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APPEARANCES:

OFFICE OF THE STATE ATTORNEY  
By: MR. NED HALE, ESQUIRE  
ASSISTANT STATE ATTORNEY  
appearing on behalf of the State of Florida

MR. CARLOS ALBERTO CANET, ESQUIRE  
appearing on behalf of the Defendant

- - -

I N D E X

	<u>DIRECT</u>	<u>CROSS</u>	<u>REDIRECT</u>	<u>RECROSS</u>
WITNESS (RICK SWOPE)				
By Mr. Canet	3		37	
By Mr. Hale		27		39
WITNESS (DR. STEPHAN ROSE)				
By Mr. Canet	41		69	
By Mr. Hale		56		74

1 Thereupon, the following proceedings were had:

2 \*\*\*\*\*

3 THE COURT: Ladies and Gentleman, the State has  
4 rested their case.

5 Defense, care to call any witnesses? Put on any  
6 testimony?

7 MR. CANET: Yes, Your Honor. At this time, the  
8 Defense would like to call Mr. Rick Swope to the  
9 witness stand.

10 - - -

11 WHEREUPON,

12 RICK SWOPE,

13 being first duly sworn to testify the whole truth, as  
14 hereinafter certified, testified as follows:

15 THE CLERK: Be seated. Please state your name  
16 and spell your last name for the record?

17 THE WITNESS: My name is Rick Swope. S-w-o-p-e.

18 DIRECT EXAMINATION

19 BY MR. CANET:

20 Q Mr. Swope, how are you employed, sir?

21 A I have my own business. I do primarily accident  
22 reconstruction. I have an office here in Davie, and I have  
23 one in Atlanta, Georgia.

24 Q Do you have any law enforcement experience?

25 A Yes, I do.

1 Q What is your law enforcement experience?

2 A I was a police officer for 15 years. The last six  
3 years of my career I was with the Broward County Sheriff's  
4 Office, in Fort Lauderdale.

5 For four of those six years, I was the  
6 Administrative Coordinator and the ran the Traffic Homicide  
7 and DUI Task Force Units. I did the budgeting. I did all  
8 of the purchasing of the units. Scheduling. Hiring of  
9 people and moving people. That kind of stuff.

10 Q Let me interrupt you. As part of your duties at  
11 the time that you were with the Broward Sheriff's Office,  
12 did you have anything to do with breath testing?

13 A Yes.

14 Q What did you have to do with breath testing?

15 A Well originally, the first time with breath  
16 testing was to setup video procedures and the video unit.  
17 There was some videos, and we wanted to setup procedures.

18 I along with another individual did all the  
19 writing on the policies and procedures for the trucks and  
20 equipment and those types of things that we used. That was  
21 in '84.

22 In '85, we received a federal grant and all kinds  
23 of equipment was purchased. And we setup BAT facilities  
24 under the county, which are Breath Alcohol Testing  
25 facilities.

1           We hired 12 deputies to be on the task force and  
2 we hired about 20 deputies or civilian aids to do breath  
3 testing, et cetera.

4           Q     Did you have any hands-on type of experience with  
5 breath testing during those years?

6           A     Yes.

7           Q     What sort of hands-on experience did you have?

8           A     Well, after the initial -- I had come from another  
9 state when I came down here and was put in charge of the  
10 program, the administrative part of the program after about  
11 a year. I came from Michigan. And I had a breath permit in  
12 Michigan.

13           When I came here, I went to another class to  
14 continue so I could use a breath permit in the State of  
15 Florida. After that, I was involved and I did the  
16 purchasing of the machines. And I went to breath school  
17 here.

18           And eventually in '85, I became an instructor for  
19 the state because of my previous background. And I started  
20 teaching breath testing and field sobriety exercises. I did  
21 the maintenance.

22           And then in late, 1985 -- could have been early  
23 '86, I'm not sure, the State of Florida was looking at  
24 different types of machines to use in breath testing.

25           Q     Well, before we get into that portion, let me

1 interrupt you for just a minute.

2 You passed over something and I want you to  
3 explain something a little bit. You said you did the  
4 maintenance?

5 A Right.

6 Q What did you mean by that?

7 A Well, the maintenance was to keep the machines in  
8 service. Our department at that time had four intoxilyzers.

9 Actually, they weren't intoxilyzers. They called  
10 them "breathalyzers" at that time.

11 And doing the maintenance, making sure that it  
12 passed inspection monthly, I would meet with the inspector  
13 on a yearly basis and make sure that the machines were in  
14 order. I maintained the machines and assisted other  
15 agencies that had machines. And there were very few at the  
16 time.

17 I would assist the county. And I also maintained  
18 all the training machines at Broward Community College for  
19 the police academy. There were four machines out there.  
20 And I maintained those for about probably eight and-a-half,  
21 nine years.

22 Q Now does that mean that you performed this  
23 maintenance procedure on intoxilyzers?

24 A Well, eventually. Initially, there was no  
25 intoxilyzer. In '84 -- in other words, there were different

1 types of machines. Actually, there were three different  
2 types of machines.

3 The intoxilyzers just actually came into effect in  
4 the State of Florida in '85. They were using them for  
5 testing, but not for actual breath court cases.

6 Q During your tenure with the Broward Sheriff's  
7 Office, was that when the intoxilyzer was introduced in  
8 Broward County?

9 A Yes. We were a testing center.

10 Q And do you know how that came about?

11 A Yes.

12 Q How did that come about?

13 A Well, the state was attempting -- we would go to  
14 meetings -- I think at that time it was like every eight  
15 weeks. Every two months. Somewhere in that vicinity. And  
16 the meeting would be in either Palm Beach, Dade, or Broward.  
17 And they would rotate.

18 At that time, the State was -- HRS was running the  
19 program. And they were attempting at that time to get down  
20 to one machine because there was -- all the agencies in  
21 Broward, everyone had different type machines. In other  
22 words, there was probably like out of all -- 20 some  
23 agencies in Broward, maybe there was -- the models were  
24 split between all the agencies. And they were trying to get  
25 down to one machine.

1                   And that's how they initially started testing  
2 various machines. And we were a testing center in Broward.  
3 And we had several different machines that we tested for the  
4 state.

5           Q       Did there come a time that the intoxilyzer  
6 machine became the machine of choice in the State of  
7 Florida?

8           A       Yes.

9           Q       Do you recall when that was? What year that may  
10 have been?

11          A       Well, the intoxilyzer began to be used in late  
12 '85, early '86. But it became exclusive I believe in '88,  
13 '89. That's when it was exclusive.

14          Q       Are you familiar with CMI?

15          A       Yes.

16          Q       And CMI is a business?

17          A       Yeah. It is, yes.

18          Q       CMI makes the intoxilyzer, is that correct?

19          A       They do. Correct.

20          Q       Now, is CMI a non-for-profit company that gives  
21 away intoxilyzers to police agencies to combat drunk  
22 driving?

23          A       No.

24          Q       Are they in the business of making money?

25          A       I assume so. Yes. They sell the machines. I



1 bought the machines, actually.

2 Q So they sell intoxilyzers?

3 A Right.

4 Q They sell intoxilyzers to police agencies or state  
5 agencies?

6 MR. HALE: Objection. Leading.

7 THE COURT: Sustained.

8 BY MR. CANET:

9 Q Do they sell intoxilyzers?

10 A Yes, they do.

11 Q To whom?

12 A Well, they sell them to mainly police agencies.  
13 And they sell them to private companies. And in some cases,  
14 private individuals have been able to purchase a couple.

15 Q Do you know whether or not they market their  
16 machine?

17 A Sure. There is a pamphlet just like you get for  
18 everything. And they market the good points of the machine  
19 and how the machine works and that kind of stuff. And you  
20 get the same kind of advertising stuff like with any  
21 product.

22 Q Do you know how the intoxilyzer was chosen in the  
23 State of Florida?

24 A Yes.

25 Q How was it?

1 A One individual actually chose the intoxilyzer.

2 Q Who was that?..

3 A That was Mr. Rerick.

4 Q What was his position at the time?

5 A Well, at that time he was -- I don't know the  
6 official title, whether he was the administrator or director  
7 of the breath testing program for HRS.

8 Q Was he elected to the position?

9 A No. He was appointed.

10 Q And then what happened with the intoxilyzer and  
11 Mr. Rerick?

12 A Well, what happened is the intoxilyzer was chosen  
13 as the machine of choice. And about a year after the  
14 intoxilyzer was chosen, a different model came out.

15 There were actually two model used in the state.  
16 The 64 and 66. And the second model came out -- I'm just  
17 guessing right now, maybe 18, 20 months after the initial  
18 one. And then it became known as the Breathalyzer 5000 R.

19 Q What does the "R" stand for?

20 A Rerick, I guess. That's what everybody thinks.

21 Q So he named the thing after himself?

22 A Sort of. Yeah.

23 Q Now you said initially there was a 64 model?

24 A Right. The first models were 64.

25 Q And what did the company say about the 64 models

1 when they introduced them here in Florida?

2 A Well, it met the concerns of basically what the  
3 state was looking for. It was you know, the best breath  
4 testing machine on the market.

5 Q They represented that it was the best one at the  
6 time?

7 A Yes.

8 Q And then they came out with a 66?

9 A The 66 came out later. Yes.

10 Q Why did they come out with a 66 if the 64 was the  
11 best one available?

12 A Well, this was a better model. It was an upgraded  
13 model and it was better than the previous one. And then  
14 they came out subsequently with another one after that. I  
15 think last year. Actually, two years ago.

16 Q So there is even one out now that replaces the 66?

17 A Right. The third generation.

18 Q So every once in a while, CMI comes out with the  
19 newest best breath testing machine?

20 A Right.

21 Q And that's how they advertise it to the people  
22 that want to purchase this?

23 MR. HALE: Objection. Leading, Judge.

24 THE COURT: Sustained.

25

1 BY MR. CANET:

2 Q Is that how they advertise it?

3 A Yes.

4 Q Other than Mr. Rerick choosing on his own that the  
5 intoxilyzer would be used by all agencies in the State of  
6 Florida, are you aware of whether or not there was any kind  
7 of legislative process that took place in that decision?

8 A I am aware. Yes.

9 Q Was there?

10 A No. None.

11 Q Were you in law enforcement at the time that that  
12 happened?

13 A Yes.

14 Q And if I heard you correctly, you were the  
15 administrator here in Broward County for the breath testing  
16 of BSO?

17 A That's correct.

18 Q Was BSO at the time the busiest agency with  
19 respect to DUI testing?

20 A Yeah. It still is. There is no question, it's  
21 the busiest.

22 Q Did Mr. Rerick consult you as the Administrative  
23 Director with respect to using the intoxilyzer?

24 A No. He asked for input from everybody. And we  
25 were originally going to vote on what we thought was the

1 best procedure and how to do monthly maintenance and  
2 everything.

3 But after the purchase of the machine, we  
4 basically were locked out I guess after that.

5 Q He was responsible for getting money from the  
6 legislature to purchase this machine?

7 MR. HALE: Objection. Leading.

8 THE COURT: Sustained.

9 BY MR. CANET:

10 Q Was he the person responsible for obtaining money  
11 to purchase this machine from the legislature?

12 A Yes. Originally, he yes.

13 Q Now Mr. Swope, what is the extent of your  
14 educational background with respect to the intoxilyzer?

15 A Well, I have a Master's degree from the University  
16 of Miami in technology and engineering.

17 I also have done a considerable amount of work. I  
18 probably trained about -- I'm just guessing, somewhere in  
19 the neighborhood of 800 hours with that machine from the  
20 state and teaching officers. I have taught probably in the  
21 neighborhood of either lecturing or -- I've taught around  
22 2200 officers and probably about 1000 civilians.

23 Most of the civilians when I say that are  
24 investigators, attorneys, judges, whatever. It encompasses  
25 a wide range.

1 I also have maintained several of the machines. I  
2 still currently do, even though I am not in law enforcement.

3 I left law enforcement in 1990. I taught steadily  
4 at the police academy through 1995, I and maintained their  
5 machines through that period. And because of my work  
6 schedule, I only go out there occasionally as a guest  
7 lecturer.

8 And then I do a lot of experimentation. I am on  
9 a staff that is the only staff in the United States that  
10 goes around and teaches the intoxilyzer to agencies and to  
11 individuals throughout the country. That's lead by Dr.  
12 Jenson, out of Minnesota. I am one of the staff members.  
13 Actually, there are four staff members.

14 I am also working with individuals on a grant at  
15 FIU now. I am doing their maintenance on the machine.  
16 Taking care of it. Programing. Anything.

17 Q That is Dr. Rose's intoxilyzer?

18 A That's correct. Well, it's FIU's. But Dr. Rose  
19 has me take care of it. And I do all the maintenance on it  
20 and any testing that they need done, et cetera, because I  
21 have the permits. I have actually state permits to do that.

22 Q So would you say that your education on the  
23 intoxilyzer gives you knowledge as to how it works?

24 MR. HALE: Objection. Leading.

25 THE COURT: Overruled.

1 MR. CANET: It's not leading.

2 THE COURT: I said, overruled.

3 THE WITNESS: Yes.

4 BY MR. CANET:

5 Q You are aware that the intoxilyzer needs to be  
6 satisfied or has to have three elements satisfied before a  
7 valid breath test can be obtained?

8 MR. HALE: Same objection, judge.

9 THE COURT: Overruled.

10 THE WITNESS: Yes. That's correct.

11 BY MR. CANET:

12 Q What are those three elements?

13 A Well, the elements are time, pressure, and slope.  
14 S-l-o-p-e.

15 Q If you could give a very very brief explanation of  
16 what each of those mean?

17 A Sure. A time factor means that an individual must  
18 blow for a minimum of six seconds before the machine  
19 actually accepts what is called a proper blow.

20 So they have to keep the tone on for at least six  
21 seconds. If they can blow longer, that is fine. If they  
22 can blow five minutes, that's fine. As long as the tone  
23 keeps going.

24 Pressure, you have to have enough pressure when  
25 you blow into the machine to open the switch. And it would

1 be similar to blowing into a balloon. When you start  
2 blowing into a balloon, it expands. It's the same thing.

3 The slope means that it's an indicator to look for  
4 any mouth alcohol or substances in the mouth which may come  
5 up. Sometimes people -- it's kind of gross -- burp or  
6 regurgitate. Some people throw up.

7 The machine has a detector on it that will notice  
8 a rapid rise or fall in the mouth alcohol. The machine is  
9 supposed to pick that up and make sure they're not getting  
10 what is known as mouth alcohol.

11 It would be like if I took a sip of alcohol now  
12 and spit it out and blew in the machine, I wouldn't have any  
13 alcohol in my system, but it's in the breath.

14 That's what the machine looks for.

15 Q Why did the makers of this machine concern  
16 themselves with first of all, building in those three  
17 elements and mouth alcohol?

18 A Well, mouth alcohol was something obviously that  
19 people have. If you drink, a lot of people do burp. Some  
20 people regurgitate. Very impaired people might throw up.  
21 So those things wanted to be addressed.

22 The other issue is that the machine has to  
23 actually convert a breath sample into blood. Even though  
24 the breath card always says "breath," the machine has to  
25 convert over.



1           Because it's not actually what is in your breath  
2 that causes an individual to be impaired, it's what is in  
3 your bloodstream actually. When you drink alcohol, it goes  
4 into your system. And what is in your blood is what causes  
5 your judgment to be off, your vision to be impaired, to be  
6 unsteady on your feet and that kind of stuff. So the  
7 machine has to make a conversion. And that's what the  
8 machine is built for. And it's built for the average  
9 individual. Obviously, you can't test everybody  
10 individually.

11           Q     So how is it that the machine is able to reach  
12 that blood alcohol reading? And do the three elements of  
13 time, pressure and slope have anything to do with it?

14           A     Number one, in getting a deep lung sample, the  
15 more deep lung air you get the closer you are going to get  
16 to the true blood alcohol reading.

17                     That's because as the air passes over your lungs,  
18 the capillaries in your lungs and things like that hold all  
19 of the alcohol or hold the alcohol that is in your  
20 bloodstream. And the machine is able on the conversion  
21 ratio of 2100 to 1 CC of blood to make that conversion.

22                     Simply put, if you had a balloon and you blew  
23 clean air into the balloon, and you took a flashlight and  
24 you held that flashlight, and the beam goes through the  
25 balloon and out the other end, you measured the amount of

1 light that goes through the balloon.

2 If you took the same balloon and you took a puff  
3 of cigarette smoke, then obviously less light is going to  
4 come through. If you could measure the distance between the  
5 two, that would give you the readings.

6 Q This conversion that you are talking about, is  
7 that something that is programmed into the machine?

8 A Yes, it is.

9 Q That's part of the machine's software?

10 A It's part of the machine. Correct.

11 Q Now is that conversion ratio, is that something  
12 that is fixed inside the machine? Or is it variable inside  
13 the machine?

14 A No. It's fixed. The 2100 is a solid number that  
15 is used, period.

16 Q So that calculation is performed over and over  
17 again inside the machine?

18 A Correct.

19 Q Okay. Now as part of your education and training,  
20 were you made aware of alcohol metabolism in human beings?

21 A Yes.

22 Q What part of your education and training has made  
23 you aware of alcohol metabolism in human beings?

24 A Mainly, through drinking classes. And when I say  
25 drinking classes and studies, every time I run tests on

1 individuals -- and I have probably done -- well, I have  
2 written on and tested about 240 individuals. And I've  
3 probably been present during another three or four hundred.

4           And those tests are correlated to show what --  
5 they have individuals come in on a voluntary basis. And  
6 they ask them to come in and sign papers and all kind of  
7 stuff. Sometimes it's not too hard to get a bunch of  
8 drinkers. And we give them certain amounts of alcohol based  
9 on what they are telling us that they normally drink.

10           Some people normally drink one and tell us they  
11 are intoxicated. And some have ten and they feel okay.

12           We put the people in categories. We put them by  
13 sex. We put them by race. We put them by weight. We put  
14 them in the categories and give them measured amounts of  
15 alcohol. And then after anywhere from -- depending on the  
16 study we're doing at the time, it could be ten minutes or it  
17 could be as much as an hour, we start taking breath from  
18 them through an intoxilyzer. We get the breath result.

19           And then the only bad thing about it is we stick  
20 them with a needle and take blood out of them. And some  
21 people give us as many as 10 or 12 blood drops during an  
22 hour period. A lot of people don't like that particular  
23 part. We usually them about that afterward.

24           Q     So you're taking a breath sample. And at the very  
25 same time, you're taking a blood sample?

1           A     Right.

2           Q     What's the purpose of that?

3           A     Well, that's to correlate it to see how accurate  
4 the sample is. Because after a period of time, some people  
5 -- we found that women tend to absorb alcohol quicker.

6                     In other words, quicker than men do. That they  
7 start drinking, and that they show the effect much quicker.  
8 And they also burn it off much quicker.

9                     In a man, it might take two hours to get to a peak  
10 level. And in a woman, it may take an hour.

11          Q     Have any of these studies ever been done in an  
12 official capacity?

13          A     Sure. Some of them have been published.

14          Q     That was my next question. Have the results of  
15 those studies ever been used to say, formulate a rule  
16 pertaining to breath testing in the State of Florida?

17          A     No.

18          Q     Are you familiar with the rule that was  
19 promulgated in the State of Florida concerning the approval  
20 criteria for the intoxilyzer?

21          A     Yes. Pretty familiar.

22          Q     Did that rule ever require a blood breath  
23 correlation study?

24          A     Well, the rule didn't. They were actually  
25 requested to, and they did do one. But the rule did not

1       require it.

2           Q       Okay.  And as part of that blood breath  
3 correlation study, was it ever determined that there was a  
4 plus or minus .02 associated with any breath that was  
5 obtained because of this correlation that we're talking  
6 about?

7           MR. HALE:  Objection.  Leading.

8           THE COURT:  Overruled.

9           THE WITNESS:  Yes.

10          MR. CANET:  May I approach the witness, Judge?  
11                   (indicating)

12       BY MR. CANET:

13           Q       I'm going to show you Page 19 of that document,  
14 and ask for you to look at the middle of that page.  
15                   (indicating)

16          A       Okay.

17          Q       Do you recall that being a regulation here in the  
18 State of Florida?

19          A       Yeah.

20          Q       With respect to breath testing?

21          A       Yes, I do.

22          Q       And approval criteria?

23          A       Yes.

24          Q       And that talks about these breath -- blood breath  
25 studies that you just described, right?

1           A     Yes.

2           Q     And does that rule reflect the data that was  
3 gathered and how it was put into the rule as far as on the  
4 .02 differential?

5           A     Well, some. Yes.

6           Q     And that rule requires that those results have to  
7 be plus or minus .02 percent?

8           A     That's correct.

9           Q     Okay. Is that due to the difference between  
10 breath and blood? Simultaneous breath and blood?

11          A     Yes.

12          Q     So would it be safe to say that even the State of  
13 Florida acknowledged that with any given breath test, there  
14 had to be this plus or minus .02 because of the simultaneous  
15 difference between a breath and a blood?

16          A     That's correct.

17          Q     And that is due to this partition ratio that we  
18 have been talking about?

19          A     Yes.

20          Q     Now the partition ratio you said is fixed in the  
21 machine?

22          A     Yes, it is.

23          Q     Is the partition ratio fixed in people?

24          A     No.

25          Q     It's variable in people?

1           A     It's variable.  Yes.

2           Q     Is it a little bit of variability?  Or is there a  
3 lot of variability?

4           A     It's a wide range.  And that depends upon the  
5 person.  Some people have a very wide range.  Some don't.

6           Q     The State of Florida in one of it's regulations  
7 acknowledged that at minimum, that variability is going to  
8 be plus or minus .02?

9           A     That's correct.

10          Q     And that variability can be even greater than a  
11 plus or minus?

12          A     Yes.

13          Q     How wide can that variability be?

14          A     As much as 75 or 80 percent of the reading, high  
15 or low.

16          Q     Now does that ratio in people, does that change  
17 in the same person over time and drinking?

18          A     Yes.

19          Q     Okay.  How about during the time that somebody is  
20 absorbing?  Is that ratio wider or lower?

21          A     Well, it's usually wider when someone is absorbing  
22 alcohol.

23          Q     Now if somebody blows into the machine at the time  
24 that they are still absorbing alcohol, and keeping in mind  
25 this ratio that we have been talking about, what does that