

IN THE CIRCUIT COURT OF THE
NINETEENTH JUDICIAL CIRCUIT IN AND FOR
INDIAN RIVER COUNTY, FLORIDA

CASE NO. 1974315

JUDGE DAVID MORGAN

STATE OF FLORIDA

Plaintiff,

vs.

JAMES CARLSON,

Defendant.

EXCERPT FROM TRIAL

This cause came on for Trial on [REDACTED] before
the Honorable David Morgan, at the Indian River County
Courthouse, Vero Beach, Florida.

The appearances were as follows:

FOR THE STATE:

MARGARET KEYS
Assistant State Attorney
2000 16th Avenue
Suite 329
Vero Beach, Florida 32960

FOR THE DEFENDANT:

NORMAN GREEN
1245 21st Street
Vero Beach, Florida 32960

1 EXCERPT FROM TRIAL

2 TESTIMONY OF RICK SWOPE

3 JANUARY 27, 1998

4 P R O C E E D I N G S

5 Whereupon,

6 RICK SWOPE,

7 called as a witness on behalf of the defense, first being duly
8 sworn, testified as follows:

9 DIRECT EXAMINATION

10 BY MR. GREEN:

11 Q State your name, please.

12 A My name is Rick Swope, S-W-O-P-E.

13 Q Where do you reside, Mr. Swope.

14 A I reside primarily in Davie, Florida, although I do
15 go to Atlanta quite often. I have a residence up there, also.

16 Q What's your occupation?

17 A I do primarily accident reconstruction, that's about
18 ninety percent of what I do. The other ten percent I work on
19 cases involving alcohol, either through breath testing or
20 through studies and articles that I write and study or also in
21 the area of field sobriety exercises.

22 Q Okay. Do you charge for your services?

23 A Yes, I do.

24 Q (Inaudible.)

25 A Yes, I charge for reconstruction and DUI

1 consultation, correct.

2 Q Will that affect the opinion that you render here
3 today?

4 A No.

5 Q What's your educational background?

6 A I was a police officer for fifteen years. The last
7 four of the six years I was an officer I was with the Broward
8 County sheriff's office I was the administrative coordinator
9 of the DUI task force in traffic homicide unit. I've had over
10 two thousand hours of education in either breath testing or
11 accident investigation. The breath testing, I've been a
12 breath operator since 1974. I've operated, I think, seven or
13 eight different types of machines since that period of time.
14 When I was with the Sheriff's office I was involved with the
15 breath testing program, setting it up, videotaping the
16 procedures that would be used, types of machines used, etc.
17 I have a bachelor's degree in criminal justice from St. Thomas
18 University. I have a master's degree from University of Miami
19 in technology and engineering. I have an instructor's permit
20 for DUI testing with the National Highway Traffic Safety
21 Administration.

22 Q Is that NHTSA?

23 A That's correct. That's NHTSA, Department of
24 transportation. And I also have a certificate, actually a
25 dual certificate in the State of Florida to teach. I have an

1 instructor's permit to teach police officers, which gives me,
2 I can sign the permits, etc., in the state. I have one from
3 the Government, also. And then I have a regular teaching
4 certificate that I can teach in the area schools or colleges
5 but I really don't do that that often.

6 Q Have you ever taught before?

7 A Yes.

8 Q Where have you taught?

9 A Well, I taught for twelve years at Broward Community
10 College. I taught at Palm Beach, Dade and the Broward
11 Criminal Justice Institutes for police training. I've also
12 been in about sixteen or seventeen counties in the state
13 teaching police officers either through seminars or training
14 classes. I've taught over three thousand police officers in
15 the past twelve or thirteen years. I've also spoken either a
16 seminar or taught at Harvard Law School in Boston, I've taught
17 at Emory University in Georgia, I've taught at the University
18 of North Florida in Jacksonville, ~~University of Louisville~~ in
19 Kentucky and I've written some papers or training outlines
20 associated with those universities.

21 Q And do you attend seminars?

22 A Yes, I generally attend, oh, usually between three
23 and five a year. It depends on who's giving certain seminars
24 and what they're about.

25 Q Do you belong to any special associations?

1 A Yes. I belong to the National Association of
2 Accident Reconstructionists, Society of Automotive Engineers,
3 a few other. Maryland Association of Reconstructionists and
4 a few others, but that's primarily the main.

5 Q Mr. Swope, are you the person that would teach a
6 police officer that has a permit to operate a Intoxalyzer?

7 A Depends on what type of training. In, up until
8 1996, that would be correct. I have taught many police
9 officers. Now I teach primarily privately, meaning
10 investigators, lawyers, private individuals, private firms.
11 But I have taught many police officers. And in Florida to
12 teach an officer you have to have a valid permit which means
13 you can teach officers only. In other words, you can only
14 teach officers. And I currently don't do that right at this
15 time. But I do lecture officers.

16 Q Okay. Have you testified as an expert (inaudible).

17 A Yes.

18 Q In what fields have you testified as an expert?

19 A Accident reconstruction and the Intoxalyzer and
20 field sobriety testing issues.

21 Q How many times have you been declared an expert
22 witness in court?

23 A Over six hundred then.

24 Q Have you testified in the courts of Florida?

25 A Yes.

1 Q Do you know how many counties you've testified in?

2 A At last count, 23.

3 Q Have you testified outside the state of Florida?

4 A Yes.

5 Q How many states have you testified?

6 A Seventeen.

7 Q You only testify for defendants, defense witness?

8 A No.

9 Q You also, does the State hire you?

10 A Yes.

11 Q State of Florida?

12 A Well, I've been hired by the State, yes.

13 Q Are you familiar with the Intoxalyzer 5000?

14 A Yes.

15 Q How familiar?

16 A Well, I'm pretty familiar, but at the time the
17 machine was introduced into the state of Florida, I was on one
18 of the, actually it was called a test site at that time and we
19 were what's called an evaluation area. We did certain types
20 of testing. I was also involved in blood and breath
21 correlations where we actually took blood and breath from
22 individuals and correlated the instant results. I did that
23 for a couple of years. Then I became involved with private
24 industry, machines, and I attended classes put on by Dr.
25 Jensen and a few other so-called individuals in the field that

1 do that with the different models of 5000 and then I was a co-
2 owner on two 5000's and there is a -- I'm trying to think of
3 the association, but it's run by Dr. Jensen out of Minnesota.
4 He's a breath testing person. And I'm one of the instructors
5 on his staff and we put on the first breath testing course in
6 the country for private individuals. So we experimented with
7 the machines, tore them apart, did pretty much everything. I
8 also attended a course put on by the factory as to how they're
9 maintained.

10 Q Who is the person or the company that makes this
11 machine?

12 A Well, the machine now is made by CMI. Actually,
13 they're in Kentucky. They were originally in Colorado. I
14 took my training in Colorado, at a place called Minter,
15 Colorado. But the machines now are made in Kentucky and
16 produced in Owensburg, Kentucky.

17 Q Have you read the manual for the Intoxalyzer 5000?

18
19 A Many times, yes.

20 Q Does CMI a particular warranty in that manual?

21 A Yes, a warranty comes with each machine, yes.

22 Q Do you have a copy of that warranty?

23 A Yeah, I think I do.

24 Q What is that you're referring to?

25 A It's one of the machines that I'm a co-owner of.

1 It's an operator's manual Intoxalyzer 5000. This particular
2 manual covers the 5000-R series. There actually are three
3 different series of machines that are all called Intoxalyzer,
4 they're all called 5000, but there's three different models,
5 and each model's identified on the printout card as to what
6 model it actually is. Florida just has a weird letter called
7 R, although it's really a 5000, but Florida calls it an R.

8 Q Well, you have the manual for the 5000-R. Does it
9 warrant -- first of all, what's the purpose of the machine?

10 A Well, the purpose of the machine is to give, to
11 analyze a person's breath sample, primarily for ethanol.
12 That's primarily what it does.

13 Q Do, does the manufacturer warrant that machine for
14 a particular purpose?

15 A No.

16 Q Do they specifically exclude that in their warranty?

17 A Yes.

18 Q What are the field sobriety tests?

19 A Field sobriety tests are --

20 MS. KEYS: Objection, your Honor.

21 THE COURT: All right. Sustained.

22 DIRECT EXAMINATION (Continued)

23 BY MR. GREEN:

24 Q Mr. Swope, an officer has testified that prior to an
25 arrest he performed certain exercises with Mr. Carlson and he

1 mentioned NHTSA.

2 A Yes, sir.

3 Q And that they were standard, normal tests for NHTSA.

4 A Yes, sir.

5 Q Do you know what they are?

6 A Yes, sir.

7 Q Can you tell us what they are?

8 MS. KEYS: Objection, your Honor.

9 THE COURT: Okay. Approach the bench.

10 (Bench conference.)

11 THE COURT: State your objection.

12 MS. KEYS: Relevance, your Honor. (Inaudible.)

13 THE COURT: (Inaudible) getting an opinion on anything.

14 Tender him as an expert to give an opinion.

15 MR. GREEN: Actually, he doesn't have to declare him --

16 THE COURT: Necessarily.

17 MR. GREEN: Your Honor, we'll tender him (inaudible).

18 THE COURT: I mean, formally -- well, the reason I ask
19 that is that it is incumbent upon the Court to rule as to what
20 areas he will be giving an opinion in.

21 MR. GREEN: I understand.

22 THE COURT: So I'll take the objection as going to that.
23 I will allow him to testify as an expert regarding this
24 machine, but I've read **Meader versus State** very closely. This
25 case relied upon to prevent prosecutors and police officers

1 from referring to any such things as tests. I don't find that
2 it's relevant or helpful to hear the incorrect way to do any
3 kind of tests or test activities or exercises that one does,
4 just like one walks, one talks --

5 MR. GREEN: Correct.

6 THE COURT: -- and it's not relevant, I don't think, what
7 a particular sanction group might think or say should or
8 should not be done. The officer's testified as to what one,
9 the jury is to gain or not gain an impression of sobriety
10 based upon how one performed physical acts. **And I don't think**
11 **it's relevant --**

12 MR. GREEN: Okay. So --

13 **THE COURT: to allow this witness to get into tests,**
14 **either a correct way or not a correct way to do tests.**

15 MR. GREEN: No, but he can testify what they are, what
16 they were designed to show.

17 THE COURT: I don't think it's relevant. (inaudible)
18 find out that there is anybody that says you should do these
19 a certain way. (Inaudible) state very clearly says that it
20 could be as simple as crawling on all fours, and that's
21 (inaudible) garner the degree of inebriation from and that's
22 something he has indicated that he has some specialized
23 training in the area of he operation of the Intoxalyzer 5000
24 which is the machine in this case. I will allow him to give
25 his opinion as to that. If you wish to voir dire before

1 that's done, I'll let you do that, if you want to,

2 MS. KEYS: (Inaudible)

3 THE COURT: -- on the issue, take issue with this, the
4 fact that he should be declared an expert.

5 MS. KEYS: (Inaudible.)

6 THE COURT: Now, there is no accident here. The theory
7 he was an accident reconstruction --

8 MR. GREEN: No.

9 THE COURT: So basically I'm going to limit his testimony
10 to opinions or otherwise regarding the operation of this
11 machine. Is that reasonably clear?

12 MR. GREEN: That's clear.

13 THE COURT: Okay. Then that will be over your objection,
14 I supposed I didn't let you get in a word edgewise, but see
15 you're --

16 MR. GREEN: It is over --

17 THE COURT: So I'll sustain the State's objection, having
18 treated it as an objection really to going into this area,
19 based on relevance. Okay?

20 MS. KEYS: Thank you.

21 (End of bench conference.)

22 MR. GREEN: Judge, I would tender Mr. Rick Swope an
23 expert witness in the area of the Intoxalyzer 5000, the same
24 machine that was used in this case.

25 THE COURT: Does the State wish to voir dire?

1 MS. KEYS: No, your Honor.

2 THE COURT: All right. Folks, I'm going to allow the
3 witness to testify as an expert witness. Let me read you an
4 instruction that I will read you again later, but expert
5 witnesses are like other witnesses with one exception. The
6 law permits an expert witness to give his or her opinion.
7 However, an expert's opinion is only reliable when given on a
8 subject about which you believe him to be an expert. Like
9 other witnesses, you may believe or disbelieve all or any part
10 of an expert's testimony. Now, Mr. Green, you may inquire.

11 DIRECT EXAMINATION (Continued)

12 BY MR. GREEN:

13 Q Okay. How long have you studied the Intoxalyzer
14 5000?

15 A Since 1984, when that particular machine came out.

16 Q Okay. What does it sample?

17 A It takes a sample of one's breath and analyzes it by
18 use of infrared lighting, or infrared wave lengths, and it
19 gives a numerical value based on what it sees in the chamber.

20 Q Can you explain how this machine works?

21 A Sure. What happens is is that the, a person blows
22 into the machine, there are three things that the machine
23 looks for: it looks for time, it looks for pressure and it
24 looks for slope. Individual has to blow a minimum of six
25 seconds, it can be as long as it wants, but it has to be a

1 minimum of six seconds. The breath goes through a heated tube
2 into a sample chamber. The sample chamber is about twelve
3 inches long and there's infrared light which actually reflects
4 through a mirror. To give you an example of how it would work
5 is is if you had a balloon and you blew that balloon up, and
6 if you took a flashlight and you shine the beam through the
7 balloon, so much light would come out of the other end of the
8 balloon. If you could measure that light, record it and then
9 take the same balloon, same air, and now take a puff of smoke,
10 or something, and blow it into the balloon, the amount of air
11 would be less coming through, or light, I should say. So if
12 you could measure the difference between the light, that would
13 give you a numerical value. Just like at night if you have
14 your fog lights on in fog or something like that, obviously,
15 your headlights don't penetrate as much. You can measure the
16 difference between the two, it'll give you a value. And the
17 machine does that between clean air and alcohol or ethanol air
18 that is blown into the machine. Same principle.

19 Q What would happen if it doesn't blow clean air into
20 the machine?

21 A Then the reading would be skewed, so to speak, and
22 it would also be, the machine would re-reference itself based
23 on whatever is in the sample chamber at the time. So if
24 breath remained over, in other words, if your zero reference
25 point is, let's at point A, if now there was some alcohol left

1 in the chamber, my reference point may move up to point B and
2 the machine now would, would think that the alcohol that's in
3 the chamber is clean air and it would reference itself off of
4 that air. So that's what it would do if there's anything left
5 over.

6 Q If it started with impure air, would the entire test
7 have error -- error as opposed to air.

8 A Yes. It certainly would, because the software, the
9 point zero zero zero on the air blank check is always going to
10 read that no matter what. I mean, in other words, when I
11 operate it, unless I run an additional series of tests -- like
12 when I use a machine for scientific purposes, I run different
13 types of tests because I want to make sure that I'm not re-
14 referencing the machine on something else. So I have to do an
15 independent test or the sample chamber. The, normally the
16 people who run that would not know that if, in other words,
17 the instrument or machine re-references itself somewhere
18 during the test or cycle.

19 Q Well, the officer that testified testified that it
20 ran an air blank and it came up zero zero zero.

21 A Okay.

22 Q Does that mean that there, that the sample chamber
23 is pure?

24 A No. The point zero zero zero is always going to
25 appear no matter what is in the chamber because the zero zero

1 zero is a programmed software effect. In other words, it's
2 like when you turn on your computer and it's booting up, you
3 get all those little letters and numbers, those come up every
4 time no matter what. Even if the thing breaks down halfway
5 through the cycle, it starts out with those numbers. And the
6 Intoxalyzer is the same. That is a program check, it's a
7 cycle, and the State of Florida has elected to do what's
8 called a five cycle test. Air blank, breath, air blank breath
9 and air blank. We call that A, B, A, B, A. But that's a
10 program that the State of Florida requested. Manufacturer can
11 program it however they want to.

12 Q Is there an error factor built into the machine?

13 A Well, yes and no. The word error is something that
14 scientifically I would not use. When you build a machine you
15 never try to say, well, geez, I have so much error over here
16 with it. It's something that you, through testing, have found
17 that you're accurate to within a plus or minus. I call the
18 reliability level, that is, point zero zero five, meaning that
19 the manufacturer says that this machine is going to be
20 reliable to within a plus or minus point zero zero five.
21 That's what they're saying.

22 Q Is there any additional (inaudible).

23 A Yes.

24 Q What that be?

25 A Well, then there's what's called a breath, a breath

1 factor, which the State of Florida has adopted a sort of a
2 different way. In other words, the State says that the
3 machine is okay within a plus or minus point zero zero five.
4 Then there's a second item, so to speak, in breath testing
5 which is known as point zero two zero factor. Now, in Florida
6 you have to have two tests that come within a point zero two
7 zero of whatever the first test is, or subsequent test. You
8 have to have two tests that come within that level. In breath
9 testing, we use that scientifically as a reliability factor
10 because when we do blood and breath testing, the machine could
11 be high or low over this point zero two zero. So that gives
12 us an error range, so to speak, that we can play with and say,
13 well, whatever the reading is, we know we have two factors to
14 look at. We have the zero zero five, which is only a
15 five/thousandths, one way or the other. And then we have the
16 zero two zero reading, which is another factor. And that is
17 used in analyzing the difference between the samples because,
18 in breath testing, you're, you are doing what's called a
19 removed step. In other words, the machine is actually based
20 on a blood level but you actually don't put blood into the
21 machine, you put breath. So, therefore, you're actually at
22 step B when you're at the machine rather than step A. So,
23 because you're converting the sample, you have to realize that
24 there is some error on both sides up or down.

25 Q Well, what, how do you overcome that step?

1 A Well --

2 Q What's the theory?

3 A Well, first of all, in overcoming the step, there's
4 only one way to overcome the step; that would be by direct
5 testing.

6 Q Well, but, that's not done here.

7 A That's correct, that's not done.

8 Q So how can taking someone's breath tell you what the
9 blood alcohol level is?

10 A Technically, you can't, at that particular point in
11 time. You can estimate.

12 Q Is the machine an estimator?

13 A No. The machine is based on an average of each, of
14 all persons, which is known as twenty-one hundred to one.
15 Twenty-one hundred cc's of air are equal to one cc or
16 milliliter of blood, which is basically a drop. So the
17 machine actually is giving you an average, is what it's doing.
18 There's no way to tell exactly. Now if -- do you have a board
19 or something?

20 MR. GREEN: Judge --

21 DIRECT EXAMINATION (Continued)

22 BY MR. GREEN:

23 Q You mean, something to write on?

24 A Yeah. I just wondered if, maybe, this is something.

25 THE WITNESS: Can I use that

1 THE COURT: Sure. If you're going to write -- open it
2 all the way, Mr. Green. If you're going to write, write big
3 enough so everyone can see.

4 THE WITNESS: sure.

5 THE COURT: There are some pens down there.

6 THE WITNESS: Sure. Now, this is an L curve which we use
7 in breath testing and we have what's called, as I was telling
8 you, the range of reliability, the oh two oh and the zero zero
9 five, which we have this. Those are the ranges. When you
10 have a reading, and let's just say that the reading, there's
11 a point one oh percent. If the reading is on that particular
12 level then your errors could be somewhere around here.
13 They're very close as to be, because the legal limit, of
14 course, is the zero eight. So our error ranges, if you make
15 an error at this point, let's say, the error can magnify
16 itself very quickly because you're only dealing with a few
17 hundredths of a percent. If you have, let's say, a point zero
18 two zero, well, we can make all kinds of errors up here
19 because it's not going to really matter. If we have somebody
20 with a super high reading -- and when I say super high, I mean
21 somebody who's two or three times the legal limit -- then our
22 error rate doesn't really matter because the individual is so
23 high that it really doesn't matter. So if we're off a little
24 bit and make a few mistakes it doesn't matter because our, we
25 can be off a lot. But if we're off just a little bit right

1 here, through either a partition ratio or through someone's
2 temperature, so to speak, or this factor here, we can easily
3 end up, you know, being below this oh eight level at any
4 particular time. So we're only dealing with a very minute
5 amount versus where somebody who's, who's really impaired, so
6 to speak, or very intoxicated, the error doesn't really matter
7 to us too much.

8 DIRECT EXAMINATION (Continued)

9 BY MR. GREEN:

10 Q In this partition ratio, how does that come into
11 play here?

12 A Well, the partition ratio comes into play at, it's
13 twenty-one hundred to one. That's what the machine is set on,
14 for everyone.

15 Q So that's something set in the machine.

16 A Right. And that's set on --

17 Q And what does that assume?

18 A It assumes that your twenty-one hundred cc's of air
19 that's in your lungs are equal to one drop or cc of blood.

20 Q Now, is that true?

21 A No, not, not for everyone. There's, these, this
22 twenty-one hundred to one came out in the 1940's based on a
23 lot of different studies at that particular time, and since
24 the 1980's the difference now has been that people go
25 generally from thirteen hundred to twenty-six hundred because

1 these studies now are done on drinking individuals. So,
2 obviously it was better to test people who had alcohol in
3 their systems than people who weren't. But the machines are
4 all set on this because there are some people that feel that's
5 still a fair level and some that don't. But the fact is
6 there's no way the machine knows what you're at. So, in other
7 words, you could be -- in other words, just taking the reading
8 in this case, we could be. You could be on (inaudible) just
9 without any of the error factors or reliability factors I told
10 you before, you could have a reading of point zero seven one
11 to point one four three. So, if you ask me what the true
12 reading is, I can only tell you it could be between that
13 level. I couldn't get it for you any closer.

14 Q You're saying that will be the range that the
15 particular reading of the machine gave on the 13th as far as
16 Mr. Carlson is concerned?

17 A That's right. I used the highest, which I recall
18 was a point one one six, was the actual reading.

19 Q Now, when you say actual reading --

20 A Right.

21 Q -- you mean that's what the machine said.

22 A That's what the machine said, correct, or what was
23 on the cards. I took the highest of what was on the printed
24 (inaudible).

25 Q What card are you talking about? We haven't seen a

1 card here.

2 A There's a printed card, a hard copy, there's
3 actually two, essentially three copied cards; one's a hard
4 copy and two are just regular copies on top, that's printed
5 out by the machine and it's signed by the operator. The
6 values are printed on by the printer in the Intoxalyzer and
7 then that's given out, the operator has the card and then
8 usually a copy goes to the defendant and one to the State and
9 the officer usually keeps a copy.

10 Q And you give an opinion that the breath reading that
11 the machine said was one one six could have actually been
12 point oh seven one (inaudible) point one four three.

13 A Right.

14 Q How do you, based on what?

15 A Well, I base that on a couple different things is,
16 number one, the partition ratio using an average that I used
17 here, thirteen hundred to twenty-six hundred. We also have an
18 error rate that could be plus or minus. Remember, I already
19 told you it could be higher, it could be lower. And then in
20 doing that, after I'm all finished with the analysis of the
21 file, when I call the attorney who retains me, primarily the
22 last thing I do when I look at the video tape and I look at
23 the arrest affidavit to see if does this reading correlate
24 with what I see on videotape, or what the officer sees, and
25 also what the individual said that they may or may not have

1 drank. So, I also use this reading to figure out how many
2 ounces of alcohol would be in someone's system at that time
3 and what would it show. So that's how I put it all together
4 and see, you know, does this reading reflect the way a person
5 looks and acts, or not.

6 Q Well, did you look at the video in this case?

7 A Yes, I did. I looked at it a couple times. I
8 believe I sent the copy back to you, if I recall.

9 Q Well, does what you saw in your calculations add up?

10 MS. KEYS: Objection, your Honor.

11 THE COURT: What's the objection?

12 MS. KEYS: May we approach?

13 THE COURT: Sure.

14 (Bench conference.)

15 THE COURT: Sure.

16 MS. KEYS: (Inaudible) earlier (inaudible) has had the
17 opportunity (inaudible) I don't think that it's proper for him
18 to give an opinion as to how this, how the defendant looked
19 (inaudible) classified him as an expert for Intoxalyzer and
20 not how he appeared.

21 MR. GREEN: Judge, he said this is what he normally does
22 to come to a his conclusions. He ask him how he looked based
23 on what, you know --

24 THE COURT: Okay. Well, I qualified him as an expert,
25 not Merlin, and that's the only issue for the jury to

1 determine and you're asking that he be allowed to testify that
2 basically have the video as evidence that's about right
3 (inaudible) that's a stretch (inaudible). So I sustain the
4 objection.

5 MS. KEYS: Thank you.

6 (End of bench conference.)

7 DIRECT EXAMINATION (Continued)

8 BY MR. GREEN:

9 Q Based on your investigation of -- by the way, do you
10 get the maintenance records for this machine?

11 A Yes, I did look at, I think, three months that you
12 had sent me, yes.

13 Q Okay. And were you aware as to whether or not there
14 was a problem with the clock?

15 A Yes, I was aware that there was a time differential,
16 yes.

17 Q And were you aware, from the records that you
18 reviewed, that in July, late July of 1997, that their,
19 apparently, Vero Beach Police maintenance officer set the
20 clock?

21 A Yes. I thought maybe it was August. Maybe I'm off
22 a month or two.

23 Q Well, do you have a copy there that you --

24 A No. I think I gave it back to you, but I, I know it
25 was reset before the test, and maybe it was July. But I

1 thought it was August.

2 MR. GREEN: (Inaudible.)

3 THE COURT: Sure. It's Defendant's 2, I believe.

4 MR. GREEN: Just to refresh his recollection.

5 DIRECT EXAMINATION (Continued)

6 BY MR. GREEN:

7 Q Now, Mr. Swope, just to refresh your recollection,
8 I show you Exhibit 2 and ask you if that refreshes your
9 recollection as to whether it was July or August.

10 A Yes, sir, it does.

11 Q Okay. And what do you now recall?

12 A It was July 26, of '97.

13 Q And at that time they set the clock, and --

14 A Yes.

15 Q -- apparently some time between July 26 and
16 September 13 in the early morning hours it was off by eight
17 minutes.

18 A Yes.

19 Q Is that normal?

20 A No.

21 Q Are these machines reliable?

22 A No.

23 Q Why do you say that?

24 A These machines do not meet the scientific test the
25 way they are for reliability, meaning that it's kind of one of

1 the scientific terms that the machine does what it's supposed
2 to do. In other words, the machine does take an alcohol
3 sample of one's breath and it does analyze it and it does give
4 a reading, but reliability is the scientific test to be able
5 to complete and to repeat a test over and over and over again.
6 And, again, because we are removed one step from the blood,
7 this is a breath testing device, and it will never meet the
8 test of reliability because it is actually adding a step into
9 a testing process. So we actually can't get a reliability
10 test out of here. We can get a result, and we can get a
11 sample, and a lot of times we can be pretty close, but it
12 won't meet the scientific test to reliability which is the
13 highest test that there is.

14 Q Well, if by being pretty close, is this particular
15 highest sample of point one one six, would be anywhere in the
16 range from point zero seven one to point one four three; is
17 that correct?

18 A Right. And a lot of time it could amount to a big
19 error. Well, for you it could amount to a big error.
20 Scientifically, it's too close.

21 Q If a person testified and there was testimony that
22 a person stated that they had four beers between 8:30 and,
23 say, 12:30, and this machine took a sample at, depending on
24 what they're going to, Vero Beach police time, the machines's
25 time, either at 3:52, or at 4:00, or 3:54 and a quarter till