

IN THE SUPERIOR COURT FOR THE STATE OF VERMONT
IN AND FOR THE COUNTY OF CALEDONIA, CRIMINAL DIVISION

STATE OF VERMONT,

Plaintiff,

v.

DALE B. SMITH, ET AL.,

Defendant.

Docket No. 382-6-12 Cacr

9:09 a.m.

February 12, 2013

Volume II of II

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MOTION HEARING, CONTINUED
BEFORE THE HONORABLE MARY MILES TEACHOUT
JUDGE OF THE SUPERIOR COURT

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FOR THE DEFENDANT:

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1 (Proceedings commence at 9:09 a.m.)

2 THE COURT: Please be seated. Good morning.

3 MR. SLEIGH: Good morning, Your Honor.

4 THE COURT: We're here for the continuation of the
5 hearing in multiple cases on motion to exclude breath tests.

6 And, Mr. Nagurney, I understand you had an accident?

7 MR. NAGURNEY: That's right. I was not at fault,
8 though, I'm happy to say.

9 THE COURT: That's good. Is everyone all right?

10 MR. NAGURNEY: Yes. We are fine. My car less so,
11 but thank you for understanding and giving us the extra time.
12 I appreciate that.

13 THE COURT: I believe we are in the direct
14 examination of Ms. Buldoc.

15 MR. NAGURNEY: Correct.

16 MR. SLEIGH: Your Honor, before we start with that if
17 I could just address a housekeeping matter.

18 I had offered Exhibit O, which was the previously
19 marked book called Strengthening Forensic Science. I have
20 since supplied Mr. Nagurney with a link to that on the web and
21 downloaded it on a disc and I have a disk available for the
22 Court. So, we would now renew our motion to admit O.

23 MR. NAGURNEY: Ms. Conti tells me -- or Dr. Conti I
24 should say -- tells me she has reviewed the exhibit. So, I'm
25 all right with that, Your Honor.

1 THE COURT: All right. Defendant's O is admitted.

2 MR. SLEIGH: Thank you.

3 (Defendant's Exhibit O received)

4 AMANDA BULDOC

5 called as a witness for the State, having been duly sworn,
6 testified as follows:

7 DIRECT EXAMINATION CONTINUED

8 BY MR. NAGURNEY:

9 Q Hello, Ms. Bolduc. So, if I can properly remember
10 where we left off, I believe we were talking about the various
11 testing that's performed in the laboratory by the Department of
12 Health that was performed prior to the release of these
13 DataMaster DMT instruments for use in evidentiary testing; is
14 that correct?

15 A Yes.

16 Q I believe I've asked you about the process of verifying
17 the reference solutions that were used to test the DataMaster
18 DMT on the gas chromatograph?

19 A Yes.

20 Q And I would ask -- I believe I asked you as well to
21 describe briefly the process of what that verification on the
22 gas chromatograph entailed and I think that's about the middle
23 of where I was when --

24 A I think we started --

25 Q Yeah.

1 A -- we started into that; yes.

2 MR. NAGURNEY: Okay. If I may approach to have an
3 exhibit marked, Your Honor?

4 THE COURT: Yes.

5 THE CLERK: Did you already have some that were
6 already marked?

7 MR. NAGURNEY: I believe so. I think we're up to
8 it's either 2 or 3.

9 THE CLERK: Okay. Yeah.

10 THE COURT: Yeah. You only have -- State's 1 has
11 been admitted, that's all.

12 MR. NAGURNEY: Mr. Sleigh stole all of my thunder
13 from me with the pre-deployment testimony.

14 BY MR. NAGURNEY:

15 Q So, Ms. Bolduc, I'll show you what's been marked as
16 State's Exhibit 2 and ask if you recognize that document?

17 A I do.

18 Q What is that document?

19 A This is a copy of the headspace analysis logbook. So,
20 these are the solutions that would have been made for the
21 internal standard and the timing mix for the gas chromatograph.

22 Q Okay. And is that exhibit a summary exhibit? Will
23 that -- is that record kept as a summary by the laboratory or
24 are there other documents related to that practice?

25 A There would be other documents that would relate to

1 this.

2 Q Okay. But Exhibit 2, does that fairly and accurately
3 summarize the notes that the laboratory would keep regarding
4 the gas chromatograph and the testing that was performed?

5 A These are two of the components that would have been
6 used for testing.

7 MR. NAGURNEY: Okay. I would offer Exhibit 2, Your
8 Honor.

9 MR. SLEIGH: I believe it's already admitted as part
10 of Q but I have no objection.

11 THE COURT: I'll admit but I don't quite understand
12 what it is. So, if you could do a --

13 MR. NAGURNEY: Sure. Absolutely.

14 THE COURT: -- little more identification of it.

15 (State's Exhibit 2 received)

16 BY MR. NAGURNEY:

17 Q So, if you could please explain why the Department of
18 Health laboratory at the time they were doing the
19 pre-deployment testing of these instruments kept Exhibit 2 or
20 as part of Exhibit Q?

21 A Yeah. It wasn't just for testing the DataMasters.
22 When we run the GC, the gas chromatograph instrument, either
23 for blood or for SIM solution. We make an internal standard
24 solution that goes in every sample. We also making a timing
25 mix that's run as part of the calibration. And so this logbook

1 keeps track of when those solutions were prepared and what the
2 components are within that solution --

3 Q And can --

4 A -- or those solutions.

5 Q -- and can you explain what a timing mix is?

6 A A timing mix is a sample that contains a few different
7 components. We use acid aldehyde, methanol, acetone, and
8 isopropanol to show that these components come out at a
9 different time than ethanol does. So, we don't have any
10 cross-contamination between these other alcohols and ethanol.

11 THE COURT: I need that again.

12 THE WITNESS: Sure. There are -- when you test a
13 blood sample there are a bunch of things that could be in the
14 blood; acid aldehyde, ethanol, which is what we're primarily
15 looking for, possibly methanol, or isopropanol. Sometimes
16 people will drink these other alcohols and they may come out in
17 your blood. So, we run a timing mix to show that -- that these
18 other chemicals will be analyzed at a different time.

19 So, when you put a sample in the GC it's basically a
20 race. You take a small portion of that sample and put it into
21 the instrument and depending on the weight of the chemical it
22 will get to the other end of the column within the GC at a
23 different time. So, each of these components will come out on
24 your graph at a different time. It'll show a different peak.
25 So, we can look at these peaks and when they come out and know

1 which chemical it is just based on the time that it gets out of
2 the instrument.

3 THE COURT: And do I understand that S2 is a document
4 related to preparation of solutions of two types, both of them
5 to be used in the gas chromatograph?

6 THE WITNESS: That's correct.

7 THE COURT: And what's the first one again; internal
8 something?

9 THE WITNESS: The first one is an internal standard.
10 So, it's a solution that's added to every sample that goes in
11 the GC and it has a couple of components that you'll actually
12 see come out, n-Propanol and t-Butanol. And when those come
13 out we can use those to quantitate. So, we know how much of
14 each of those chemicals was put in in the beginning and we
15 measure how much comes out at the end and then we can say,
16 based on the area under the peak, how much was there. So the
17 certain response from the detector correlates to a
18 concentration.

19 THE COURT: Okay. Thank you.

20 MR. NAGURNEY: If I may approach the witness, Your
21 Honor?

22 THE COURT: Yes.

23 BY MR. NAGURNEY:

24 Q Ms. Bolduc, I'll show you what's been marked as State's
25 Exhibit 3 and ask if you can identify that exhibit please.

1 A This is the -- another one of the logbooks that
2 documents that -- the calibration standards that would then be
3 prepared.

4 Q The calibration standards for which instrument?

5 A For the GC.

6 Q Gas chromatograph?

7 A Yes.

8 Q And is that a true and accurate copy of the exhibit as
9 it was provided?

10 A Yes.

11 MR. NAGURNEY: Your Honor, I would offer for
12 admission State's Exhibit 3. I will save Mr. Sleigh pointing
13 out that I believe it is a subset of Exhibit Q as well.

14 MR. SLEIGH: No objection, Your Honor.

15 THE COURT: State's 3 is admitted.

16 (State's Exhibit 3 received)

17 BY MR. NAGURNEY:

18 Q So, if you could explain, please, more fully what
19 State's Exhibit 3 demonstrates.

20 A Sure. When we calibrate the GC, the gas chromatograph,
21 we set four concentrations of ethanol as low as around a .02
22 and as high as around a .04 and each of those is analyzed by
23 the GC. And then based on the detector response we'll set a
24 calibration line. So, we'll then compare an unknown to these
25 known values. So, this is -- when we make the solutions we

1 weigh out ethanol on a balance and we document what the weight
2 is, and that would be the assigned concentration of those four
3 solutions.

4 Q So, Ms. Arvizu mentioned in her direct testimony a
5 company called Cerilliant.

6 A Yes.

7 Q Do you recall that testimony?

8 A Yes.

9 Q Do you use any products made by Cerilliant with the gas
10 chromatograph?

11 A We will purchase QC samples from them periodically.

12 Q Why do you purchase quality control samples from
13 Cerilliant?

14 A They're just one of the vendors that makes ethanol in a
15 concentration that we're looking for.

16 Q Okay. The gas chromatograph, if I'm understanding you
17 correctly, is used as an independent check on the values
18 associated with the reference solutions that are used to test
19 the DataMaster DMT instrument?

20 A It's used to quantify what the reference solution --
21 what the target concentration is.

22 Q And part of that process of verifying what the target
23 concentration of the reference solution is on the gas
24 chromatograph involves the records that you have in front of
25 you as Exhibits 2 and 3?

1 A Yes.

2 Q And further involves the introduction, I suppose for
3 lack of a better word, to the gas chromatograph of reference in
4 quality control solutions made by the Cerilliant company that
5 Ms. Arvizu mentioned?

6 A Yes.

7 Q You've been qualified by this Court I believe as well
8 as many others as an expert in both the DataMaster DMT and the
9 gas chromatograph; correct?

10 A Yes.

11 Q Do you have an opinion about whether the scientific
12 method used by the laboratory to verify the concentrations of
13 the reference samples used to test the DataMaster DMT was
14 scientifically valid?

15 A I do.

16 Q And what's that opinion?

17 A It is valid.

18 Q What makes you say that?

19 A We use the same method for analysis of blood as we do
20 for the analysis of SIM solution. We have quality controls --
21 set standards in place. It's reviewed by the quality control
22 officer at the lab to make sure that we are running an adequate
23 method, that there are quality control steps put into place to
24 prevent any errors and that everything is documented in
25 accordance with the lab policy.

1 Q You mentioned the blood testing that the laboratory
2 does using the gas chromatograph.

3 A Uh-huh.

4 Q And one of the rights that a defendant has when he or
5 she is processed for a DUI and a sample of their breath is
6 taken has the right to an independent test. Are you familiar
7 with the type of independent testing that's performed?

8 A Yes.

9 Q What type of a sample is tested?

10 A A blood sample is generally tested.

11 Q And how is the blood tested? What instrument is used?

12 A It depends. These samples go out of state, so they're
13 not tested by either the Vermont Department of Health or
14 Department of Public Safety but the outside labs generally use
15 a gas chromatograph to analyze their samples.

16 Q So there are laboratories other than the Vermont
17 Department of Health's laboratory and now the Vermont Forensic
18 Laboratory that use the gas chromatograph as an independent
19 check on this process of evidentiary breath testing?

20 A Yes.

21 Q And there are states that would verify the results of a
22 breath test using a gas chromatograph?

23 A Yes.

24 Q And they would do that through the verification of the
25 sample of blood?

1 A Yes.

2 MR. NAGURNEY: And if I may approach the witness with
3 the letter, Your Honor?

4 THE COURT: Yes.

5 BY MR. NAGURNEY:

6 Q Ms. Bolduc, I'll show you what has been marked as
7 State's Exhibit 4 and ask you if you recognize that document?

8 A Yes.

9 Q What is that document?

10 A It's a copy of my CV from March of last year.

11 Q And is that a true and accurate copy as you've provided
12 to me?

13 A As of March of last year; yes.

14 MR. NAGURNEY: Your Honor, I would offer State's
15 Exhibit 4.

16 MR. SLEIGH: No objection, Your Honor.

17 THE COURT: State's 4 is admitted.

18 (State's Exhibit 4 received)

19 BY MR. NAGURNEY:

20 Q So, along your professional training certifications,
21 preceding your professional membership certifications on the
22 third page I see an International Association of Chemical
23 Testing and a New England Association of Forensic Scientists;
24 is that correct?

25 A Yes.

1 Q Tell me about the International Association of Chemical
2 Testing.

3 A IACT is professional membership for people who actually
4 test blood and breath for the presence of alcohol. They have
5 also recently expanded to cover DUID, so drug testing as well,
6 but it's mostly for people who work in this field, both on
7 the -- as state laboratories. There are people who are defense
8 experts that are also members. It's a way to, you know, share
9 understanding. We have annual meetings, so we get together and
10 there are presentations. They offer training opportunities.

11 Q So, as a member of IACT do you have a familiarity --
12 well, tell me what is required to go onto IACT first.

13 A You have to be sponsored by somebody who is already a
14 member. You have to have certain levels of qualifications, so
15 a reasonable understanding of alcohol. You have to degrees in
16 a science field.

17 Q And if you become a member of IACT, as a result of that
18 do you have a familiarity with the standards in your field?

19 A Yes.

20 Q And can you explain for the Court briefly the evolution
21 of the standards from your time when you begun IACT through the
22 present.

23 A When I first began --

24 THE COURT: The standards for what? You may know
25 what you're talking about but I don't.

1 MR. NAGURNEY: Sure. Well, when I say standards in
2 the field, Your Honor, I mean the standards covering what is an
3 acceptably scientific means of evidentiary breath testing.

4 BY MR. NAGURNEY:

5 Q So has -- have the standards governing evidentiary
6 breath testing changed or are they changing?

7 A They're not really standards, they're guidelines and
8 recommendations, best practices in the field, and they are
9 constantly evolving.

10 Q How have they evolved in your time as a member of IACT?

11 A As instrumentation has gotten more sensitive there are
12 just different recommendations. So, originally, you know, way
13 back there used to be, you know, the Breathalyzer was the
14 instrument of choice. There are now new manufacturers, so
15 there is different recommendations between using infrared
16 spectroscopy as a method of identifying alcohol. There is
17 guidelines based on if you're going to use a fuel cell means of
18 testing.

19 There are recommendations for, you know, a lot of
20 programs, like Vermont uses wet bath simulators. Many states
21 have now switched to dry gas. So, there is information on best
22 practices when using dry gas. You know, there is information
23 on the actual procedure, the steps taken for testing. So, IACT
24 recommends a 15-minute observation period and deprivation
25 period prior to the test. There is different recommendations

1 on the testing method, how often instruments should be
2 calibrated and maintained.

3 Q So, given your familiarity with IACT's standards for
4 evidentiary breath testing, do you have an opinion about the
5 standards of the Vermont Department of Health and now Vermont
6 Forensic Labs Breath Program?

7 A Yes.

8 Q What's that opinion?

9 A IACT does recommend doing a two test breath sequence.
10 Vermont is a -- one test is mandatory, the second test is
11 optional. So, in that case we don't quite meet that
12 recommendation, but again it's just a recommendation. There
13 are a whole host of other agencies that also are only one test.
14 But other than that we do meet most -- all of the
15 recommendations that they have.

16 So our -- our lab has appropriate SOPs in place. We
17 have a number of quality control checks in place. We do a
18 15-minute observation period. We have training and testing for
19 both the officers and the technicians, the lab technicians who
20 maintain the instrument. So, we definitely have a quality
21 program.

22 Q I was asking you earlier about the health lab and the
23 testing that you conducted on this instrument prior to the
24 validation of field use, and I want to make certain I got a
25 definite statement from you of who was involved.

1 A Sure.

2 Q Who -- who designed and directed this testing process?

3 A When the program -- the alcohol program for the
4 Department of Health -- looked at the instrument -- at the time
5 the members of the program were Bob Drava (phonetic) who was
6 the program chief, myself, Ms. Richardson -- Darcy Richardson
7 (phonetic), and our electronics technician at the time was
8 Steve Harnois (phonetic). And so the four of us got together
9 and we actually worked with both National Patent Analytical
10 Systems, the manufacturer, and us.

11 Because we were the very first state to order the DMT
12 we wanted to make sure that we tested them thoroughly. So, we
13 actually talked with New York State who had ordered just after
14 we did, we talked with South Carolina who had ordered recent --
15 fairly soon after we had. So, we looked at other states'
16 testing protocols for both the DMT and other manufacturers.
17 There were some other states that had just recently purchased
18 instruments from other manufacturers. So we looked at their
19 testing protocols to make sure that our validation was in line
20 with what other programs were doing at the time was in line
21 with what the manufacturer recommended for testing the
22 instruments.

23 Q And so do you have an opinion about the testing that
24 you did?

25 A Yes.

1 Q And as far as whether it was equivalent to other states
2 that used the DataMaster?

3 A Yes.

4 Q And as far as whether it was equivalent with
5 manufacturer recommendations?

6 A Yes.

7 Q And was it?

8 A It was. We actually went beyond what the manufacturer
9 had recommended. Not quite as far as some other states had
10 gone. Washington State had a more thorough investigation.
11 Their testing was kind of beyond the pale, much further than
12 what almost every other jurisdiction would even consider, but
13 very much in line with the other states. We did do more
14 testing than New York State as far as interfering compounds.
15 We were right in line with what South Carolina was doing.

16 Q Do other states use the DataMaster DMT --

17 A Yes.

18 Q -- breath testing instrument? And does the federal
19 government approve of the DataMaster DMT breath testing
20 instrument --

21 A Yes.

22 Q -- for evidentiary testing?

23 You've mentioned standard operating procedures and
24 quality control.

25 A Uh-huh.

1 Q Were there standard operating procedures in place
2 during the time of the testing of the instruments?

3 A We were writing them while we were testing. As far as
4 the calibration, certification, installation, and maintenance
5 of the instrument we were writing them based on our old
6 procedures with the old DataMaster and how it would apply to
7 the new software on the new DMT. So, we were using -- it was
8 basically the same method, we were just updating the SOPs to
9 match the new software on the DMT.

10 Q So, I want to make certain you used the same method
11 that you used for your earlier breath testing instruments --

12 A Yeah.

13 Q -- but applied it to the DataMaster DMT?

14 A Correct. And then updated the SOPs for the DMT.

15 Q And can you explain the prior breath testing instrument
16 that was in use?

17 A It was the BAC DataMaster.

18 Q And who makes that instrument?

19 A The same manufacturer of the DMT, National Patent.

20 Q Does the DataMaster BAC also rely on infrared spectra
21 photometry?

22 A It does.

23 Q Did you have to make any significant changes to the
24 standard operating procedures for the new instrument?

25 A Only as far as the user interface, because the user

1 interface was different, but the actual analytical portion of
2 the instruments are nearly identical. They both use the same
3 simulator, so the -- that portion of it was the same.

4 Q Now, I'll ask you the same question as test -- with
5 respect to testing and which quality control were in place
6 during the testing.

7 A I'm not sure what you mean.

8 Q Which -- when you were running these various batches of
9 reference solutions did you have specific quality control in
10 place that were done with the testing?

11 A When we were testing them on the DMT or on the GC?

12 Q On the DMT.

13 A There were quality control steps in place.

14 Q And can you describe what those were?

15 A If the solution had been used for a significant period
16 of time we knew that there was a small amount of depletion and
17 eventually the solution would be replaced. We monitored the
18 temperature on the simulators to make sure that that was
19 appropriate. We monitored the solutions to make sure that we
20 weren't using anything that was expired.

21 We kept track of how often the solutions had been
22 run. Part of the testing procedure was to make sure that when
23 you run a linearity that you run all four of the concentrations
24 within 24 hours by the same analyst on the same instrument.
25 So, we monitored that to make sure that those were being

1 appropriately done. We made sure that on each instrument there
2 was at least one analyst. There had to be at least two people
3 who put their hands on that particular instrument to make sure
4 that all the testing was done and that it was done by more than
5 one person.

6 Q So, you've testified that you're familiar with the
7 testing that was done on the DataMaster DMT and that you're
8 familiar with the DataMaster DMT instrument itself?

9 A Yeah.

10 Q Are you also familiar with the regulations or the rules
11 for evidentiary breath testing --

12 A Yes.

13 Q -- that the Department of Health had in place at the
14 time?

15 A I am.

16 Q Do you have an opinion as to whether the DataMaster DMT
17 instrument based on the testimony you performed in the
18 laboratory meets those Department of Health regulations?

19 A Yes.

20 Q What is your opinion?

21 A The instrument absolutely meets those regulations.

22 Q With respect to the precision regulation?

23 A Yes.

24 Q Why do you say that?

25 A The instrument is tested for precision. Precision is a

1 measure of when you have repeated analysis how close those
2 individual analyses are to one another. We run those
3 instruments 10 times per each solution. Four solutions is one
4 linearity. That linearity is run at least five, sometimes ten
5 times, and we measure how close each one of those repetitions
6 are to the others. The standard for the rule and regulations
7 say it has to be precise within 5 percent. We actually hold it
8 to a much tighter standard. We hold it to a standard deviation
9 of .002 and the instrument absolutely meets that standard.

10 Q And Exhibit P was the collection of various deployment
11 testing performed on the DataMaster DMT?

12 A Yes.

13 Q Where is the section of that testing that would refer
14 to the precision?

15 A The linearity section.

16 Q I'll ask you the same question about the DataMaster DMT
17 with respect to the regulations -- the rules for breath alcohol
18 analysis I should say that deal with accuracy.

19 A Yes.

20 Q And there are actually two regulations that speak of
21 accuracy; am I correct?

22 A Yes.

23 Q And can you explain briefly why there are two and how
24 your agency interprets those?

25 A It's my understanding that the -- the difference is

1 when you -- one of them just really points out that your result
2 has to be reported in grams per 210 liters and when you analyze
3 that it has to be 10 percent at grams per 210 liters. And then
4 the other accuracy relates to a blood test and if you were to
5 compare a breath test to a blood test there is a certain ratio
6 you have to use, a partition ration comparing breath and blood.

7 Because the law is written for DUI that your result
8 is based on a blood or a breath, we don't actually do that
9 comparison. But if you were to -- and the rules has written in
10 there the partition ratio that must be used when comparing one
11 to the other.

12 Q Okay. So, what does the rule --

13 THE COURT: I --

14 MR. NAGURNEY: I'm sorry.

15 THE COURT: I'm afraid I need that repeated, and also
16 if we're talking about rules it would be helpful to me to
17 relate which rule you're talking about when you're talking --
18 because you seem to be breaking them down to talk about
19 different rules for different purposes and --

20 MR. NAGURNEY: Okay.

21 THE COURT: -- we would like that identified.

22 BY MR. NAGURNEY:

23 Q Okay. So, you're familiar with the breath alcohol
24 analysis rules?

25 A Yes.

1 Q And they're at -- the rule -- the third rule and the
2 fourth rule of the breath alcohol analysis rules both speak
3 relative to the accuracy required that the DataMaster DMT
4 instrument must meet?

5 A That any result must meet; yes.

6 Q Okay. And first I'll ask if you can explain why
7 accuracy is mentioned in two separate rules?

8 A I believe it has to do with the fact that we used to
9 have to compare a breath result to a blood result. So, the one
10 rule says that you have to be 10 percent accurate at grams per
11 210 liters which is the units that a breath result are reported
12 in. And the other one speaks to if you were then to compare a
13 breath result to a blood result there is a certain partition
14 between a breath and blood and to compare one to the other you
15 have to use a ratio and it just spells out what the partition
16 ratio is that must be used.

17 Q So, it's the fourth rule essentially if I'm
18 understanding you that governs the accuracy of the DataMaster
19 DMT?

20 A I'd have to look to see --

21 Q Sure.

22 MR. NAGURNEY: If I may --

23 THE WITNESS: -- if it was third or fourth.

24 MR. NAGURNEY: -- approach, Your Honor?

25 THE COURT: Yes, please.

1 BY MR. NAGURNEY:

2 Q This is Exhibit A.

3 A That's correct.

4 Q So, the fourth rule of the breath alcohol analysis
5 rules requires an accuracy of plus or minus 10 percent and it's
6 reported in grams per 210 liters?

7 A That's correct.

8 Q And the grams per 210 liters is the unit in which the
9 DataMaster DMT reports the breath alcohol concentration in it?

10 A Yes.

11 THE COURT: Would you say that again please?

12 MR. NAGURNEY: Sure.

13 BY MR. NAGURNEY:

14 Q The DataMaster DMT present -- reports its results as a
15 decimal?

16 A Yes.

17 Q And that decimal is grams per 210 liters of breath?

18 A Right. So, for example it would be .08 grams per 210
19 liters is your result.

20 Q And that's the unit associated with the report of the
21 DataMaster?

22 A Yes.

23 Q Given your familiarity with the testing the laboratory
24 performed on the DataMaster DMT, your familiarity with the
25 breath testing rules, particularly rule four, do you have an

1 opinion about whether the DataMaster is capable of meeting that
2 rule?

3 A Yes.

4 Q And what is your opinion?

5 A The instrument is more than capable of meeting this
6 rule.

7 Q Why do you say that?

8 A When we calibrate the DataMaster we run a calibration
9 check on that and at the time of calibration the instrument
10 must meet a 3 percent accuracy at the time of calibration.
11 After calibration the instrument is certified and we hold it to
12 a 5 percent accuracy at all levels except .02 where at .02 we
13 hold it to 10 percent just because it's such a small number the
14 margin -- or the acceptance range around a .02 is .002, which
15 is less than the noise of the instrument.

16 So, we hold it to 10 percent at the .02 level and 5
17 percent at every other concentration and the instrument more
18 than meets that 5 percent at the time of certification. And as
19 the instrument is performing in the field every single time a
20 breath sample is given we run a quality control check at the
21 time of the test which must meet a 5 percent accuracy standard.

22 Q Okay. There are other regulations as well that I don't
23 think are at issue in this hearing but I should ask you; you're
24 familiar with the affidavit that you signed for use in civil
25 suspension cases of the general chemist affidavit?

1 A I am.

2 Q And paragraph 9 of that affidavit specifically states
3 that if the DataMaster produces a ticket that the ticket itself
4 is evidence that the DataMaster meets the regulations?

5 A Yes.

6 Q And can you explain why that is?

7 A The DMT is designed as a failsafe. If there was
8 anything wrong with the instrument that would prevent an
9 accurate result from being reported, the instrument will
10 identify the error and will either abort the test and not print
11 out a ticket at all or not even allow a sample to be given or
12 it will print out a ticket that has an error on it. If you
13 have a ticket that has a BAC number associated with a breath
14 test, then all of the quality control checks within the
15 instrument would have had to have been met in order for it to
16 allow a sample to be given.

17 Q So, the DataMaster performs quality control checks
18 before each test you've just said?

19 A Before, during and after.

20 Q What are the quality control checks -- what are they
21 designed to make sure the DataMaster does?

22 A That it's reporting an ethanol concentration with a
23 known accuracy, and if there is anything wrong with the
24 instrument such that it wouldn't be an accurate quantization
25 such that it wouldn't identify or that there is some other

1 chemical in the breath that could interfere with the
2 appropriate identification of ethanol, those tests would be
3 aborted.

4 Q So, is it fair to say that if the DataMaster is
5 incapable of reading the breath testing rules at the time of
6 the test or during the test that the testimony will be aborted?

7 A That's correct.

8 MR. NAGURNEY: Your Honor, I don't have anything more
9 specific than that for Ms. Bolduc only because I understand
10 from Mr. Sleigh that it's his position that we're going to
11 conduct this hearing as though the general chemist affidavit of
12 Ms. Bolduc were on the record.

13 THE COURT: Well, it's not on record unless it's on
14 the record. So one or the other of you is going to have to
15 introduce it.

16 MR. NAGURNEY: Okay. Also, Your Honor, I hadn't
17 planned on putting a specific copy of each evidentiary ticket
18 produced by the DataMaster in as an exhibit, only because there
19 are a number of them and Mr. Sleigh's motion speaks
20 specifically to the general testing that was done rather than
21 the individual testing that each instrument performed. So, I
22 just want to make sure I am appropriately clear with that as
23 well. I can certainly have the tickets with me but there are
24 likely 30 of them, it may take some time.

25 THE COURT: I understand that no individual tickets

1 are being challenged; is that correct?

2 MR. SLEIGH: Right. There's a 104(a) hearing that
3 has to do with the admissibility of the evidence.

4 THE COURT: Okay.

5 MR. NAGURNEY: Okay.

6 BY MR. NAGURNEY:

7 Q Ms. Bolduc, in that case I'll just briefly cover the
8 contents of the remainder of your affidavit with you so you can
9 certainly have those on the record.

10 What's the approved method for evidentiary breath
11 testing in the State of Vermont?

12 A Infrared spectroscopy.

13 Q And explain to --

14 MR. SLEIGH: Excuse me, Your Honor. I have no
15 objection to him admitting the general chemist affidavit as
16 opposed to having her recite it paragraph by paragraph.

17 THE COURT: Wouldn't that be easier?

18 MR. NAGURNEY: It would be, Your Honor, although I
19 can't lay my hands on it immediately. I could certainly get
20 one for you very quickly though. It's either in my materials
21 or I can get one across the street at the State Attorney's
22 Office.

23 THE COURT: It's up to you how you present your case.
24 I think it would be more useful to have the document.

25 MR. NAGURNEY: The affidavit; okay. Your Honor,

1 if -- and if I may then I'll just ask for a very brief recess
2 and I'll assemble it. I didn't know that I was going to be
3 expected to produce it as an exhibit.

4 MR. SLEIGH: Your Honor, he can introduce it at the
5 close of his evidence or at any time. So, we --

6 THE COURT: Okay. That's fine.

7 MR. SLEIGH: -- could keep going.

8 THE COURT: Why don't you do it during break?

9 MR. NAGURNEY: Okay. All right. In that case, Your
10 Honor, I don't believe I have anything further for Ms. Bolduc.

11 THE COURT: All right.

12 Mr. Sleigh.

13 MR. SLEIGH: Thank you.

14 CROSS-EXAMINATION

15 BY MR. SLEIGH:

16 Q Good afternoon, Ms. Bolduc. How are you?

17 A Good morning.

18 Q Or good morning I guess. You're familiar with the
19 standards set forth in ISO 1725 are you not?

20 A Vaguely.

21 Q Vaguely?

22 A Yes.

23 Q All right. Do you intend to become more familiar with
24 them over time?

25 A As our lab seeks that accreditation I will. It's

1 currently the responsibility of my supervisor and the quality
2 officer at the lab to set forth those guidelines.

3 Q Okay. And let me just get -- establish one thing.
4 When we were -- when you were doing the pre- or redeployment
5 testing that's in evidence in Defendant's P, I believe, is it
6 true that you had -- the lab had no written standard operating
7 procedures manual?

8 A No. We had -- we had SOPs that -- for the BAC
9 DataMaster and we were writing them for the DMT --

10 Q Okay. So -- so the answer is --

11 A -- at the time that we were requesting.

12 Q -- for the DMT at the time you were doing the
13 redeployment validation you did not have an applicable standard
14 operating procedures manual; is that right?

15 A They were complete by the time the instruments went in
16 the field.

17 Q Okay. Listen to my question. At the time you were
18 doing the testing you did not have a standard operating
19 procedures manual; is that right?

20 A Correct.

21 Q Now, you're aware I assume since you've work for DPS
22 now that the Legislature passed a statute directing that the
23 responsibility for the breath test program be transferred from
24 your old agency, the Department of Health, to the Department of
25 Public Safety; is that right?

1 A Yes.

2 Q And is it fair to say that that transfer followed
3 several disturbing revelations about the practices of the
4 Department of Health Lab?

5 A Yes.

6 Q For example, you brought to the attention of the lab
7 director that your technician was providing false information
8 in his reports; is that right?

9 A That I suspected that.

10 Q All right. And that he was certifying machines to be
11 at operation levels when they were not?

12 A I had suspicions of that.

13 Q And you put those suspicions in writing?

14 A Yes.

15 Q And you claimed under oath that you had proof to back
16 up those suspensions; is that right?

17 A Yes.

18 Q And did you in fact have proof to back up those
19 suspicions?

20 A There were TSIs that were very questionable.

21 Q All right. Now, when you reported these allegations of
22 misconduct to the lab director was there an investigation?

23 A There was.

24 Q Okay. And were you interviewed about your allegations?

25 A No, I was not.

1 Q But you were the one that made the complaints; right?

2 A Yes.

3 Q And you had written documentation that would have
4 supported your complaints about the TSIs?

5 A Yes.

6 Q And nobody asked you to show it to them; is that right?

7 A Correct.

8 Q And in essence the lab director determined that your
9 allegations were false; is that right?

10 A That was the conclusion that they had come to.

11 Q Were they false?

12 A No.

13 Q Now, you also found out that at least in some
14 circumstances that the DataMaster DMT was generating reports of
15 breath alcohol even when it was testing the simulator solution
16 as out of range; is that right?

17 A On one instrument that happened.

18 Q And that was the Royalton instrument?

19 A Yes.

20 Q And it was in service for a year or so without the
21 tolerance check function being accurate; is that right?

22 A Approximately eight months.

23 Q Okay. So, that it would allow the device to generate a
24 ticket even though the simulator solution was being read out of
25 range?

1 A That's correct.

2 Q And so at least --

3 THE COURT: Excuse me.

4 MR. SLEIGH: -- that's what you said to Mr. Nagurney.

5 THE COURT: Excuse me. It would be helpful to me to
6 understand what read out of range means.

7 MR. SLEIGH: Sure.

8 BY MR. SLEIGH:

9 Q The device, the DMT, as part of its analytical cycle
10 draws vapor in from the attached simulator solution --

11 A Yes.

12 Q -- to test the simulator solution as being in the
13 appropriate range?

14 A Yes. It's an artificial breath sample with a target
15 concentration and a 5 percent acceptance range. The software
16 on the instrument is supposed to be set up so that when it
17 analyzes that if it's not within that 5 percent acceptance
18 range it is supposed to abort the test. On this particular
19 instrument there is -- there used to be a box on the DMT that
20 said I believe it was tolerance and it was turned off such that
21 when it was not within that 5 percent it didn't abort the test
22 as it should have been.

23 Q And there was no indication of that on the evidentiary
24 ticket that was printing it out; right?

25 A If you looked at the ticket, the range is printed on

1 the bottom of the ticket which says where the instrument should
2 be reading the solution and it was not within that. So, if an
3 operator had actually looked at the ticket you would have been
4 able to see it on a ticket.

5 Q But you said I think to Mr. Nagurney every single time
6 a DMT goes through the analytical process that it would either
7 not generate an analytical result because of failure or if it
8 generated an analytical result that that result would be
9 accurate and reliable; is that right?

10 A That's correct.

11 Q So, that's not true though is it?

12 A It is true only in that the tolerance is never supposed
13 to be turned off. This particular instrument had been used for
14 training and it was never reactivated as it should have been.
15 We've actually now changed the software such that you can't
16 turn the tolerance off.

17 Q At the time, the assertion that every single ticket
18 demonstrates an accurate and reliable result is not true; is
19 that right?

20 A The instrument will still accurately report what it
21 read for the simulator solution. What's -- what happens is
22 every time you analyze the simulator solution you take a small
23 portion of that out of the solution. Eventually you'll take
24 enough out so that the solution will need to be replaced. It
25 depletes over time.

1 So, the instrument was still accurately reading what
2 it saw from the solution. It's not that the instrument was not
3 accurate, it's that the solution had been depleted and the flag
4 to change it wasn't -- wasn't there so that the solution didn't
5 get changed in a timely manner. The instrument is still
6 accurate. It's still reading what it saw. It just didn't
7 abort the test as they should've.

8 Q All right. Now how did the lab discover this problem?

9 A A defense attorney had brought it to the attention of a
10 defense --

11 Q What defense attorney?

12 A I believe it was Corby Gary.

13 Q Okay.

14 A Had brought it to the attention of a defense expert
15 sometime over the summer. That information wasn't relayed to
16 us until September, even though they knew about it for a number
17 of months, that there was a problem with this instrument. It
18 wasn't relayed to the Department of Health until September.

19 Q So it was the defense expert's job to be the Department
20 of Health's quality control agent?

21 A No, absolutely not. But if we didn't receive any
22 tickets and we didn't receive any complaints we didn't have a
23 way of knowing that there was a problem with that instrument.
24 We only receive copies of tickets when the state's attorneys
25 provide them to us, if they would like a case-specific infrared

1 affidavit. When we looked at the routine performance checks of
2 this instrument it didn't display anything wrong.

3 Q Okay. Do you agree that reference materials used to
4 calibrate the DMT should be purchased from accredited
5 suppliers?

6 A No.

7 Q Do you agree that reference materials should be of a
8 known concentration and include an uncertainty measurement?

9 A They should be of a known concentration, but I don't
10 believe that they should have to have an uncertainty
11 measurement.

12 Q Now you say that you consulted with the manufacturer of
13 the DMT, regarding the precision and accuracy capabilities of
14 the DMT. Is that right?

15 A Yes.

16 Q And you're aware that the manufacturer vouches for the
17 precision and accuracy of those devices, right?

18 A They do.

19 Q They do not provide you any data regarding their
20 testing the machine, do they?

21 A They will provide a Certificate of Calibration with
22 each instrument. There are some states that that's sufficient
23 for them, they do not recalibrate their instruments. We
24 recalibrate ours.

25 Q Okay. They don't provide you any of the underlying

1 data, do they?

2 A No, they don't.

3 Q Now as I understand it, you generate the reference
4 materials that you use to calibrate the DMT and your GC in the
5 lab. Is that right?

6 A Yes. We create our own calibration solutions.

7 Q And when you create those calibration solutions you do
8 not incorporate any uncertainty measurement. Is that right?

9 A That's correct.

10 Q Now when I was listening to you last Thursday it seemed
11 to say that you prepare these solutions to a desired
12 concentration and then you use replicate analysis of the
13 solutions by the gas chromatograph to determine their
14 concentration. Is that right?

15 A Yes.

16 Q And you do that something like 28 times.

17 A Yes.

18 Q And then you take an average of those 28 times.

19 A Yes.

20 Q Are you familiar with ISO Guide 34, as it applies to
21 the general requirements for the competence of reference
22 material producers?

23 A You showed it to me for the first time five minutes
24 before this hearing.

25 Q Okay.

1 MR. SLEIGH: May I approach, Your Honor?

2 THE COURT: Yes.

3 BY MR. SLEIGH:

4 Q Let me show you what's been marked Exhibit W. So the
5 first time that you've seen that standard was this morning?

6 A Yes.

7 Q Are you aware that the standard specifically prohibits
8 relying solely on statistical analysis for the generation of
9 calibration standards?

10 A I did read that in here.

11 Q Okay. But you had no knowledge of this standard?

12 A No.

13 Q And are you aware that this particular standard has
14 been in effect since 2009?

15 A I see that it says 2009 on here.

16 Q All right.

17 MR. SLEIGH: Your Honor, we move the admission of
18 Defendant's W.

19 MR. NAGURNEY: Your Honor, I guess I'm not sure how
20 it's relevant, given that it's not a accreditation standard the
21 lab's required to have. Yeah, but I don't object to its
22 authenticity.

23 THE COURT: It is relevant to the issue before the
24 Court, so Defense W is admitted.

25 (Defendant's Exhibit W received)

1 MR. SLEIGH: May I approach one more time, Your
2 Honor?

3 THE COURT: Yes.

4 BY MR. SLEIGH:

5 Q Specifically, the prohibition on the use of purely
6 statistical methods is located at Section 5.16.1. Is that
7 right? On page 23?

8 A Yes.

9 Q Thank you. Ms. Bolduc, do you, when you're creating
10 these reference standards, check your balances immediately
11 prior to generating any traceable weights?

12 A At the Department of Health, no.

13 Q And you stated, I think, on Thursday that at the
14 Department of Health the pipettes were calibrated once a year.
15 Is that right?

16 A Yes.

17 Q And it would be fair to say that when you're using the
18 pipettes and generating the reference standards, at the
19 Department of Health anyway, you did not check those
20 immediately prior to their use. Is that right?

21 A That's right.

22 Q And of course then there'd be no documentation that
23 either the balances or the pipettes had been checked
24 immediately prior to the use, in generating these reference
25 standards.

1 A It's just the annual checks that we would have.

2 Q I think you said on Thursday that the lab decided that
3 it would establish a one-year shelf life for the various
4 simulator solutions it generated. Is that correct?

5 A Yes.

6 Q And that was predicated on your reading of a Debowski
7 article that said one solution in glass bottle, somewhere,
8 lasted 26 years?

9 A There was more than one solution and they had different
10 concentrations that they had tested, but they were 26-year-old
11 solutions.

12 Q Have you ever done any -- did the Department of Health,
13 I should say, do any internal stability studies to determine
14 what the actual expiration rate would be, based on the
15 simulator solutions, as of it's stored at the Department of
16 Health?

17 A I believe that they had done studies prior to my
18 arriving there. We had been using the DataMaster since 1996.
19 I arrived at the Department of Health in 2005, and we have
20 always had a one-year shelf life on our simulator solutions.
21 And so I believe that they had set the predicate prior to my
22 arrival.

23 Q Are you aware of any stability studies being done?

24 A No.

25 MR. SLEIGH: Just one minute, Your Honor.

1 May I approach and get Exhibit A, Your Honor?

2 THE WITNESS: I have it.

3 MR. SLEIGH: Or a copy of it.

4 BY MR. SLEIGH:

5 Q All right. So the precision and accuracy regulations
6 are at paragraphs 2 through 4. Is that right?

7 A 2 refers to precision. 3 and 4 refer to accuracy.

8 Q All right. Neither of those rules constitute
9 quantified measurement uncertainty. Correct?

10 A There is no reference to measurement uncertainty in the
11 rules.

12 Q Okay. Now you understand the notion of uncertainty
13 measurement to be a quantification. Right?

14 A Yes.

15 Q Have you read the Gullberg article that was introduced
16 on Thursday?

17 A Yes.

18 Q And you saw at least how Rod Gullberg calculated
19 uncertainty as it applies to breath testing in Washington
20 State.

21 A In Washington State, yes.

22 Q Now I think you said on Thursday that you went to the
23 University of Indiana for specialized training in breath and
24 blood alcohol testing?

25 A I did.

1 Q Was that the so-called Borckenstein School?

2 A Yes.

3 Q Is that the leading school for training forensic
4 chemists and blood and breath alcohol testing?

5 A Yes.

6 Q And it requires demonstration of competence. It's not
7 like going to National Patent for a day, where they give you a
8 certificate for just hanging around with John Fusco, right?
9 There's testing?

10 A Our training from National Patent was not just hanging
11 around with the president of the company.

12 Q Okay. But unlike the National Patent, you actually
13 have to take tests at the Borckenstein School to demonstrate
14 your competence and command of the material, right?

15 A When I went we had to take a test. They no longer give
16 an exam.

17 Q Okay. And is Rod Gullberg on the faculty there?

18 A He is.

19 Q And did you attend his lectures on statistics?

20 A Yes.

21 Q Did you attend the optional one that he does at night?

22 A I did not.

23 Q Besides yourself, who at the lab has completed the
24 Borckenstein training?

25 A At the Department of Health Lab or the forensic lab?

1 Q At the Department of Health lab.

2 A Just myself and the other chemist, Ms. Richardson.

3 Q Who?

4 A Ms. Richardson.

5 Q Okay. She's gone though, right?

6 A Yes.

7 Q And how about at the forensic lab?

8 A The new chemist that we've just hired has attended the
9 training.

10 Q Okay. But in the new curriculum where you don't have
11 to take a test anymore?

12 A That's correct. And I believe our quality officer has
13 also attended.

14 Q All right. And who else in the state has attended and
15 satisfactorily completed that, back in the old days when they
16 gave a test?

17 A There was another chemist at the Department of Health
18 lab who worked in the alcohol program for a little while.
19 Steve Marrow (phonetic) had attended that course as well.

20 Q All right. How about people who aren't at the lab that
21 you know in Vermont had took and graduated from that class?

22 A You took the class.

23 Q Oh, thank you. You understand, at this point, the lab
24 has committed to become 17025 compliant?

25 A In 2014, yes.

1 Q And by doing so, it has embraced the concept of the
2 necessity for uncertainty measurement?

3 A It is.

4 MR. NAGURNEY: Objection, Your Honor. I don't know
5 if she has the foundation to testify to this.

6 MR. SLEIGH: She talked about all the policies, all
7 the direction, interpretation of the health department's
8 positions on things. I think there was a rather broad brush,
9 Your Honor.

10 THE COURT: The objection is overruled.

11 MR. NAGURNEY: Judge, if I may, I think it's more
12 appropriately, just for the record, a question for the
13 laboratory director or Ms. Conti, since she's more directly
14 involved.

15 THE COURT: Uh-huh. And based on the other testimony
16 she's given, she may be asked this question.

17 BY MR. SLEIGH:

18 Q Do you have the question in mind?

19 A I do not.

20 Q That makes two of us. Let me see if I can get --

21 (Counsel confer)

22 BY MR. SLEIGH:

23 Q So at any rate, by desiring to become ISO compliant,
24 the Department of Public Safety is embracing the requirement of
25 expressing analytical results, with a quantified uncertainty

1 measurement. Is that right?

2 A Uncertainty measurement reporting is part of the
3 accreditation that the lab will be seeking.

4 Q And will breath test results, analytical results, be
5 accompanied by an uncertainty measurement once you're
6 compliant?

7 A I don't know. I'm not part of the decision-making, and
8 that's what our quality officer and our program director --
9 that's a decision for them.

10 Q Do you agree that every analytical method has to be
11 appropriate for the purpose for which it's intended?

12 A Yes.

13 Q And that every analytical result should be expressed
14 with some accompanying confidence interval?

15 A You don't have to report a confidence interval. No.

16 Q All right. But you do have to express it with the
17 uncertainty measurement, at least under ISO 17025.

18 A ISO 17025 requires some form of uncertainty
19 measurement.

20 Q One of the elements of calculating uncertainty is the
21 analysis of data of the performance of the method. Is that
22 right?

23 A That's part of an uncertainty calculation.

24 Q Now the health department has actually taken the
25 position, in the past, to turn off the data collection

1 components or capabilities of the DataMaster BACs. Isn't that
2 right?

3 A On the BACs.

4 MR. NAGURNEY: Objection, Your Honor. Again, the
5 questions about a DataMaster BAC. I don't know why it's
6 relevant to whether the DataMaster DMT meets the --

7 MR. SLEIGH: Well, first of all, he said that the
8 standard operating procedures that were in flux during this
9 particular period had their genesis in a previous standard
10 operating procedure that applied to the DataMaster BACs.

11 He's also asked if the DataMaster BAC was
12 functionally equivalent to the DataMaster DMT. And so I'm just
13 trying to get a tiny bit of evidence about how it is this
14 scientific agency handled these two devices, and turning of the
15 memory function I think is indicative, like turning off the
16 tolerance check and various other failings, falsifying TSIs and
17 other things that can give the Court some -- it affects the
18 weight of the overall presentation.

19 THE COURT: The objection is overruled.

20 BY MR. SLEIGH:

21 Q So you're aware the Department of Health turned off the
22 memory function?

23 A That would've been before my time with the Department
24 of Health.

25 Q Okay. So you don't know if they did or they didn't?

1 A I know that they had turned it off. I don't know the
2 reasoning behind it because that was before my time with the
3 Department of Health.

4 MR. SLEIGH: Your Honor, can I have just two seconds
5 to talk to Mr. Hatt, and then I'll be back.

6 THE COURT: All right.

7 (Pause)

8 MR. SLEIGH: Thank you for your patience, Your Honor.
9 I have no further questions.

10 THE COURT: Mr. Nagurney.

11 MR. NAGURNEY: Thanks, Your Honor.

12 REDIRECT EXAMINATION

13 BY MR. NAGURNEY:

14 Q So Mr. Sleigh asked you about the standard operating
15 procedures during the testing of the instruments.

16 A Yes.

17 Q When did those go into effect?

18 A The SOPs?

19 Q Correct.

20 A The instruments were deployed, initially, in July of
21 2008, so they would've been prior to that.

22 Q So it would've been in place prior to July 2008.

23 A Yes.

24 Q And you've reviewed Exhibit P, which is all the
25 deployment testing that was conducted on these instruments

1 prior to their use for evidentiary testing in these cases.

2 A In these cases, yeah.

3 Q When was that testing done?

4 A These were in 2010. And '11.

5 Q So the standard operating procedures in place, or not
6 in place by 2010?

7 A They were in place.

8 Q So there were standard operating procedures that
9 controlled the testing of the instruments.

10 A Yes.

11 Q These instruments were tested in 2010, and explain to
12 the Court why they were tested at that time.

13 A They were purchased. There were three rounds of
14 purchasing. Most of the instruments in this case were
15 purchased later. And once the instruments were out in the
16 field they were then pulled back, sent back to the
17 manufacturer. The manufacturer updated the software in the
18 instruments. On a few they updated the hardware. They ensured
19 that the instrument worked in compliance with their testing
20 protocols, that there was nothing tampered with on any of the
21 instruments. They were sent back to the state, and then all
22 the instruments were then retested prior to going in the field.
23 We call that the redeployment testing, and that's what is the
24 overall validation for most of the instruments in this case.

25 Q Okay. So Mr. Sleigh went to some lengthy talk about

1 Royalton and what occurred at the Royalton, Vermont, State
2 Police Barracks with a DataMaster instrument. Do you recall
3 that testimony?

4 A I do.

5 Q Did that problem affect any of these instruments here?

6 A No.

7 Q How do you know that?

8 A That particular instrument is not one of the ones
9 that's in this case.

10 Q And you mentioned that the instruments were all sent
11 back to the manufacturer.

12 A Yes.

13 MR. NAGURNEY: If I may approach the witness, Your
14 Honor?

15 THE COURT: You may.

16 BY MR. NAGURNEY:

17 Q This is part of Exhibit P. It's the deployment testing
18 for DataMaster instrument 100 and 140.

19 A Yes.

20 Q I'll ask if you see any evidence in that deployment
21 test, about whether the instrument was returned to the
22 manufacturer.

23 A Yes.

24 Q What part of the exhibit demonstrates that?

25 A Pages 3 and 4.

1 Q Okay. And tell the Court what you're looking at that
2 make up pages 3 and 4.

3 A Page 3 is the packing slip that would've come with the
4 instrument, in the box, that says "DataMaster DMT service
5 return." And the serial number of this particular instrument.

6 Page 4 is a memo from the manufacturer that says that
7 on this particular date NPAS received this particular
8 instrument. Each instrument was sent to National Patent, with
9 a copy of all of the performance reports from the Department of
10 Health, any TSIs that had been generated on that particular
11 instrument.

12 It would've gone back to the manufacturer so they could
13 look through it to make sure it was maintained appropriately.
14 They looked at the internal configurations of the instrument.
15 They ran a number of tests. And they would certify whether the
16 instrument had any defects in it, and whether it passed or
17 failed their testing.

18 Q And that was done for each of the exhibits that make up
19 Exhibit P, with the exception of one. Correct?

20 A That was done for all of the instruments. There may
21 have been one or two instruments that didn't go back through
22 the entire barrage of redeployment testing, just because as we
23 were pulling instruments out and reshuffling them they may not
24 have needed to go back out in the field right away. So they
25 may not have gone through the testing. So they may not have a

1 binder put together, such as these, but all of them would've
2 been tested by the manufacturer and would've had a certificate
3 that they had looked at each one of the instruments.

4 Q Okay. So based upon the steps and the safeguards that
5 were put in place with the manufacturer of these instruments,
6 do you have an opinion as to whether any of the instruments
7 that are involved in this case, that are a part of Exhibit P,
8 could be afflicted by the problems Mr. Sleight highlighted, that
9 occurred in Royalton?

10 A No. None of these instruments could've possibly had
11 that issue.

12 Q Mr. Sleight showed you Exhibit W, which is part of the
13 ISO guidelines.

14 A Yes.

15 Q What statute requires your lab, either Department of
16 Health or the current forensic lab, to follow those guidelines?

17 A There is no requirement to follow those guidelines.

18 Q What rule does your lab, either Department of Health or
19 the forensics lab, to follow those guidelines?

20 A There is no rule that requires that.

21 Q You testified about measurement uncertainty. Does
22 measurement uncertainty relate to the instrument itself, the
23 DataMaster DMT, or does measurement uncertainty relate to the
24 processes or procedures in testing the instrument?

25 A I'm not an expert in measurement uncertainty, but it's

1 my understanding that it applies to the method as a whole, and
2 not the particular instrument, as an individual.

3 MR. NAGURNEY: I don't have any further questions for
4 this witness.

5 MR. SLEIGH: Just a couple.

6 THE COURT: Let me just ask a couple of questions and
7 then you both can follow-up.

8 I'm a little confused about timing. When you
9 testified that the standard operating procedures were being
10 rewritten from the old DataMaster, was that in 2008 or 2010?

11 THE WITNESS: We purchased the instruments,
12 initially, in 2006, and tested them from 2006 through 2008,
13 when they went out in the field. So those SOPs would've have
14 been worked on throughout that timeframe. It would've been in
15 place by 2008, when the instruments went in the field.

16 THE COURT: So when was it that you were developing
17 the SOP manual for the DMT?

18 THE WITNESS: From 2006 through 2008. Prior to their
19 launch in the field.

20 THE COURT: Okay. And when you said that uncertainty
21 measurement is a part of the requirement for accreditation that
22 the lab is seeking, what accreditation is the lab seeking?

23 THE WITNESS: I'm sorry. It's my supervisor who is
24 responsible for that.

25 THE COURT: Okay. If you don't know that's fine.

1 THE WITNESS: Thank you.

2 THE COURT: Okay. Following my questions, did you
3 want to ask any other?

4 MR. NAGURNEY: No, Your Honor.

5 THE COURT: Okay. Mr. Sleigh.

6 MR. SLEIGH: Thank you.

7 REXCROSS-EXAMINATION

8 BY MR. SLEIGH:

9 Q Is there any requirement in the statute that says the
10 Vermont Department of Health or the Vermont Forensic Laboratory
11 had to comply with minimal scientific standards?

12 A That's not written in the rule, no.

13 Q And is there any statute that says that the Vermont
14 Forensic Laboratory or the Vermont Department of Health have to
15 comply with minimal scientific standards?

16 A No.

17 Q Nevertheless, do you believe that the Vermont
18 Department of Health and the Vermont Forensic Laboratory had a
19 duty to comply with minimal scientific standards?

20 A Absolutely. Yes.

21 MR. SLEIGH: No further questions.

22 FURTHER REDIRECT EXAMINATION

23 BY MR. NAGURNEY:

24 Q Have you complied with minimal scientific standards
25 here?

1 A Yes.

2 THE COURT: I think that completes your testimony.
3 Thank you.

4 THE WITNESS: Thank you.

5 THE COURT: Mr. Nagurney.

6 MR. NAGURNEY: Yes, Your Honor. I call Dr. Conti,
7 Your Honor.

8 THE CLERK: Raise your right hand, please.

9 TRISHA CONTI

10 called as a witness for the State, having been duly sworn,
11 testified as follows:

12 THE CLERK: Have a seat.

13 DIRECT EXAMINATION

14 BY MR. NAGURNEY:

15 Q Good morning, Doctor. I'll ask you to state your name
16 for the record, please.

17 A It's Trisha Conti. T-R-I-S-H-A C-O-N-T-I.

18 Q And Ms. Conti, how are you employed?

19 A I work for the Vermont Forensic Laboratory.

20 MR. NAGURNEY: If I may approach the witness, Your
21 Honor?

22 THE COURT: Yes.

23 BY MR. NAGURNEY:

24 Q I'll show you what's been marked for identification
25 State's 5, and I'll ask if you recognize that.

1 A Yes. This is my CV.

2 Q And is it a true and accurate copy of your curriculum
3 vitae as it was provided?

4 A This looks like not the most recent copy of my CV, but
5 yes, it is one that I provided to the state's attorneys.

6 Q Okay.

7 MR. NAGURNEY: Your Honor, I would offer State's
8 Exhibit 5.

9 MR. SLEIGH: I have no objection, Your Honor.

10 THE COURT: State's 5 is admitted.

11 (State's Exhibit 5 received)

12 THE COURT: That needs to go.

13 MR. NAGURNEY: Oh. I'm sorry.

14 BY MR. NAGURNEY:

15 Q How has your CV changed since this version?

16 A I've attended a number of additional educational
17 courses since this CV was put together last year.

18 Q And what were those courses related to?

19 A A course on method validations, statistics, and the
20 forensic laboratory measurement uncertainty and traceability.

21 Q And you have coursework in all those areas?

22 A Yes.

23 Q Okay. Have you attended and completed training
24 regarding the DataMaster DMT?

25 A I have.

1 Q And how are you familiar with the DataMaster DMT?

2 A I am currently the alcohol program supervisor at the
3 forensic lab, so I supervise the program which manages the
4 DataMaster DMTs.

5 Q How long have you been the supervisor of that program?

6 A Since January 1st of 2012.

7 Q And what did you do before you supervised that program?

8 A I worked at the Vermont Forensic Laboratory as a DNA
9 CODIS analyst.

10 Q What's your educational background?

11 A I have a Bachelor of Science degree in biomedical
12 technology from the University of Vermont, and I also have a
13 PhD in pharmacology and toxicology from Dartmouth College.

14 Q And have you completed your dissertation in that area?

15 A I have, yes.

16 Q And what's the topic of that dissertation?

17 A It was the effect of arsenic on a liver enzyme called
18 cytochrome P450 3A.

19 Q And does that relate to the field of forensic
20 toxicology?

21 A No, it does not.

22 Q What was the qualification that you bring from your
23 education to work in a forensic laboratory?

24 A I do have a PhD in toxicology, so I've taken a number
25 of courses during those graduate studies and undergraduate

1 studies in the topic of toxicology. Completing a PhD
2 dissertation on its own, you have a great understanding for the
3 scientific process and what goes into the investigation part of
4 that.

5 Q Okay.

6 MR. NAGURNEY: Your Honor, I'd offer Ms. Conti as an
7 expert in the DataMaster DMT instrument method validation,
8 measurement uncertainty, laboratory practices and procedures.

9 MR. SLEIGH: May I just voir dire on the latter part?
10 I have no objection to the first, I think, three criteria --

11 THE COURT: Uh-huh.

12 MR. SLEIGH: -- but laboratory management.

13 VOIR DIRE

14 BY MR. SLEIGH:

15 Q Ms. Conti, prior to January -- was it 1st, 2012, had
16 you ever managed a forensic laboratory?

17 A No, I had not.

18 Q Have you ever taken any courses in the quality
19 assurance, as it pertains to forensic laboratories?

20 A No.

21 Q And during your graduate studies did you take any
22 courses or work in managing any kind of laboratory?

23 A No, I did not.

24 MR. SLEIGH: Your Honor, we would object to
25 qualification as to laboratory management.

1 THE COURT: Would you like to follow-up?

2 MR. NAGURNEY: If I may, at least one for this, Your
3 Honor.

4 DIRECT EXAMINATION CONTINUED

5 BY MR. NAGURNEY:

6 Q Ms. Conti, how long have you been the manager of the
7 Vermont Forensic Laboratory?

8 A I've been manager of the alcohol program unit in the
9 forensic lab for over a year. Thirteen months.

10 Q And in the course of that 13 months, could you briefly
11 explain your duties to the Court?

12 A Sure. As a supervisor I manage the alcohol unit, which
13 includes blood and breath alcohol testing. So it's currently a
14 unit of five people, including myself. We maintain and
15 calibrate all of the DataMaster DMTs used for evidentiary
16 purposes in the state of Vermont. We also do all of the blood
17 alcohol testing in DUI cases throughout the state, and we also
18 do beverage analysis as well. I provide expert testimony on
19 all things related to the alcohol program, and any other duties
20 required for the program.

21 Q Tell me about your familiarity with the laboratory
22 standards and practices that are in place in the Vermont
23 Forensic Laboratory.

24 A I have been a member of the Vermont Forensic Laboratory
25 since 2005. During that period we've gone through an

1 accreditation process as a laboratory, which I was involved in,
2 as far as the preparation, and during the conduction of the
3 audit, as part of the accreditation. I've worked closely with
4 our quality manager in the laboratory, as we work towards
5 accreditation in our next cycle in 2014.

6 Q So you are familiar with the accreditation process.

7 A Yes.

8 Q And you have participated in an audit that led to an
9 accreditation that the lab currently holds.

10 A Yes.

11 MR. NAGURNEY: Your Honor, again I would offer Ms.
12 Conti -- or Dr. Conti, excuse me, as an expert in the area of
13 laboratory practice and procedures.

14 MR. SLEIGH: Continue with our objection, Your Honor.

15 THE COURT: It's my practice not to do blanket
16 qualifications unless there is agreement, but to address
17 qualifications at the time of any opinion question.

18 MR. NAGURNEY: Okay.

19 BY MR. NAGURNEY:

20 Q So, Ms. Conti, you mentioned that you're the head of
21 the alcohol breath testing program. The alcohol testing
22 program, I should say.

23 A Yes.

24 Q Explain when that authority was transferred to you.

25 A The Vermont Forensic Laboratory, as a part of the

1 Department of Public Safety, took over authority of the program
2 on March 1st, of 2012.

3 Q And what did you do prior to taking over the alcohol
4 program in March of 2012?

5 A I was involved in implementing procedures and policies
6 at the forensic laboratory, to govern the alcohol programs,
7 that when March 1st happened we were ready to open our doors
8 and have a seamless transition of the program.

9 Q Explain to me what procedures and policies you
10 implemented, to receive the alcohol program?

11 A Anything from evidence handling, of the kits that would
12 be submitted, to maintenance and calibration, and all the
13 procedures that go into the DataMaster DMT. We did procedures
14 for blood alcohol analysis. We updated our quality manual, our
15 safety manual, and our evidence handling manual, to include the
16 alcohol testing program.

17 Q Did you review the testing that had been performed by
18 the Department of Health laboratory, with respect to the
19 DataMaster DMT?

20 A Yes.

21 Q Tell me about that, please.

22 A In addition to going onsite at the Vermont Department
23 of Health laboratory, and talking with the individuals that
24 were, at that time, involved in the alcohol program, we
25 reviewed all of the redeployment testing packets --

1 MR. SLEIGH: Your Honor, I'm just going to object to
2 the pronoun "we," as I'm not exactly sure if this is a team
3 that she's referring to, or if it's her. If it's "we," then we
4 might get at the problems of actual knowledge.

5 THE COURT: Well, the objection is overruled. You
6 may cross-examine when it's your turn.

7 MR. SLEIGH: Thank you.

8 THE WITNESS: I'll clarify. "We," was myself and
9 Terrance High (phonetic), the quality manager of the Vermont
10 Forensic Laboratory. So Terr (phonetic) and myself reviewed
11 everything that the health lab had done for redeployment
12 testing, all the instruments which were currently in field use.
13 We went to National Patent Analytical Systems for training on
14 the DataMaster DMT and its software. We attended in-house
15 training at the health lab, for DataMaster supervisor and
16 operator training, as well as blood alcohol analysis training.

17 BY MR. NAGURNEY:

18 Q So is the Vermont Forensic Lab accredited?

19 A Currently, yes.

20 Q And what's the accreditation that it has?

21 A The accreditation is under the ASCLD/LAB Legacy
22 Program.

23 Q And you said that when you brought the alcohol program
24 under the umbrella of the Vermont Forensic Lab, that you
25 reviewed the testing.

1 A Correct.

2 THE COURT: You reviewed what?

3 MR. NAGURNEY: The testing and the documents
4 underlying the alcohol laboratory.

5 THE WITNESS: Yes.

6 BY MR. NAGURNEY:

7 Q The alcohol laboratory, while it was at the Department
8 of Health, was not accredited. Is that correct?

9 A Correct.

10 Q When you reviewed the standards and procedures of the
11 alcohol laboratory did you do that with an eye toward
12 accreditation?

13 A We did it with an eye towards assimilating the
14 Department of Health lab had done with currently the practices
15 that were being done at the Vermont Forensic Laboratory.

16 Q And do the practices of the health lab satisfy the
17 practices of the Vermont Forensic Laboratory?

18 A We made some minor modification to the program, but
19 yes, as an underlying scientific foundation they do meet the
20 practices that we currently provide at the forensic lab.

21 Q You speak about underlying scientific foundation, is
22 that synonymous with the method validation?

23 A Method validation and the procedures that they had in
24 place and anything pertaining to the program. Yes.

25 Q Okay. You were present in the courtroom for Ms.

1 Arvizu's testimony?

2 A I was.

3 Q And you heard her opinion regarding the method
4 validation of the DataMaster program?

5 A Yes.

6 Q Is there a set criteria for method validation?

7 A No.

8 Q What does method validation require that a laboratory
9 demonstrate?

10 A It demonstrates that the intended use of the process
11 fits its purpose.

12 Q And the process, in this case, would be the alcohol
13 breath testing program.

14 A Correct.

15 Q So remind me what documents you've reviewed about the
16 alcohol breath testing program.

17 A I reviewed all of the redeployment testing that the
18 health lab had done on all the instruments after they were
19 pulled from the field and reissued in 2011 and 2012.

20 Q And the Exhibit P, which is the redeployment testing --

21 THE COURT: Excuse me. After they were what?

22 THE WITNESS: All of the instruments were pulled from
23 the field in 2011, sent back to the manufacturer, to make sure
24 that the instruments were adequately performing. And then when
25 they were sent back to the health lab they conducted a series

1 of deployment testing, to make sure that the instruments were
2 performing according to their guidelines, prior to being
3 deployed into the field.

4 BY MR. NAGURNEY:

5 Q And having reviewed those documents and that
6 information, do you have an opinion about the method validation
7 the health laboratory performed on these documents?

8 A Yes.

9 Q What is that opinion?

10 A It was a sound, and scientifically valid method.

11 Q And what's the basis for that opinion?

12 A The basis was they did exhaustive studies on numerous
13 criteria for the instruments, which proved that the
14 instruments, themselves, could meet the rules and regulations,
15 and they were fit for use, for evidentiary breath testing.

16 Q Ms. Arvizu testified at some length --

17 THE COURT: I'm sorry.

18 I'm sorry. Could you repeat the question and the
19 answer again, please?

20 MR. NAGURNEY: Certainly.

21 BY MR. NAGURNEY:

22 Q What is the basis for your opinion that the Department
23 of Health lab adequately --

24 THE COURT: Well, first ask -- go ahead. All right.
25 All right.

1 BY MR. NAGURNEY:

2 Q If you could please share with me the basis for your
3 opinion that the Department of Health lab sufficiently or
4 scientifically validated their method.

5 A The testing that the health lab had done to demonstrate
6 that the machines were scientifically valid in their intended
7 use. It was sound, it was scientifically valid, and I had no
8 reason to believe, or to cause any use -- I could not give my
9 stamp of approval to the testing that they had done, while we
10 took over the program.

11 THE COURT: So what's the opinion again? There are
12 changes in verbs and nouns in there that are confusing me.

13 MR. NAGURNEY: Sorry.

14 THE COURT: Can you state your opinion?

15 THE WITNESS: My opinion is that the validation
16 studies that the health lab did were sound and scientifically
17 reasonable, for their intended use.

18 MR. NAGURNEY: If I may approach the witness, Your
19 Honor?

20 THE COURT: Yes. Go ahead.

21 BY MR. NAGURNEY:

22 Q I'll show you what's been admitted as State's
23 Exhibit G. I believe that is the audit of your laboratory,
24 that was done by the --

25 THE COURT: State's what?

1 MR. NAGURNEY: It was made, excuse me, as
2 Defendant's G.

3 THE COURT: Defendant's G. Okay.

4 BY MR. NAGURNEY:

5 Q It should be the NFSTC report?

6 A Correct.

7 Q What does NFSTC stand for?

8 A It's the National Forensic Science Technology Center.

9 THE COURT: I'm sorry.

10 THE WITNESS: It's the National --

11 THE COURT: Wait just a minute. What document did
12 you just give her?

13 MR. NAGURNEY: This is Defendant's G, Your Honor.

14 MR. SLEIGH: Your Honor, I don't think it's been
15 offered yet.

16 THE COURT: It hasn't. Okay. Do you realize that?

17 MR. NAGURNEY: No, I did not.

18 THE COURT: Okay.

19 THE CLERK: That's my mistake. I thought it -- okay.

20 THE COURT: Go ahead. So you do need to identify it.

21 MR. NAGURNEY: Sure.

22 THE COURT: Since I don't know what it is.

23 THE WITNESS: Sure. It's an assessment that was put
24 together by the National Forensic Science Technology Center, in
25 response to the Department of Public Safety taking over the

1 alcohol program. We contracted this group to come in and
2 provide an assessment of the current status of the alcohol
3 testing program at the health lab, to help us move forward with
4 transitioning the program.

5 THE COURT: And who was it done by again?

6 THE WITNESS: NFSTC. Is the acronym.

7 THE COURT: All right. Next.

8 BY MR. NAGURNEY:

9 Q So the exhibit that's been marked G, that you're
10 holding in front of you, is this a true and accurate copy of
11 the report that NFSTC produced?

12 A Yes.

13 MR. NAGURNEY: Your Honor, I would offer Exhibit G.

14 MR. SLEIGH: No objection, Your Honor.

15 THE COURT: G is admitted.

16 (Defendant's Exhibit G received)

17 BY MR. NAGURNEY:

18 Q And you reviewed the report that makes up Exhibit G?

19 A I have, yes.

20 Q What was the conclusion that the report came to?

21 A There were numerous conclusions. Basically, this group
22 came in and provided an assessment of the health lab program,
23 and found that the methods and procedures they were using were
24 sound and in line with currently practiced fields in alcohol
25 testing throughout the United States. And they gave us

1 numerous recommendations on anything from staffing needs, space
2 needs, funding needs, to transition the program over to the
3 Department of Public Safety.

4 Q And so does anything that was raised in Exhibit G, as
5 an opinion of the NFSTC, change your opinion about the adequacy
6 of the Department of Health's alcohol testing program, as
7 you've inherited it from them?

8 A No.

9 Q We've spoken a lot in this hearing about the ISO. Are
10 you familiar with that organization?

11 A Yes.

12 Q What exactly does the ISO do?

13 A The ISO is the International Organization for
14 Standards, and they put out guidelines for how laboratories
15 should conduct practices, so that they will be reliable and
16 standardized.

17 Q How does ISO relate to ASCLD?

18 A ASCLD/LAB, starting in 2004, started a new
19 accreditation track, where they have adopted the ISO 17025
20 standards, as part of their required standards for
21 accreditation.

22 Q How many testing labs in this country meet the current
23 ISO 17025 standard?

24 A You'd have to define testing. Under the ASCLD/LAB
25 international standards there are two tracks. One is for

1 testing laboratories and one is for calibration labs. So
2 breath alcohol testing would fall into the calibration lab.
3 Currently, there's only six labs in the entire country that are
4 international calibration lab certified.

5 Q You're familiar with ASCLD Legacy accreditation.

6 Correct?

7 A Yes.

8 Q Ms. Arvizu testified and said that the ASCLD Legacy
9 accreditation contains requirements regarding traceability.

10 A Correct.

11 Q Do you agree with her?

12 A No.

13 Q Why not?

14 A If you look at the accreditation requirements and
15 documents under the Legacy Program, there's no mention of ISO.
16 The only mention of anything pertaining to traceability or
17 reference solutions is how they're stored and information about
18 how you're supposed to label them and maintain copies of
19 certifications that may come along with materials that you
20 purchased. It's not the traceability standards that are put
21 forth in the ISO documents.

22 Q So is she correct or incorrect in that statement?

23 A She's incorrect.

24 Q I'll show you what Attorney Sleigh admitted, I believe,
25 as Exhibits D and E, and asks you -- ask you if you're familiar

1 with those documents?

2 A I am.

3 Q And what are those?

4 A These are policies that as -- that the Board of
5 Directors at ASCLD/LAB had put forth in trying to help -- help
6 explain their policy on measurements or the traceability as far
7 as the international accreditation is concerned.

8 Q And across the front of those documents there's a -- I
9 guess it's a watermark, you could call it?

10 A Yes.

11 Q And what does it say?

12 A It says "currently under review."

13 Q And you heard Ms. Arvizu testify about that, correct?

14 A I did.

15 Q And she testified that while this particular copy was
16 marked as "currently under review," the fact of the matter was
17 that this policy is now in full force and effect as written in
18 the exhibit?

19 A That's what she said, yes.

20 Q Is she correct about that?

21 A Absolutely not.

22 Q How do you know that?

23 A If you go to the ASCLD/LAB web page, there is
24 documentation which --

25 MR. SLEIGH: Objection; hearsay, Your Honor.

1 MR. NAGURNEY: Your Honor, she's an expert testifying
2 about the basis of her opinion.

3 MR. SLEIGH: It sounds like she's going to testify
4 exactly what the website says. I think that's a little bit
5 different.

6 THE COURT: The objection is overruled. Ms. Arvizu
7 testified about what was on the website.

8 THE WITNESS: These documents have an effective date
9 of July 1, 2012. They were put forth prior to that at the
10 end -- when they were approved at the end of 2011, as a means
11 to help the community understand these two topics as we move
12 towards everybody undergoing the international accreditation
13 process.

14 The community as a whole, the ASCLD/LAB community,
15 was very uncomfortable with these documents, because not a lot
16 of forensic laboratories have dealt with these two topics, and
17 because of the feedback that ASCLD/LAB received, they decided
18 to undergo a public-comment period in the beginning of 2012 for
19 two months, and at that end of that they were going to take the
20 comments under advisement and go forth with the effective date
21 of July 1, 2012, which is on the front of these documents;
22 however, they are still pending and not active.

23 THE COURT: When was the public-comment period?

24 THE WITNESS: The public-comment period was for 60
25 days. I think it was January 1, 2012 through March 1, 2012,

1 but based on the comments and the feedback that they've got,
2 they have still not put these into effect.

3 BY MR. NAGURNEY:

4 Q I'll show you what was admitted as Exhibit B, ask if
5 you recognize that exhibit?

6 A I do.

7 Q What is Exhibit B?

8 A This is guidelines for forensic science laboratories
9 that the ILAC group put forth.

10 Q Is ILAC an accrediting body?

11 A They're not an accrediting body per se; they're more of
12 a consortium of members which are accrediting bodies.

13 Q Does Exhibit B anywhere state about the acceptability
14 of a laboratory making its own calibration solution?

15 A There is mention of that, and it is an acceptable
16 practice.

17 Q Where in Exhibit B does it show that it's an acceptable
18 practice?

19 A That would be page 12, Section 5.6.2.2.2. It's under
20 the measurement traceability section.

21 Q Okay. So according to this exhibit, making your own
22 solutions is an acceptable practice?

23 A Correct.

24 Q You've reviewed the --

25 THE COURT: If you can, wait just a minute, please.

1 MR. NAGURNEY: Sure.

2 THE COURT: Okay. Go ahead.

3 BY MR. NAGURNEY:

4 Q You've been present in the courtroom for the testimony
5 of all the witnesses prior, correct?

6 A Yes.

7 Q And you've heard Ms. Bolduc and Mr. Kimball both talk
8 about these steps and the processes that were -- that the
9 laboratory went through at the Department of Health to create
10 these reference solutions?

11 A Yes.

12 Q Do you have any concerns about the creation of the
13 reference solutions through the steps as described by
14 Mr. Kimball and Ms. Bolduc?

15 A No.

16 Q Do you have an opinion about the process of creating
17 the solutions that was done by the Department of Health
18 Laboratory, as far as its scientific acceptability?

19 A Yes.

20 Q What is that opinion?

21 A I think it's a perfectly fine and acceptable process
22 for creating simulator solutions.

23 Q And what's the basis for that opinion?

24 A The basis is looking at how other labs around the
25 country handle preparing simulator solutions; having NFSTC come

1 in and review the documentation as well that the health lab
2 provided; looking at the their processes, and knowing that the
3 NFSTC group are experts in their field, also saying that
4 they're perfectly acceptable and standard within the field.

5 Q You've reviewed the contents of Exhibit O; that's the
6 Strengthening Forensic Science: A Path Forward --

7 A Yes.

8 Q -- book?

9 A I have.

10 Q And based upon your review of that exhibit, do you have
11 an opinion about the acceptability of the practices in place at
12 the Department of Health that have since been adopted by the
13 Department of Public Safety's forensic lab, in view of that
14 exhibit?

15 A Yeah. It's not really a good comparison. Exhibit O
16 talked about how to standardize practices within forensic
17 science throughout the country. It gave a number of
18 recommendations as to how to improve the scientific validity of
19 forensic sciences as a whole. They made numerous
20 recommendations, anything from funding, to staffing, to more
21 research being needed.

22 There was some information in there as to having the
23 ISO-17025 guide being a good example of how laboratories could
24 do work, but there's nothing in there that makes me believe
25 that what the health lab has done and what we're currently

1 doing is not sound, scientific practice.

2 Q Are you familiar with the Rod Gullberg article that's
3 been marked as Exhibit F?

4 A Yes.

5 Q And given the contents of the Rod Gullberg article, do
6 you have an opinion about whether the practices and the testing
7 by the Department of Health and adopted by the Department of
8 Public Safety in the forensic laboratory are affected by his
9 recommendations?

10 A I don't think they're affected, per se. Rod put forth
11 a study that he had done in his capacity with Washington State,
12 as to how they went about assigning a certain measurement to
13 their breath testing results. I think it's a valid scientific
14 practice, and as we move towards our own ASCLD/LAB
15 international accreditation, that's something that we will be
16 looking more strongly at, but it doesn't negate any of the work
17 that the health lab has done, or that we've done, as far as
18 breath alcohol testing is concerned.

19 Q And part of your testimony as an expert witness for the
20 Department of Public Safety, for the alcohol testing program,
21 requires you to make decisions -- excuse me, issue opinions,
22 both about the admissibility of a test, and about the weight
23 that should be afforded to a test?

24 A Correct.

25 Q Does the Gullberg article that's marked and admitted as

1 Exhibit F address the admissibility of breath testing, or the
2 weight of breath testing?

3 A It affects the weight.

4 Q Why do you say that?

5 A Numerous times throughout that article it specifically
6 states that knowing the measurement of certainty associated
7 with a process affects the weight, not the admissibility of the
8 evidence, and I think Rod himself has said that numerous times
9 in --

10 MR. SLEIGH: Objection, Your Honor, as to what she
11 thinks Rod himself may have thought.

12 THE COURT: Sustained. You can't say what he has
13 said. The article itself is in evidence, but you can't testify
14 about what he said.

15 THE WITNESS: Okay.

16 MR. NAGURNEY: Just briefly, Your Honor.

17 This is a 104(a) hearing, and she's an expert giving
18 her opinion, so I -- if I may?

19 BY MR. NAGURNEY:

20 Q Have you -- are you familiar with Mr. Gullberg and his
21 work beyond simply what's in Exhibit F?

22 A Yes.

23 Q And what -- and can you explain, briefly, that
24 familiarity?

25 A Sure. I've reviewed procedures that Washington State,

1 the lab that he works at, has put forth that are available on
2 the Internet. So I've reviewed their policies and procedures.

3 Q Based upon the review of the policies and procedures,
4 separate and apart from Exhibit F, do you have an opinion as to
5 whether the issue of measurement uncertainty should affect the
6 admissibility for the weight of the test result?

7 MR. SLEIGH: Your Honor, I don't think that's a
8 proper question for a forensic scientist. That's a legal
9 question.

10 THE COURT: How is it relevant to the issue here?
11 We're not -- we're not addressing a particular test result.

12 MR. NAGURNEY: Well, Your Honor, there -- I suppose
13 there are two parts to that question. The first is that you
14 had asked me a little while ago to introduce the exhibit of --

15 THE COURT: I didn't ask you. I told you it's up to
16 you how you present your case.

17 MR. NAGURNEY: Okay. Well, Your Honor, to the extent
18 that this hearing would affect the admissibility of an -- or to
19 the extent that this hearing is directly involved to the civil
20 suspension cases that are included with this challenge that
21 Mr. Sleigh has brought, the chemist will be asked -- or has --
22 is asked by the State to offer an opinion on not simply the
23 admissibility of the test results, but the weight that should
24 be afforded to them.

25 To the extent that she is, I think, that she

1 certainly has the foundation to testify that she understands
2 the difference between the admissibility of a test result,
3 i.e., whether the test results meets the regulations, and the
4 weight that she would have chemist -- as an expert witness,
5 would afford to that test result based upon the various other
6 underlying factors that were included in that test-results
7 production.

8 THE COURT: Well, she's already testified about that,
9 so I've forgotten now the question --

10 MR. NAGURNEY: Okay. I'll -- I'll --

11 THE COURT: -- that you asked, but it did seem to go
12 more specifically to evaluation of specific test results, and
13 we're not doing that in these hearings. This has to do only
14 with admissibility.

15 MR. NAGURNEY: Okay. I'll move on, then, Your Honor.

16 BY MR. NAGURNEY:

17 Q Ms. Conti, you've testified as an expert witness
18 regarding the DataMaster DMT instrument in Vermont's courts?

19 A Yes.

20 Q And how many times have you done so?

21 A Approximately 20.

22 Q You're familiar with the regulations or the rules for
23 alcohol breath testing that the Department of Health had in
24 place?

25 A Yes.

1 Q And as adopted by the Department of Public Safety?

2 A Yes.

3 Q Based upon your review of Exhibit P and the other
4 documents, the testimony that you've heard from Ms. Bolduc and
5 Mr. Kimball, do you have an opinion about whether the
6 DataMaster DMT breath testing instrument meets the regulations
7 or the rules of the Department of Health for alcohol breath
8 testing?

9 A Yes.

10 Q What is that opinion?

11 A It meets the rules and regulations as set forth in the
12 Department of Health.

13 Q What is the basis for that opinion?

14 A The basis is reviewing the data and the instrument
15 performance and the body of data that's been put together over
16 the years for the instruments, and knowing that the data proves
17 that it meets the rules and regulations.

18 THE COURT: When you say "it," what does "it" refer
19 to?

20 THE WITNESS: Reviewing all of the testing data and
21 seeing that the data meets the accuracy and precision
22 requirement, specifically for the rules and regulations.

23 BY MR. NAGURNEY:

24 Q You've mentioned that the lab is shifting toward an ISO
25 Standard?

1 A Yes.

2 Q Can you explain why you're doing that?

3 A We are currently ASCLD/LAB Legacy accredited. The
4 Legacy Program is -- ASCLD/LAB is no longer accepting
5 applications for the Legacy Program. They're moving towards
6 the international requirement which has adopted the ISO-17025
7 guidelines, so in order to be accredited in our next
8 accreditation cycle, we have to go to the international
9 standards.

10 Q Mr. Sleigh suggested that the ISO Standards -- or he
11 asked you whether you thought they were a minimum scientific
12 standard; what is your opinion about whether the ISO Standard
13 as a minimum scientific standard?

14 A I would say the ISO guidelines are the top-tier
15 scientific standards.

16 Q Are there ways other than an ISO accreditation to a
17 laboratory for you to have confidence in the results the
18 laboratory is producing?

19 A Yes.

20 Q What are -- what would -- what would you want to know
21 about the laboratory?

22 A I would want to know what their standard operating
23 procedures are. I would want to know their policies and
24 procedures in regard to their management; anything from
25 evidence handling to their quality control guidelines. I think

1 the most important piece is having sound policies and
2 procedures to back up and have certainty that what you're doing
3 in the laboratory is sound.

4 MR. NAGURNEY: I don't have any further questions for
5 Ms. Conti -- Dr. Conti, I should say.

6 I keep doing that to you. I'm sorry.

7 THE WITNESS: That's okay.

8 THE COURT: We'll take our morning break for 15
9 minutes, and resume at five past 11.

10 MR. SLEIGH: Thank you, Your Honor.

11 THE BAILIFF: All rise.

12 (Recess at 10:50 a.m., recommencing at 11:10 a.m.)

13 THE COURT: Please be seated.

14 Mr. Sleigh?

15 MR. SLEIGH: Thank you, Your Honor.

16 CROSS-EXAMINATION

17 BY MR. SLEIGH:

18 Q Dr. Conti, I think you testified that you, in fact,
19 have a PhD in toxicology; is that right?

20 A Yes.

21 Q And you've published in that field?

22 A Yes.

23 Q And have you published articles concerning testing
24 results?

25 A Yes.

1 Q And when you publish, generally speaking, we're talking
2 about peer review journals?

3 A Yes.

4 Q What does that mean?

5 A That means they're journals that are reviewed by peers.
6 So there's an editorial board, and it's people that are within
7 your discipline, so they have specialized knowledge that the
8 methods that you are using are sound and scientifically valid.

9 Q And they would examine your proposed publication to see
10 if it incorporated scientifically-valid predicates?

11 A Yes.

12 Q Would that include an expression of traceability when
13 you're documenting your test findings?

14 A In a sense, that they'll look at the methods and
15 materials that you use, just to make sure that you have
16 information in there that is sufficient for another body to
17 reproduce the results that you've gotten.

18 Q So they'll be able -- you -- you explain your method,
19 what materials you used, to set forth the entire procedure
20 leading up to your conclusions and your test results?

21 A Yes.

22 Q So that a reader could trace the beginning of the
23 process, through the process, to the end result?

24 A Correct.

25 Q And in a peer-reviewed article, you certainly have to

1 express your test results with the uncertainty measurement; is
2 that right?

3 A No.

4 Q Your articles don't contain uncertainty measurements
5 when it relates to standards?

6 A Some. Not uncertainty as a -- as the term is used in
7 the ISO documents. Uncertainly as far as maybe an average in
8 the standard deviation, but not a confidence interval.

9 Q All right. Now, as I understand it, you became the
10 head of the alcohol program January 1, 2012; is that right?

11 A Yes.

12 Q And I take it you were brought up to speed on some of
13 the history of the alcohol testing program as it had existed at
14 the Department of Health?

15 A Yes.

16 Q You knew, for example, that sometime in 2010, or so,
17 all the State's DataMasters were sent back to the manufacturer
18 for recalibration; is that right?

19 A Yes.

20 Q And that was because there had been some serious
21 concern about the performance of those machines prior to taking
22 them out of service and sending them back to the manufacturer?

23 A Yes.

24 Q So that was in 2010?

25 A Yes.

1 Q The manufacturer then sent the machines back to Vermont
2 and gave the lab some sort of certificate that they were in
3 good working order?

4 A Correct.

5 Q But the manufacturer provided you no data supporting
6 their certificate; is that right?

7 A True.

8 Q Now, Mr. Nagurney asked you if the Vermont Forensics
9 Laboratory is currently accredited, and you said yes, right?

10 A Right.

11 Q But the breath alcohol program is not accredited; is
12 that right?

13 A Correct.

14 Q And it's never been accredited?

15 A No.

16 Q Never been, prior to NFSTC, audited by any outside
17 agency?

18 A Not to my knowledge, no.

19 Q And the NFSTC report, such as it was, came in after the
20 redeployment of these various machines?

21 A Yes.

22 Q Are you aware that the Congress of the United States
23 became concerned with the performance of forensics labs across
24 the country?

25 A Yes.

1 Q And they were concerned that forensic labs weren't
2 applying or maintaining adherence to minimum scientific
3 standards; is that right?

4 A There were concerns that the forensic labs -- the
5 forensic discipline, as a whole, was not held to some of the
6 same standards as other forms of industry, yes.

7 Q Okay. And they commissioned the National Research
8 Council to investigate the state of forensic science in the
9 United States; is that right?

10 A Yes.

11 Q And the National Research Council in 2009 published
12 their findings in a document titled Strengthening Forensic
13 Science in the United States: A Path Forward; is that right?

14 A Yes.

15 Q And have you read that?

16 A I have.

17 Q And that was published in 2009?

18 A Yes.

19 Q And one of the recommendations that the National
20 Research Council made for forensic laboratories, testing
21 laboratories, is that they adhere to the international standard
22 17025; is that right?

23 A The international standard 17025 was mentioned as a
24 good example of how we could move forward and standardize
25 forensics in the country, yes.

1 Q Okay. And that was in 2009?

2 A Yes.

3 Q So the health department, concerned about the
4 performance of the DataMaster DMT shipped them all back to
5 National Patent in 2010?

6 A Yes.

7 Q And they get back to Vermont sometime late 2010, 2011,
8 depending on the machine?

9 A Right.

10 Q They come with a certificate of service, but with no
11 data that backs that up from a scientific point of view?

12 A Correct.

13 Q And the health department decides that they're going to
14 have to test these machines themselves?

15 A Right.

16 Q Now, you were working at the Vermont Forensic Lab in
17 2009, 2010; is that right?

18 A Yes, I was.

19 Q And when was the last time that the forensic lab had a
20 full accreditation audit by ASCLD/LAB?

21 A 2009.

22 Q And in 2009, ASCLD/LAB informed its members that from
23 that point forward it would no longer accept applications or
24 continue Legacy accreditation; is that right?

25 A Without special approval, yes.

1 Q All right. So when you get accredited by ASCLD/LAB,
2 you're accredited for a period of five years, assuming that you
3 file the annual reports and otherwise comply with their
4 requirements?

5 A Correct.

6 Q So in 2009, the lab knew that it wasn't going to be
7 able to rely on this Legacy accreditation past 2014?

8 A Right.

9 Q In 2009, ASCLD informed its members that it was moving
10 to the so-called ISO Standard, right?

11 A They were notified prior to that, but, yes.

12 Q Okay. So in 2009, the lab -- Vermont Forensic Lab knew
13 that the Legacy accreditation was going to expire in 2014, and
14 that to get accredited by ASCLD/LAB, you'd have to conform to
15 the ISO Standard by 2014?

16 A Yes.

17 Q Now, you're aware that the Vermont Legislature became
18 concerned about the performance of the Department of Health
19 breath alcohol testing regimen, are you not?

20 A Yes.

21 Q And in fact, they passed a statute that stripped the
22 Department of Health of its supervision of the breath alcohol
23 program and transferred it to the Department of Public Safety?

24 A Yes.

25 Q And in that bill they also required that the Department

1 of Public Safety get the breath alcohol program accredited?

2 A Yes.

3 Q And at that time, the only accreditation available, at
4 least under the ASCLD/LAB Program, would have involved
5 compliance with ISO 17025?

6 A That's correct.

7 Q Now, you yourself did not participate in any of the
8 what we call pre-deployment testing of these machines; is that
9 right?

10 A Not unless it's happened since we took over authority
11 of the program. There have been a handful on instruments since
12 March 1, 2012, that we've had to do the deployment testing on.

13 Q Have you reviewed the machines that are involved in
14 this particular challenge?

15 A Yes.

16 Q Are any of those certified after March 1, 2012?

17 A No.

18 Q All right. So a scientist in the Vermont Department of
19 Health would have been familiar with -- well, should a
20 scientist -- well, strike that.

21 So these machines, as I get it, come back, and they
22 need to be certified via the Vermont Department of Health?

23 A Correct.

24 Q The Vermont Department of Health did not adopt the ISO
25 Standard in its effort to validate those machines; is that

1 correct?

2 A Correct.

3 Q It did not adapt any previously existing standard
4 operating procedure from outside the jurisdiction; is that
5 right?

6 A Correct.

7 Q So that the standard that the -- or the testing method
8 of the method validation was developed entirely within the
9 Department of Health?

10 A Yes.

11 Q So it's idiosyncratic to the Department of Health?

12 A Yes.

13 Q You heard Kirk Kimball say that they've employed the
14 same practices and procedures that the Department of Health had
15 employed for two or three decades, did you not?

16 A I heard him say that, yes.

17 Q All right. Does science change over the course of 30
18 years?

19 A Yes, it does.

20 Q Would one expect to use the same procedures you used 30
21 years ago to validate a breath -- a breath machine, like the
22 DMT, that didn't exist 30 years ago?

23 A No.

24 Q Would you acknowledge that the testing employed by the
25 Vermont Department of Health, the redeployment testing, did not

1 comply with the traceability requirements as they exist in ISO
2 17025?

3 A Yes.

4 Q And would you also acknowledge that the redeployment
5 testing did not take into consideration any quantification of
6 uncertainty?

7 A Yes.

8 MR. SLEIGH: One moment, Your Honor.

9 BY MR. SLEIGH:

10 Q And as you go forward, and by, what, December 2014,
11 it's the goal of the Vermont Forensic Lab to be ISO 17025
12 compliant?

13 A Yes.

14 Q And that would include in the breath testing --
15 alcohol, breath testing program?

16 A Yes, with the understanding that it's the calibration
17 of the breath testing instruments that will be accredited, not
18 the actual testing, because that is not an option.

19 Q All right. And the calibration will have to comply
20 with the traceability requirements of the international
21 standard?

22 A Yes.

23 Q And the uncertainly quantification?

24 A Yes.

25 Q Why is it important to include uncertainty measurements

1 in testing results?

2 A It gives another layer of confidence to the testing
3 result. It lends credibility to it. It gives you an
4 understanding of how confident you are in what you're reporting
5 as a result.

6 Q Okay. In other words, it's important to know the
7 weight of your quantitative data to know how certain you are
8 that the number you're providing is accurate; to know what
9 error is built into that so you can give a confidence interval,
10 so you're saying how sure you are that the result you're
11 reporting is, in fact, what the result is?

12 A Yes.

13 Q And that wasn't done in the redeployment calibration
14 certification of any of these machines; is that right?

15 A True.

16 Q Another part of the legislative mandate was that, for
17 the first time, the breath alcohol program be assessed by an
18 outside agency; is that right?

19 A Yes.

20 Q And that was the report generated, ultimately, in what
21 you've seen as Exhibit G?

22 A Yes. I don't know if the legislative mandate
23 particularly said that this assessment must take place. It was
24 my understanding that the Department of Public Safety undertook
25 this assessment as a way to help us bring the program over from

1 the Department of Health Lab.

2 Q And within G, there are numerous recommendations of
3 changes that the lab's going to have to make in order to become
4 ISO compliant; is that right?

5 A Correct.

6 Q It wasn't clear to me when you were talking to
7 Mr. Nagurney that your review of the redeployment calibration
8 consisted of the review of the paperwork in Exhibit B; is that
9 right?

10 A It included review of all of the redeployment data
11 packets for each of the instruments.

12 Q It did not include a review of the GC results regarding
13 the simulator solution that we've offered in Exhibit Q; is that
14 right?

15 A No, it did not.

16 Q You and I talked about the existence of that at a
17 deposition, right?

18 A Yes.

19 Q Now, at the deposition, we talked about Ms. Arvizu's
20 opinion, correct?

21 A Yes.

22 Q And it was your understanding at the deposition that
23 she'd seen the redeployment packets, but not the GC documents;
24 is that right?

25 A Correct.

1 Q And I asked you, I believe, whether you agreed with her
2 assessment in paragraph 14 of her affidavit that the lab did
3 not comply with the traceability requirements of the ISO
4 Standard; is that right?

5 A Yes.

6 Q And you agreed with that?

7 A I agreed that given the limited scope of data she was
8 provided, that I was in agreement with her finding.

9 Q All right. And the GC simulator solution documents in
10 Q, you didn't review, because they were never made available to
11 you; is that right?

12 A They were made -- we received simulator solution data
13 for all of the batches of simulator solution that were handed
14 over to us by the Department of Health. We did not have the
15 body of data for historical lots of solution.

16 Q That was actually in a box in the closet of Kirk
17 Kimball's office?

18 A I -- it was in file cabinets throughout the department.

19 Q Okay. And do you know who finally assembled those and
20 caused them to be digitally stored, initially?

21 A You did it, in part, and then Greg Nagurney and I did
22 in part, afterwards.

23 MR. SLEIGH: Thank you, Your Honor. I have no
24 further questions.

25 THE COURT: Mr. Nagurney?

1 MR. NAGURNEY: Thanks, Your Honor.

2 REDIRECT EXAMINATION

3 BY MR. NAGURNEY:

4 Q Ms. -- sorry. I'll --

5 Mr. Sleigh talked about the traceability of records
6 you've reviewed, and you -- I want to make certain your
7 statement was that the calculation of an average and the
8 calculation of a standard deviation is part of what you would
9 expect a laboratory to look at as far as traceability, so they
10 could have some confidence in their results?

11 A Traceability is a -- it depends how you're using the
12 word "traceability." There's different definitions, and it's
13 not used clearly throughout the community. There is a notion
14 that traceability is just the unbroken chain of comparisons to
15 a reference material which goes to the -- a standard, and then
16 there is the notion of traceability which incorporates that
17 unbroken chain, as well as realization to the standard
18 international unit; it's a component as having a measurement
19 assurance program; part of it is ongoing recalibration.

20 So traceability, from an ISO 17025 standpoint,
21 incorporates a number of things; it's not just having
22 measurement and certainty or document traceability.

23 Q Here in the testing that makes up --

24 THE COURT: I'm sorry. Could you repeat what it --
25 in the second version, what it is, in addition to the unbroken

1 chain to the reference materials?

2 THE WITNESS: Sure. Traceability has a number of
3 components. One is an unbroken chain of comparisons between a
4 result that's generated in the lab and a known certified
5 amount, which is something that's provided by a reference
6 laboratory for reference solutions. It's purchasing reference
7 solutions from a lab that's 17025 compliant is a portion of it.
8 It's also using standardized methods and procedures in the
9 field. There's a number of components that go into the overall
10 traceability of a number, of a result.

11 BY MR. NAGURNEY:

12 Q And how about the calculation of the test average, or
13 the standard deviation for the test?

14 A That's a separate component, because measurement and
15 certainty itself is looking at the inherent uncertainty in all
16 of the components of a process. It's not necessarily just
17 taking the average and standard deviation of a result. That
18 could be a component of it, depending on how you're using it.

19 Q So --

20 THE COURT: Excuse me. Are you -- are you equating
21 average -- I forget exactly how you said it, but standard of
22 deviation with uncertainty, or --

23 THE WITNESS: No. It's -- uncertainly looks at --
24 the measurement of uncertainty takes into account the entire
25 process. So there could be dozens of components that each have

1 their own uncertainty value --

2 THE COURT: Right.

3 THE WITNESS: -- and you have to look at the
4 aggregate for a process. Just looking at if you have a list of
5 results, like if you ran QC samples and you ran them 100 times,
6 you could look at the average and standard deviation of that to
7 get a component of the uncertainty, but it's not going to be
8 the totality of it. It's just going to be one small component.

9 THE COURT: All right. Thank you.

10 BY MR. NAGURNEY:

11 Q So when these instruments were returned to NPAS, you
12 know, the National Patent Analytical Systems, you said they
13 were returned for calibration, and Mr. Sleigh asked you whether
14 there was any data supporting the certificate that the
15 manufacturer issued, do you remember that question?

16 A Yes.

17 Q And you answered no, that you didn't have access to
18 NPAS's data.

19 A Correct.

20 Q Does that fact affect your opinion?

21 A No.

22 Q Why not?

23 A Because regardless of what the manufacturer found, they
24 provided a coversheet with limited information about the status
25 of the instrument.

1 Q Okay.

2 A After that fact, the health lab took it upon themselves
3 to redo a whole host of testing to makes sure that they felt
4 comfortable putting instruments in the field, regardless of
5 what NPAS had said.

6 Q Mr. Sleigh asked you about Exhibit O, which was
7 Congress and their concerns about forensic laboratories and the
8 testing they were producing.

9 A Yes.

10 Q Which begs the question, is the DataMaster DMT approved
11 for use with the federal government?

12 A Yes.

13 MR. NAGURNEY: If I may approach the witness, Your
14 Honor?

15 THE COURT: Yes.

16 BY MR. NAGURNEY:

17 Q I'll show you what's been marked as State's Exhibit 6,
18 ask you to identify that document.

19 A This is a document put forth by the National Highway
20 Transportation -- National Highway Traffic Safety
21 Administration, or NHTSA, on testing they perform, and which
22 instruments they deem acceptable for evidentiary breath testing
23 in the United States and internationally.

24 Q And can you explain, briefly, who NHTSA is?

25 A Sure. It's the National Highway Traffic Safety

1 Administration. So it's a federal agency which is involved in
2 multiple aspects of highway safety, and because evidentiary
3 breath testing is an important component of highway safety or
4 roadway safety, they took it upon themselves to deem
5 instruments that they believe are acceptable for evidentiary
6 breath testing.

7 Q And does -- you've reviewed the document previously?

8 A Yes.

9 Q And is the document I've provided you, marked as
10 State's 6, a fair and accurate depiction of the NHTSA testing
11 document?

12 A Yes.

13 Q And that's published in the Federal Register, isn't it?

14 A Yes, it is.

15 MR. NAGURNEY: Your Honor, I would offer State's
16 Exhibit 6 for what it's worth, although I would state that you
17 can -- I'd like you to take judicial notice of it as well,
18 since it is available in the Federal Register.

19 THE COURT: Well, I -- it's -- I'm not taking
20 judicial notice of it --

21 MR. NAGURNEY: Sure.

22 THE COURT: -- but you've offered it.

23 So Mr. Sleigh?

24 MR. SLEIGH: It's not clear to me the date of that
25 particular --

1 THE WITNESS: The date on this is 1993.

2 MR. SLEIGH: May I approach, Your Honor, just to take
3 a look at --

4 THE COURT: Yes.

5 MR. SLEIGH: Your Honor, may I voir dire, briefly?

6 THE COURT: All right.

7 VOIR DIRE

8 BY MR. SLEIGH:

9 Q Looking at State's 6, does the DataMaster DMT even
10 appear on this document?

11 A Not on this one, no.

12 Q No, did the DataMaster DMT exist in 1993?

13 A No.

14 MR. SLEIGH: Objection, Your Honor.

15 MR. NAGURNEY: Judge, the document's not being
16 offered with the respect to the acceptability of the Datamaster
17 DMT for federal testing purposes. That's a separate exhibit,
18 but I will offer what I've offered the Exhibit 6 for is simply
19 to show it contains the volume of testing that controls the
20 admission of testing instruments like the Datamaster DMT to the
21 acceptable list of instruments that the Federal Government
22 maintains and publishes in the Federal Register.

23 MR. SLEIGH: As it existed in 1993. I mean, I think
24 we have -- I just think there's no foundation for this.

25 THE COURT: Since it relates to 1993 it's really not

1 relevant to this case, so the objection's sustained.

2 MR. NAGURNEY: If I may ask the witness a few more
3 questions, Your Honor, as I believe that it is.

4 THE COURT: You may.

5 MR. NAGURNEY: Okay.

6 If I may approach the witness, Your Honor.

7 THE COURT: Yes.

8 BY MR. NAGURNEY:

9 Q Putting aside Exhibit 6 for one moment, I'll show you
10 what's been marked as Exhibit 7, and I'd ask if you can
11 identify that document?

12 A Yes. This is a document put forth, again, by NHTSA as
13 part of the Department of Transportation, and it's a conforming
14 products list for evidential breath testing instruments.

15 Q And does it fairly and accurately reflect the
16 conforming products list as you last reviewed it?

17 A Yes.

18 MR. NAGURNEY: Your Honor, I'd offer State's
19 Exhibit 7, it's the conforming products list published by NHTSA
20 from 2010, and containing the DataMaster DMT.

21 MR. SLEIGH: No objection, Your Honor.

22 THE COURT: State's 7 is admitted.

23 (State's Exhibit 7 received)

24 BY MR. NAGURNEY:

25 Q So, the DataMaster DMT does conform with the conforming

1 products list. Correct?

2 A Yes.

3 Q What does inclusion on the conforming products list
4 mean for an instrument?

5 A It means that it conforms to the specifications set for
6 by NHTSA in their testing and approval of the instruments.

7 Q How do you -- or how does one, as an instrument
8 manufacturer get their instrument placed on the conforming
9 products list?

10 A I believe there's an application that they have to fill
11 out and basically just ask for NHTSA to evaluate their
12 instrument.

13 Q How does NHTSA evaluate the instrument?

14 A They have a series of testing that they do to make sure
15 that it meets the criteria that they've set forth for
16 acceptability.

17 Q Has that testing criteria changed recently?

18 A To my knowledge, no.

19 Q Is that the testing criteria that's reflected in
20 State's Exhibit 6 from 1993?

21 A Yes.

22 Q Does the testing criteria --

23 MR. NAGURNEY: Your Honor, I would again offer
24 State's Exhibit 6.

25 MR. SLEIGH: Your Honor, what I've heard is an

1 expression of belief at this point, certainly nothing certain.
2 It doesn't seem to be personal knowledge. So, I would continue
3 my objection to State's 6.

4 THE COURT: I'm still not quite sure what you're
5 offering it for.

6 MR. NAGURNEY: I'm offering to show Your Honor that
7 the testing that controls admission to the conforming products
8 list in 2010 is unchanged since the testing list and
9 qualifications of testing was published in 1993.

10 THE COURT: And how does that help --

11 MR. NAGURNEY: Because Mr. Sleigh --

12 THE COURT: The issue here?

13 MR. NAGURNEY: -- offered Exhibit O, which showed
14 that, as recently as 2009, Congress, which is the federal body
15 that requires that the DataMaster DMT be used for testing had
16 grave concerns about forensic testing, and yet, after the
17 report was published in 2009, the DataMaster was approved in
18 2010, despite the fact that it was passing the same test that
19 every instrument had passed since 1993.

20 THE COURT: State's 6 is admitted, then.

21 (State's Exhibit 6 received)

22 BY MR. NAGURNEY:

23 Q So, tell me about State's 6 and the testing that shows
24 the DataMaster DMT has to pass.

25 A The specifications have anything to do from how it's --

1 the power source to linearity testing they do for accuracy and
2 precision and interference testing; and a number of other
3 components.

4 Q You're familiar with the testing that the Department of
5 Health Lab performed and the Department of Public Safety
6 performs?

7 A Yes.

8 Q How does it compare to the testing that the Federal
9 Government performs?

10 A For certain sections it meets it, and a number of
11 others it exceeds it.

12 Q Meets or exceeds?

13 A Yes.

14 Q Where does anywhere --

15 THE COURT: When you say "it", what are you referring
16 to?

17 THE WITNESS: The testing that the Department of
18 Health did in their redeployment process meets or exceeds the
19 testing undergone by the National Highway Safety Administration
20 for breath testing instruments.

21 BY MR. NAGURNEY:

22 Q So, Exhibit 6 which was published in the Federal
23 Register states a purpose for the testing. Are you familiar
24 with the purpose as stated by the exhibit?

25 A Not word for word, but yes, I know the general purpose

1 of it.

2 Q And what's the expressed purpose of the testing?

3 A It's to establish performance criteria for instruments
4 that will be used in criminal justice proceedings for
5 evidential breath testing.

6 Q And, the performance criteria contained in the tests
7 are -- strike that. I withdraw the question.

8 Anywhere in Exhibit 6, upon your review, have you
9 seen a mention of the concept of traceability?

10 A No.

11 Q Have you seen a mention of a concept or measurement
12 uncertainty?

13 A No.

14 Q Is method -- is State's Exhibit 6 a method validation
15 study?

16 A Not per se, but it's a method in and of itself. It's
17 -- I'm sure -- well, I can't say to that, but -- It's criteria
18 and method validation that NHTSA set forth as to what they
19 needed to see in order to put an instrument on the list.

20 Q How similar is the method that NHTSA requires to the
21 method that the State Laboratory requires?

22 A Again --

23 MR. SLEIGH: I don't think that question can generate
24 a meaningful answer. How similar are testing methods? I mean,
25 there are, I assume, hundreds of criteria, and just to say it's

1 similar, I don't think is probative.

2 THE COURT: The objection's overruled.

3 BY MR. NAGURNEY:

4 A Some of the criteria set forth by NHTSA have to do with
5 the power supply and, you know, sampling requirements, things
6 that are inherent in the type of instrument that you're going
7 to use. Others speak to its ability to detect interfering
8 compounds or accuracy precision, which are specifically tested
9 by the Department of Health Lab in order to meet the rules and
10 regulations set forth for evidential breath testing.

11 So, in the regards of those particular topics, the
12 Department of Health Lab testing exceeds what was done by
13 NHTSA.

14 Q So, you've issued a laboratory report to the Vermont
15 Legislature about the status of its breath alcohol, or this
16 alcohol program now that it's under your umbrella at DPS?

17 A Yes.

18 Q You admitted that you are not an ISO at the plant
19 laboratory.

20 A Absolutely.

21 Q Why is that not a problem vis-a-vis the report?

22 A Because when we were mandated to take over the program
23 in the Department of Public Safety, we were told that at some
24 point the program would need to be accredited, and for us
25 internally, in consultation with our lab director and the

1 Commissioner, we made the decision that our plan would be to
2 seek accreditation with the rest of the laboratory in 2014.

3 So, we are progressing towards that point where the
4 entire lab will be accredited, it's not something that you can
5 just flip a switch and decide to open up the doors next week
6 and say, "Alright, we're going to be ISO 17025 compliant."
7 That process involves not just the testing components, but it
8 also involves the entire management structure of the
9 laboratory.

10 Not something that's easily changed or made compliant
11 with overnight. It's going to take years in order to get to
12 that point where we're ready for the next round of
13 accreditation.

14 Q The act that transferred the authority from the program
15 to you, I believe is Act 56?

16 A Yes.

17 Q And you're familiar with Act 56?

18 A Yes, I am.

19 Q And is that the enabling legislation that you reviewed
20 with the laboratory director that you just referenced?

21 A Yes.

22 Q Where in that legislation does it say you must be ISO
23 certified by a certain date?

24 A I don't believe it said ISO certification, or any
25 mention of ISO in that. It just said that the breath alcohol

1 program will be accredited. There was no date given as a
2 deadline.

3 Q You mentioned the difference between a calibration lab
4 and a testing lab, and I think -- I'll ask you to explain those
5 two again, please.

6 A Sure, in regards specifically to ASCLD/LAB
7 International, the testing component for accreditation involves
8 anything from drug analysis to firearms analysis, any of the
9 testing components which are all of the other disciplines done
10 currently at the Vermont Forensic Laboratory with the exception
11 of the breath alcohol testing program. That is not an option
12 underneath the ASCLD/LAB International testing accreditation.

13 Q The alcohol lab --

14 THE COURT: I'm sorry.

15 MR. NAGURNEY: I'm sorry.

16 THE COURT: I did not understand your answer.

17 THE WITNESS: It's confusing. ASCLD/LAB
18 International offers two different accreditations. One is
19 under a testing component, and one is under a calibration
20 order, a reference solution component. If you look at the
21 testing, that will include anything from DNA analysis to latent
22 print analysis, firearms, any of your typical forensic
23 disciplines. The calibration component specifically covers
24 calibration of breath alcohol testing instruments. Breath
25 alcohol testing itself is not an option under the testing

1 component of the international program.

2 THE COURT: Say that again.

3 THE WITNESS: Yeah. I don't know if you --

4 THE COURT: Just the last part.

5 THE WITNESS: Sure. Breath alcohol testing itself is
6 not an option of accreditation under the ASCLD/LAB
7 International testing component. They don't offer that.

8 THE COURT: But what is it that's under the
9 calibration component?

10 THE WITNESS: It's specifically calibration of breath
11 alcohol testing instruments.

12 THE COURT: Okay.

13 THE WITNESS: It's not the actual breath testing,
14 using the instruments, it's calibration of the instruments.

15 THE COURT: Okay.

16 BY MR. NAGURNEY:

17 Q So, am I correct if I understand that even once the
18 necessary accreditations are in place, they will relate only to
19 the alcohol calibration rather than the testing?

20 A Correct. Breath testing -- or blood testing will be
21 covered underneath the testing arm of the international, but
22 breath alcohol testing using the DataMasters will only be
23 covered under the calibration component.

24 Q So, with respect to Exhibit Q, which Mr. Sleigh spoke
25 to you about, those were the documents that Kirk Kimball

1 maintained, you have -- I just want you to state whether you
2 have or have not reviewed the components of Exhibit Q.

3 A I have.

4 Q Did any of the documents you reviewed as part of
5 Exhibit Q, either in the small universe of documents produced
6 to Mr. Sleigh, or in the larger universe of documents that you
7 assembled yourself from the files maintained by Kirk Kimball
8 affect your opinion about the ability of the DataMaster DMT
9 instrument to meet the regulations?

10 A No.

11 MR. NAGURNEY: I don't have anything further from the
12 witness, Your Honor.

13 MR. SLEIGH: Just a couple of follow ups, Your Honor.

14 THE COURT: Okay.

15 REXCROSS-EXAMINATION

16 BY MR. SLEIGH:

17 Q You said that the NHTSA examination of the DataMaster
18 DMT was not a method validation. Is that right?

19 A Correct.

20 Q Now, assuming the DMT was on the approved list at the
21 time of the redeployment testing, you had that -- at that
22 point, the DMT on the approved products list. Correct?

23 A Correct.

24 Q And certified by the manufacturer. Correct?

25 A Yes.

1 Q But, you had no access to the data that supported
2 either of those conclusions. Correct?

3 A I had access to the redeployment data for the
4 instruments.

5 Q You didn't have access to the NHTSA testing of the DMT?

6 A No.

7 Q You didn't have access to the National Patent's testing
8 that led to the certification?

9 A Correct.

10 Q And neither did anybody else at the Department of
11 Health?

12 A No.

13 Q And so, the Department of Health had to undertake its
14 own validation to see if the DMT worked in Vermont for the
15 purposes for which it was intended?

16 A Correct.

17 MR. SLEIGH: I have no further questions, Your Honor.

18 THE COURT: Okay.

19 FURTHER REDIRECT EXAMINATION

20 BY MR. NAGURNEY:

21 Q I think I've covered this before, but Mr. Sleigh
22 brought it up in his cross. All the documents you've seen
23 specific to the Department of Health, have any of them affected
24 your opinion about the sufficiency for scientific purposes of
25 the method validation conducted by the Department of Health?

1 A Not at all.

2 MR. NAGURNEY: Nothing further, Judge.

3 THE COURT: That completes your testimony, you may
4 step down. Thank you.

5 Does that complete the State's evidence?

6 MR. NAGURNEY: Those are my witnesses, Your Honor,
7 yes.

8 THE COURT: Okay. And were you going to introduce
9 the chemist's affidavit or not?

10 MR. NAGURNEY: I don't need to, Your Honor, inasmuch
11 as this isn't a civil suspension hearing. It's simply
12 specifically addressing the issues raised by Mr. Sleight's
13 expert in her affidavit. So, I'll wait until the actual
14 decision from the Court and then the formal civil hearing to
15 introduce the affidavits.

16 THE COURT: All right.

17 STATE RESTS

18 THE COURT: Mr. Sleight, any rebuttal testimony?

19 MR. SLEIGHT: Unfortunately the storm took my expert
20 back to New Mexico, Your Honor, so no, we don't have any
21 available.

22 THE COURT: Okay. Would you like to make any
23 arguments today or submit findings and memos or what?

24 MR. NAGURNEY: If I may briefly just summarize our
25 position, Your Honor, now, but I would appreciate the

1 opportunity to provide you with a post hearing memo on the
2 topic.

3 THE COURT: Mr. Sleigh?

4 MR. SLEIGH: I'd just as soon submit the conclusions
5 and proposed findings in a more comprehensive way rather than
6 just off the cuff right now. So, I'd like to an opportunity to
7 submit a pleading.

8 THE COURT: And, despite that would you still like
9 to --

10 MR. NAGURNEY: Can I have a sentence?

11 THE COURT: Sure.

12 MR. NAGURNEY: Okay. This hearing is --

13 THE COURT: I don't mind having both. So --

14 MR. NAGURNEY: This hearing is unusual --

15 THE COURT: I will give you both an opportunity --

16 MR. NAGURNEY: Okay.

17 THE COURT: -- to submit follow up documents, but if
18 you want to say something today, that's fine.

19 MR. NAGURNEY: Just briefly, if I may.

20 THE COURT: Okay.

21 STATE'S CLOSING ARGUMENT

22 MR. NAGURNEY: This hearing is unusual, Your Honor,
23 in that Mr. Sleigh and I agree about much of the facts that
24 you're being asked to consider. We may have some disagreement
25 as to the extent to which Ms. Arvizu's assessment of the

1 laboratory was informed by adequate documents, but I don't
2 think either of us agree that under Rule 104(a) this Court is
3 being asked to decide simply by a preponderance of the evidence
4 whether these results are admissible. And what you're being
5 asked to do is apply that preponderance standard to the methods
6 that the lab at the Department of Health and then as adopted by
7 the Department of Public Safety applied to the testing of these
8 instruments.

9 This isn't a hearing specifically about the --
10 whether the lab met the ISO standards because we've agreed that
11 we are not yet an ISO compliant lab. It's really just a
12 hearing about is it more likely than not that the scientific
13 methods used by the laboratory to validate the DataMaster DMT
14 were valid and reliable, and therefore, admissible.

15 THE COURT: I have a couple of questions, and you can
16 either respond now or in what you submit in writing. But, Mr.
17 Sleight, which specific portions of the Rules is (sic) relevant
18 to your motion?

19 MR. SLEIGHT: The so-called accuracy and precision
20 paragraphs, which I think are C-2, 3 and 4.

21 THE COURT: Two, three and four. Okay.

22 (Pause)

23 THE COURT: And, both of you agreed that State v.
24 Rolfe is controlling. And under State v. Rolfe, I'm going to
25 quote from page five.

1 "We further rule that the State may lay the
2 foundation for the results of infrared breath tests
3 by showing that the analysis met the performance
4 standards contained in the regulations. A defendant
5 faced with criminal charges or civil suspension may
6 contest these foundation facts, but may not otherwise
7 challenge the test's admissibility."

8 It goes on to say:

9 "Alternatively, the State may attempt to introduce
10 the test results into evidence under VRE § 702."

11 So, Mr. Sleigh, what specific foundation facts is it
12 that you're contesting?

13 MR. SLEIGH: We're contesting the lab's ability to
14 show in a scientifically reasonable fashion that the machine
15 met the performance criteria in two, three and four. And we're
16 contesting the foundational facts which is the, from our point
17 of view, State's self-reliant idiosyncratic noncompliant,
18 untraceable, absent uncertainty measurement calculations and
19 calibrations that led to their opinion that the machine meets
20 those performance criteria.

21 THE COURT: All right. Anything further that either
22 of you would like to say now?

23 MR. NAGURNEY: Just if I may, to refine your
24 statement about Rolfe somewhat, Your Honor.

25 I agree that Rolfe, and I'm sure that Mr. Sleigh

1 would agree, is the case that controls this issue, but what
2 Rolfe does is interprets 23 VSA § 1203(d) and that's more
3 directly controlling simply because it's the statutory
4 authority. Rolfe interpreted what § 1203(d) said. And there
5 have been, obviously, many challenges to Rolfe since, as Mr.
6 Sleigh is, himself, quite aware.

7 But there are, in addition to Rolfe, there are
8 prodigy for the Court to consider. But, again, I think it's
9 worth pointing out that § 1203(d) is really the statute that I
10 would be relying on were these matters to go to trial to make
11 my demonstration of foundation for the admissibility of the
12 result.

13 THE COURT: Right. But, as to the question as to the
14 initial admissibility, I believe both of you quoted that
15 paragraph that I just read from now.

16 MR. NAGURNEY: Correct. Correct.

17 MR. SLEIGH: Yeah.

18 THE COURT: Okay.

19 MR. SLEIGH: Your Honor, as a courtesy, I don't know
20 how the Court likes to read, but I've marked this provisionally
21 as O Prime, if you find the book easier to deal with than the
22 electronic file.

23 THE COURT: That might be helpful. Do you have any
24 objection to O Prime?

25 MR. NAGURNEY: No.

1 THE COURT: You're saying it's the same as O, which
2 is the CD?

3 MR. SLEIGH: It's identical to, it's just in bound
4 form.

5 THE COURT: Okay. Any objection?

6 MR. NAGURNEY: That's fine, Your Honor.

7 THE COURT: Okay. So, O Prime is also admitted.

8 (Defendant's Exhibit O Prime received)

9 THE COURT: Okay. So, we need to establish a date
10 for findings and memos.

11 MR. SLEIGH: I'm sure Mr. Nagurney and I are anxious
12 to get this behind us. Would two weeks suffice? The reason
13 I'm asking, I'm going to be in D.C. the tail end of the week of
14 the 20th through the 24th, and I have to go to Los Angeles for
15 depositions the 28th through the 2nd. So, maybe March, well, I
16 guess three weeks from today?

17 THE COURT: From my perspective, the sooner the
18 better.

19 MR. SLEIGH: I agree, but I -- that's --

20 THE COURT: Are you -- two weeks is the 26th of
21 February.

22 MR. SLEIGH: Right.

23 THE COURT: And is there a problem with that?

24 MR. SLEIGH: Well, it's just that I'm going to be
25 gone from the 20th until the 24th at a CLE in D.C. So, that

1 takes four out of the fourteen days away.

2 How about two weeks from this Friday?

3 THE COURT: That's March 1st?

4 MR. SLEIGH: Yes.

5 THE COURT: All right. So, any problem with March
6 1st for both of you?

7 MR. SLEIGH: No, I'd just as soon have simultaneous
8 filings.

9 MR. NAGURNEY: I'm checking, Your Honor. It
10 shouldn't be an issue. I guess it is worth noting that I had
11 requested a transcript of the deposition that we had done in
12 advance of this, about three weeks ago, and I haven't yet had
13 it arrive. So, I would like to take advantage of getting a
14 transcript of these proceedings just so I can use it to cite
15 with in my factual findings.

16 THE COURT: Uh -

17 MR. NAGURNEY: Or are you looking for more of a just
18 a memorandum?

19 THE COURT: Whichever way you want to do it.

20 MR. NAGURNEY: Okay.

21 MR. SLEIGH: I'll talk to Mr. Nagurney, maybe we can
22 split the cost of getting a transcript and paying for it to be
23 expedited, and that'll be a little easier on both of us, the
24 way transcripts are generated these days.

25 THE COURT: Right.

1 MR. SLEIGH: There are a couple of hoops you've got
2 to go through.

3 THE COURT: Well, it can be fast, if you pay the
4 money.

5 MR. SLEIGH: It can be, you've just got to pay for
6 it.

7 MR. NAGURNEY: Yeah, it's not that, I actually had
8 the other one overnighted, and have yet to see it. So. But,
9 no, I think if I have sufficient time to review the
10 transcripts, I think March 1st is excellent.

11 THE COURT: All right. March 1st, then.

12 MR. SLEIGH: All right. Thank you.

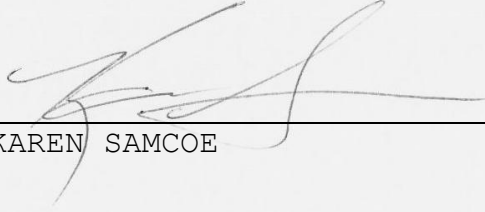
13 THE COURT: Thank you.

14 (Proceedings concluded at 11:59 p.m.)
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CERTIFICATION

I, Karen Samcoe, a court approved proofreader, do hereby certify that the forgoing is a correct transcript from the official electronic sound recording of the proceedings in the above-entitled matter, to the best of my professional skills and abilities.

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KAREN SAMCOE

FEBRUARY 24, 2013