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IN THE COUNTY COURT IN  
AND FOR DADE COUNTY, FLORIDA

5/31/96 10:16  
Report 5-1

TRAFFIC DIVISION

CASE NO. 058834-J, 58923-EK

COPY

STATE OF FLORIDA,

Plaintiff,

vs.

RICHARD COHEN,

Defendant.

State Attorney's Office  
Civic Park Plaza  
Miami, Florida  
April 25, 1996  
2:30 p.m.

DEPOSITION OF RICK A. SWOPE

Taken before MARIA ADAMS FRUCHEY, Court Reporter and  
Notary Public in and for the State of Florida at Large,  
pursuant to Notice of Taking Deposition.

LS:1 WJ L-14W96

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APPEARANCES:

K. FERNANDEZ-RUNDLE,  
Assistant State Attorney,  
BY: BRENDA A. MEZICK,  
Assistant State Attorney,  
On behalf of the State,

ESSEN, ESSEN, SUSANECK, CANET & LIPTON  
BY: L. EDWIN SARR, ESQ.  
18305 Biscayne Boulevard, Suite 400  
North Miami Beach, FL 33160  
On behalf of the Defendant.

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<u>WITNESS</u>	<u>DIRECT</u>	<u>CROSS</u>
RICK A. SWOPE	3	- -

- - -

1 THEREUPON:

2 RICK A. SWOPE

3 was called as a witness by the Plaintiff and, after having  
4 been first duly sworn, was examined and testified as follows:

5 DIRECT EXAMINATION

6 MS. MEZICK: Madame Court Reporter, these have  
7 already been identified at a previous no-show deposition.

8 THE WITNESS: At a previous what?

9 MS. MEZICK: No-show deposition. Not of yours.

10 We are here in the case of Richard Cohen, Case Number  
11 058834J. My name is Brenda Mezick. I'm an assistant  
12 state attorney. The date is April 25th.

13 BY MS. MEZICK:

14 Q. Mr. Swope, why don't we begin with the real heart of  
15 this and that is the air blank issue.

16 Just generally, when you push the start bottom on the  
17 Intoxilyzer 5000-R, what occurs?

18 A. On a machine that's working?

19 Q. On a machine that's working.

20 A. What you do is insert a card, that's the first thing  
21 you do.

22 Q. I have a question. Is there a difference between an  
23 instrument and a machine?

24 A. Yes. An instrument would be a scientific type of  
25 device that would measure one or more things that would be

1 considered as reliable such as a gas chromatograph. In the  
2 State of Florida that is considered to be an instrument.

3 A machine would be something like the Intoxilyzer  
4 that consists of various software, has various components, is  
5 not considered reliable, but it's considered accurate and  
6 possibly precise. That is the difference between a machine  
7 and an instrument.

8 Q. When you say it is not considered, who's the person  
9 that is doing the consideration? Who are you referring to?

10 A. The entire scientific community that works with  
11 Breathalyzer. That would be Doctor Dubowski (phonetic),  
12 Doctor Jenson, probably a list of other people.

13 Q. Doctor Jenson and Kurt Dubowski do not believe the  
14 Intoxilyzer 5000-R is reliable?

15 A. That it is not reliable as far as an instrument goes.  
16 It is accurate as far as giving you a depiction or a numerical  
17 value dealing with breath although you are converting blood to  
18 breath, so to speak, with a particular machine, therefore, the  
19 chances of the reliability, the factors of it being reliable  
20 increases your air rate and your air factors.

21 Q. Can you define what you mean by the term "reliable."

22 A. Sure. Reliable is the ability to produce or  
23 reproduce whatever experiment you are conducting over and over  
24 and over again with the same figure.

25 If I'm trying to shoot a bullet into a target, if I .

1 hit the center of the target, nine out of ten times I would be  
2 considered reliable because I have hit the target accurately.  
3 I have made a precise shot nine out of ten times and,  
4 therefore, I meet the reliability test.

5 The Intoxilyzer, by virtue of its design, by trying  
6 to convert a breath sample into a blood reading or a blood  
7 sample into a breath reading does not have the ability to  
8 reproduce an exact sample over and over again and that's based  
9 upon the fact that an individual cannot blow the same way.  
10 Variations in temperature occur. The fact that we do not know  
11 an individual's partition ratio or their rate of drinking  
12 prior to or after they have been stopped and given a breath  
13 test.

14 Those things do not meet the test of reliability.  
15 They meet the test of accuracy, some may meet the test of  
16 precision, but they do not equal reliability.

17 Q. Okay. When you refer to a particular person, I  
18 assume you are referring to their published literature and not  
19 to conversations or seminars that you have had with them or  
20 are you referring to both?

21 A. To both, sure.

22 Q. Are aware of any particular articles in which any of  
23 the two persons that you've just named Dubowski or Jenson have  
24 made this conclusion?

25 A. Well, I think you can look at anyone of Dubowski's

1 articles he has written from 1978 on and he will tell you in  
2 everyone of the articles dealing with the correlation factors  
3 that he has done from blood to breath that the machine is not  
4 giving you a reliable reading by fact of the partition ratio  
5 changing greatly in each individual.

6 He has stated the machine is accurate and so have I  
7 numerous times, but it is not reliable. It's the best they  
8 can do for converting a sample.

9 Q. Is it Doctor Dubowski?

10 A. Kurt Dubowski, yes.

11 Q. Has he ever made the conclusion that the Intoxilyzer  
12 5000 or the Intoxilyzer 5000-R cannot accurately determine  
13 what is introduced into its chamber, assuming of course that  
14 it's functioning correctly?

15 A. Well, again, you are using the term "accurately." I  
16 think I've mentioned already several times that accurately the  
17 machine will always give you an accurate reading for ethanol  
18 every time.

19 Numerically, you may not get an accurate numerical  
20 value. You may get the fact it is picking up ethanol.  
21 Whether or not it is reliable is based on the knowledge you  
22 have before of the individual giving the test sample.

23 Q. Have they ever come to the conclusion that the  
24 instrument is not accurately reading what is -- is misreading  
25 what is inside the subject's body to the extent that it is

1 showing an artificially high alcohol level?

2 A. Well, sure. I think Doctor Dubowski's articles in  
3 '85 and '86 --

4 Q. Do you know which particular articles?

5 A. I have given them in my previous 500 depositions with your  
6 office before.

7 Q. Right, but they would not have been with me.

8 Do you recall the titles?

9 A. No, I have it in my trial book. When I come to  
10 trial, I have a big book with all the information in it. I'm  
11 sure Essen's office has it.

12 Q. An article published in 1985?

13 A. I believe it's '85 or '86, yes. And there have been  
14 numerous ones since that time that all deal with the blood and  
15 breath issue.

16 Q. Which show that there is -- they do not corroborate  
17 each other to the extent that the Intoxilyzer is reading  
18 artificially high?

19 A. Well, it depends on when the testing is taken.

20 According to the articles and even the blood/breath  
21 correlations I've been involved in, if the individuals have  
22 completed drinking, which is normally the same as when an  
23 officer arrests somebody they have usually completed their  
24 drinking, if they are on their way up, the reading they have  
25 is artificially high. If they are on the way down, the

1 reading is artificially low. Depending where you catch them  
2 on the curve the reading will be high or low and that's going  
3 to depend on their partition ratio. If it is near 2100 to 1,  
4 the better reading you are going to have.

5 Q. What is the difference between venous blood and  
6 arterial blood?

7 A. Well, I didn't know we were getting into blood.

8 Q. You just did. The answer you gave me referred to the  
9 blood/breath correlation.

10 A. We are here for the air blanks.

11 Q. You gave me an answer which suggested that there is a  
12 difference between a blood/breath correlation.

13 My assessment of this particular body of literature  
14 is showing different situations. It's showing where there is  
15 a blood/breath correlation between venous blood and a breath  
16 blow or arterial blood and a breath blow.

17 A. There are tests like that although I'm not commenting  
18 on the venous or arterial blood because there is a difference  
19 between those.

20 What I am commenting on is what would be more  
21 indicative of two samples given at police departments and I  
22 could really care less most of the time about venous or  
23 arterial samples because we don't take blood.

24 What we are looking for is the rise or fall, what the  
25 individual was at the time he was driving the car.



1 Q. My understanding would be that the purpose would be  
2 to determine whether the person was pre-absorptive, actively  
3 absorptive or post-absorptive?

4 A. Correct.

5 Q. If a person is pre-absorptive, that means the body  
6 has not completely absorbed the alcohol, there is still  
7 absorption and that the path of the alcohol, it's going to the  
8 brain; right?

9 A. Right.

10 Q. So is it fair to say that the alcohol that is going  
11 to the brain is a better indication of what is going to be  
12 impairing the brain?

13 A. Yes.

14 Q. Alcohol impairs the brain; correct? That is how you  
15 have the -- that is what results in the symptomatology we  
16 normally associate with imbibing alcohol; correct?

17 A. Yes, but that's not the way your office perceives it.

18 You just stated exactly what I testify to all the  
19 time, but your office always is against us on that saying that  
20 it's not the way it happens because you're trying to get a  
21 sample of one's breath, which you have made the point, what I  
22 have been arguing for the past year in Dade County which I  
23 thank you for doing that.

24 Q. Okay. So the answer was, yes, that the blood going  
25 to the brain is going to be a better indication of what is

1 impairing the brain?

2 A. Absolutely.

3 Q. Is it fair to say that arterial blood in the actively  
4 absorptive phase is going to be a better indication of this as  
5 opposed to venous blood?

6 A. Probably, although I'm not a blood expert.

7 Again, the difference between the arterial and the  
8 venous blood is only a percentage of the reading anyway and I  
9 don't think I've ever testified as to one being better than  
10 the other because I leave that up to somebody else who's a  
11 little better qualified.

12 (Short interruption.)

13 BY MS. MEZICK:

14 Q. You have testified that in your opinion the most  
15 reliable method of testing the level of alcohol in a person's  
16 body is blood?

17 A. Yes.

18 Q. You have testified in your opinion that is the most  
19 reliable -- the most accurately reliable method?

20 A. Yes.

21 Q. And you have expressed criticism over the Intoxilyzer  
22 5000 because it's not, in your opinion, reliable?

23 A. Right.

24 Q. And the basis for that opinion is because there is a  
25 methodology out there that is reliable?

1 A. Right.

2 Q. And that being blood?

3 A. Right.

4 Q. You have testified previously when asked the  
5 question, what is generally higher in terms of a reading, an  
6 alcohol reading, and you have testified that, correct me if  
7 I'm wrong, that blood is almost always higher?

8 A. Generally, that's what I've indicated, yes.

9 Q. It's generally higher?

10 A. Yes.

11 Q. Now, situations where the blood would be lower than  
12 the Intoxilyzer reading would be situations where the person  
13 is actively absorptive; correct?

14 A. Yes.

15 Q. Is that the only situation?

16 A. No.

17 Q. Assuming again that the Intoxilyzer is working  
18 correctly and setting aside for a moment amount of alcohol.

19 A. Well, assuming that the machine is working and that  
20 the individual's in the pre-absorptive stage, that is  
21 probably -- not counting on some kind of medical condition  
22 that would preclude that, I would say that is generally the  
23 condition that exists, yes.

24 Q. When you make that assessment you are referring to  
25 venous blood, are you not, the -- you are referring to the

1 studies which are testing venous blood; is that correct?

2 A. I don't think I have ever been asked that question  
3 and I don't recall if that would be venous or arterial blood  
4 or not. I would have to look at the study. I would say it  
5 would probably be venous, but I don't know. I would have to  
6 look at the study I may have been using at that particular  
7 time.

8 Q. Do you have an opinion whether or not in cases where  
9 the breath alcohol reading is going to be -- the Intoxilyzer  
10 reading is going to be higher than the blood reading, whether  
11 or not that would be true if you were to test a person's  
12 arterial blood while they are actively absorptive?

13 A. I don't know. I would leave that up to a doctor. I  
14 would probably let Doctor Rose or somebody testify to that  
15 and, again, you are only dealing with a very small percentage  
16 of the reading, anyway.

17 Q. In a situation where the Intoxilyzer would be higher  
18 than a blood reading, it would be very small?

19 A. Probably. Sure.

20 Q. What is very small?

21 A. Well, maybe one to five percent of the reading.

22 Q. Okay. Are you familiar with the motion that was  
23 filed in this case by Essen & Essen -- and by the way, Edwin  
24 Saar was here at the beginning of the deposition, has left and  
25 is going to return. He was noticed of the deposition.

1           Take a look at that. I'm referring you to the motion  
2 filed with our office on September of '95 and it is styled  
3 Motion to Exclude Breath Analysis Results.

4           Referring you to paragraphs number 5 and number 6.

5           A.    Okay.

6           Q.    In paragraph number 5 there is sentence that says,  
7 "According to the manufacturer, the purpose of the blank  
8 sample analysis is to insure that the device begins analysis  
9 at the baseline level."

10           Do you know what representation by the manufacturer  
11 they are referring to?

12           A.    They are referring to the air blank.

13           Q.    But the representation by the manufacturer, where  
14 would that representation be embodied?

15           A.    In the manual.

16           Q.    Is that what they are referring to? That is my  
17 question?

18           A.    It would be in the manual and it would also be in the  
19 instructor's manual for the State of Florida where they  
20 instruct students on what to do and also the classes that --

21           Q.    When you say "the manual," you are referring to the  
22 operator's manual created by CMI?

23           A.    I believe so, yes.

24           Q.    I'm going to show you a manual. This manual is dated  
25 November 1989 by CMI.

1 A. That is an old book. That's old.

2 Q. Is that old?

3 A. That's old, old, old, yes.

4 Q. Would that not have the representation that you are  
5 talking about?

6 A. I don't know.

7 Q. Do you know whether or not the representations have  
8 changed in regards to the air blank?

9 A. Well, the manuals change many times. Like the low  
10 sample volume, that changed and the manual used to say  
11 "deficient sample" until the state didn't like the wording, so  
12 they changed the software, but the air blank --

13 Q. Do you know if there has been any change in the  
14 representation regarding that?

15 A. I am familiar with what it says here in the manual  
16 you gave me on page 86.

17 Q. I'm not sure that representation that is being  
18 referred to by the law firm of Essen & Essen is what is on  
19 page 86.

20 Do you know where else in the manual it might be or  
21 what it is that they are referring to?

22 A. What they are referring to is exactly what's here in  
23 page 86.

24 Q. Great.

25 A. And that's -- there might be other things in the

1 manual. I don't know, but I know that it indicates here that  
2 the instrument purges the sample chamber which is what it's  
3 supposed to do or what it says it's doing and analyzes the  
4 room air for substances that could potentially interfere with  
5 the accuracy of the test.

6 So what that says is that the reading you get during  
7 the air blank phase will indicate to the operator if any  
8 substances or interference are available. If so, by virtue of  
9 looking at the machine, the operator can tell if the reading  
10 is above that or the machine will actually not go into a test  
11 mode. It could be one of two things.

12 Q. In a typical subject blow, there would actually be  
13 two, quote, unquote, air blanks. Correct me if I'm wrong.

14 A. You're wrong.

15 Q. Is there any other place in the manual that you are  
16 aware of that refers to this?

17 A. Well --

18 Q. To the way it functions during the air blank.

19 A. Well, there's different manuals. I mean, every time  
20 you see -- page 100 tells the same things that I just said to  
21 you.

22 There are various pages in here. All of them have  
23 air blanks on it. Shows what it's going to be. It gives a  
24 copy of a test card with the air blanks on. Air blank is  
25 basically through here all the time, but I think the

1 instructor's manual for the state may have some more  
2 information on it. I'm not sure.

3 Q. So to the best of your knowledge, the representation  
4 of the manufacturer that's being referred to is what is  
5 contained in the manual and what is contained in the  
6 instructor's manual?

7 A. Yeah, and I'm sure -- I don't recall that all the  
8 rules may have been adopted from HRS when FDLE took over, but  
9 I realize that they have also taught students about the air  
10 blank as far as what it shows and it shows 000 if the chamber  
11 is clear.

12 Q. In your understanding the representation is what, of  
13 the manufacturer?

14 A. My understanding, that during the air blank phase,  
15 the machine is sucking in room air in order to ascertain that  
16 no alcohol, no vapors, no interference are present in the  
17 chamber.

18 Once that is completed, whatever the purge time may  
19 be, it then gives the operator a visual reading which is .000  
20 and either one of two things will happen:

21 If the operator sees that the reading is not a .000,  
22 obviously, he would abort the test or, number two, if the  
23 machine detects some type of interferent (sic) or is not able  
24 to clear the chamber, the machine should spit the card out and  
25 print it as an interferent or advise the operator that



1 something is wrong.

2 Q. It will print out "invalid test?"

3 A. Well, we know it won't, but it should, yes. In other  
4 words, that's what I would expect by looking at the manual as  
5 to what the machine will do. That is what I would expect it  
6 to do, yes.

7 Q. When you push the start button, okay, you are about  
8 to begin a subject --

9 A. Test.

10 Q. -- test. You push the start button.

11 A. Yes. This is for Masters' benefit, so he knows how  
12 to work the Intoxilyzer. Push the start button, number one.  
13 I know that he doesn't know how to do it. Masters, push the  
14 start button.

15 Q. Pretty cheeky to have a record of your potshots.

16 A. Can he read? Have the court reporter put pictures  
17 in.

18 Q. You push the start button.

19 Will the Intoxilyzer, according to the manufacturer,  
20 read what's in the chamber before it runs room air through?

21 A. Well, that's not the first thing you do.

22 Q. It's not?

23 A. The first thing is the test card goes in before the  
24 machine goes into a mode. The machine says "insert card."  
25 The card is drawn into the Intoxilyzer and it immediately goes

1 into an air blank phase which means that it's now taking room  
2 air and insuring that the chamber is purged before the first  
3 subject test.

4 Q. According to the manufacturer, does it read what's  
5 inside the chamber first before it puts room air through it or  
6 does it just put room air through?

7 A. Puts room air through and then gives a reading.

8 Q. Pursuant to the manufacturer?

9 A. Yes. Well, I don't want to mislead you on that  
10 because I know you get misled by cops all the time as to how  
11 this things works, okay.

12 It's not doing what the manufacturer says. It's  
13 doing what the State of Florida has said. The State of  
14 Florida has given them the program for the software. It is  
15 not doing what the machine says but what the Florida says.

16 The State of Florida requires an air blank first.  
17 Most states do the same thing, but I'm saying that program to  
18 do that is done by the state and the machine is set up based  
19 upon what the state wants.

20 Q. Thank you. There is an air blank phase?

21 A. Yes.

22 Q. And you define an air blank -- let's work with the  
23 definitions which we have from the manufacturer.

24 A. Okay.

25 Q. The air blank phase means that room air is purged . . .

1 through or is run through the chamber; is that correct?

2 A. Correct.

3 Q. So when you push a start button and enter the  
4 evidence card, it's going to run air through?

5 A. Yes.

6 Q. It will do that for approximately three minutes?

7 A. No, I think for the first one -- it's at least 30  
8 seconds. Now, whether it's a little bit longer, I know some  
9 of the machines are programmed a little differently.

10 One of the machines that I use has a 90-second  
11 program between tests. In other words, for a minute and half  
12 I cannot give another test. That is okay. Some machines have  
13 that, some don't. Some can take a test within 30 seconds of  
14 each other. Some machines aren't like that.

15 So normally, it will be at least 30 seconds that the  
16 air is drawn into and through the machine.

17 Q. You have how many instruments?

18 A. Well, I maintain two for private law firms and I also  
19 work occasionally, because I don't do it much anymore, but I  
20 maintained four machines at Broward Community College for  
21 seven or eight years.

22 Q. You have but you don't do it regularly now?

23 A. No. The last time I did a maintenance out there was  
24 five or six months ago.

25 Q. You said you have you maintained an instrument or an.

1 Intoxilyzer that has a 90-second cycle?

2 A. Yes, between tests, between the first subject blow  
3 and the second subject blow.

4 Q. Does that mean the Intoxilyzer has different  
5 software?

6 A. No. It's a different program. Different departments  
7 in the state have that. I don't think Dade County happens to  
8 have that, but you can get that on your machine. It is  
9 something you can do.

10 Q. Are these the Intoxilyzers that are with Broward or  
11 the Intoxilyzers with the private law firms?

12 A. One of the private law firms -- Mr. Essen's  
13 Intoxilyzer has the 90-second wait between the two tests.  
14 There are departments -- Broward has one or two machines that  
15 do it. Palm Beach has one or two. It is not a major change  
16 in the software. Just a delay.

17 Q. Who owns the two instruments, Mr. Essen?

18 A. And Mr. Jim Best and Rene Palomino is the other.

19 Q. Are either of these instruments registered with the  
20 state?

21 A. You mean as far as can I give a breath sample to an  
22 arrested person?

23 Q. For evidentiary purposes.

24 A. No.

25 Q. How long have they owned them?

1           A.    I don't know.  You have to ask them.  I have been  
2 maintaining them for quite a while.

3           Q.    As they are kept there, you have been maintaining  
4 them while they have been maintained in the control of the law  
5 firms?

6           A.    I have control of them.  They are in the their  
7 offices.  They can't get into them, into the side ports and  
8 mess with the machines.  I have access to them when I want or  
9 I am conducting a monthly maintenance.

10          Q.    They are physically kept on the premises of Mr. Essen  
11 and Mr. Best?

12          A.    Yes.

13          Q.    And they have been there for approximately how long,  
14 do you know?

15          A.    No.  I'm sure Mr. Essen's has had his probably for  
16 about two years and Jim Best has probably had his for a year,  
17 year and a half, and I am giving you a guess.

18          Q.    Have you been maintaining them during these two  
19 years, Mr. Essen's Intoxilyzer?

20          A.    Yes.

21          Q.    A year and a half for Mr. Best?

22          A.    Yes.

23          Q.    Do you know who maintained them before you?

24          A.    Well, Mr. Essen's, nobody was maintaining it.  It's a  
25 brand new machine, and Mr. Best, I believe he purchased it

1 from Florida Power and Light. FP&L used to have a bunch of  
2 Intoxilyzers to check their drunken electricians.

3 Q. Can't take the cop out of the expert.

4 So you have said it purges room air for approximately  
5 30 seconds?

6 A. Yes.

7 Q. What happens?

8 A. Well, then the next -- after the air is purged, you  
9 will get a reading which is always .000, and then it will ask  
10 for a subject test or subject blow and then the individual  
11 will then blow.

12 After the blow is completed or he has met the  
13 requirements of the machine, then an air blank will occur  
14 again. After that's completed, the second subject test will  
15 take place. Once the subject has satisfied that test and  
16 provided it is within .02, another air blank will take place  
17 and a card will be spit out.

18 Q. Is there a difference between the air blank phase 1  
19 and the air blank phase 2 or the air blank 1 and the air blank  
20 2?

21 A. No.

22 Q. There is absolutely no difference?

23 A. As to what?

24 Q. According to the manufacturer as to what the  
25 Intoxilyzer does.

1 A. No.

2 Q. So in your opinion the Intoxilyzer does not read  
3 what's in the chamber before it runs ambient air through on  
4 the first air blank?

5 A. I'm afraid I'm lost on that one. I don't understand  
6 what you mean.

7 Q. My understanding is air blank 1, it does two  
8 readings, it reads what's in the chamber and it runs air  
9 through and reads it again?

10 A. No, no.

11 Q. It does not do that?

12 A. No, no, no.

13 Q. Okay. So there is no difference between what happens  
14 in air blank 1 and air blank 2?

15 A. Well, I don't know what you mean by saying "no  
16 difference."

17 It's running room air through the chamber and it's  
18 either purging what is in there -- it's supposed to purge  
19 what's in there.

20 The software is set up to already be at a zero  
21 reference point. The software is assuming there is no alcohol  
22 in the chamber when the air blank is complete. Your reference  
23 point for alcohol is always the same or should be always the  
24 same.

25 Q. The Intoxilyzer does not establish a reference point.