an analyst who did
22 not sign the certification or personally perform or observe
23 the performance of the tests reported in the certification.

24 So here City's not trying to submit into evidence
25 Ms. Mitchell-Mata's certification, so it is distinguishable.

1 THE COURT: Counsel, let me just ask you, just for my
2 clarification. So what you are trying to admit into
3 evidence whether or not it's (inaudible) are the results of
4 the work that she did in that -- and the report is her
5 certification, correct?

6 MS. SRA: No, Your Honor. So the report -- the City is
7 not seeking to admit her report into evidence.

8 THE COURT: But the information --

9 MS. SRA: No. So the Court --

10 THE COURT: What is Mr. Capron then going to be --

11 MS. SRA: So the report that Ms. Mitchell-Mata generated
12 was taking what's in the case file, doing her own analysis,
13 and coming to a conclusion. And so that's -- the report is
14 Ms. Mitchell-Mata's conclusion.

15 What the City's trying to do is have Mr. Capron do his own
16 independent analysis, and come to his own conclusion about
17 what he believes -- or not what he believes, but through --
18 as an independent reviewer of that case file, what his
19 conclusion is as to what is in Mr. Wiggins's blood.

20 THE COURT: But the case file he's reviewing is the
21 information that was created by Ms. Mata, right? Because
22 his -- I'm just trying to be clear. Because he didn't take
23 all the blood and stuff out himself. He just looked at -- I
24 think he just looked at what she did, and he reviewed what
25 she did. And so --

1 MS. SRA: Yes. So --

2 THE COURT: -- you're going to have him testify -- just so
3 I'm clear, so you're not going to talk about her work at
4 all, just that he reviewed, but it was her work that he
5 reviewed? I'm trying to see how --

6 MS. SRA: No, no, no.

7 THE COURT: -- you're going to separate that.

8 MS. SRA: Yes, Your Honor. So yes, Ms. Mitchell-Mata
9 certainly did the testing, as Mr. Capron testified to.

10 What he's reviewing is the entire case file. So he's
11 reviewing the chromatograms that were spit out, checking to
12 make sure the calibrations -- what they were, looking at all
13 the peaks, seeing that everything is in comportance with the
14 standard operating procedures.

15 As he testified to, there's administrator review, a
16 technical review. He reviews a bunch of different, sort of
17 aspects of that case file.

18 THE COURT: But let me ask you this. In the end, though,
19 you want his testimony to be that there was a .11?

20 MS. SRA: That's correct.

21 THE COURT: Okay.

22 MS. SRA: Yes.

23 THE COURT: Thank you. Go ahead.

24 MS. SRA: So, okay. So just a moment, Your Honor.

25 THE COURT: I'm sorry.

1 MS. SRA: No. No problem.

2 So going back to Bullcoming, so there the State was trying
3 to put forth into evidence the certification. And the Court
4 held that the certification reported more than a
5 machine-generated number, that it represented that the
6 toxicologist had received Bullcoming's blood sample, that he
7 had checked to make sure the forensic report number and
8 sample number corresponded, that he had performed a
9 particular test on the blood sample, adhered to precise
10 protocol, left the report mark section blank, indicated that
11 no circumstance or condition affected the sample's integrity
12 or the analysis's validity.

13 These representations relating to past events of human
14 actions not revealed in raw, machine-produced data are meat
15 for cross examination. And so that's what -- that is
16 distinct here -- is distinguishable here because the City is
17 not having Mr. Capron testify that this is what Christie
18 Mitchell-Mata did. He's not taking her certification and --
19 because that is hearsay. Her certification is hearsay.

20 What Mr. Capron is doing is looking at the raw data only.
21 He is not testifying on behalf of Ms. Mitchell-Mata. He
22 cannot -- he cannot testify on behalf of Ms. Mitchell-Mata.
23 He can not say that, oh, yes, I observed her do XYZ, because
24 he wasn't there. So that's what's distinguishable.

25 And the Court in Bullcoming, specifically

1 Justice Sotomayor, where she concurred in part, supports the
2 City's argument here. She stated, this is not a case in
3 which the person testifying is a supervisor, reviewer, or
4 someone else with a personal, albeit limited connection to
5 the scientific test at issue. It would be a different case
6 if, for example, a supervisor who observed an analyst
7 conducting a test testified about the results or a report
8 about such results. We do not -- we need not address what
9 degree of involvement is sufficient, because there was no
10 involvement whatsoever in the relevant test and report.

11 Here Mr. Capron is, in fact, a supervisor and a reviewer
12 of the report. He has some connection.

13 Justice Sotomayor went on to say, third, this is not a
14 case in which an expert witness was asked for his
15 independent opinion about underlying testimonial reports
16 that were not themselves admitted into evidence.

17 So that's essentially Mr. Capron. He is an expert witness
18 who the City would be asking for his own independent opinion
19 about underlying testimonial reports. So the certification,
20 that is not actually being admitted into evidence.

21 THE COURT: So let me just -- I'm sorry to interrupt you.
22 But if I don't ask now, then it leaves my mind.

23 MS. SRA: No. No problem, Your Honor.

24 THE COURT: Like, I think -- so going back, you said that
25 so it is testimonial. So without having the certification

1 that was done by the person that actually did it, how is
2 Mr. Capron's testimony even able to come in aside from
3 confrontation? Because he didn't do any of the -- putting
4 the things in (inaudible). So that's where I'm kind of
5 getting --

6 MS. SRA: Well, Your Honor --

7 THE COURT: -- lost. Because I think the testimony that I
8 heard -- and I think by both the witnesses -- is that the
9 person that does the analysis, they have to do certain
10 things in order to make the report be generated. I mean, it
11 can't just -- it can't just be generated.

12 So they actually have to input something. They have to
13 put blood in, certain amount of blood, all that.

14 So how would Mr. -- so you're saying you don't intend to
15 use Ms. Mata's information, but just Mr. Capron's review of
16 the file. So I was --

17 MS. SRA: Right. And I think -- so the City's not using
18 her certification that's on the actual reports. But also, I
19 think --

20 THE COURT: Then how does he know what was done if you're
21 not using?

22 MS. SRA: Because he's reviewed the entire case file,
23 which is data that was generated by instruments. And so
24 that is data that a machine spits out. That's not something
25 that Ms. Mata -- so the data that the machine has spit out

1 is contained in the case file. There's obviously notes in
2 the case file of what Ms. Mitchell-Mata did, for example, if
3 there was something strange going on with the blood, that
4 she would have noted it.

5 So what Mr. Capron is doing is not simply reviewing to see
6 if Ms. Mitchell-Mata did it correct for purposes of what the
7 City would be calling him for; he is actually analyzing the
8 data and, according to his own expertise, his own rule as a
9 forensic toxicologist supervisor, arriving at his own
10 conclusion about what the contents of Mr. Wiggins's blood
11 revealed. Much like Ms. Arvizu reviews the case file, comes
12 to a different conclusion.

13 THE COURT: So how is his analysis -- to me, his analysis
14 is different than Ms. Mata, because she's the one who
15 actually had to put everything in that got us to the -- so
16 are you saying his analysis is the same as hers, such that
17 we don't -- you don't need her to come in, because his
18 analysis is the same as hers ?

19 MS. SRA: Well, Your Honor, so Mr. Capron obviously didn't
20 test the blood. But as far as the analysis go of the data
21 that the instrument spit out, that the machine spit out,
22 that analysis is the same, because all of that is recorded
23 information that is in the case file.

24 And actually, I did print off a case for the Court, and I
25 did send it email --

1 THE COURT: Okay.

2 MS. SRA: -- sometime last week about a new Court of
3 Appeals case.

4 THE COURT: Is that the one you printed for me?

5 MS. SRA: Yes, Your Honor.

6 THE COURT: Yeah. I have that. Thank you.

7 MS. SRA: And so that case --

8 MS. WHYTE: What case is that, Counsel?

9 MS. SRA: I don't have it at the -- I gave my last copy to
10 the Court. But I did send you --

11 MS. WHYTE: I mean, do you remember the name? Just
12 because I think there were, there were many cases that were
13 cited.

14 THE COURT: I think she may have -- I think you referred
15 to it in your brief. Ramirez?

16 MS. SRA: Actually, no, Your Honor, I did not. Let me
17 just pull it up here.

18 THE COURT: I thought Counsel referred to -- Defense
19 referred to it in her brief.

20 MS. SRA: I'm just wanting to confirm. That's all, Your
21 Honor.

22 THE COURT: Okay.

23 MS. SRA: Just wanting to confirm what case it is, because
24 I think --

25 THE COURT: Ramirez and Russell.

1 MS. SRA: State v. -- okay.

2 MS. WHYTE: Yes, Your Honor. Thank you.

3 MS. SRA: So in that case there was a cell phone. A
4 specific individual, let's call him individual A,
5 extracted -- or performed the chip-off process. So that
6 individual extracted the cell phone data from the chip that
7 was recovered in the phone, and ran a program on it, much
8 like Christie Mitchell-Mata took the blood vials and ran
9 testing on it, testing that is done by the instrument.

10 And the Court applied the Lui two-part test. And the
11 first part -- the first question was whether this person is
12 a witness. And the Court held, yes, well, obviously this
13 person is a witness. This person took the chip and
14 performed this program -- ran this program on the chip; but,
15 because he reached no conclusions regarding the extractions
16 of the data, he was not a witness against the defendant, and
17 thereby the report was not inculpatory, and confrontation
18 was not violated.

19 And so the Court arrived at that conclusion because,
20 again, it's the program that ran the data. Even though he
21 physically took the cell phone, took the chip off, ran the
22 program, the Court held that the information is not created
23 by him. It's data. And that another witness could testify
24 in lieu of him, and he did not have to appear at court and
25 testify.

1 THE COURT: So, Counsel, that sounds very different to me
2 than blood. I mean, take a chip and -- I don't know, put it
3 in a machine sounds different than blood. Because I think I
4 might even be able to do that, and I'm not very techie.

5 But the blood actually -- so it sounds like -- very
6 different to me than blood.

7 But just want to -- because I want to have a chance to ask
8 you guys these questions when I'm doing my review, so that's
9 why I'm putting them out there now.

10 MS. SRA: Yes, Your Honor. I think that the City would
11 rely --

12 THE COURT: I have read the case, too. And I'll read it
13 again.

14 MS. SRA: Yes.

15 THE COURT: But I'm (inaudible) I'm just saying it
16 sounds -- it just sounds different than blood. It sounds
17 like this person did do something that a technician would
18 do. I don't know if there was any -- I don't remember
19 reading if they had any special training.

20 But go ahead.

21 MS. SRA: So I think the cases that the City would -- that
22 the leading case that the City would rely heavily on is the
23 Lui case.

24 THE COURT: Lui case. Thank you.

25 MS. SRA: Which in the Jones case is analyzed extensively.

1 And while I realize Jones was unpublished, GR 14.1 does
2 state that the Court may afford it as much value as it deems
3 appropriate.

4 So I think that the Jones case is the one that is very
5 much on point. And the Jones case actually dealt with
6 drugs, and not ethanol. And the drug testing is much more
7 complicated than just straight ethanol testing.

8 And so the City would just rest on those two cases.

9 THE COURT: Jones and Lui?

10 MS. SRA: Yes, Your Honor. Thank you.

11 THE COURT: Thank you. All right.

12 MS. WHYTE: And, Your Honor, may I approach (inaudible)
13 ask Madam Clerk whether I could get a copy of that Defense 9
14 that --

15 THE COURT: Yes.

16 MS. WHYTE: -- that I -- thank you.

17 THE CLERK: Just 9?

18 MS. WHYTE: Just 9, yeah. Thank you very much. Thank
19 you.

20 Thank you, Your Honor. And I just want to say before we
21 start, I have spent a lot of time engaging with this issue.
22 I'm happy to answer any question at any time that the Court
23 has (inaudible).

24 THE COURT: All right. Thank you.

25 MS. WHYTE: Want to answer any questions.

1 THE COURT: Sometimes I have questions, and then when I
2 get back, I won't have the opportunity to ask you all. So
3 that's why.

4 MS. WHYTE: No. Absolutely. I welcome any questions, and
5 I hope I can answer them.

6 I guess I wanted to start with one excerpt from case law
7 that I think will clarify some issues. This is from the
8 footnote in *Melendez-Diaz v. Massachusetts*. The citation
9 for this footnote is 129 Supreme Court Reporter 2527. The
10 actual pin cite is 2537, footnote 6.

11 And this is from the majority opinion. It clarifies the
12 two lines of confrontation clause case law that have evolved
13 out of the Supreme Court. So there is the kind of
14 confrontation clause for just regular witnesses, people who
15 aren't experts, just Joe Schmoe off the street; and then
16 there's the line of case law that really focuses exclusively
17 on expert witnesses. So those cases are, of course,
18 *Melendez-Diaz*, *Bullcoming*, and then *Williams*.

19 And there is one important place where those two lines of
20 case -- the *Crawford* line and then the *Melendez-Diaz* line
21 share an important point of commonalty. And that's really
22 summarized in this footnote.

23 It says, the analyst who swore the affidavits provided
24 testimony against *Melendez-Diaz*, and they are, therefore,
25 subject to confrontation. We would reach the same

1 conclusion if all analysts always possessed the scientific
2 acumen of Madame Curie and the veracity of Mother Teresa.

3 And what the Court means by that is that -- we've talked a
4 lot about whether or not Ms. Mitchell-Mata was a good
5 toxicologist. I think there has been testimony that I hope
6 didn't suggest, but may, you know, may have suggested that
7 an issue is whether or not the Washington State Patrol
8 toxicologists are good people trying to do their jobs in
9 accordance with the standards and procedures, and whether
10 they're following them and doing their best work, and not
11 trying to subvert the system. And that really wasn't our
12 focus, and it's not relevant.

13 Ms. Mitchell-Mata could have been Madame Curie, and as
14 honest as Mother Teresa, in the words of -- I think this is
15 Justice Scalia writing for the Court. We would still need
16 to confront her, because she is the witness against
17 Mr. Wiggins.

18 And I have Defense 9 here, just so that I can read for the
19 Court. The import -- the City quibbled I think with
20 Melendez-Diaz and its applicability to this case because
21 it's true that in Melendez-Diaz they were trying to admit a
22 certification similar to this one -- this is Defense 9 that
23 I'm holding in my hand -- in order to indicate that the
24 particular substance found on a criminal defendant was a
25 particular kind of drug.

1 But the real issue, the real import of Melendez-Diaz, and
2 the reason why that violated the confrontation clause, was
3 not simply because it was a document being admitted without
4 the preparing toxicologist; it's because the document was a
5 sworn statement. That's a key portion of the holding in
6 Melendez-Diaz.

7 And what we have here -- and Mr. Capron read it into the
8 record, and of course the document has been admitted into
9 evidence. But the relevant paragraph is at the bottom of
10 page 1, and it reads as follows: Christie Mitchell-Mata,
11 MFS, certifies under penalty of perjury, under the laws of
12 the state of Washington, that the foregoing -- meaning all
13 of the data that she has tested, the numbers she's
14 reporting, the dates on which she did the tests, the fact
15 that she did those tests, the fact that she used those
16 vials, she's got lot numbers on here, the fact that she's
17 referencing the correct case number, she's certifying that,
18 under penalty of perjury, the foregoing is true and correct.

19 Unless indicated otherwise, I performed all testing
20 reported above for the submitted evidence. The document on
21 which this certification appears is a true and complete copy
22 of my official report, and I technically reviewed all
23 relevant pages of testing documentation in the case record.

24 The tests were administered according to testing methods
25 approved by the state toxicologist pursuant to WAC

1 448-14-010, 020, 030, and/or RCW 46.61.506, subsection 3, by
2 an analyst possessing a valid permit issued by state
3 toxicologist.

4 I talked to Mr. Capron about this report, and he
5 acknowledged that his name doesn't appear anywhere on it.
6 And that's because, as he testified, he didn't do any of the
7 testing.

8 He said, if I had done some of the testing, my name, Brian
9 Capron, would appear under the tests that I did.

10 This sworn statement is what makes the difference in
11 Melendez-Diaz and Bullcoming for why a document was
12 testimonial, in other words, why the confrontation clause
13 applied.

14 It's because there is somebody who did this work who's not
15 only -- who not only did it and did all of those things, but
16 is swearing with a degree of formality that they did it,
17 they did it in accordance with the law, that they did --
18 that everything on this report is true and correct. And
19 that is not only what makes a person a witness against for
20 the purposes of Melendez-Diaz, Bullcoming, and Williams,
21 because the only reason, the only ground on which
22 Justice Thomas split from the four-justice plurality in
23 Williams to write his own separate concurrence -- he agreed
24 in the result, but not only on the ground that there wasn't
25 this certificate on the Cellmark DNA report that was at

1 issue in Williams's case.

2 So that's -- it's sufficient for the Supreme Court of the
3 United States, and it's sufficient for Lui, because Lui was
4 decided after Williams even, which is the most recent -- I'm
5 just going to (inaudible) Madam Clerk so I don't forget --
6 which is the most recent case from the Supreme Court
7 addressing this issue.

8 Now, the City said it rests on Lui. Well, let's look at
9 Lui. Lui, I agree with the City, addressed this issue. And
10 I think our Supreme Court in Lui was really trying to make
11 sense of the three cases that came out. And in the case of
12 Williams, it came out actually while Lui was before the
13 Court, and the Court took the unusual step of asking for
14 reargument and re-briefing just on the specific issue that
15 was presented in Williams.

16 But what's interesting about Lui is that there were a
17 couple of different things. There was DNA evidence, but
18 there was also a toxicology report, and photographs, and an
19 autopsy report.

20 Now, in Lui, the defendant was accused of murder. In the
21 Court's opinion, there was a significant amount of evidence
22 against him aside from these things.

23 But the Court found, as the City has indicated, that the
24 DNA portion, that evidence did not affront Mr. Lui's right
25 to confrontation. And there are numerous reasons why that

1 is, and why in subsequent cases DNA evidence has been found
2 not to pose this unique problem that toxicology reports do.

3 One of the reasons -- the Court heard testimony from
4 Ms. Arvizu -- there might be 15 people, 20 people involved
5 in just producing a single DNA profile. But even more
6 importantly is that all those 20 people produce is a sheet
7 of paper that say this is a DNA profile.

8 That doesn't become inculpatory. That doesn't become --
9 that doesn't make somebody a witness against until you have
10 an expert look at both that profile and look at the DNA
11 profile that was generated for a particular defendant.

12 So for example, if I were a defendant in a murder case,
13 God forbid, and I had a DNA sample run from the crime scene,
14 and they produced this DNA sample, nobody knows that that's
15 a problem for me until they get my DNA, produce a report
16 about my DNA, and then have an expert witness compare those
17 and say, you know what? These profiles match.

18 That is the inculpatory piece. That is what makes a
19 witness against a defendant, and it is that person who needs
20 to sit in that chair and be subject to cross examination.
21 Not necessarily the person who aliquoted some blood and put
22 it in this, and then another guy came in and did some
23 sequencing. It's the person who's looking at this report,
24 and looking at that report, and saying this is a match, and
25 it's that person.

1 Likewise with cell tower data. If you just pull a chip
2 off of a cell phone, and it -- you know, there might be
3 multiple people. As Your Honor said, you know, somebody
4 might just take it out, and that's maybe not so technical,
5 and then somebody else might look at it.

6 The problem is, when you have someone who says, here's
7 some data about where the cell phone was, and here's some
8 data about this defendant, and these two things match, so
9 that this cell phone data says something bad about this
10 defendant.

11 The problem with the issue in Mr. Wiggins's case is that
12 what the Washington State Patrol has produced is something
13 that is in itself inculpatory. And I think the City's
14 argument illustrates that.

15 I'm confused by the suggestion that the City isn't
16 intending to use Ms. Mitchell-Mata's work or her
17 certification, because we know that what they're interested
18 in is the number. If they don't want that .11, the number
19 that Mr. Capron acknowledges was produced solely by
20 Ms. Mitchell-Mata, then why are we here prosecuting
21 Mr. Wiggins for DUI for being over the limit? That's the
22 number that's inculpatory.

23 And if all Mr. Capron can do is come here and read that,
24 then that's a problem. Because we need the person who
25 analyzed and produced to create that number. And the record

1 just doesn't support that all Ms. Mitchell-Mata did was
2 somehow generate a bunch of data out of a machine, and now
3 Mr. Capron is the one who's doing the review and the
4 analysis.

5 If the City could say that, I think all of the case law
6 that we have, including Bullcoming, which specifically
7 addressed the case of blood analysis in the context of a DUI
8 for a gentleman who was charged with a very serious DUI. I
9 think he blew -- or was tested at a .21. The Court threw it
10 out because the person who did that testing wasn't present
11 in the court to be subjected to confrontation, because that
12 is the inculpatory thing.

13 There doesn't need to be any more analysis done to the
14 graphs that produced that number to generate the inculpatory
15 number, which therefore makes a person a witness against the
16 defendant, which the City acknowledges is the test
17 articulated in *Lui*.

18 And I think *Lui* is one of the best illustrations for that.
19 So as I said, in *Lui*, there was the DNA issue, which I have
20 addressed, but there was also these other three things.
21 There was the toxicology report, the photographs, and the
22 autopsy report.

23 Now, with the toxicology report, they had run a toxicology
24 report on the decedent, the victim of the murder, because
25 there was an allegation by the defendant that she had been

1 on drugs at the time of her death. So the toxicology report
2 was run on her body.

3 They also performed an autopsy. That was performed by a
4 subordinate medical examiner. And the person who came to
5 testify was the supervisor of that person.

6 And then there were photographs that were taken at the
7 scene. The photographs depicted bruising on the victim's
8 neck.

9 So I'll start with the toxicology report. The toxicology
10 report was introduced. The supervisor made representations
11 about what it contained. And then there was also some
12 temperature readings and some other readings that were taken
13 as part of the autopsy report. And again, the witness
14 testified as to those readings. He testified that the
15 temperature of the body and the ambient temperature were 30
16 something, 30 degrees. And then based on that data, he
17 offered his conclusion that the body had been out there for
18 some number of days, and that it, you know, therefore, made
19 it more likely that the defendant did it.

20 As to the photos, the witness looked at the photos, looked
21 at the pictures of the bruising, and said, you know, that,
22 in my training and experience, in my professional experience
23 as a medical examiner, that kind of bruising is consistent
24 with -- I think it was manual strangulation.

25 The Court in Lui, as I said, did not find a problem with

1 the DNA; did not find a problem with the photographs,
2 because the gentleman on the stand was looking at the
3 photographs and saying, I am looking at those photographs,
4 and maybe, you know, you guys don't know what that means to
5 you, but to me, that means manual strangulation. And that
6 person was on the stand and subject to confrontation by the
7 defense about what -- what do you mean that means bruising
8 for manual strangulation? What do you -- how do you know
9 that? What tests did you do? What experience do you have
10 that leads you to say that?

11 But that his testimony about the toxicology report and
12 about the temperature readings were error. So on page -- so
13 this is in State v. Lui, 179 of the 2nd Washington Reporter
14 457, and the specific pin cite is at page 486 of the
15 decision.

16 It says, right at the top of that page, paragraph 59 of
17 the opinion, applying the test of the prior Supreme Court
18 decisions shows that Orchid's DNA analysts were not
19 witnesses against the defendant, but rather, facilitated
20 Pineda's role as an expert witness.

21 So Pineda was the person who came in and gave the opinion
22 that the DNA profiles matched. Court found that that was
23 not a problem.

24 Similarly, taking the temperature of Boussiacos's body was
25 not an inculpatory act. It helped the expert estimate the

1 time of death. Oh, I'm sorry. The temperatures, that
2 portion was not found inculpatory; it was the issues from
3 the autopsy report and the toxicology report. Here's where
4 it says that.

5 Finally, while the toxicology report and Harruff's
6 statements taken from the autopsy report helped to inculcate
7 Lui, their admission was harmless error.

8 The key portion there is error. The Court found that it
9 was an error. He was not permitted to testify as to what
10 was in the toxicology report and what was in the autopsy
11 report.

12 Now, the Court found it was harmless, because in the
13 appellate standard of review, they're looking at the entire
14 record and seeing whether the majority of the untainted
15 evidence would still support a conviction even if the Court
16 tossed the tox report out, and the autopsy report out, based
17 on the confrontation clause violation.

18 And the Court found that in this case, unfortunately for
19 Mr. Lui, there was enough evidence against him that the
20 State had presented that those two errors were harmless .
21 But they were still error.

22 And I think that's because the Courts are recognizing that
23 there's something different about what is happening in a
24 toxicology report where one person is working on their own,
25 generating an inculpatory number, and the Court is

1 acknowledging that. While the toxicology reports help to
2 inculcate Lui, it was harmless error because of the other
3 evidence against him.

4 So I think Lui raises the exact, same issue. Lui offers a
5 test of whether someone is a witness against. And as I
6 said, that is more than demonstrated by the declaration of
7 penalty of perjury; and not just the fact that she's
8 declaring under penalty of perjury, but the fact of what
9 she's swearing to under penalty of perjury.

10 And I think Bullcoming is also squarely on point with the
11 case at issue here.

12 The City cited a portion of Sotomayor's concurrence in
13 that case. Sotomayor joined the majority, but also wrote
14 separately. She indicated that the issue was -- you know,
15 as the City said, it's not a case where the person is a
16 supervisor. This is a case where somebody played no role in
17 producing the BAC report, and did not observe any portion of
18 Curtis Caylor's conduct of the testing. Razatos, the
19 witness in this case, in Bullcoming, had no involvement
20 whatsoever in the relevant tests and report.

21 So we don't -- I think we don't know what exactly
22 Justice Sotomayor meant by supervisor, but she clearly meant
23 somebody who observed some portion of the testing and/or
24 conducted some portion of it. Because she distinguishes
25 from this case, where she was part of the majority, where

1 the witness presented did not observe any portion of the
2 conduct of the testing, and had no involvement whatsoever in
3 the relevant testing report.

4 And I would note that in Bullcoming, the State sought to
5 qualify that gentleman who testified as an expert in how the
6 lab runs, and somebody who's very familiar with it, somebody
7 who works there, somebody who can talk about all the
8 procedures, and everything that's followed, and talk about
9 why. And it wasn't good enough. It was a confrontation
10 clause violation to allow that gentleman to testify.

11 The question in front of the Court in Bullcoming was
12 remarkably similar to the question here. And the Court
13 concluded that the accused right -- sorry, this is on
14 Bullcoming, 564 U.S. 647, and the pin cite is 652. The
15 accused right is to be confronted with the analyst who made
16 the certification, unless that analyst is unavailable at
17 trial and the accused had an opportunity pretrial to cross
18 examine that particular scientist.

19 THE COURT: Counsel, there was a lot of talk by --
20 questions about the difference between someone who is a
21 technician, and I think you touched on a little bit when you
22 talked about the Melendez case.

23 But technician versus someone who actually did more than a
24 technician, could you speak on that, and how that was
25 reflected in the cases that you cited?

1 MS. WHYTE: I think so, Your Honor. But if I'm not
2 answering your question, please redirect me. So --

3 THE COURT: So there was a lot of testimony about what
4 Ms. Mata did. It was just more like a technician would
5 do -- what the information -- the machine does all of the
6 work. So that's my (inaudible).

7 MS. WHYTE: So I think that the City has an interest in
8 arguing that, because they've cited case law from other
9 states.

10 Now, one of the cases, unfortunately, was a Draeger case,
11 so I think it's inapplicable here, because I think in
12 Draeger you really have a situation where it's much closer
13 to something going into a machine, and a machine spitting
14 out data.

15 And of course I think the City would acknowledge that, in
16 Draeger cases, what they're seeking to admit are the numbers
17 that get spit out of the machine. That case was in the
18 City's brief. I don't think it's applicable here. But that
19 was the Connecticut v. Buckland case that they cited in
20 their brief, 313 Connecticut 205.

21 I think that's an issue where you have a guy who -- I
22 mean, could be a cop, you know, often I think that's what it
23 is, or somebody at the state patrol who's operating machine
24 a person's blowing in, and the number is being spit out.

25 The testimony that we have here, which is consistent with

1 Bullcoming and Melendez-Diaz in the sense that those were
2 both blood tests -- well, I'm sorry, Melendez-Diaz was a
3 test for drugs, but by a toxicology lab, and Bullcoming was
4 a blood test. Both acknowledged that there's a special role
5 when people are doing the kinds of things that, frankly,
6 both witnesses testified to here.

7 So Mr. Capron testified at length, and Ms. Arvizu -- I
8 think her testimony corroborated that -- that analysts in
9 the Washington State Patrol need training. They have to
10 have a degree. Unfortunately, you know, any dreams I might
11 have of working at the state patrol toxicology lab are
12 dashed because I don't have the requisite qualifications,
13 because you need to be a scientist.

14 And the reason you need to be a scientist, as Mr. Capron
15 acknowledged this morning, is because you got to know
16 something about chemistry to be able to do these machines,
17 to be able to produce the data, you know, withdraw the
18 correct amount of solutions, perform the techniques in
19 accordance with the standard operating procedures.

20 The very fact that, as they testified here, that you need
21 that training, I think speaks to the concerns that are
22 raised in Bullcoming in particular, but also Melendez-Diaz.

23 I think I can -- I know Bullcoming I think I can offer the
24 Court a citation, because Bullcoming talks extensively about
25 why you need to talk to the person who performed the test.

1 So it's interesting because the City here argues -- one of
2 their arguments in their brief is that, you know, this is
3 raw, machine-produced data. And that was very similar to
4 the argument that was made in Bullcoming. And in fact, that
5 was adopted by the New Mexico Supreme Court and then
6 reversed.

7 So this is in Bullcoming, and it is 564 U.S. at 657. The
8 Supreme Court says, first the Court said Certifying Analyst
9 Caylor was a, quote, was a mere scrivener, who, quote,
10 simply transcribed the results generated by the gas
11 chromatograph machine; second, SLD Analyst Razatos, who is
12 the witness who was brought to testify at trial, although he
13 did not -- although he did not participate in testing
14 Bullcoming's blood, quote, qualified as an expert witness
15 with respect to the gas chromatograph machine. Razatos
16 provided live, in-court testimony, the Court stated, and
17 thus was available for cross examination regarding the
18 operation of the machine, the results of the Bullcoming's
19 BAC test, and the SLD's established laboratory procedures.

20 The Court rejected that analysis wholesale, all of it.
21 That was the reasoning of the New Mexico Supreme Court. And
22 the Court said, you know, no way.

23 And in the majority opinion, the Court goes on to say --
24 so this is from a similar part of the opinion. This is
25 moving down to page 661. The Court said, this Court settled

1 in Crawford that the, quote, obvious reliability of a
2 testimonial statement does not dispense with the
3 confrontation clause.

4 So there again, addressing the fact that, even if you
5 think Ms. Mitchell-Mata is doing an amazing job -- and I, I
6 would have a really hard time thinking of great questions to
7 ask her, I still have the right to -- Mr. Wiggins still has
8 the right to have me ask those questions on his behalf.

9 But that the confrontation clause commands not that
10 evidence be reliable, but that reliability be assessed in a
11 particular manner by testing the evidence in the crucible of
12 cross examination.

13 And then further down on that page, it says, recognizing
14 that admission of the blood alcohol analysis depended on,
15 quote, live, in-court testimony by a qualified analyst, the
16 New Mexico Supreme Court believed that Razatos could
17 substitute for Caylor, the testing analyst in that case,
18 because Razatos, quote, qualified as an expert witness with
19 respect to the gas chromatograph machine and the SLD's
20 laboratory procedures.

21 And then here's the Court speaking, the U.S. Supreme
22 Court, but surrogate testimony of the kind Razatos was
23 equipped to give could not convey what Caylor knew or
24 observed about the events his certification concerned, i.e.,
25 the particular test and testing process he employed.

1 So I think the City can say, well, but Mr. Capron has --
2 he's drawing an independent conclusion. Indeed, I think the
3 City has to say that in order to have any traction on their
4 argument.

5 But they can't change the record here, which establishes
6 through testimony that Mr. Capron didn't watch
7 Ms. Mitchell-Mata perform these tests; that he frankly
8 didn't -- whatever he's done now since they -- you know,
9 since he's been working on testifying for this case, that he
10 didn't review some of these things when he signed off on her
11 testing. The testimony establishes that he only reviewed
12 the case file. That was his testimony.

13 Ms. Arvizu established that there were things that were
14 visible in the case file, but there were also some things
15 that were only visible once you had all of the data.

16 The testimony established that Ms. Mitchell-Mata did have
17 all the data because she was the one who ran, not only
18 Mr. Wiggins's batch, but the whole shebang, all 40 tubes,
19 the controls, the calibrators.

20 Mr. Capron established that she was the one who made the
21 decisions about which ones to pull off the line and do more
22 testing on, that she was the one who decided what order to
23 put them in.

24 And as I said, you know, we've talked some about her --
25 whether or not she would have done that reliably or whether

1 or not there were procedures in place. But it's not at
2 issue.

3 The only issue is whether she is the one that Mr. Wiggins
4 has a right to confront. And although I think reliability
5 isn't the question here, I think it helps illustrate why
6 it's so important that we need Ms. Mitchell-Mata, because
7 there were errors in Mr. Wiggins's file. She may not have
8 had the scientific acumen of Marie Curie, and we have a
9 right to question her about that. And questioning
10 Mr. Capron is not going to cut it.

11 Mr. Capron acknowledged in his testimony that all he had
12 were the data that were produced by her; and that looking at
13 the data that she produced and the conclusions she drew,
14 that that seemed to match up, as far as he could tell, just
15 by looking at the case file.

16 But as we know from Ms. Arvizu's testimony, that's the
17 only conclusion you can draw. But if someone made an error
18 at point A, and that messed up the data at point B, and then
19 she got results at point C, and Mr. Capron says, well, point
20 B connects to point C, we still don't know what happened at
21 point A that might have affected point B.

22 And Mitchell-Mata's the only one who can tell us what
23 happened at point A. That's why we need her here. And
24 that, frankly, is the problem with the unpublished Division
25 III case that the City cites. Obviously the Court's not

1 bound by it, but there was no expert testimony in the record
2 on that case. So you know, I think, I mean, it was
3 unpublished probably for a reason.

4 But there was no record in that case before the Court,
5 either the trial Court or the Appellate Court, of what, you
6 know, what can happen, why it is that it's important.

7 I mean, it also, I think, directly contradicts Supreme
8 Court precedent, but I think that might be why. There is no
9 information there about why it's so important that we know
10 what happened at point A, so that we can confront her about
11 what happened and what the result was at point C, which is
12 the inculpatory act, which is what makes her a witness
13 against Mr. Wiggins.

14 THE COURT: Thank you.

15 MS. WHYTE: Did the Court have any further questions?

16 THE COURT: No. Thank you.

17 Ms. Sra, anything else?

18 MS. SRA: Yes, Your Honor. Thank you. I'm going to start
19 with the State v. Ramirez case.

20 The Court had expressed concern about the chip-off
21 process, and that it might be, you know, a simplistic
22 process requiring not a lot of training. I went back and
23 reviewed the case, and, in fact, on page 3 it does state
24 that chip-off forensics is a high-tech method of extracting
25 and analyzing data stored on flash memory chips. This

1 method often allows the extraction of data from devices,
2 even if the device is damaged or the data has been deleted.

3 And so in the Ramirez matter, the chip-off procedure was
4 done by somebody else. The Court allowed somebody else to
5 testify, and held that that was not a violation of the
6 confrontation clause, even though we're dealing with the
7 same issues here, the same questions. Well, how do we know
8 that the person that did this high-tech method of extracting
9 and analyzing the data did it properly? We don't know.

10 And so essentially it's the same issue, because -- and the
11 reason that the Court held the way it did, and held that
12 this was not a violation of confrontation, is because there
13 is nothing the technician or the examiner can do to change
14 data on the chip.

15 And so likewise here, there is nothing that Brian Capron
16 can do, nothing that Christie Mitchell-Mata can do when she
17 inputs -- when she tests the blood under the parameters
18 which are known to Mr. Capron when he is coming to his own
19 conclusion after reviewing all of the data in the case file.

20 THE COURT: Let me ask you this, Counsel. So I understand
21 that they took the information off the chip. But that was
22 just a random phone at that point, right? How is that --
23 just the data off the chip, that didn't connect to the
24 defendant in the case, right, until somebody else did their
25 part?

1 MS. SRA: Well, the phone was -- just a moment, Your
2 Honor.

3 THE COURT: But I guess, yeah. It didn't connect to the
4 defendant at that point, right?

5 MS. SRA: So it was the victim's cell phone that was taken
6 by the defendant.

7 THE COURT: Right. But the other person connected the
8 information from there with the defendant's phone records;
9 is that correct? If I'm remembering correctly.

10 MS. SRA: So let's see here. So the person that
11 testified, it says, at the hearing on this matter
12 Runsthrough (phonetic) admitted that she did not extract the
13 data, and that her testimony relied entirely on the report
14 of testing done by Matthews (phonetic), the missing witness.
15 Runsthrough testified generally about the type of data
16 Matthews could have extracted from the cell phone, which
17 included text and short message, service messages, pictures,
18 Internet activity, and calendar information. Runsthrough
19 also testified that she's familiar with the chip-off
20 process.

21 So what the witness at court testified about was a report
22 that was generated by a different witness of the data.
23 After he ran the program --

24 THE COURT: I guess my -- maybe I'm not being clear with
25 my question. I guess the information that came off the chip

1 didn't necessarily -- wasn't necessarily attached to the
2 defendant in that case at that point. It was the
3 victim's -- it had to be something else that combined it to
4 make it be attached to the defendant -- inculcate the
5 defendant I guess is what I'm saying.

6 MS. SRA: Correct. That was when Detective Cox (phonetic)
7 took the stand, so a different witness, and said all of
8 these things combined --

9 THE COURT: All right.

10 MS. SRA: -- inculcate.

11 THE COURT: All right. Go ahead.

12 MS. SRA: And so Defense in her argument keeps going back
13 to this certification, read it into the record.

14 I would like to make the record very clear. The City is
15 not attempting to admit that certification into evidence.
16 That certification is exactly what Bullcoming and
17 Melendez-Diaz is about. In both of those cases, that is
18 what the State was -- that is what the State admitted into
19 evidence.

20 THE COURT: So I guess, Counsel, I understand that
21 (inaudible). But isn't that the same -- isn't it the same
22 thing? Even though you're not trying to admit the paper,
23 you're trying to admit the information that was contained in
24 the paper, which is the .11.

25 MS. SRA: No, Your Honor. So the City is not trying to --

1 so in Bullcoming, the reason that they called this
2 toxicologist that was called a surrogate toxicologist is
3 because the toxicologist got up on the stand and parroted
4 the information on that report. So that would be like
5 Mr. Capron taking the witness stand and saying -- and me
6 handing him the report, and him saying, yeah, this report
7 says Mr. Wiggins's BAC was .11.

8 That toxicologist did not testify that he looked at the
9 case file, that he analyzed the gas chromatographs himself,
10 much like Lui and the complex DNA profiles.

11 The DNA profile of the defendant is inculpatory, yes, by
12 itself, because that's his DNA, much like the blood in this
13 case is the defendant's.

14 The data, though, the DNA profile and the gas
15 chromatogram, that's the data that's being analyzed. And
16 there's nothing that Christie Mitchell-Mata can do to change
17 that. Christie Mitchell-Mata cannot go in and program the
18 computer a different way, and spit out a different result.

19 And so when Brian Capron is looking at the case file, he
20 knows exactly what was input. He knows exactly what
21 parameters, standard operating procedures that he testified
22 to extensively, and then he's looking at the chromatogram,
23 and, as a toxicologist, is reading that data.

24 THE COURT: So he knows what was written in her report,
25 right? He's not -- because he didn't do it.

1 And then regarding the DNA, wasn't it a two-part thing?
2 So, like, there was the DNA, and then somebody else said
3 what -- that DNA matches the defendant in that case.

4 It seems a bit different to me, because hers was all in
5 one. She did the test and came up with the result. Another
6 person didn't have to come to get the end result. So it
7 seems different to me. But --

8 MS. SRA: So, Your Honor --

9 MR. KARR: If we could just have one moment, Your Honor.

10 THE COURT: Uh-huh.

11 MS. SRA: So, Your Honor, I believe this was an exhibit
12 that was admitted into evidence. It was the graphs of
13 the --

14 THE COURT: Do you know what exhibit it was?

15 MS. SRA: It was Defense exhibit. I'm not sure what
16 number it was.

17 THE COURT: Okay.

18 MR. KARR: I think it was Defense 10, the case file.

19 THE COURT: 10, okay.

20 MS. SRA: So Mr. Capron's not considering
21 Ms. Mitchell-Mata's toxicology report, as we see it, like,
22 the two-page toxicology report with her certification.
23 That's not something that he considers when he makes his own
24 independent conclusion.

25 The only things that he's considering are the graphs that

1 we see, the graphs and the documents that have been spit out
2 by a computer, by an instrument.

3 THE COURT: I understand that part.

4 MS. SRA: And so in --

5 THE COURT: I guess the part I don't -- I keep going back
6 to, though, is that she's the one who put in everything from
7 the beginning to -- or else we couldn't get the graphs. We
8 can't get the graphs, right, without putting the blood in
9 and doing all those other things. You can't just get
10 graphs.

11 MS. SRA: Right.

12 THE COURT: So that's where I'm getting -- where I'm kind
13 of --

14 MS. SRA: I understand, Your Honor. And much like we
15 can't get DNA profiles without putting something in, we
16 can't get a cell phone data without inputting something.

17 And in United States v. Washington, which I have included
18 in my briefing, the United States Court of Appeals for the
19 Fourth Circuit, reason that the work performed by
20 non-testifying analysts was non-testimonial. They went on
21 to say, the most the technicians could have said was that
22 the printed data from their chromatograph machines showed
23 that the blood contained PCP and alcohol. The machine
24 printout is the only source of the statement, and no person
25 viewed a blood sample and concluded that it contained PCP

1 and alcohol.

2 And so in short, the inculpatory statement, the
3 defendant's blood sample contains PCP and alcohol, was made
4 by the machine on printed sheets, which was given to the
5 toxicologists. The technicians could neither have affirmed
6 or denied independently that the blood contained PCP and
7 alcohol, because all the technicians could do was to refer
8 to the raw data printed out by the machine.

9 THE COURT: So one follow-up question to that. So from
10 the questions that you asked in the testimony, it seems like
11 you're saying Ms. Mata was, like, a technician, and
12 Mr. Capron was the analyst.

13 MS. SRA: Yes. So, Your Honor, Ms. Mitchell-Mata was the
14 technician in running the samples of Mr. Wiggins's blood.
15 But essentially it could be her, it could be Mr. Capron, it
16 could be somebody else at the tox lab that analyzes the
17 data.

18 And by virtue of the fact that the blood showed positive
19 for alcohol is not Ms. Mitchell-Mata making an inculpatory
20 statement. That's the --

21 THE COURT: Who is the analyst in your scenario?

22 MS. SRA: Mr. Capron.

23 THE COURT: And so Mr. Capron is the analyst, yet he
24 doesn't sign the certificate, so that's confusing to me
25 again. Because if he's the one who analyzed it, seems like

1 he would be the one who would sign saying I have reviewed
2 and analyzed, and this is the finding.

3 MS. SRA: Right.

4 THE COURT: Sounds like they're both technicians, because
5 he's only reviewing what she did.

6 MS. SRA: So, Your Honor, at one point Ms. Mitchell-Mata,
7 when she was here, she was the primary analyst. And so
8 that's why the report she generated, she did that
9 certification. She signed her name.

10 Also, you know, I think it was a couple of days after she
11 produced that report, Mr. Capron went in and did his own
12 analysis, and signed off as a technical reviewer.

13 THE COURT: Okay.

14 MS. SRA: Now, because we don't have Ms. Mitchell-Mata, he
15 is now stepping in as the primary analyst doing his
16 analysis. That's why the City is not using that report that
17 Ms. Mitchell-Mata signed off on, the certification, because
18 the City agrees with Defense counsel that that is
19 testimonial, and that that is subject to confrontation.

20 THE COURT: Okay. So one follow-up question, and then
21 I'll let you finish.

22 So when I look at Bullcoming and Melendez, it seems that
23 the Court, and Lui Court, seems like they agreed with those
24 cases. It seems pretty, like, almost uncontroverted what
25 they're saying is that the person who did the testing --

1 initial testing in a case where those two prongs in that,
2 that that's the person who needs to come.

3 So can you just tell me how -- your take on that, and how
4 you would distinguish from what I am feeling about that?

5 MS. SRA: Yes, Your Honor. So I think that in Bullcoming
6 and Melendez-Diaz, we're -- again, we're dealing with a
7 factually distinct situation, because in those cases the
8 state admitted into evidence the certification of the
9 toxicologist.

10 And so in Lui we have the DNA profiles, which are created
11 by 15 or some odd people. These are complex DNA profiles.
12 And then they don't come in. This other individual comes in
13 and testifies about those profiles and makes an inculpatory
14 statement.

15 And so here the City agrees that Ms. Mitchell-Mata would
16 meet the second portion of the test if the City tried to
17 admit that report that she signed off on as a primary
18 analyst into evidence, because that has her certification on
19 it, and that is an affidavit. It's signed under penalty of
20 perjury. It is subject to confrontation.

21 But because Mr. Capron is relying on chromatographs that
22 have been spit out by a computer, much like the DNA
23 profiles, much like the cell phone extractions, much like as
24 U.S. v. Washington, the chromatograph machines showed that
25 the blood had ethanol, and the Court held that that's --

1 that machine has inculcated the defendant.

2 So just because Ms. Mitchell-Mata performed the test
3 doesn't equate that she is the one making that inculpatory
4 statement. She can't control what that blood will show.
5 The machine spits that out.

6 And when Brian Capron comes in and analyzes that data that
7 has been spit out by the machine, that is when he would make
8 inculpatory statement against Mr. Wiggins.

9 THE COURT: Thank you. Anything else?

10 MS. SRA: Your Honor --

11 THE COURT: Sorry for interrupting you.

12 MS. SRA: No, no. Not at all.

13 So the U.S. v. Washington case from the Fourth Circuit
14 goes on to state that, moreover, there would be no value in
15 cross examining the lab techs on their out-of-court
16 statements about whether the blood sample tested positive
17 for PCP and alcohol, because they made no such statements.
18 They would only be able to refer to the machine's printouts,
19 which the toxicologist also had; thus, we reject the
20 characterization of the raw data generated by the lab's
21 machines as statements of the lab's technicians who operated
22 the machines.

23 So much like Ms. Mitchell-Mata, if she were to come in and
24 testify, she's going to testify to the same thing that
25 Mr. Capron is testifying to. She's going to say, I

1 input --- I followed standard procedures, and this is what
2 the machine spit out. That is exactly what Mr. Capron would
3 be testifying to. The raw --

4 THE COURT: Except he can't say that he opened the blood,
5 that he put the blood in, that he calibrated it. He can't
6 say any of those things.

7 MS. SRA: But all of those things are reported.

8 THE COURT: But she did those things.

9 MS. SRA: Correct. And so the raw data generated by the
10 diagnostic machines are the statements of the machines
11 themselves, and not their operator.

12 And so here we have testing that's done by a
13 non-testifying analyst, a tech, if you will; however, the
14 testing generates data, and then Brian Capron comes in and
15 forms an independent opinion based on that data.

16 And I would also argue that all of the -- you know,
17 whether the blood was coagulated or not, whether standard
18 procedures were followed, et cetera, those are still subject
19 to cross examination; but also, that goes to the weight, and
20 not the admissibility.

21 I think what the City would just stress is the data that
22 Brian Capron is looking at, the data that Ms. Mitchell-Mata
23 looked at is generated by an instrument, is generated by a
24 machine.

25 Yes, Ms. Mitchell-Mata actually ran the test, much like

1 the 15 people in Lui ran the DNA profiles, much like the
2 Ramirez case where the individual performed this high-tech
3 chip-off process and got the data from the cell phone.

4 However, the only person that's creating a testimonial
5 statement subject to confrontation is the person that
6 reviews the data, comes to their own independent conclusion,
7 and testifies at trial.

8 Lui stated that an analyst who simply adds a reagent or
9 runs a batch on an instrument does not make a statement
10 subject to confrontation. Lui is very clear on that, and
11 says that -- that confrontation does not sweep in analysts
12 whose only role is to operate a machine or add a reagent to
13 a mixture, much like Christie Mitchell-Mata, who her only
14 role is to run the testing as a toxicologist of the lab.
15 Merely laying hands on evidence does not a witness make.

16 Lui also goes on to say that expert witnesses may not
17 parrot the conclusions of others and circumvent the
18 confrontation clause. So again, like, if Brian Capron was
19 to come here and say, Christie Mitchell-Mata certified,
20 under penalty of perjury, that the results were .11, that
21 would obviously be problematic.

22 However, an expert may rely on the work of laboratory
23 technicians when reaching his or her conclusion. And again,
24 Mr. Capron is reaching his conclusion on his analysis of the
25 data that was generated by the testing that was run by

1 Ms. Mitchell-Mata.

2 Your Honor, I believe that I would rest at this point.

3 THE COURT: All right. Thank you.

4 MS. WHYTE: May I add one thing about the U.S. v.
5 Washington case, Your Honor? Or would you -- or I could put
6 it in --

7 THE COURT: I'm sorry?

8 MS. WHYTE: I was just asking, may I add one thing about
9 the U.S. v. Washington case that I think wasn't on the
10 record? I mean, three seconds.

11 THE COURT: Go ahead.

12 MS. WHYTE: Sorry. I just wanted to note for the Court
13 that that was a 2007 case, before Melendez-Diaz even, before
14 Bullcoming, before Lui, before Williams; but also, just in
15 that case that was an Armed Forces case.

16 In that case the practice was for unnamed lab technicians
17 to prepare data, and then it was signed off on by the chief
18 toxicologist, who was the person who was at trial.

19 So I think it's not -- there were no names affixed to
20 that. The defendant was arguing he should have been able to
21 consult with those and confront those unnamed lab
22 technicians, and that was the issue in that case.

23 THE COURT: Thank you. Did you want to respond just to
24 that point, Ms. Sra? You don't have to, but (inaudible) get
25 the last word.

1 MS. SRA: Your Honor, I would just add that that case
2 hasn't been overruled.

3 THE COURT: All right. Thank you. So I'm thinking if I
4 can have a ruling for you by next -- because I'm at the jail
5 on -- and then on afternoon calendar. Every day but Friday
6 is just a morning calendar at the jail. So that would be
7 the (inaudible). Oh, I'm looking at the wrong one. So that
8 would be -- is that the 18th? The 18th.

9 MS. WHYTE: In that case, Your Honor, would it make sense
10 to send Mr. Wiggins's master to a date after that?

11 THE COURT: Yeah. I think so.

12 MS. WHYTE: Okay. Rather than having him come back
13 tomorrow?

14 THE COURT: Yeah. And his presence can be excused, if
15 you'd like, for that. I'll let you make that decision.

16 MS. WHYTE: Okay. I think he wasn't MRA ever anyway.

17 THE COURT: No. I meant for the motion decision.

18 MS. WHYTE: Oh, I see. So the Court is going to --

19 THE COURT: It will be up to you. He doesn't need to
20 come, unless you want him to be here.

21 MS. WHYTE: Okay. Will it be an oral ruling or a written
22 ruling, Your Honor?

23 THE COURT: It will be oral. But if the parties would
24 like to prepare findings and conclusions --

25 MS. WHYTE: I think we can have an oral hearing if that's

1 what the Court wants. I think Mr. Wiggins might want to be
2 here, but I will ask.

3 THE COURT: Yes. That's fine. He can have the option.

4 Does that work for you, Ms. Sra? I know you --

5 MS. SRA: Yes, Your Honor. So just next Friday, the 18th?
6 Yes, that works.

7 THE COURT: (Inaudible).

8 MS. SRA: Yeah.

9 THE COURT: All right. Thank you, everyone, for your good
10 work and your patience.

11 MS. SRA: Thank you, Your Honor.

12 MR. KARR: Thank you, Your Honor.

13 THE COURT: We'll see you next Friday, if not before.
14 We'll be off the record.

15 MR. BURNTON: Did Court give a time for the --

16 THE COURT: 1:30.

17 MR. KARR: 1:30.

18 (January 10, 2019, conclusion of hearing)

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C E R T I F I C A T E

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