

1 DISTRICT COURT  
JEFFERSON COUNTY  
2 STATE OF COLORADO  
100 Jefferson County Parkway  
3 Golden, Colorado 80401

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4 PEOPLE OF THE STATE OF COLORADO,

5 Plaintiff,

6 vs.

^FOR COURT USE ONLY^  
Case No. 11-T-9491  
Division A

8 MARK ANTHONY DUGAN,

9 Defendant.

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10 TRANSCRIPT OF ELECTRONICALLY RECORDED PROCEEDINGS  
11 September 7, 2012

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12 The hearing in the above-entitled matter  
13 commenced on Friday, September 7, 2012, before the  
HONORABLE RYAN JAMES STUART, Judge of the County Court.

14 This is a complete transcript of the  
15 electronically recorded proceedings had on this date in the  
aforementioned matter.

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23  
24  
25

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1 PROCEEDINGS

2 THE COURT: Is Mr. Frigo here or are  
3 we --

4 SPEAKER: Yeah, he's here.

5 THE COURT: Okay. Well, we'll call the  
6 case up, the Court calls 11-T-9491, People of the State of  
7 Colorado versus Mark Dugan.

8 MR. GREENBLATT: Jed Greenblatt and Pete  
9 Frigo for the people.

10 MS. JOHNSON: Nancy Johnson present with  
11 Mr. Dugan.

12 THE COURT: Okay. Anything that we need  
13 to take up before we call the jury in?

14 MS. JOHNSON: No, but I need a few more  
15 minutes to get everything organized, if I may, Your Honor.

16 THE COURT: Okay.

17 MS. JOHNSON: We didn't get in here until  
18 five minutes ago.

19 THE COURT: Yeah, sorry. We're switching  
20 up the courtrooms. We thought it would be easier for the  
21 people coming in to A for the docket so we wouldn't get  
22 interrupted here.

23 MS. JOHNSON: And that's fine, I just,  
24 like I say, I have to get things set up

25 THE COURT: Sure. Five more minutes,

1 does that give you enough time?

2 MS. JOHNSON: Yeah, if I can have five  
3 minutes.

4 THE COURT: Absolutely.

5 MS. JOHNSON: Thank you.

6 THE COURT: The Court will be in recess.

7 (Recess was taken at this time.)

8 THE COURT: Thank you. You can be  
9 seated. The Court recalls 11-T-9491, People of the State of  
10 Colorado versus Mark Dugan.

11 SPEAKER: Your Honor, the people are  
12 ready and prepared.

13 MS. JOHNSON: The defense is ready to  
14 proceed, Your Honor.

15 THE COURT: All right. We'll bring the  
16 jury in.

17 (Jurors were brought into the courtroom  
18 at this time.)

19 THE COURT: Good morning. Welcome back.  
20 I'm glad you all made it. We got started a little bit later.  
21 I wanted to get started at 8:15. I promise we have a docket  
22 that was scheduled today and so I have another Judge covering  
23 that docket. We had to switch courtrooms, obviously. You are  
24 not imagining things.

25 But everybody is ready to go, so we'll

1 get started.

2 Mr. Frigo, your first witness or your  
3 next witness.

4 MR. FRIGO: Thank you, Your Honor. The  
5 people would call Erin Alex.

6 THE COURT: Ms. Alex, if you can please  
7 step up to the witness stand, I'll swear you in. Please raise  
8 your right hand.

9 ERIN ALEX  
10 was called as a witness on behalf of the plaintiff and having  
11 been sworn, was examined and testified as follows:

12 DIRECT EXAMINATION

13 BY MR. FRIGO:

14 Q Ms. Alex, can you please introduce  
15 yourself to the jury and spell your last name for the record.

16 A My name is Erin Alex, A-l-e-x.

17 Q And where do you work, Ms. Alex?

18 A I work for Chemitox Laboratory in  
19 Boulder.

20 Q And what is Chemitox Laboratory?

21 A We are an independent toxicology lab. We  
22 test bodily fluids for alcohol and drug content.

23 Q And what do you specifically do for  
24 Chemitox?

25 A I am, my job title is a forensic chemist.

1 So most of the time I work with blood and test that for alcohol  
2 and drug content.

3 Q Can you tell the jury your educational  
4 background?

5 A I have four years with the University of  
6 Northern Colorado with an emphasis in chemistry. And I have a  
7 semester at CU Boulder with an emphasis in biochemistry.

8 Q And do you have any published papers?

9 A No.

10 Q Thank you. How long have you been a  
11 blood analyst with Chemitox?

12 A I've worked for Chemitox for six years.  
13 And I've been a blood analyst for almost five.

14 Q On a day-to-day basis, give us an idea of  
15 what you do with Chemitox?

16 A We receive samples, we work with many  
17 police agencies and (not audible) agencies. We receive blood  
18 samples and when we get those in, we test them for drug and  
19 alcohol content.

20 Q About how many blood samples would you  
21 say you test a day?

22 A Between 20 and 30, five days a week.

23 Q 20 and 30 a day?

24 A Yes.

25 Q Have you been specifically trained to

1 perform these types of blood alcohol tests?

2 A Yes.

3 Q And what is that training?

4 A I had a year of on-the-job training with  
5 my supervisor, Sarah Erfer.

6 Q In your lifetime with Chemitox, how many  
7 blood samples would you say you've tested?

8 A Over, probably over 7,500.

9 Q Can you describe for the jury the method  
10 you use for testing blood?

11 A The method that we use is called head  
12 space gas chromatography. Essentially what that is is we use a  
13 head space gas chromatograph and we take a, we run a  
14 calibration curve and run known standards and controls. We  
15 take a portion of the sample, we run it in duplicate for  
16 reproducibility.

17 Alcohol is a volatile, so the vial is  
18 heated up so the alcohol turns in to the gas where the vial is  
19 injected with a needle and it travels through a column like a  
20 straw and then hits a flame that elicits a response and then  
21 we're able to get a result.

22 Q You indicated that you run a sample prior  
23 to running the blood. What is the purpose of running the  
24 sample?

25 A Before we run the calibration we run a

1 blank and a volatile mix. The purpose of the mix is to show  
2 separation that we can see, separation between different kinds  
3 of volatiles. And then we calibrate the machine and then we  
4 run known standards and controls.

5 Q In a layman's terms, does the running of  
6 the sample help you determine if the machine is working  
7 correctly?

8 A Yes.

9 Q And how so?

10 A It shows that we can see separation. And  
11 when we see the numerical results of the known standards and  
12 controls, it indicates that it is working properly.

13 Q So to further go in to this discussion,  
14 you talk about known results, so in this sample you'll have  
15 separate compounds; is that correct?

16 A Yes.

17 Q And what are those separate compounds  
18 that are in the sample?

19 A In the volatile mix, we run a set of, I  
20 can't remember exactly, different volatiles such as methanol,  
21 ethanol, isopropyl alcohol, acetone and our internal standard.  
22 And they're different chemical make ups, so they come out at  
23 different times in the column.

24 So when it shows a peak when it hits the  
25 flame, and that's call retention time. And that indicates what

1 is present in the sample.

2 Q And to clarify that, we're talking about  
3 peaks in what the machine, the gas chromatograph, shows; is  
4 that correct?

5 A That is correct.

6 Q So as a sample is run through this  
7 instrument, you know what's in a particular sample; is that  
8 correct? And that's the known sample?

9 A Yes.

10 Q So, for instance, you said that there's  
11 isopropanol alcohol; is that correct?

12 A Isopropanol, yeah.

13 Q As well as ethanol?

14 A Yes.

15 Q As well as methane; is it?

16 A Methanol.

17 Q Methanol.

18 A Yes.

19 Q Thank you. So you run it through the  
20 machine and you know this is already in this particular sample;  
21 is that correct?

22 A That is correct.

23 Q So when you run it through the machine  
24 you're checking to make sure that this machine also knows that  
25 this sample contains those specific items.

1 A That is correct.

2 Q And is that how you test the machine and  
3 make sure that it's working correctly?

4 A Yes, that is an indicator that it's  
5 working properly.

6 Q Inside that known sample, do you know the  
7 specific amounts of those individual elements that you have in  
8 the sample?

9 A I do not.

10 Q But you know that they're actually in the  
11 sample?

12 A Yes.

13 Q So the fact that the machine is  
14 recognizing that those other elements, such as methanol,  
15 isopropanol and ethyl alcohol is in the sample relates to the  
16 fact that the machine is working correctly; is that correct?

17 A Yes, it is.

18 MS. JOHNSON: Objection, Your Honor, at  
19 this point I'm going to ask whether or not the district  
20 attorney is going to tender this person as an expert. And if  
21 he is, I'm going to ask for voir dire. If he's not, she is  
22 testifying well past what a layperson's knowledge is. And it  
23 is improper.

24 THE COURT: Your response.

25 MR. FRIGO: Your Honor, I'm laying the

1 foundation that she knows how the machine works, the machine  
2 was working on this day. At that time, I will proffer her to  
3 the Court as an expert, but I need to get to her experience  
4 with the machine and the testing procedures to lay that  
5 foundation.

6 THE COURT: I'll overrule the objection.  
7 The witness has not been asked for an expert opinion yet.

8 Q (By Mr. Frigo) The machine that you use  
9 to test blood on a daily basis, is this machine certified by  
10 the Colorado Department of Health?

11 A The machine itself is not certified by  
12 the Department of Health. The lab is.

13 Q The lab is?

14 A Yes.

15 Q So Chemitox is certified by the Colorado  
16 Department of Health?

17 A That is correct.

18 Q And --

19 MS. JOHNSON: Objection, Your Honor,  
20 that's hearsay.

21 THE COURT: Overruled.

22 Q (By Mr. Frigo) Ms. Alex, how often is  
23 Chemitox certified by the Colorado Department of Health?

24 A We have an inspection once a year and  
25 then we get our certification. And that certification is good

1 for a calendar, for one calendar year.

2 Q Was the machine certified on September  
3 13, 2011?

4 A The lab was certified, yes.

5 Q Excuse me, the lab.

6 A Yes.

7 Q Thank you. And does the lab continue to  
8 remain certified?

9 A Yes.

10 MR. FRIGO: And, Your Honor, at this time  
11 the people would move to qualify Ms. Alex as an expert in blood  
12 analysis, specifically and only for the analysis that was done  
13 in this case and the results of this test under Rule 702.

14 MS. JOHNSON: May I voir dire?

15 THE COURT: Ms. Johnson, you may.

16 VOIR DIRE EXAMINATION

17 BY MS. JOHNSON:

18 Q Ms. Alex, I would like to ask you about  
19 your curriculum vitae, you provided one to the district  
20 attorney, correct?

21 A I don't know.

22 MS. JOHNSON: If I may approach.

23 THE COURT: You may.

24 MS. JOHNSON: I tender to the witness  
25 what has been marked as Defendant's Exhibit F.

1 Q (By Ms. Johnson) Do you recognize that  
2 document?

3 A I do.

4 Q And what is that?

5 A A copy of my CV.

6 Q Thank you. Now on it it says that you  
7 are a forensic chemist, correct?

8 A Yes.

9 Q And a forensic toxicologist?

10 A I don't know. I would have to read it.  
11 I have not --

12 Q You did not prepare this?

13 A I did not, no.

14 Q It also says you're the lab director; is  
15 that correct?

16 A That is not correct.

17 Q So this CV is not correct.

18 A I don't know. I would have to look at it  
19 and read it.

20 MS. JOHNSON: If I may, Your Honor,  
21 approach.

22 THE COURT: You may.

23 Q (By Ms. Johnson) Now that you've reviewed  
24 it, would you agree that it does say that you're the lab  
25 director.

1 A It does say that.

2 Q And that's not correct.

3 A That is not correct.

4 Q And it does say you're a forensic  
5 toxicologist?

6 A Yes.

7 Q And you are not?

8 A I am a forensic chemist.

9 Q And you do not have a bachelor's degree;  
10 is that correct?

11 A That is correct.

12 Q You have no further training other than  
13 the on-the-job training that you received.

14 A That is correct.

15 Q You've no continuing education.

16 A No.

17 Q You've attended no seminars.

18 A No, that is not true. I attended the  
19 American Academy of Forensic Toxicology when it was here in  
20 Denver.

21 Q So you've attended one seminar.

22 A Yes.

23 Q No publications.

24 A No.

25 Q Now so you're not -- are you familiar

1 with the Department of Public Health and Environment Laboratory  
2 Services Division Rules pertaining to the testing of alcohol  
3 and other drugs?

4 A I've seen them before.

5 Q Are you familiar with the requirements  
6 for the laboratory?

7 A No.

8 Q When you do your test, do you -- let me  
9 back up. Do you do anything more than walk in and push  
10 buttons?

11 A I don't understand.

12 Q Well, are you responsible for quality  
13 assurance.

14 A My lab director is.

15 Q And who is your lab director?

16 A Sarah Erfer.

17 Q And you are not familiar, you do nothing  
18 but go in and run the test, correct?

19 A That is correct.

20 Q Do you process the specimens in at all?

21 A I prepare the specimens to be run on the  
22 machine, yes.

23 Q Are you familiar with how to detect  
24 whether there are problems with the machine?

25 A Yes.

1           Q     And are you familiar with the -- does the  
2 laboratory have written procedures on how you are to proceed if  
3 there are problems?

4           MR. FRIGO:  Objection, Your Honor,  
5 outside the scope of voir dire to determine if Ms. Alex is an  
6 expert witness in blood testing.

7           THE COURT:  Your response.

8           MS. JOHNSON:  Your Honor, basically I'm  
9 trying to find out if she, if she has problems with her  
10 analysis whether she knows how to recognize them and how to  
11 deal with them pursuant to a written policy.

12           She relies on, apparently the laboratory  
13 and other people in it to prepare the machine, to make sure  
14 it's properly maintained, to make sure that --

15           MR. FRIGO:  Your Honor, at this time I'm  
16 going to object to speaking objections.  If we can do this at  
17 the podium, excuse me, at the bench.

18           THE COURT:  All right.  You can approach.  
19 All right.  Go ahead and discuss amongst yourselves.

20           (Bench conference held.  Not audible.)

21           MS. JOHNSON:  We would object based on  
22 her lack of formal education, based on her lack of knowledge  
23 concerning the laboratory, based on the lack of training  
24 basically other than one year on-the-job training.  We would  
25 object to her being accepted as an expert in this case.

1 THE COURT: Pursuant to Rule 702, the  
2 Court will recognize the witness as an expert in blood  
3 analysis.

4 MR. FRIGO: Thank you, Your Honor.

5 Q (By Mr. Frigo) Ms. Alex, I would like to  
6 begin just by clearing up your CV that defense counsel brought  
7 up. You indicated that you didn't prepare your resume or your  
8 CV for this case?

9 A That is correct.

10 Q Do you know who prepares those?

11 A I don't.

12 Q Okay. So if it came on Chemitox  
13 letterhead, can we assume that it was prepared by Chemitox?

14 A Yes.

15 MR. FRIGO: If I may approach the  
16 witness, Your Honor.

17 THE COURT: You may.

18 MR. FRIGO: I'm showing defense counsel  
19 what's been previously marked as People's Exhibit 1 and  
20 People's Exhibit 2.

21 MS. JOHNSON: Okay.

22 Q (By Ms. Johnson) Ms. Alex, can you please  
23 look at People's Exhibit 1 and 2 for me. And do you recognize,  
24 let's start with People's Exhibit 1.

25 A Yes, I do. It's a copy of the Alcohol

1 and Drug Determination form that we put in our blood kits and  
2 send out to various police agencies.

3 Q So when the police agency receives a  
4 blood kit, that is a copy of the form that they receive from  
5 your agency?

6 A Yes.

7 Q Okay. And People's Exhibit 2, do you  
8 recognize that?

9 A Yes.

10 Q And what is that?

11 A That is the back of the form of People's  
12 Exhibit 1.

13 Q Okay. So in fact People's Exhibit 1 and  
14 2 is basically just one page, a front and a back?

15 A Correct.

16 Q Okay. And what does People's Exhibit 2  
17 indicate to you?

18 A It tells the officer how to use the kit,  
19 what testing panels we offer, what is included in the kit, and  
20 that the kit is certified under Colorado regulations.

21 Q So the blood tubes are certified?

22 A Yes.

23 Q The swabs and all of the --

24 MS. JOHNSON: Objection, Your Honor, this  
25 is hearsay.

1 THE COURT: Overruled.

2 Q (By Mr. Frigo) So the contents of the box  
3 specifically are certified by your agency; is that correct?

4 A I don't know if they're certified by  
5 Chemitox.

6 Q But by the State of Colorado?

7 A By the State of Colorado, yes.

8 Q Okay. Can you tell that People's Exhibit  
9 1 relates to any particular blood sample?

10 A It does.

11 Q And how can you tell that?

12 A The name is filled out on the form by the  
13 officer.

14 Q And whose blood does that refer to?

15 A Mark Dugan.

16 Q And after you send out this form in the  
17 blood kits, how do you receive the form back?

18 A We generally receive the blood kits back  
19 by mail.

20 Q And is there anything that accompanies  
21 these blood forms when you receive them back?

22 A Yes. It comes in a Styrofoam box with  
23 two generally sealed blood tubes and this form partially filled  
24 out.

25 Q And you say partially filled out, when

1 it's received back with the two blood tubes filled with blood,  
2 is it further filled out by your agency?

3 A Yes. For chain of custody.

4 Q Okay. So someone from your office  
5 receives this back and do they inspect the box when it comes  
6 in?

7 A Yes.

8 Q And is that a part of your normal  
9 procedures to inspect the blood sample box when it returns to  
10 Chemitox?

11 A Yes.

12 Q And if there are any issues when the  
13 blood sample kit is returned to Chemitox, would that be noted  
14 on People's Exhibit 1?

15 A Yes.

16 Q And where would that be noted?

17 A There's a box on that form that says  
18 discrepancies and comments.

19 Q And that box is on People's Exhibit 1?

20 A Yes, it is.

21 MS. JOHNSON: Your Honor, I would note  
22 for the record that the witness keeps referring to the form  
23 rather than her memory and object.

24 MR. FRIGO: And, Your Honor, at this time  
25 the people would move to enter People's Exhibits 1 and 2 as

1 business record exceptions under 803, 6.

2 MS. JOHNSON: Your Honor, we would object  
3 to this. There is hearsay on this form. And without it being  
4 redacted, we would object to its admission.

5 THE COURT: Counsel, please approach with  
6 the documents so that I can see them.

7 (Bench conference held. Not audible.)

8 THE COURT: People's Exhibit 1 will be  
9 admitted under the business records exception.

10 MR. FRIGO: And 2?

11 THE COURT: And 2.

12 MS. JOHNSON: We clearly object to 2,  
13 Your Honor. That was not offered.

14 THE COURT: It was.

15 MS. JOHNSON: This?

16 (Bench conference held. Not audible.)

17 THE COURT: 1 and 2 will be admitted.

18 Q (By Mr. Frigo) So, Ms. Alex, you were  
19 talking about when the blood tubes, when a blood kit comes in  
20 to Chemitox someone from your agency or your organization  
21 receives the box; is that correct?

22 A Yes.

23 Q And do they inspect the box for any sort  
24 of tampering or damage to the box?

25 A Yes.

1 Q And if there is anything that is wrong or  
2 damaged on the box, would they note that on People's Exhibit 1?

3 A Yes, it would be noted.

4 Q And that would be noted in the lower  
5 right-hand corner, I believe you said.

6 A Yes.

7 Q And did someone from your office indicate  
8 any discrepancies to that blood sample from Mr. Dugan?

9 A No.

10 Q When was the blood sample received by  
11 your office?

12 A September 13, 2011.

13 Q And is it on that date that you analyzed  
14 the blood that was in that kit?

15 A I would have to refresh with the report  
16 to check the date. I don't remember.

17 Q Let me ask you this, are you the person  
18 that ran the test for Mr. Dugan's blood?

19 A Yes, I am.

20 Q And do you do any preliminary screening  
21 of those tubes prior to running the blood?

22 A What do you mean by screening?

23 Q Do you observe the tubes for any  
24 contamination?

25 A Yes.

1 Q And what type of analysis do you do at  
2 that point?

3 A We visually check the blood tubes, invert  
4 them and vortex them to make sure that the blood is not  
5 clotted, that there's no bubbling, anything like that. And  
6 that the seals are also in tact.

7 Q If you invert the tubes when you get them  
8 and see bubbling, what does that tell you?

9 A The sample is not valid.

10 Q And what would you do at that point if  
11 you realized that there's some sort of -- and let me retract  
12 that question first. What does bubbling mean to you when you  
13 see it in the tube when you receive it?

14 A To me it indicates that there is  
15 something wrong with the sample.

16 Q And then you indicated that it's an  
17 invalid sample.

18 A Yes.

19 Q And what do you do at that point with  
20 that sample?

21 A I would take it to Sarah.

22 Q Your boss?

23 A Yes.

24 Q Would you run that sample?

25 A No.

1 Q You say, you also indicated if there's  
2 clotting in the tube. Is that something you look for as well?

3 A Yes.

4 Q And what does clotting tell you when you  
5 first get the tubes?

6 A That also tells us that the sample is  
7 invalid for testing.

8 Q And you wouldn't run that sample either?

9 A No.

10 Q What other things are you looking for?

11 A Again, that the seals are in tact. If  
12 they aren't, it shows that there's tampering with the sample.  
13 And again, we wouldn't test it.

14 Q When you received the two blood samples  
15 of blood tubes from Mr. Dugan's case, were the seals in tact?

16 A Yes.

17 Q And were you the one that removed the  
18 seals?

19 A I removed the seal on one tube.

20 Q Okay. And you leave the other one in  
21 tact?

22 A Yes.

23 Q And these tubes are vacuum packed; is  
24 that correct or vacuum sealed?

25 A Yes.

1           Q     When you remove the top of the tube, what  
2 happens to the blood inside? Does the blood change? Does the  
3 level of the blood inside the tube rise?

4           A     The level of the blood does not change.

5           Q     So the fact that there's no change when  
6 you take the top off, does that show that there's no  
7 contamination?

8           A     Yes.

9           Q     Why is it important for you to go through  
10 these steps prior to running Mr. Dugan's blood?

11          A     This is important to make sure that we  
12 get an accurate result on the sample. And we don't want to  
13 test a sample that's invalid.

14          Q     You indicated that the seals of the tubes  
15 were in tact. Was there any indication that there was any sort  
16 of tampering with the seals?

17          A     No.

18          Q     If there had been, would you have noted  
19 it?

20          A     Yes.

21          Q     On this particular day that you ran the  
22 sample, did you insure that the equipment that you ran the  
23 sample on was working correctly?

24          A     Yes.

25          Q     And how did you do that?

1           A     Again, at the beginning of the day we run  
2 a blank and the volatile mix. We calibrate the machine and  
3 then run a set of known alcohol standards and controls. If  
4 those all come out correctly then we will run the samples.

5                     And in between every tenth sample, we run  
6 another known standard to insure that the calibration hasn't  
7 slipped.

8           Q     And this technique that you use, it's  
9 called gas chromatography?

10          A     Head space gas chromatography.

11          Q     And is that a generally accepted way in  
12 the scientific community, to test for blood alcohol?

13          A     Yes, it is.

14          Q     You indicated that you ran that first  
15 sample on 9-13; is that correct?

16          A     Yes.

17          Q     Did you record a result for that sample?

18          A     Yes.

19          Q     And by me saying did you record that  
20 result, do you actually have any physical typing in regarding  
21 the defendant's result of that blood test?

22          A     No.

23          Q     When the results are generated, how are  
24 they generated?

25          A     What we do is I review and approve the

1 chromatographs after the run is done. And then my supervisor  
2 also reviews and approves the chromatographs to make sure that  
3 they are correct and there's nothing funky going on.

4 And if everything is okay, we have a  
5 computer system that uploads the results.

6 Q You indicated something funky going on,  
7 what would be something funky?

8 A Any funny peaks or indications of  
9 contamination.

10 Q Okay. Did you notice any funny peaks or  
11 notice any contamination from Mr. Dugan's blood?

12 A No.

13 MR. FRIGO: If I may approach, Your  
14 Honor.

15 THE COURT: You may.

16 MR. FRIGO: Your Honor, at this time I'm  
17 showing the witness what I've marked as People's Exhibit 4.  
18 I've shown it to defense counsel.

19 Q (By Mr. Frigo) Ms. Alex, do you recognize  
20 People's Exhibit 4?

21 A Yes.

22 Q And how do you recognize it?

23 A This is a copy of the report that we sent  
24 out to the police agency with the results of the blood alcohol  
25 content.

1 Q Okay. And does this specific report with  
2 the blood alcohol content relate to a specific blood test?

3 A Yes, it does.

4 Q And how do you know that?

5 A The person's name is under the subject  
6 line.

7 Q And what name is under the subject line?

8 A Mark Dugan.

9 Q Okay. And are there specific Chemitox  
10 and seal numbers associated with the specific test?

11 A Yes, there is.

12 Q And are those seal numbers the same as  
13 those listed on People's Exhibit 1, when the blood was drawn?

14 A Yes, they are.

15 Q On every blood test that you run at  
16 Chemitox for blood alcohol testing, is this form generated?

17 A I'm sorry.

18 Q Is this form generated for every test  
19 that you run regarding blood alcohol testing?

20 A Yes.

21 MR. FRIGO: And, Your Honor, at this time  
22 the people would move to enter -- and if I may back up for a  
23 second, Your Honor.

24 Q (By Mr. Frigo) Ms. Alex, is there a  
25 result from Mr. Dugan's blood on People's Exhibit 4?

1 A Yes, there is.

2 MR. FRIGO: If I may approach, Your  
3 Honor.

4 THE COURT: You may.

5 Q (By Mr. Frigo) If you can circle that  
6 result with this (not audible) pen for me.

7 MR. FRIGO: And now, Your Honor, I would  
8 like to move People's Exhibit 4, move for the admission of  
9 People's Exhibit 4.

10 THE COURT: Ms. Johnson.

11 MS. JOHNSON: Your Honor, we would  
12 object. There is a signature on the lower part --

13 THE COURT: What I would like is for you  
14 to please approach with the document so that I can see what  
15 you're referring to. Again, while we talk, you can talk  
16 amongst yourselves.

17 9Bench conference held. Not audible.)

18 THE COURT: Exhibit 4 is admitted.

19 Q (By Mr. Frigo) And, Ms. Alex, you've  
20 indicated that you've circled the results of Mr. Dugan's blood  
21 sample that you ran on 9-13. What were the results of his  
22 blood alcohol level?

23 A The results of Mr. Dugan's blood alcohol  
24 content is 0.238 grams of ethyl alcohol per 100 milliliters of  
25 blood.

1 Q And was that the actual blood alcohol  
2 concentration of his blood?

3 A Yes.

4 Q And you indicated that was point 238?

5 A Yes.

6 MR. FRIGO: Your Honor, at this time I  
7 would pass the witness.

8 THE COURT: Cross-examination.

9 MS. JOHNSON: Thank you, Your Honor. If  
10 I may have a minute, Your Honor.

11 THE COURT: Of course.

12 CROSS-EXAMINATION

13 BY MS. JOHNSON:

14 Q Now, Ms. Alex, your job, as you stated,  
15 is to run the blood test, correct?

16 A That is correct.

17 Q And you rely on the machine to do that,  
18 correct?

19 A The machine does record the results of  
20 the --

21 Q Now do you maintain the machine?

22 A I do not maintain the machine.

23 Q Does anyone maintain the machine?

24 A Sarah Erfer maintains the machine.

25 Q Is there a written policy regarding

1 maintenance?

2 A Yes, there is.

3 Q And written logs?

4 A Yes, there is.

5 Q And we requested to see those, correct?

6 A I don't know.

7 Q And Ms. Erfer declined to provide them,  
8 correct?

9 A I don't know.

10 SPEAKER: Objection, Your Honor, beyond  
11 the scope.

12 THE COURT: Sustained.

13 Q (By Ms. Johnson) Now when the specimen  
14 comes in to the laboratory, it's received, who logs it in?

15 A In this case, Gary Kotke did.

16 Q And how do you know that?

17 A His name is at the bottom of the form.

18 Q Did you see him sign it?

19 A No.

20 Q So you don't know actually whether he did  
21 that or not.

22 A It looks like his handwriting.

23 Q But you did not see him do it.

24 A No.

25 Q The Colorado Department of Health and

1 Environment has specific requirements concerning blood testing;  
2 is that correct?

3 A Yes.

4 Q And one of them is storing, the storage  
5 of the specimen, correct?

6 A Yes.

7 Q And it must stored at less than 8 degrees  
8 centigrade, correct?

9 A That is correct.

10 Q Was that done at Chemitox?

11 A The sample was stored, yes.

12 Q And how do you know that?

13 A After we got done testing the sample, we  
14 put it in the refrigerator.

15 Q What did you do before you tested the  
16 sample? You don't know. Was it stored between the time you  
17 received it and when it was tested?

18 A I assume it was.

19 Q This is an assumption. You don't know.

20 A I don't know.

21 Q Now do you know what date it was received  
22 in the laboratory?

23 A Yes.

24 Q And what date it was tested?

25 A Yes.

1 Q Was that the same day?

2 A Yes, it was.

3 Q But you do not know whether the -- was  
4 the specimen refrigerated before you obtained it?

5 A I don't know.

6 Q You stated that the seals were in tact,  
7 correct?

8 A That is correct.

9 Q What was the volume of blood in the tube?

10 A I don't know.

11 Q The Colorado Department of Health and  
12 Environment requires a specific percentage of sodium fluoride;  
13 is that correct?

14 A I would have to look at the regulations.  
15 I don't know offhand.

16 MS. JOHNSON: If I may approach.

17 THE COURT: You may. I'll give to the  
18 witness what's been marked as Defendant's Exhibit H.

19 Q (By Ms. Johnson) Do you recognize that  
20 document?

21 A I do, yes.

22 Q Would you turn to section 7.1?

23 A Okay.

24 Q And does that refresh your memory?

25 A Yes.

1 Q And it shows, in 7.1.2.1 has specific  
2 requirements for the tubes, correct?

3 A Yes.

4 Q And that includes that they be sterile.

5 A Yes.

6 Q And that the sodium fluoride  
7 concentration be greater than point 9 percent (not audible).

8 A Correct.

9 Q Now did you test the sterility of the  
10 sample?

11 A No.

12 Q So you don't know whether they were  
13 sterile before it was collected.

14 A I don't know if the tubes were sterile  
15 before they were collected or when the blood was collected.

16 Q Did you test for the sodium fluoride  
17 content?

18 A No.

19 Q So you don't know whether there was  
20 sufficient sodium fluoride in the tube?

21 A I don't.

22 Q So you don't know whether the tubes, the  
23 sample actually complied with those regulations.

24 A No.

25 Q Do you know what volume of blood was in

1 the tube?

2 A I don't.

3 Q Did you measure it?

4 A No.

5 Q So you don't know whether the Department  
6 of Public Health and Environment regulations have been complied  
7 with.

8 A No.

9 Q Thank you. Now you rely on laboratory  
10 equipment to do the test.

11 A Yes.

12 Q And you said that the machine was not  
13 certified by the Colorado Department of Health and Environment?

14 A The machine itself is not certified.

15 Q Just the laboratory.

16 A The laboratory is, yes.

17 Q And for that testing, for that  
18 certification there are certain requirements; is that correct?

19 A I don't know.

20 Q You don't know anything about the  
21 certification.

22 A I know we have to do proficiency tests,  
23 like outsourced proficiency testing to be certified and pass  
24 those.

25 Q And do you do the proficiency testing?

1                   A     Yes, I do.

2                   Q     And do you know when the last time before  
3 this test was run that a proficiency test was done?

4                   A     I don't.

5                   Q     Now do you know whether you passed it?

6                   A     We did pass it.

7                   Q     But you don't know when it was done?

8                   A     No, I don't recall.

9                   Q     Do you have a written procedure on how to  
10 do proficiency testing?

11                   A     We have a written procedure on how to  
12 test for blood alcohols, yes.

13                   Q     And the defense asked for a copy of that,  
14 correct?

15                   A     I don't know.

16                   SPEAKER:  Objection, Your Honor.

17                   THE COURT:  Sustained.

18                   SPEAKER:  I would move to strike.

19                   THE COURT:  That question will be  
20 stricken.  You can disregard the question.  Questions aren't  
21 evidence any way, but you can disregard it.

22                   Q     (By Ms. Johnson) Now does Chemitox has a  
23 quality assurance manual, a written one?

24                   SPEAKER:  Objection, Your Honor, outside  
25 the scope.

1 MS. JOHNSON: Your Honor, this goes to  
2 the laboratory --

3 THE COURT: Can you please approach?

4 (Bench conference held. Not audible.)

5 Q (By Ms. Johnson) Now does the laboratory  
6 have a quality assurance policy?

7 A Yes.

8 Q And does it have one concerning the  
9 organization of their laboratory?

10 A I don't understand the question.

11 Q For instance, does it have one concerning  
12 job qualifications and descriptions?

13 A I don't know.

14 Q Have you ever been given a -- well, you  
15 don't know. So you're not familiar with it.

16 A Not about one for job qualifications.

17 Q Are you familiar with the duties of your  
18 job?

19 A Yes.

20 Q And are logs kept of, for instance, the  
21 temperature on the refrigerator?

22 A There is, yes.

23 Q And was it an accurate, was it within the  
24 8 degree centigrade limit on the date in question?

25 A I would have to look at the log.

1 Q You don't know.

2 A I don't know.

3 Q Thank you. Now is there a procedure for  
4 your blood testing?

5 A Yes.

6 Q Is it available when you perform the  
7 test?

8 A The written procedure? Yes, it is.

9 Q And is it available next to the machine?

10 A Yes.

11 Q Now you did not personally see Gary  
12 Kotke, is that --

13 A Yes.

14 Q -- receive the specimen.

15 A I did not. No.

16 Q You didn't see him sign off on it.

17 A No.

18 Q You didn't see him log it in.

19 A No.

20 Q You didn't see how he treated the  
21 specimen.

22 A No.

23 Q You don't know where he stored it.

24 A No.

25 Q You don't know when it arrived in the

1 laboratory with regard to time.

2 A I do. It's written down, the time is  
3 written down on the form.

4 Q Okay. And you obtained it from him and  
5 tested it the same day you said.

6 A Yes.

7 Q Were validation studies done on the  
8 machine you work on?

9 A Yes.

10 Q Were -- did you perform them?

11 A I have performed them, yes.

12 Q What validation studies did you perform?

13 A We perform a known sample from six months  
14 old, three months old, and nine months old on the machine.  
15 And --

16 Q And when you say known sample --

17 A Like an unknown blood alcohol  
18 concentration.

19 Q So you perform one that has been stored  
20 for that long?

21 A Yes.

22 Q And you don't -- do you know whether it  
23 was, those samples had been stored properly.

24 A They have been stored properly.

25 Q And how do you know that?

1                   A     We keep a temperature log, if anything is  
2 off, it's brought to the attention of Sarah.  And --

3                   Q     But you haven't seen that.  Do you  
4 maintain that log?

5                   A     I do not maintain that log.

6                   Q     So you don't know --

7                   A     No.

8                   Q     -- specifically.  Okay.  Now when you get  
9 the specimen, do you mix the specimen before you use it?

10                  A     Yes.

11                  Q     And do you put it on the rocker mixer?

12                  A     No.

13                  Q     How do you mix it?

14                  A     We have a vortexer that we put on the  
15 bottom of the tube and it swirls the sample.

16                  Q     And that is -- does that result in  
17 breaking blood cells ever?

18                  A     I don't know.

19                  Q     You don't test for that?

20                  A     No.

21                  Q     Now you take the specimen and you mix it,  
22 correct?

23                  A     Yes.

24                  Q     And then you (not audible) out a sample?

25                  A     Correct.

1 Q One milliliter?

2 A It is 100 microliters of sample.

3 Q And that is a tenth of a milliliter.

4 A Correct.

5 Q And there are approximately five  
6 milliliters in a teaspoon, correct?

7 A That I don't know.

8 Q 100 microliters is a very small amount  
9 then.

10 A Yes, it is.

11 Q A drop or two.

12 A What's your definition of a drop?

13 Q Well, that's okay. Just a very small  
14 amount.

15 A It is a small amount.

16 Q And you place it in a 20 milliliter vial.

17 A Yes.

18 Q Now is the pipette that you've taken the  
19 100 microliters out, is it a positive displacement pipette or  
20 an air displacement pipette?

21 A Positive displacement.

22 Q And could you explain to the jury what  
23 that means?

24 A Essentially it's an automatic pipetter  
25 diluter. We insert the tip of the pipetter in to the tube,

1 push the button, it sucks up 100 microliters of the sample. We  
2 push the button again in to, like insert the tip in to the  
3 vial, push the button again and it expels the sample in to the  
4 vial along with a milliliter of diluent.

5 Q So it's an automatic pipetter you said.

6 A It is an automatic pipetter.

7 Q And is it calibrated?

8 A Yes.

9 Q Do you calibrate it?

10 A No.

11 Q How often is it calibrated?

12 A It's calibrated, actually, I couldn't  
13 tell you. I don't know.

14 Q So --

15 A I know it's calibrated at least once a  
16 year.

17 Q Okay. And how is that calibration done?

18 A I don't know.

19 Q When was the last time that it was  
20 calibrated before this sample was done?

21 A I don't know.

22 Q So you don't know actually whether it was  
23 accurately done.

24 A No.

25 Q Now it's done once a year or twice a



1                   A     The internal standard indicates that we  
2 can see a peak, but the machine is picking up a volatile.

3                   Q     Now the machine itself is, you said it  
4 was heated or you said it was head space gas chromatography.

5                   A     Yes.

6                   Q     And there was a flame ionization  
7 detector.

8                   A     Yes.

9                   Q     Let me talk a little about that.  When  
10 you say it was -- and you mentioned a column.

11                  A     Yes.

12                  Q     Now basically you're using, putting how  
13 much internal standard in each specimen.

14                  A     I don't --

15                  Q     You said you had an automatic pipetter.

16                  A     Right.

17                  Q     And you're using a 20 milliliter vial.

18                  A     Right.

19                  Q     And that's, well, you don't know whether  
20 a teaspoon is 5 milliliters, so it's roughly what, four or five  
21 teaspoons?

22                  A     If that's how much 5 milliliters is, yes.

23                  Q     Okay.  And in it you put just 100  
24 microliters of the sample.

25                  A     Correct.

1 Q And you put an internal standard. How  
2 much internal standard?

3 A A milliliter.

4 Q So 100 microliters is what a tenth of a  
5 milliliter?

6 A Yes.

7 Q So there's ten times as much internal  
8 standard as there is sample.

9 A Yes.

10 Q Okay. And you seal that.

11 A Yes.

12 Q And it's moved to a heating element.

13 A Yes.

14 Q And it's agitated. You need to speak out  
15 loud. It's being recorded.

16 A No, the vial is not agitated.

17 Q Okay. It's heated.

18 A Yes.

19 Q And that is to make sure the alcohol in  
20 the specimen becomes part of the air around, above the 1.1  
21 milliliters in the bottom.

22 A Correct. It's to turn it in to a gas.

23 Q And then it is, after what, approximately  
24 an hour --

25 A No, 13 minutes.

1 Q 13 minutes later, the machine takes a  
2 sample of that air.

3 A Correct.

4 Q And puts it in to the machine.

5 A Yes.

6 Q And that goes in to the column.

7 A Correct.

8 Q And the column is actually 30 meters  
9 long.

10 A Yes.

11 Q And it's coiled up.

12 A Yes.

13 Q And it's heated.

14 A Yes.

15 Q And it's very, very fine.

16 A Yes.

17 Q So how much of the air is taken out of  
18 the sample which has just a tenth of a sample, how much air  
19 above the liquid is taken and put in to the column?

20 A I don't know.

21 Q And it goes through the column.

22 A Correct.

23 Q And then it, it goes in to the -- well,  
24 let me back up. It's split in to two, so it goes in to two  
25 separate columns; is that correct?

1 A That is correct.

2 Q And the columns are identical, not  
3 identical, but they're slightly different.

4 A Right.

5 Q And they're each, at the end of the time  
6 period, what 20 minutes later, an hour.

7 A The whole cycle to run a sample is about  
8 two-and-a-half minutes.

9 Q Two-and-a-half minutes later the specimen  
10 goes in to the flame ionization detector.

11 A Yes.

12 Q And there are two of them, one for each  
13 column.

14 A Yes.

15 Q And then it reads the peaks.

16 A That is correct.

17 Q And it prints out a report.

18 A Yes.

19 Q Now the flame, this machine though is  
20 actually dumb. It has to be programmed, right?

21 A Yes.

22 Q Do you do the programming?

23 A I do not.

24 Q Are you familiar with the program?

25 A No.

1 Q Are you familiar with whether you have to  
2 tell the machine what to look at and what not?

3 A No.

4 Q You just push the button and it goes.

5 A Yes.

6 Q So you're not familiar with the  
7 programming and you don't know how, what happens other than it  
8 spits out a report.

9 A I know -- I don't do anything with the  
10 programming. I know how to read the report though.

11 Q And the report spits out a report, the  
12 area percent under a peak, correct?

13 A I don't know.

14 Q Okay. Now in the first blank you run  
15 there's not supposed to be anything but internal standard; is  
16 that correct?

17 A That is correct.

18 MS. JOHNSON: May I approach?

19 THE COURT: You may.

20 MS. JOHNSON: I'm handing to the witness  
21 what has been marked as Defendant's Exhibit I and J.

22 Q (By Ms. Johnson) Can you identify those  
23 for the jury?

24 A This is a copy of the chromatograph of  
25 the blank on each column.

1 Q And there's a little arrow on those  
2 pointing to a small peak; is that correct?

3 A Yes.

4 Q And the machine has recognized that  
5 that's a peak.

6 A Yes.

7 Q And on the BAC one report, it does not  
8 identify it, correct?

9 A That is correct.

10 Q But on the BAC two report it has.

11 A Okay. Yes.

12 Q And it's identified it as isopropanol.

13 A Yes.

14 Q And that's not supposed to be there; is  
15 it?

16 A No.

17 Q Thank you. Now after you've run the  
18 blank, you put in calibrators; is that correct?

19 A We run the volatile mix and then a set of  
20 calibrators.

21 Q Now again, the calibrators are to tell  
22 the machine how to calculate the answer.

23 A Yes.

24 Q There are a series of known values.

25 A Right.

1 Q And they're teaching the machine what to  
2 do.

3 A Right.

4 Q And again, the only thing that's supposed  
5 to be in them is the calibrator and the internal standard; is  
6 that correct?

7 A Yes.

8 MS. JOHNSON: If I may approach.

9 THE COURT: You may.

10 MS. JOHNSON: I hand the witness what's  
11 been marked as Defendant's Exhibit K and L.

12 Q (By Ms. Johnson) Can you identify those  
13 for the jury?

14 A Yes. This is the 0.010 calibrator on  
15 both the A and the B column.

16 Q And again there's an extra peak in there;  
17 isn't there?

18 A Yes.

19 Q And on the BAC one, the computer, the  
20 machine does not identify it.

21 A Correct.

22 Q But on the BAC two, it has.

23 A Yes.

24 Q And that's isopropanol.

25 A Yes.

1 Q And it's not supposed to be there.

2 A No. We do not quantitate off the B  
3 column though. That's just to show for screen confirmation.

4 Q But it's the same sample.

5 A Yes.

6 Q And it's just split at a Y on the  
7 machine.

8 A Right.

9 Q And so if it's in one, it's in the other.

10 A I don't know.

11 Q You don't know whether if the same sample  
12 is split two ways whether they would be identical?

13 A I don't know if they'd be identical.

14 Q Okay.

15 MS. JOHNSON: Move for admission of I, J,  
16 K and L.

17 THE COURT: Any objection?

18 SPEAKER: If I may see them again, Your  
19 Honor, really quick.

20 THE COURT: Sure.

21 SPEAKER: If I may approach.

22 THE COURT: You may.

23 SPEAKER: I don't object, Your Honor.

24 THE COURT: I, J, K and L will be  
25 admitted.

1 MS. JOHNSON: If I may approach?

2 THE COURT: You may.

3 MS. JOHNSON: Give to the witness what's  
4 been marked as Defendant's Exhibits M and N.

5 Q (By Ms. Johnson) Can you identify those  
6 for the jury, please.

7 A Yes, this is the 0.080 calibration.

8 Q And it says on the bottom that it's  
9 calculating area percent; is that correct?

10 A That is correct.

11 Q And again, it's showing, this should have  
12 nothing but the internal standard and the calibrator, correct?

13 A Correct.

14 Q And yet in each one there are additional  
15 peaks.

16 A Yes.

17 Q Where do those peaks come from?

18 A I don't know.

19 Q Was there anything else there that  
20 shouldn't be there?

21 A I don't know.

22 Q So --

23 MS. JOHNSON: Move for admission of M and  
24 N.

25 THE COURT: Any objection?

1 SPEAKER: No, Your Honor.

2 THE COURT: Defendant's M and N will be  
3 admitted.

4 Q (By Ms. Johnson) And just to let the jury  
5 know, all of these are coming from the same run; is that  
6 correct?

7 A Yes, it is.

8 Q And are they coming from the same run as  
9 Mr. Dugan's specimen?

10 A Yes.

11 MS. JOHNSON: If I may approach.

12 THE COURT: You may.

13 MS. JOHNSON: Tendering to the witness  
14 what's been marked as Defendant's Exhibit O and P.

15 Q (By Ms. Johnson) Can you identify those  
16 for the jury?

17 A This is our 0.200 calibration.

18 Q And again only supposed to be the  
19 calibrator and the internal standard.

20 A Correct.

21 Q And again both of these show an extra  
22 peak there.

23 A Yes.

24 Q And that's not supposed to be there.

25 A No.

1 Q And you don't know where it came from.

2 A No.

3 Q And you don't know where there was  
4 anything else wrong either.

5 A No.

6 Q And this is, shows contamination of some  
7 sort.

8 A The peak? The peaks on these are  
9 extremely small. They don't show any cause for contamination.  
10 It's background noise.

11 Q But it's recognized by the computer as  
12 isopropanol.

13 A It's a small peak. It's not considered  
14 significant.

15 Q But it's there.

16 A It is there. In a very, very, very small  
17 amount.

18 Q And it's there. And it shouldn't be  
19 there, correct?

20 A In a perfect scientific world, it would  
21 not be there.

22 Q But it's there, correct?

23 A Yes.

24 Q And and since it shouldn't be there, it  
25 came from somewhere.

1 A Yes.

2 Q You don't know where it came from.

3 A No.

4 Q So it's a contaminant, correct?

5 A It's small background noise.

6 Q Then if it's noise, why did the computer  
7 recognize it?

8 A I don't know. You would have to -- I  
9 don't know.

10 Q Did you bring it to Ms. Erfer's  
11 attention?

12 A I did not. It's not a significant amount  
13 to bring to her attention.

14 Q And how do you determine what's a  
15 significant amount?

16 A If the peak is above 20 millivolts.

17 Q So you're basically determining  
18 arbitrarily what's significant.

19 A With our internal procedures, that is not  
20 a significant amount to be brought to Sarah's attention.

21 Q Is that written?

22 A Yes, it is.

23 Q And the -- is, how has that been  
24 determined what's significant?

25 A You would have to ask Sarah.

1 Q You don't know.

2 A I don't know.

3 Q But you have determined what can be  
4 ignored and what can't.

5 A Based on our procedures, yes.

6 Q But we do know it shouldn't be there.

7 A Yes.

8 Q And we don't know, for instance, whether  
9 there's extra amounts of anything else because, for instance,  
10 isopropanol or (not audible), we don't know whether that's (not  
11 audible) extra amounts of that, however minor.

12 A No.

13 Q No, what? We don't know?

14 A I don't know.

15 MS. JOHNSON: Move for admission of, I  
16 believe M, N, O and P, Your Honor.

17 THE COURT: M and N have been admitted.

18 MS. JOHNSON: Okay. O and P then.

19 SPEAKER: Your Honor, the people would  
20 object as cumulative at this point. She's made the same point  
21 on three separate tests. The people have not objected to the  
22 first two.

23 THE COURT: O and P will be admitted.

24 MS. JOHNSON: Thank you, Your Honor.

25 Q (By Ms. Johnson) Now do these peaks

1 continue, extra peaks continue throughout the run?

2 A I would have to look at the  
3 chromatographs. I don't recall off the top of my head.

4 Q Well, after the calibrators, you run  
5 another blank; is that correct?

6 A Yes.

7 Q And again that blank should have nothing  
8 but the internal standard; is that correct?

9 A Yes.

10 MS. JOHNSON: If I may approach.

11 THE COURT: You may.

12 MS. JOHNSON: Tender to the witness  
13 what's been marked Defendant's Exhibits Q and R.

14 Q (By Ms. Johnson) Can you tell the jury  
15 what those are?

16 A This is a blank that was run on the head  
17 space.

18 Q And that was in what position in the (not  
19 audible)?

20 A I actually can't tell from the paper.  
21 Wait, actually, yes, I can. Yes, this was run after the  
22 calibrators.

23 Q And again the machine is recognizing that  
24 there's an extra peak there.

25 A There is a small peak.

1 Q And you don't know where it came from.

2 A No.

3 Q And the computer, the machine has  
4 recognized it.

5 A Yes.

6 Q And that is a chromatogram machine,  
7 correct?

8 A A chromatograph.

9 Q The chromatographs are the printouts,  
10 correct?

11 A Yes.

12 Q So the machine is a chromatogram.

13 A Right.

14 Q So --

15 MS. JOHNSON: Move for admission of Q and  
16 R, I believe are the ones.

17 SPEAKER: No objection, Your Honor.

18 THE COURT: Q and R will be admitted.

19 MS. JOHNSON: If I may approach.

20 THE COURT: You may.

21 MS. JOHNSON: I tender to the witness  
22 what's been marked as Defendant's Exhibits S and T.

23 Q (By Ms. Johnson) Can you tell the jury  
24 what those are?

25 A This is one of the samples of the

1 defendant's blood that was run.

2 Q And again they're showing basically an  
3 extra peak in that; is that correct?

4 A Yes.

5 Q Do you know why they're showing that?

6 A No.

7 Q Now how many times did you run the sample  
8 of Mr. Dugan?

9 A Twice.

10 Q And did -- now you said that the report  
11 was printed out, reported out, was the number; is that correct,  
12 the amount of alcohol in his blood?

13 A Yes.

14 Q Were the results from both samples  
15 identical?

16 A I don't know. I would have to look at  
17 both results that we got.

18 Q Since this has extra peaks in it or an  
19 extra peak in it, how do you know that that's not affecting the  
20 result?

21 A It's not affecting the result. It is a  
22 small background noise peak. It does not show cause for  
23 concern. And it's not even close to eluding on top of the  
24 ethyl alcohol peak.

25 Q Do you know, since you don't know where

1 this peak came from, and it's being recognized by the machine,  
2 do you know that there isn't extra things of some other  
3 compound such as ethanol in there?

4 A I don't. But again, it's a small  
5 background noise peak.

6 Q And how do you determine it's background  
7 noise since the machine has recognized it?

8 A The peak is below 20 millivolts. If it  
9 was above that, I would take it to Sarah.

10 Q So that's the arbitrary cut off, 20  
11 millivolts.

12 A That is our policy. Anything larger than  
13 that, take it to her.

14 Q And you don't know that there wasn't  
15 something else in there, correct?

16 A Something?

17 Q Well, you've got an extra peak there.  
18 You don't know whether there was contamination in the ethanol  
19 peak. You don't know where any of this came from.

20 A The ethanol came from the alcohol content  
21 of his blood.

22 Q But you don't know whether the, there  
23 was, there's extra isopropanol. You don't know whether there  
24 was extra ethanol too.

25 A No, but on the calibrators and controls,

1 there is no extra ethanol because they came out within range of  
2 our known controls.

3 Q But the contamination extends throughout  
4 the run.

5 A It's not contamination. It's background  
6 noise.

7 Q Background noise is generally a little  
8 jitter along the baseline, correct?

9 A This is a little peak along the baseline.

10 Q It's a definite peak, however, correct?

11 A But it's a small one.

12 Q But it's a definite peak.

13 A Yes.

14 Q And it was recognized by the machine.

15 A Yes.

16 Q So it does not, by definition, it is not  
17 background noise because it is a definite peak and it was  
18 recognized by the machine, correct?

19 A You would have to ask Sarah.

20 Q And at the end of the run, you run  
21 another control; is that correct?

22 A Yes.

23 Q And was there still an extra peak in that  
24 run?

25 A I would have to look at the

1 chromatograph.

2 MS. JOHNSON: I think we got up to Q and  
3 R; is that correct?

4 THE WITNESS: S and T.

5 MS. JOHNSON: Move for admission of S and  
6 T?

7 THE COURT: Any objection?

8 SPEAKER: No, Your Honor.

9 THE COURT: S and T will be admitted.

10 MS. JOHNSON: May I approach? I tender  
11 to the witness what's been marked Defendant's Exhibit U.

12 Q (By Ms. Johnson) Would you tell the jury  
13 what that is?

14 A This is a control at the end of the run  
15 on the B column of our 0.170 control.

16 Q And again it's showing the extra peak in  
17 there, correct?

18 A That is correct.

19 Q And this should show nothing but the  
20 internal standard and the calibrator.

21 A Yes.

22 Q And it's calculating the area under that  
23 peak.

24 A Yes.

25 Q Now let's turn to the report. You have a

1 copy there. And it notes that it was reviewed by; is that  
2 correct?

3 A Yes.

4 Q Did you see that person review it?

5 A No, I did not.

6 Q Do you know whether she actually reviewed  
7 it?

8 A I don't.

9 Q Do you know when she reviewed it?

10 A No.

11 MS. JOHNSON: If I may approach. I  
12 tender to the witness what's been marked as Defendant's Exhibit  
13 G.

14 Q (By Ms. Johnson) Can you tell me, is that  
15 the same report?

16 A It's a copy of the same report.

17 Q But there's, it's different than the  
18 other report, correct?

19 A Yes.

20 Q It has a number along the side.

21 A Yes.

22 Q And the report that the district attorney  
23 gave you has a number up at the top.

24 A Right.

25 Q Did you write either of those numbers?

1 A I did not.

2 Q And the report, Defendant's G, isn't  
3 signed off on.

4 A No.

5 Q But the report the district attorney gave  
6 you is.

7 A Yes.

8 Q You don't know when it was reviewed.

9 A No.

10 Q There's no date.

11 A No.

12 Q You did not sign either one.

13 A I did not, no.

14 Q There's nowhere on this where you are  
15 certifying that the test was done properly.

16 A I myself?

17 Q Yes.

18 A No.

19 Q You're not certifying that the kit was  
20 proper.

21 A No.

22 Q You're not certifying that the answer is  
23 correct.

24 A No.

25 Q And in fact, all it says is, the one the

1 district attorney gave you says it's reviewed by and there's a  
2 number at the top, a handwritten number.

3 A Yes.

4 Q And the one, the Defendant's G, has a  
5 handwritten number along the top and it's not reviewed.

6 A That is correct.

7 Q And you don't know, I mean there's a  
8 report date on there, correct?

9 A Yes.

10 Q But you don't know when or even if it was  
11 reviewed and approved.

12 A Defendant's Exhibit G is a copy of  
13 People's Exhibit 4 that we keep in our course of business. We  
14 don't keep the signed copy.

15 Q So the signed copy, you don't know  
16 whether the one that you keep in the course of business has  
17 been reviewed?

18 A It is because it's a copy of it.

19 Q But it's not an exact copy.

20 A No, it's not an exact copy.

21 MS. JOHNSON: Move for admission of  
22 Defendant's Exhibit G.

23 SPEAKER: No objection, Your Honor.

24 THE COURT: G is admitted.

25 Q (By Ms. Johnson) Now let's turn to the,

1 let me make sure that I know which, let's get some of this out  
2 of the way. Let's turn Prosecution's Exhibit 2. Now the  
3 bottom of that has what's called a certification, correct?

4 A Yes.

5 Q Now in that certification, just that part  
6 that says certification, there is no company name.

7 A No.

8 Q There's no lot number.

9 A No.

10 Q There is no fax number.

11 A No.

12 Q There's no expiration date.

13 A No.

14 Q As required by 21 CFR, Chapter 1, Part  
15 820.

16 A I don't know what that is.

17 Q Okay. You don't know what requirements  
18 are for a certification.

19 A For the blood kit, no.

20 Q There's no expiration date on there of  
21 anything?

22 A On this form, no.

23 Q There's no lot number for any of the  
24 things in it.

25 A No.

1 Q There is no signature on this.

2 A No.

3 Q There's no one saying that this is  
4 certified. No one signed it certified under penalty of  
5 perjury.

6 A I'm sorry, say that again.

7 Q There's no one swearing that this is  
8 accurate.

9 A That is correct.

10 Q It just says certification.

11 A Yes.

12 Q And looking at just that part, we have no  
13 idea what it is. It just says certification.

14 A It does say certification.

15 Q Okay. Thank you. Now --

16 THE COURT: Ms. Johnson, I apologize, I'm  
17 going to need to take a break. So what we'll do is we'll take  
18 a brief morning recess. You can stretch, use the restroom.  
19 And we'll resume with the cross-examination.

20 (Recess was taken at this time.)

21 THE COURT: The Court recalls 11-T-9491.  
22 We're back on the record. And for the record I just want to  
23 let counsel know that once I stepped off the bench, I did  
24 remind the jury of the admonition.

25 MS. JOHNSON: Thank you, Your Honor.

1                   SPEAKER: Thank you, Judge.

2                   (Jurors were brought back into the  
3 courtroom at this time.)

4                   THE COURT: All right. Ms. Johnson, you  
5 can resume your cross-examination.

6                   MS. JOHNSON: Thank you, Your Honor.  
7 Your Honor, at this time defense would move for admission for  
8 Exhibits F and H.

9                   THE COURT: Any objection?

10                  SPEAKER: Yes, Your Honor. If we can  
11 approach.

12                  THE COURT: Yes.

13                  (Bench conference held. Not audible.)

14                  THE COURT: Exhibit F has been admitted.

15                  Q     (By Ms. Johnson) Now let's go back to the  
16 report that you printed out, the machine printed out.

17                  A     Okay.

18                  Q     Either version. Is there anywhere on  
19 there noted who manufactured the tubes?

20                  A     No, there is not.

21                  Q     Or what lot number they were?

22                  A     No.

23                  Q     Or whether they complied with the  
24 Department of Health regulations.

25                  A     No.

1 Q And you don't know whether they complied.

2 A No.

3 Q Do you know who manufactured them?

4 SPEAKER: Objection, Your Honor, asked  
5 and answered.

6 MS. JOHNSON: No, the question was  
7 whether it was noted on the form, not whether she knew.

8 THE COURT: Overruled.

9 THE WITNESS: I'm sorry, one more time.

10 Q (By Ms. Johnson) Do you know who  
11 manufactured them?

12 A Manufactured --

13 SPEAKER: Objection, Your Honor,  
14 relevance.

15 THE COURT: Overruled.

16 THE WITNESS: Who manufactures the blood  
17 tubes?

18 Q (By Ms. Johnson) Yes.

19 A I do know who it is.

20 Q And who is that?

21 A BD Vacutainer.

22 Q And do you know what lot number was used?

23 A I do not.

24 Q Well, let's go back to the testing. You  
25 set up your run.

1 A Yes.

2 Q And it's critical that everything is  
3 prepared in the same way.

4 A Yes.

5 Q So that you can tell whether the run is  
6 consistent.

7 A That is correct.

8 Q And in order to tell whether it's  
9 consistent throughout the run, you need to know what the area  
10 under the peaks are, correct, for the internal standard?

11 A I don't know. That just prints out on  
12 the chromatographs. We don't use that.

13 Q So how do you determine whether it's  
14 consistent for the run?

15 A By the peak height.

16 Q And not area underneath the peak.

17 A Correct.

18 Q So the area underneath the peak is not  
19 what is determining the value?

20 A No.

21 Q It's the peak height.

22 A That is what we measure for consistency.

23 Q Well, if you'd look at one of the  
24 exhibits, it's the area percent that is given; is that correct?

25 A That is correct.

1 Q And not the peak height on the bottom of  
2 the form.

3 A Right.

4 Q And that's what you're using to determine  
5 the amount of ethanol, correct?

6 A I don't know.

7 Q So you don't know, you look at the height  
8 and not the area to determine whether the run is consistent.

9 A We look at the height, the peak height of  
10 the internal standard --

11 Q Right.

12 A -- to determine if it's consistent.

13 Q Now let's look at the blank. In a  
14 perfect print out, it would, the print out would be straight,  
15 go straight up, come straight down and go to the baseline  
16 again; is this correct?

17 A Correct.

18 MS. JOHNSON: And let the record reflect  
19 I have an imaginary line go up, go down and return to that same  
20 line directly.

21 THE WITNESS: Yes.

22 Q (By Ms. Johnson) Is that correct?

23 A That is correct.

24 Q But on the blank, it doesn't come  
25 straight down, it tails off; is that correct?

1 A It looks like it comes down to me.

2 Q But not straight down. There's a tail.

3 A A very slight one.

4 Q But there is a tail.

5 A Okay.

6 Q And so this is -- now when you run these  
7 tests, you treat everything the same way.

8 A Yes.

9 Q And you use blanks with just the internal  
10 standard in them.

11 A Yes.

12 Q And the calibrators with a specific  
13 amount of ethanol and the internal standard.

14 A Yes.

15 Q And that's used to tell a machine how to  
16 calculate the results.

17 A Right.

18 Q And you use a standard.

19 A Yes.

20 Q How many standards do you run each run?

21 A I would have to look at a run. I don't  
22 know off the top of my head.

23 Q The standards have known values.

24 A Yes.

25 Q And then you do your unknowns.

1 A Right.

2 Q And you said you -- what do you run in  
3 between each unknown?

4 A In between every tenth sample, we run  
5 another known standard.

6 Q You don't run blanks.

7 A Not in between the samples, no.

8 Q So are blanks important?

9 A Blanks are important, yes, to show that  
10 we can get the internal standard.

11 Q Don't they show whether there's a problem  
12 with the machine, contamination, whatever?

13 A If there is contamination, yes.

14 Q So you don't run a blank to see whether  
15 there's a problem with any given specimen.

16 A We do not run blanks after we run  
17 specimens.

18 Q So you don't know, for instance, whether  
19 there's any carry over from one specimen to the next?

20 A No.

21 Q You have no way to track that.

22 A No.

23 Q And you don't know, for instance, whether  
24 the specimen that was in front of Mr. Dugan's was high.

25 A I could look at the run for the day and

1 find out if it was.

2 Q But you don't know that right now.

3 A And it would not carry over in to the  
4 second sample of Mr. Dugan's blood.

5 Q Now in order to figure out whether the --  
6 well, you've already answered that. Never mind. And you said  
7 you know nothing about the manufacturing of the test kits.

8 A Correct.

9 SPEAKER: Objection, Your Honor, asked  
10 and answered.

11 THE COURT: Sustained.

12 MS. JOHNSON: No further questions for  
13 this witness, Your Honor.

14 THE COURT: Redirect.

15 SPEAKER: Thank you, Your Honor. If I  
16 may approach the witness for the exhibits.

17 THE COURT: You may.

18 REDIRECT EXAMINATION

19 BY SPEAKER:

20 Q Ms. Alex, defense counsel kind of made a  
21 big deal about numbers that are written on the test result,  
22 which would be People's Exhibit 4; do you remember those  
23 questions?

24 A Yes.

25 Q And what one of the things that she asked

1 you about was a number written at the top of the page; do you  
2 see that number?

3 A Yes, I do.

4 Q And what is that number?

5 A The number is 11-38970.

6 Q And does that number correspond with the  
7 case number that's on People's Exhibit 1?

8 A It does.

9 Q Okay. So essentially the number that  
10 defense counsel was asking you about is just the case number  
11 for Mr. Dugan; is that correct?

12 A That is correct.

13 Q And it has nothing to do with the  
14 results.

15 A No.

16 Q So that doesn't affect a point 238 blood  
17 alcohol level that the defendant had on the date of the  
18 violation.

19 A It does not.

20 Q I want to talk a little bit about the  
21 alleged contamination issues with the gas chromatograph that  
22 defense counsel has brought up. If there is contamination in  
23 the machine, what do you do?

24 A If I see anything that is indicative of  
25 contamination, I take it to my supervisor.

1 Q And what is contamination? You say  
2 something that's indicative of contamination, what are you  
3 looking for?

4 A We are looking for large peaks, larger  
5 than 20 millivolts that can, let's see, how do I describe this,  
6 just anything that doesn't look like it would belong on a  
7 typical blood alcohol chromatograph.

8 Q And defense -- why 20 millivolts?

9 A Millivolts, yeah. That's the peak  
10 height. And anything larger than that could be indicative of  
11 contamination. But lower than that, we allow error for  
12 background noise and background peaks.

13 Q And what is background noise?

14 A Background noise, in like a perfect  
15 science world, everything would just be boom, boom, boom. But  
16 it's not, so it's like just little bumps here and there. It's  
17 like if you're running down a trail on concrete and you kick a  
18 rock, that could be background noise.

19 Q And the machine is set up to be so  
20 precise that it even picks up this background noise?

21 A Yes.

22 Q And all of the exhibits that defense  
23 counsel gave you, the one peak that she keeps referring to is  
24 isopropanol; is that right?

25 A That is the peak that is recognized by

1 the machine in the B column, yes.

2 Q And that's not contamination?

3 A No.

4 Q And that's the same peak throughout the  
5 entire run shows up in everything single part of the test; is  
6 that correct?

7 A From what I've been presented, yes.

8 Q So this isn't something that's just  
9 showing up in one part of the run and not showing up in the  
10 later part of the run.

11 A Correct.

12 Q What is isopropanol?

13 A Isopropanol, it's rubbing alcohol.

14 Q Something generally not in someone's  
15 blood.

16 A That is correct.

17 Q When running these tests, what is the  
18 margin of error?

19 A What do you mean by margin of error?

20 Q When the, when you try to get a sample or  
21 value of someone's blood, you run two tested, an A and a B  
22 column; is that correct?

23 A Yes.

24 Q Let me first ask you, what is the purpose  
25 of running the A and the B column?

1                   A     The A column is for quantitation  
2 purposes. The B column is for screening purposes to show that  
3 there is no like super obvious extra peaks or anything like  
4 that.

5                   Q     Did you see any of those super obvious  
6 extra peaks here?

7                   A     No.

8                   Q     Okay. So does the machine, when running  
9 and getting a value of blood alcohol, have a margin of error?

10                  A     Yes.

11                  Q     And what is that margin of error?

12                  A     5 percent.

13                  Q     And is that 5 percent high and 5 percent  
14 low of the enumerated value?

15                  A     Yes.

16                  Q     Now you indicated that you run a control  
17 to make sure that the machine is working properly and can  
18 identify different substances, correct?

19                  A     Correct.

20                  Q     In that control is ethanol or ethyl  
21 alcohol one of those controls?

22                  A     It is.

23                  Q     And when running that control, did you  
24 see any problem with this particular run in the machine  
25 identifying ethyl alcohol?

1 A I did not.

2 Q Could the limited amount of isopropanol  
3 affect the result of the defendant's blood in this case?

4 A No.

5 Q And why not?

6 A Isopropanol is isopropanol and the  
7 retention time doesn't even come close to eluding whether the  
8 ethyl alcohol eludes. And in that small of a peak that the  
9 machine picked up as is background noise.

10 Q Now I want to talk a little bit about the  
11 way these peaks come out. When the peaks are when the elements  
12 are heated up in the gas chromatograph, they're released at  
13 certain times throughout the test; is that correct?

14 A That is correct.

15 Q And the elements are released in, based  
16 on size?

17 A Correct. By the size of the molecule.

18 Q So the first peak that you will see on  
19 one of these graphs would be the smaller molecules; is that  
20 correct?

21 A Correct.

22 Q And the last peak would be the higher.

23 A Right.

24 Q Or the greater number of molecules in the  
25 substance.

1 A Yes.

2 Q On these peaks, where does ethyl alcohol  
3 range from isopropanol?

4 A I would have to look at my mix  
5 chromatograph. I believe ethyl alcohol comes at point 62 and  
6 isopropyl alcohol comes at point 81.

7 Q So essentially by that determination,  
8 ethyl alcohol has more molecules than isopropanol; is that  
9 correct?

10 A It has less molecules because it comes  
11 out before the isopropyl alcohol.

12 Q Okay. Is there any way that the  
13 isopropanol found in these runs can affect how much ethyl  
14 alcohol is in the blood?

15 A No.

16 Q Why not?

17 A It's a very tiny amount. And plus, it's  
18 not ethyl alcohol.

19 Q So there's no way, if there's both  
20 isopropyl alcohol and ethyl alcohol that is being determined by  
21 the instrument, the gas chromatograph, they don't stack on top  
22 of each other making the amount of alcohol in defendant's blood  
23 appear higher or lower?

24 A That is correct.

25 Q Defense counsel asked you quite a few

1 questions regarding the blood tubes and kit.

2 SPEAKER: If I may approach, Your Honor.

3 THE COURT: You may.

4 Q (By Speaker) If I can draw your attention  
5 to People's Exhibit 2. Is there a certification on People's  
6 Exhibit 2?

7 A There is.

8 Q And what is that certification for?

9 A The certification says that the kit meets  
10 the Colorado Department of Health regulations for the kit.

11 Q So the fact that you don't know the  
12 manufacturer of the tubes or the lot number of the tubes, the  
13 tubes are still certified by the Colorado Department of Public  
14 Health and Environment?

15 A Yes.

16 MS. JOHNSON: Objection, Your Honor,  
17 foundation for knowledge of that.

18 THE COURT: Sustained.

19 Q (By Speaker) And when I ask you that, is  
20 that on People's Exhibit 2?

21 A No.

22 Q What does People's Exhibit 2 indicate  
23 regarding the certification?

24 A It just says that the kit meets the  
25 requirements for the regulations.

1 Q Defense counsel asked you some questions  
2 regarding how much blood was in the tube and sodium fluoride;  
3 did you remember those questions?

4 A Yes.

5 Q What is sodium fluoride?

6 A Sodium fluoride is a preservative.

7 Q And what does that do in terms of why  
8 it's in the blood tube?

9 A The sodium fluoride, like I said, it's a  
10 preservative. It makes sure that the alcohol does not break  
11 down in the tube.

12 Q And does it keep the blood from  
13 coagulating or clotting?

14 A There is potassium oxalate in the tube  
15 that acts as the anticoagulant.

16 Q If you noticed that there was too much  
17 blood in the tube, would you note that anywhere in your report?

18 A Yes.

19 Q Did you note that there was too much  
20 blood in the tubes?

21 A No.

22 Q And you indicated that you received two  
23 tubes from the Department?

24 A Yes.

25 Q Okay. And you tested the first tube?

1 A Yes.

2 Q What did you do with the second tube?

3 A The second tube, we stored.

4 Q Is your agency or department still in  
5 possession of the second tube?

6 MS. JOHNSON: Objection, Your Honor, this  
7 goes to the knowledge of the possibility that defense and what  
8 has been done with it.

9 THE COURT: Overruled.

10 THE WITNESS: I'm sorry, I forgot the  
11 question.

12 Q (By Speaker) That's okay. Is Chemitox  
13 still in possession of that second tube?

14 A We are not.

15 Q And, Ms. Alex, do you know why there is a  
16 second tube created?

17 A The second tube is the defense's sample.  
18 They can have another lab retest the sample for a result.

19 Q So if they're not satisfied with your  
20 result --

21 MS. JOHNSON: Again, calls for  
22 speculation.

23 THE COURT: Sustained.

24 SPEAKER: I'll withdraw the question,  
25 Your Honor.

1 Q (By Speaker) Defense counsel asked you  
2 about the number of runs that happened before and after  
3 Mr. Dugan's run of his blood; do you remember that question?

4 A Yes.

5 Q Does the affect of a blood sample run  
6 before Mr. Dugan's affect his result?

7 A No.

8 Q And why not?

9 A Because we run his sample in duplicate to  
10 gate close percent range of each other to get an accurate  
11 result.

12 Q Is the coil cleared prior to the running  
13 of Mr. Dugan's sample.

14 A I'm sorry, I don't understand the  
15 question.

16 Q Let me clarify. A sample is injected in  
17 to the machine; is that correct?

18 A Yes.

19 Q And as we know, it goes through that  
20 coil.

21 A Right.

22 Q And it's at that point that it's still  
23 being heated and separated.

24 A Right.

25 Q And by separating, the elements that are

1 in the blood, the standard, as well as the ethanol is being  
2 separated from each other?

3 A Yes.

4 Q Then the machine reads based on how many  
5 molecules, which the smaller come out first, the smaller  
6 elements come out first --

7 A Yes.

8 Q -- how much is actually in the blood; is  
9 that correct?

10 A That is correct.

11 Q And then another sample is run.

12 A Correct.

13 Q Is that coil cleared prior to that next  
14 sample?

15 A We do not run a blank in between every  
16 sample, if that's what you're asking.

17 Q That's correct. That's what I'm asking.

18 A Yeah, we do not run a blank.

19 Q So how do you know, how can you be sure  
20 that there's nothing else in that tube affecting Mr. Dugan's  
21 blood?

22 A Like I said, we run the samples in  
23 duplicate for reproducibility. And we run known standards and  
24 controls to get a proper number within the 5 percent range.

25 Q Ms. Alex, how many tubes of blood have

1 you run in your career with Chemitox?

2 A I don't know exactly, but I've sure I've  
3 tested over 7,500 samples.

4 Q A couple more questions for you regarding  
5 People's Exhibit 4. Defense counsel entered --

6 SPEAKER: If I may approach, Your Honor.

7 THE COURT: You may.

8 Q (By Speaker) A similar copy, Defense  
9 Exhibit G.

10 A Yes.

11 Q Do you have both of those in front of  
12 you?

13 A I do.

14 Q And one of them is signed by your  
15 supervisor; is that correct?

16 A Yes.

17 Q And who is your supervisor?

18 A Jennifer Hoover.

19 Q And one of them is not signed.

20 A That is correct.

21 Q The one that is signed by Ms. Hoover, by  
22 signing that, what has she reviewed before signing that, if you  
23 know?

24 A She reviews the chromatographs as well.  
25 After I review them, she reviews them as well. And then she's

1 the one that uploads the results to generate a report and sign  
2 it.

3 Q So if you have a blood, Defense Exhibit G  
4 in front of you, an unsigned copy, is that prior to her  
5 certifying the copy or certifying the blood test, if her  
6 signature is not on there?

7 A I'm sorry, one more time.

8 Q If you have a copy of the blood results  
9 for Mr. Dugan, one was signed by your supervisor and one was  
10 not, is that because that one that defense counsel has is prior  
11 to her certifying the results?

12 A No.

13 Q Why is that?

14 A This is just a copy of the signed copy  
15 that went out. I can tell by the Chemitox number written on  
16 the side of the paper here that this is the copy that we keep  
17 in our business records. And we don't keep the signed copy on  
18 file.

19 Q Where does the signed copy go?

20 A The signed copy goes to the police  
21 department.

22 SPEAKER: I don't have any further  
23 questions. Thank you for your time.

24 THE COURT: Recross.

25 MS. JOHNSON: Thank you.

1 RECROSS EXAMINATION

2 BY MS. JOHNSON:

3 Q Now, Ms. Alex, deciding that background  
4 peak less than 20 millivolts is irrelevant, what is that based  
5 on?

6 A That is a protocol that Sarah developed.

7 Q Is there any -- do you know of any  
8 scientific basis for that?

9 A No.

10 Q So it's just internal to Chemitox?

11 A Yes.

12 Q Do you know if any other laboratory  
13 follows that?

14 A I don't.

15 Q Now you said that the margin of error was  
16 plus or minus 5 percent?

17 A Yes.

18 Q So that's plus 5 percent as well as  
19 minus.

20 A Correct.

21 Q So a swing of 10 percent basically.

22 A Yes.

23 Q And you also said that as the, that the,  
24 you quantify off of column one.

25 A Yes.

1 Q And column two is just a screen.

2 A Yes.

3 Q You just don't normally use it at all.

4 A We use it to make sure that the same  
5 peaks show up in both samples when it's split.

6 Q And if you notice through the exhibits,  
7 the peak for the isopropanol got larger throughout the run; is  
8 that correct?

9 A I would have to go through and look at  
10 them again.

11 Q Okay. Now you said that isopropanol  
12 doesn't belong in the human blood, correct?

13 A That is correct.

14 Q But isn't it true that it is produced by  
15 diabetics?

16 A No.

17 Q It can't be?

18 A No. Not isopropanol.

19 Q And what do you base that on?

20 A Acetone is produced by diabetics.

21 Q What do you base that on?

22 A That's just what I've been taught.

23 Q And who taught you that?

24 A Sarah.

25 Q So you were taught that isopropanol is

1 totally irrelevant.

2 A No, it's not irrelevant. It's not found  
3 naturally in the human body.

4 Q Well, I'm talking about from someone who  
5 is, has a potential metabolic disease. Diabetes.

6 A I don't know.

7 Q Okay. You also said that the substance  
8 with less molecules came out first. Can you explain what that  
9 means?

10 A As in our volatile mix, we have methanol,  
11 ethanol, isopropanol, acetone and the internal standard.  
12 Methanol is smaller than ethanol, so it will clear the column  
13 first in that. The peak will come out earlier than ethanol.

14 Q So it's not less molecules, it's size of  
15 molecules.

16 A Why.

17 Q Now the district attorney asked you about  
18 the certification on, I believe it's Exhibit 2.

19 A Yes.

20 Q Is there any where on there that says,  
21 other than it's a test kit, what it's certified?

22 A No.

23 Q So we don't know. It's not associated  
24 with anything specifically.

25 A It's associated with that Colorado

1 Department of Health regulation.

2 Q And that's it.

3 A Yes.

4 Q Now you said sodium fluoride is a  
5 preservative.

6 A Yes.

7 Q And basically actually what it does is  
8 not allow glycolysis or the transformation of glucose to  
9 ethanol, correct?

10 A That is correct.

11 Q So it, when you say it doesn't allow  
12 ethanol to be broken down, that's not correct.

13 A It preserves the ethanol in the blood.

14 Q So that more is not created.

15 A Correct.

16 Q And that can be created if, for instance,  
17 the skin is not properly cleaned and it introduces bacteria or  
18 fungus in the specimen.

19 A Yes.

20 Q And there are Department of Health  
21 requirements of how much should be in the tube?

22 A How many sodium fluoride should be in the  
23 tube?

24 Q Yes.

25 A Yes, sir, there is.

1 Q And you don't test that?

2 A No.

3 Q So you don't know how much was in there.

4 A No, I don't.

5 Q And you don't know whether there was any  
6 other problem with it, right?

7 A I don't.

8 Q Now you said that as a business record  
9 you keep the unsigned copy; is that correct?

10 A That is correct.

11 Q And there are requirements for the amount  
12 of potassium oxalate in the tube as well, correct?

13 A That is correct.

14 Q And you don't test for that either.

15 A No.

16 Q And in fact you don't know whether either  
17 of those were in the tube.

18 A I don't know.

19 MS. JOHNSON: Thank you.

20 THE COURT: Do the jurors have any  
21 questions of this witness? Counsel, please approach.

22 (Bench conference held. Not audible.)

23 THE COURT: Ms. Alex, can the BAC be  
24 affected, increased by, the storage temperature?

25 THE WITNESS: It can. If it's not stored

1 properly, the alcohol content can get higher.

2 THE COURT: Can it be affected by using  
3 unsterile bottles?

4 THE WITNESS: That I don't know.

5 THE COURT: Can it be affected or  
6 increased by sodium fluoride?

7 THE WITNESS: It cannot.

8 THE COURT: What elements or mistakes  
9 during the testing process could increase or change the BAC?

10 THE WITNESS: I can't think of any off  
11 the top of my head.

12 THE COURT: And how often do you find  
13 tampered blood?

14 THE WITNESS: I have never seen a  
15 tampered blood tube.

16 THE COURT: Any questions based upon the  
17 jurors' questions?

18 SPEAKER: Just a couple, Your Honor.

19 EXAMINATION

20 BY SPEAKER:

21 Q Ms. Alex, you indicated that you've never  
22 seen a tampered blood tube, but have you come across a blood  
23 tube that was not suitable for testing?

24 A Only in a coroner sample, not a legal  
25 police blood sample.

1 Q And what made that not suitable for  
2 testing, that coroner's sample?

3 A The blood was severely decomposed.

4 SPEAKER: I don't have any further  
5 questions. Thank you.

6 THE COURT: Ms. Johnson.

7 EXAMINATION

8 BY MS. JOHNSON:

9 Q On that vein, what do you consider  
10 tampered with?

11 A If we receive like a box that's smashed  
12 or the blood tube is, like we receive a broken tube or we  
13 receive the blood kit with the tubes in them and it was  
14 obviously sealed and then the seals look like they were broken.

15 Q Okay. So the first two you said the  
16 smashed box or, you couldn't test any way.

17 A Correct.

18 Q So basically when you say, when we say  
19 tampered, you're considering something that wasn't, no longer  
20 maintained its seals.

21 A Correct.

22 Q Now you said that there are specimens  
23 unsuitable for testing.

24 A Yes.

25 Q Would a very short specimen be unsuitable

1 for testing?

2 A A very small specimen? Yes.

3 Q Have you ever seen that?

4 A I have seen that.

5 Q Would a clotted specimen be suitable for  
6 testing?

7 A No.

8 Q So there are specimens that are  
9 unsuitable for testing.

10 A Yes, there are.

11 MS. JOHNSON: Thank you. No further  
12 questions.

13 THE COURT: May this witness be excuse?

14 MS. JOHNSON: Yes. Thank you.

15 SPEAKER: Yes, Your Honor. (Not  
16 audible).

17 THE COURT: You're free to go.

18 THE WITNESS: Thank you.

19 THE COURT: Thank you.

20 SPEAKER: Your Honor, the people would  
21 rest.

22 THE COURT: All right. At this time we  
23 need to take up some legal issues in the courtroom, so we'll  
24 excuse you now back in to the jury room and you can take a  
25 break, but rest assured we'll be working while you're taking

1 your break.

2 (Jurors left the courtroom at this time.)

3 THE COURT: The jury is out of the  
4 courtroom. Are there any, anything that either side needs to  
5 put on the record now that we're outside the presence of the  
6 jury?

7 SPEAKER: Just one thing, Your Honor,  
8 from the people, and there was an objection regarding People's  
9 Exhibit 3, I believe, the certificate, it's People's Exhibit 2,  
10 the certificate regarding the certification of the blood tubes.  
11 The authority that the people used for that certificate, Your  
12 Honor, is 42-4-1301, subsection 6, 3, F, excuse me, 6, 3, F, G  
13 and H. G indicating, Your Honor, that it shall not be a  
14 prerequisite to the admissibility of the test results at trial  
15 that the prosecution present testimony concerning composition  
16 of any test kit used to obtain blood, urine, saliva or breath  
17 specimens.

18 A sufficient evidentiary foundation  
19 concerning the compliance with such kits, with the rules and  
20 regulations of the Department of Public Health and Environment  
21 shall be established by the introduction of a copy of the  
22 manufacturer's or the supplier's certificate of compliance with  
23 such rules.

24 Further, Your Honor, there is a hearsay  
25 objection regarding the officer or the signature of the



1 complies with the CDPHE regulations is fraudulent.

2                   The BD Vacutainer that Ms. Alex said was  
3 in the kit does not comply with the state regulations. I have  
4 a certificate of compliance here which states that the sodium  
5 fluoride can be point 8 to 1.17, which is, if it's point 8, it  
6 is less than the point 9 required by the Colorado Department of  
7 Health and Environment.

8                   It was not tested. We don't know what  
9 was in it. We don't know whether any was in it.

10                   And, therefore, the certification is  
11 fraudulent on its face because it was not tested and we don't  
12 know.

13                   That's the basis for our objection. And  
14 because she didn't know what the lot number is or et cetera,  
15 that information was provided pursuant to an SDT, I do have the  
16 actual certificate of compliance made by (not audible)  
17 Dickinson with regard to the specific tube. If I may approach.  
18 I'll give you a copy, if you want.

19                   For the record, I'll place it in the  
20 court file showing actually, if nothing else, what an  
21 appropriate certificate of compliance should be given the, it's  
22 sealed, it's notarized, there's, someone's actually signing it  
23 under oath. None of which is present in the certificate here.

24                   The certificate here is not associated  
25 with anything. We don't know where it is or where it came from

1 or anything else. There's no company name on it. There's  
2 nothing associated with that certificate to show that it is  
3 associated with the test kit used for Mr. Dugan. There's  
4 nothing on it.

5 So that is the basis of our objection to  
6 that certificate.

7 I do realize the statute says it can come  
8 in, but a fraudulent certificate should not come in, period,  
9 regardless of what the statute says.

10 And that's our basis for objection.

11 THE COURT: All right.

12 MS. JOHNSON: And --

13 THE COURT: Any other record?

14 MS. JOHNSON: -- additionally, we would  
15 move for judgment of acquittal.

16 THE COURT: All right. Any argument?

17 MS. JOHNSON: Your Honor, basically  
18 you've got -- no, we'll stand on the record as it (not  
19 audible).

20 THE COURT: All right. The Court, after  
21 considering the relevant evidence, both direct and  
22 circumstantial, when viewed as a whole in the light most  
23 favorable to the people, is, the Court finds substantial and  
24 sufficient to support a conclusion by a reasonable mind that a  
25 jury could find the defendant guilty beyond a reasonable doubt.

1 And --

2 MS. JOHNSON: We do have one other  
3 objection. The district attorney entered a signed test result,  
4 which the witness stated was not kept as a business record.  
5 They said the unsigned one was. Therefore, since it was  
6 admitted as a business record, we would move to strike that  
7 exhibit since the evidence has shown it is not a business  
8 record, that it was actually sent to the police department,  
9 that's not appropriate for admission.

10 THE COURT: And the Court will deny that  
11 motion. Anything else?

12 SPEAKER: Not from the people. Thank  
13 you, Judge.

14 THE COURT: All right.

15 MS. JOHNSON: No, Your Honor. Thank you.

16 THE COURT: Mr. Dugan --

17 MS. JOHNSON: I think it's appropriate to  
18 give the Curtis.

19 THE COURT: And that's what I was just  
20 about to do. Mr. Dugan, I have an advisement to give to you  
21 regarding your right to testify and your right not to testify.

22 You have a constitutional right not to  
23 testify in this case. If you choose not to testify, the jury  
24 will be instructed not to hold your silence against you or as  
25 an inference of your guilt.

1                   You also have the right to testify. If  
2 you want to testify, no one, even your attorney, can prevent  
3 you from doing so.

4                   If you testify, the prosecution would be  
5 entitled to cross-examine you. And if you have any prior  
6 felony conviction, the prosecution is entitled to ask you about  
7 it and thereby disclose it to the jury.

8                   If you do have -- is there a felony  
9 conviction?

10                  MS. JOHNSON: No, Your Honor.

11                  THE COURT: Okay. Have you had enough  
12 time or do you want to take some time now to speak to your  
13 attorney about whether or not you would like to testify?

14                  THE DEFENDANT: Yes, please. Yes.

15                  THE COURT: All right. Then we'll go  
16 ahead and take a break.

17                  THE DEFENDANT: Thank you.

18                  MS. JOHNSON: Thank you, Your Honor.

19                  THE COURT: The Court will be in recess.

20                  (Recess was taken at this time.)

21                  THE COURT: Thank you. You can be  
22 seated. The Court recalls 11-T-9491, People of the State of  
23 Colorado versus Mark Dugan. And --

24                  MS. JOHNSON: We do have a witness, may I  
25 go get her?

1 THE COURT: Let me just inquire of  
2 Mr. Dugan about his decision. Mr. Dugan, have you had enough  
3 time to speak with Ms. Johnson about your right to testify and  
4 your right not to testify?

5 THE DEFENDANT: Yes, Your Honor.

6 THE COURT: And have you made your  
7 decision?

8 THE DEFENDANT: Yes, sir.

9 THE COURT: And what decision is that?

10 THE DEFENDANT: I will take the stand.

11 THE COURT: You will take the stand?

12 THE DEFENDANT: Yes, Your Honor.

13 THE COURT: And is your decision the  
14 result of any pressure, undue influence or coercion?

15 THE DEFENDANT: No, sir.

16 THE COURT: Are you thinking clearly  
17 today?

18 THE DEFENDANT: Yes, sir.

19 THE COURT: Are you under the influence  
20 of any drugs, alcohol or any intoxicants that would affect your  
21 ability to think clearly?

22 THE DEFENDANT: No, sir.

23 THE COURT: And what is your educational  
24 background?

25 THE DEFENDANT: I've got a high school

1 diploma.

2 THE COURT: All right. And you have one  
3 witness who is going testify before --

4 MS. JOHNSON: Yeah, let me go get her.

5 THE COURT: Mr. Greenblatt, did you have  
6 anything else?

7 SPEAKER: Is his daughter going to  
8 testify first?

9 MS. JOHNSON: Yeah.

10 SPEAKER: All right.

11 THE COURT: We'll bring in the jury.

12 (Jurors were brought into the courtroom  
13 at this time.)

14 THE COURT: All right. Ms. Johnson.

15 MS. JOHNSON: The defense would call  
16 Lindsay Dugan.

17 THE COURT: Ms. Dugan, if you could  
18 please step up here to the witness stand. Please raise your  
19 right hand.

20 LINDSAY DUGAN  
21 was called as a witness on behalf of the defense and having  
22 been sworn, was examined and testified as follows:

23 DIRECT EXAMINATION

24 BY MS. JOHNSON:

25 Q Just have a seat. And this is being

1 recorded, so you need to speak out loud.

2 A Okay.

3 Q Can you please tell the jury your first  
4 name and spell your last name?

5 A Lindsay Dugan, D-u-g-a-n.

6 Q And do you know the gentleman to my  
7 right?

8 A Yes, he's my father.

9 Q How do you know him?

10 A He's my father.

11 Q So you've known him all of your life.

12 A Yes.

13 Q Now this accident happened on the 9th of  
14 September, 2011.

15 A Yes, ma'am.

16 Q Did you see your father that day?

17 A No, not the 9th.

18 Q Did you see him the next day?

19 A I saw him the 10th, yes.

20 Q What did his face look like?

21 A He was tired, obviously. And then he  
22 also had a welt on his forehead.

23 Q So it was a big red spot?

24 A Just a red line, like a dash right here  
25 about an inch, inch-and-a-half long.

1 Q Was it swollen at all?

2 A It was a welt, so it was kind of puffy,  
3 not much though.

4 Q And what about his eyes?

5 A Well, he wears contacts. He has to wear  
6 them. He can't go a day without them. So I've not known a day  
7 that he hasn't worn them.

8 MS. JOHNSON: That's all my questions.

9 Thank you.

10 THE WITNESS: All right.

11 THE COURT: Cross-examination.

12 CROSS-EXAMINATION

13 BY SPEAKER:

14 Q Good afternoon, Ms. Dugan.

15 A Hi.

16 Q Well actually met out in the hall, right?

17 A Yes, we did.

18 Q Okay. Your dad, you care about him,  
19 right?

20 A Well, of course.

21 Q You love him. Yes?

22 A Yes.

23 Q Sorry, we need you to, as Ms. Johnson  
24 said, we need you to answer out loud, okay?

25 A Yes.

1 Q All right. Don't want to see him get in  
2 any sort of trouble --

3 A Well, of course not.

4 Q -- at any point, right?

5 A Yes.

6 Q Okay. Now it's your testimony that in  
7 fact you did not see your dad on the 9th.

8 A No.

9 Q So you don't know where he had been  
10 during the day.

11 A No.

12 Q Right?

13 A Yeah.

14 Q You don't know where he had been at 5:00.

15 A No.

16 Q You don't know --

17 MS. JOHNSON: What day?

18 Q (By Speaker) On the 9th. Correct?

19 A Um-hmm.

20 Q You don't know where he was at 6:00 on  
21 the 9th.

22 A No.

23 Q You don't know where he was at 7:00.

24 A No.

25 Q 8:00.

1 A No.

2 Q 9:00.

3 A No.

4 Q So you don't know if he had been at a  
5 bar, correct?

6 A Yeah.

7 Q You don't know if he had been drinking at  
8 work or anywhere else?

9 A Yeah, I don't know.

10 Q You don't know if he had been drinking  
11 beer.

12 A Yeah.

13 Q You don't know if he had been drinking  
14 wine.

15 A Yep.

16 Q You don't know if he had been drinking  
17 vodka.

18 A Um-hmm.

19 Q In fact you can't tell this jury anything  
20 about what he was doing the day of the accident, right?

21 A Yeah.

22 Q Or even hours just leading up to that  
23 accident.

24 A Right.

25 Q Right?

1 A Um-hmm.

2 Q But you're telling this jury that the  
3 next day you saw him and he had a welt on his forehead.

4 A Yes, sir.

5 Q Do you know what that was from?

6 A No.

7 Q You don't know. He didn't tell you?

8 A Well, he said he had hit his head, but,  
9 on the steering wheel.

10 Q Okay. So that day, a day after, a day  
11 after he had been in an accident --

12 A Um-hmm --

13 Q A day after he had been arrested --

14 A Um-hmm.

15 Q A day after he provided a sample of  
16 blood --

17 A Yep.

18 Q It's not until after all of those things  
19 that he tells you he smacked his head on the steering wheel.

20 A Well, yeah, when I saw him in the morning  
21 afterwards. Yeah.

22 Q Was that a pretty significant aspect to  
23 you?

24 A Maybe. He doesn't smack his head on  
25 things often, so --

1 Q Okay. It was significant enough for him  
2 to tell you the day after, right?

3 A Well, yeah, that's when I saw him, after  
4 the accident.

5 Q Okay. Now you didn't photograph that,  
6 right?

7 A No.

8 Q To your knowledge, your dad didn't  
9 photograph that.

10 A No.

11 SPEAKER: Nothing further, Judge.

12 THE COURT: Redirect.

13 REDIRECT EXAMINATION

14 BY MS. JOHNSON:

15 Q You were not with him on the 9th of  
16 September?

17 A No. I work and he works.

18 Q So there was no time -- and you didn't  
19 see him after the accident until the next day.

20 A After he got home from being in the  
21 accident that night.

22 Q So there was no time or place for him to  
23 tell you anything about it.

24 A He didn't have his phone, so, no.

25 MS. JOHNSON: Thank you. No further

1 questions.

2 THE COURT: Any recross?

3 RECROSS EXAMINATION

4 BY SPEAKER:

5 Q What time did you see him?

6 A In the morning. I get a break from my  
7 job at 10:00.

8 Q Okay. So you saw him -- how long did it  
9 take you to get home from work?

10 A Two minutes.

11 Q All right. So you probably saw him  
12 10:00, 10:15, somewhere in there?

13 A Yeah.

14 Q Do you know where he was from midnight  
15 until that period of time?

16 A Yeah, he was in holding, I guess.  
17 Arapahoe House or whatever that was, for detox.

18 Q Okay.

19 A I think.

20 SPEAKER: Nothing further.

21 THE COURT: Do the jurors have any  
22 questions of this witness? No. Okay. Can the witness be  
23 excused?

24 MS. JOHNSON: Yes, Your Honor. Thank  
25 you.

1 THE COURT: You're free to go.

2 THE WITNESS: Thank you.

3 THE COURT: Thank you.

4 MS. JOHNSON: The defense would call Mark  
5 Dugan.

6 THE COURT: Mr. Dugan, please raise your  
7 right hand.

8 MARK DUGAN

9 was called as a witness on behalf of the defense and having  
10 been sworn, was examined and testified as follows:

11 MS. JOHNSON: Your Honor, the district  
12 attorney has a question.

13 SPEAKER: If we can approach, Your Honor?

14 THE COURT: Did you need to approach?

15 SPEAKER: Yes.

16 THE COURT: Absolutely.

17 SPEAKER: I don't think it affects the  
18 defendant taking the stand though.

19 (Bench conference held. Not audible.)

20 DIRECT EXAMINATION

21 BY MS. JOHNSON:

22 Q Mr. Dugan, you've been accused of driving  
23 carelessly and under the influence of alcohol on the night of  
24 September 9th.

25 A That's correct.

1 Q Now you heard Agent Beers say that you  
2 told him you were on the cell phone.

3 A That is correct.

4 Q Were you?

5 A No, ma'am, I was not.

6 MS. JOHNSON: If I may approach.

7 THE COURT: You may.

8 MS. JOHNSON: I hand to Mr. Dugan what's  
9 been marked as Defendant's Exhibit V.

10 Q (By Ms. Johnson) Now, Mr. Dugan, do you  
11 remember what time the accident occurred?

12 A I believe they said like approximately  
13 9:12, 9:13 p.m.

14 Q Now can you identify that exhibit?

15 A Yes, ma'am. This is my phone record for  
16 my phone.

17 Q Does it show you were on the phone at  
18 9:12, 9:13?

19 SPEAKER: Objection, Your Honor,  
20 foundation. Hearsay.

21 THE COURT: Sustained.

22 Q (By Ms. Johnson) You identified that as  
23 your cell phone record.

24 A Yes, ma'am.

25 Q And did you obtain that record?

1 A I did.

2 Q Is that your, the cell phone record that  
3 your cell phone provider gave you?

4 A Yes, it is.

5 Q Is there -- do they keep it in the  
6 ordinary course of business?

7 A I'm sorry, I didn't understand that.

8 Q That's okay. Is that the bill that you  
9 normally received?

10 A No, ma'am, this is not the bill that I  
11 usually receive. This is the one that I can go online and pull  
12 up my records from. I get a different type of bill.

13 Q And did you do that?

14 A I did, yes.

15 Q To your knowledge is it accurate?

16 A Yes, ma'am.

17 MS. JOHNSON: I believe the foundation  
18 has been laid, Your Honor.

19 SPEAKER: Under what hearsay exception?

20 MS. JOHNSON: I'm not entering that in to  
21 evidence.

22 THE COURT: Then you can't have him read  
23 from it.

24 MS. JOHNSON: Pardon?

25 THE COURT: Sustained.

1 MS. JOHNSON: I'm sorry, I didn't hear --

2 THE COURT: You can't have him read from  
3 it if you're not entering in to evidence. I'm sustaining the  
4 objection.

5 MS. JOHNSON: No further questions then,  
6 Your Honor.

7 THE COURT: All right.

8 SPEAKER: May I have one moment, Your  
9 Honor?

10 THE COURT: You may.

11 SPEAKER: Thank you, Your Honor.

12 CROSS-EXAMINATION

13 BY SPEAKER:

14 Q Good afternoon, Mr. Dugan.

15 A How ya doing?

16 Q I just have one question for you. Is it  
17 your testimony today that you were not on the phone at the time  
18 of the accident?

19 A That is correct, sir.

20 SPEAKER: I don't have any further  
21 questions.

22 THE COURT: Any redirect?

23 MS. JOHNSON: No, Your Honor.

24 THE COURT: Any questions from the jury?  
25 Okay. You can step down, sir.

1 Ms. Johnson.

2 MS. JOHNSON: The defense would rest,  
3 Your Honor.

4 THE COURT: All right. Does lunch sound  
5 good to everybody right now?

6 MS. JOHNSON: Pardon?

7 THE COURT: Take our lunch break right  
8 now?

9 MS. JOHNSON: That's a good idea, Your  
10 Honor.

11 THE COURT: All right. We'll take our  
12 lunch break. We'll come back at a quarter till 1:00. Again,  
13 I'll remind you of the admonition not to discuss the case or  
14 form any opinions. And you're free to eat here or go somewhere  
15 for lunch.

16 MS. JOHNSON: Your Honor, you might make  
17 it later so that we can discuss jury instructions.

18 THE COURT: All right. Let's do 1:00 and  
19 then we'll just take these next 15 minutes to do some legal  
20 stuff. Be back at 1:00.

21 MS. JOHNSON: Thank you, Your Honor.

22 THE COURT: Thank you.

23 (Jurors left the courtroom at this time.)

24 THE COURT: The jury has left the  
25 courtroom. Ms. Johnson, did you have a chance to review the

1 proposed jury instructions?

2 MS. JOHNSON: I have not, Your Honor. I  
3 have been a tad bit busy and that's part of the reason that I'm  
4 going to be spending the lunch hour doing it.

5 THE COURT: Okay. Why don't we come back  
6 at a quarter to 1:00 and work on these jury instructions.

7 MS. JOHNSON: That's fine. Thank you.

8 SPEAKER: Judge, does the Court want to  
9 mark what was previously identified as Defendant's V as in  
10 Victor as tendered, but not accepted.

11 MS. JOHNSON: I didn't tender it.

12 THE COURT: V was not tendered.

13 SPEAKER: Oh, that's true. You're right.

14 THE COURT: Can I have the exhibits  
15 though?

16 SPEAKER: Yeah, I was just going to put  
17 them in order.

18 THE COURT: Great. Thanks.

19 SPEAKER: My apologies.

20 MS. JOHNSON: That's okay.

21 SPEAKER: And, Ms. Johnson, you had  
22 indicated that you had had some proposed instructions.

23 MS. JOHNSON: I am getting them ready.

24 (Recess was taken at this time.)

25 THE COURT: All right. We're back on the

1 record, 11-T-9491. People of the State of Colorado versus Mark  
2 Dugan.

3 SPEAKER: Judge, in going through the  
4 exhibits and making sure they're all accounted for and in  
5 order, it looks like Defendant's U was not admitted. I just  
6 wanted to confirm that.

7 MS. JOHNSON: Defendant's U?

8 THE COURT: Exhibit U? I didn't show  
9 that that was admitted. What was everybody else's record of  
10 that?

11 MS. JOHNSON: We would move to admit it  
12 at this point.

13 SPEAKER: And, Your Honor, our record  
14 (not audible) that it was admitted.

15 THE COURT: Okay.

16 MS. JOHNSON: I thought it was. I  
17 thought I asked to admit all of them.

18 THE COURT: All right. Is that all of  
19 them? All of them that I --

20 SPEAKER: For defense. And then the  
21 people have 1 through 4.

22 THE COURT: Yes, that's what I show as  
23 well.

24 SPEAKER: Okay.

25 THE COURT: Thank you. We'll go off the

1 record.

2 (Recess was taken at this time.)

3 THE COURT: The court recalls 11-T-9491,  
4 the People of the State of Colorado versus Mark Dugan.

5 Ms. Johnson had something that she wanted  
6 to address before we got to the jury instructions.

7 MS. JOHNSON: Yes. I just, Defendant's H  
8 was tendered and refused. I am going to give it to the Court.

9 SPEAKER: Thank you.

10 MS. JOHNSON: If I may approach.

11 THE COURT: Thank you. Did both sides  
12 have a chance to review the proposed jury instructions?

13 MS. JOHNSON: Yes, Your Honor.

14 SPEAKER: Yes, Your Honor.

15 THE COURT: Let's start with the  
16 people's. First of all, is either side requesting the lesser  
17 DWAI instruction?

18 SPEAKER: The prosecution would, Your  
19 Honor.

20 THE COURT: All right.

21 MS. JOHNSON: Since the DA got coffee,  
22 I'm going to go (not audible).

23 THE COURT: Ms. Johnson?

24 MS. JOHNSON: Yes.

25 THE COURT: Any objection to the people's

1 proposed instructions?

2 MS. JOHNSON: Yes, Your Honor. I believe  
3 the one for the defendant does not have to testify, as well as  
4 the discrediting witnesses convicted of a felony do not need to  
5 be given.

6 SPEAKER: And I would agree with that,  
7 Your Honor. I just left them in there not knowing who or what  
8 may happen.

9 THE COURT: Yeah.

10 MS. JOHNSON: We would also, for the  
11 record, object to the lesser included.

12 THE COURT: Okay. Do you want to make  
13 any record?

14 MS. JOHNSON: Pardon?

15 THE COURT: Did you want to make any  
16 record regarding that objection?

17 MS. JOHNSON: That's not what he's  
18 charged with, so we would object to it being given.

19 THE COURT: Okay. The Court will find  
20 that the prosecution's entitled to the lesser driving while  
21 ability impaired instruction.

22 All right. Any other objections to the  
23 people's proposed instructions?

24 MS. JOHNSON: Just that I'm used to  
25 seeing the definitions of the elements of DUI to include the

1 substantially incapable section that the district attorney has  
2 included under the definitions. And we would object to them,  
3 we would object to them being separated by (not audible).

4 I think that it's more appropriate that  
5 driving under the influence, what it means actually the law  
6 says that it is a, that those are specific elements of the  
7 crime of driving under the influence and not definitions.

8 THE COURT: Your response, Mr. Frigo?

9 MR. FRIGO: Your Honor, the definitions  
10 section is part of our standard jury instructions. And I mean  
11 if the Court disagrees and Ms. Johnson disagrees with the  
12 placement of it, that's something that I can surely manipulate.  
13 However, I think the jury should be instructed as to what the  
14 definition of DUI is.

15 MS. JOHNSON: Your Honor, I believe that  
16 it says basically that he was, the elements are that he was  
17 substantially incapable, either mentally or physically or both  
18 mentally and physically, to exercise clear judgment, sufficient  
19 physical control and due care in the operation of the vehicle.  
20 And that is an element on the definition.

21 THE COURT: These are the instructions  
22 that have been approved by the supreme court, so the Court will  
23 overrule the objection from the defense as to the form of those  
24 instructions.

25 Anything else? Any other objections to

1 the people's --

2 MS. JOHNSON: No, Your Honor.

3 THE COURT: Mr. Frigo, any objection to  
4 the defendant's proposed jury instructions?

5 MR. FRIGO: Yes, Your Honor.

6 THE COURT: All right.

7 MR. FRIGO: I don't know which the Court  
8 would like to start with.

9 THE COURT: Well, we can start with the  
10 Roybal instruction regarding the voluntary consumption of  
11 alcoholic beverages. Do you object to that one?

12 MS. JOHNSON: That is from *People v.*  
13 *Roybal*, Your Honor, 655 P.2d 410, page 413, Supreme Court of  
14 Colorado, 1982.

15 MR. FRIGO: Your Honor, the people do not  
16 object to that.

17 THE COURT: Okay. The next  
18 instruction --

19 MR. FRIGO: Which is which one, Your  
20 Honor?

21 THE COURT: Yeah, I was reading over it  
22 before I described it. Laboratories licensed by the Colorado  
23 Department of Public Health are required to have a qualified  
24 laboratory director.

25 MR. FRIGO: And, Your Honor, the people

1 would object to this as well. This is --

2 MS. JOHNSON: I'm not sure which one the  
3 Court is referring to.

4 THE COURT: Regarding the qualified  
5 laboratory director.

6 MS. JOHNSON: Okay.

7 MR. FRIGO: Your Honor, I don't believe  
8 that there was any testimony elicited either on direct or  
9 cross-examination regarding duties of a lab director in this  
10 case. While it may be a regulation, it's for administrative  
11 purposes, not a statement of law as it applies to this case.

12 THE COURT: Your response.

13 MS. JOHNSON: That basically the witness  
14 testified that many, many things that her lab director did and  
15 she had no idea about it. So that's the basis for that jury  
16 instruction.

17 And it is based in 5 CCR 1005-2.

18 THE COURT: The Court will sustain the  
19 objection to this instruction finding that it's not supported  
20 by the evidence presented to the jury in the case.

21 MS. JOHNSON: It needs to be marked as  
22 tendered and (not audible).

23 THE COURT: Next one is instructions for  
24 the collection of human bodily fluids.

25 MS. JOHNSON: The basis for that is, Your

1 Honor, is 21 Code of Federal Regulations part 820. And it is  
2 certainly applicable. The collection kit was testified to and  
3 it is a correct statement of the law. I would be glad to  
4 provide the Court with a copy of the 21 CFR part 820 so the  
5 Court can confirm that.

6 THE COURT: Mr. Frigo?

7 MR. FRIGO: Your Honor, the people would  
8 object for the same reason in this case. There's been no  
9 testimony regarding the regulation by the Food and Drug  
10 Administration in this case.

11 I believe that's some of the issues that  
12 were litigated in the motions hearing as well. And Judge  
13 Greene did not let defense counsel get in to the Food and Drug  
14 Administration regulations with regard to a blood kit.

15 Further, Your Honor, I think it just is  
16 confusing to the jury. Defense counsel can surely argue that  
17 there could have been something wrong with the blood kit for  
18 whatever reasons per the testimony she's elicited. But it's  
19 not grounded in Colorado case law. We would object for that  
20 reason.

21 MS. JOHNSON: It's grounded in federal  
22 law clearly, Your Honor. It's a direct statement of the  
23 federal law. And what the kit must contain. And the contents  
24 were testified to by the officer as well as the certification  
25 was admitted in to evidence.

1                   And the requirements for that should be  
2 before the jury. Although Judge Greene determined they are not  
3 relevant, they are clearly relevant to whether the test kit was  
4 an appropriate kit. And specifically whether it should be  
5 accepted as such.

6                   THE COURT: Okay. The Court will sustain  
7 the objection to the proposed defense instruction finding that  
8 the Food and Drug Administration regulations are not relevant  
9 to the determination of the facts to the law that the jury  
10 needs to make. And, therefore, sustains the objection.

11                   The next instruction is regarding the  
12 Colorado Board of Health rules for blood testing, 7.11.

13                   MR. FRIGO: Your Honor, there are several  
14 of those --

15                   MS. JOHNSON: They're alternative --

16                   THE COURT: Well, one's 7.11 and the  
17 other is, oh no. Okay. So the first instruction is the longer  
18 one that has more of the sections of the Colorado Board of  
19 Health rules. The next instruction is a portion of those  
20 sections.

21                   Any objection to either of these  
22 instructions, Mr. Frigo?

23                   MR. FRIGO: Yes, Your Honor. The people  
24 would object on the same grounds that these are a confusion of  
25 the issues for the jury, that they're not supported by Colorado

1 case law --

2 MS. JOHNSON: They -- Your Honor, this  
3 Court is responsible for instructing the jury on the law. And  
4 this is the law of the State of Colorado. It's found in 5 Code  
5 of Colorado Regulations 1005-2. And it is a direct statement  
6 of what the law is.

7 And it, basically, much of this was  
8 testified to within the trial. And, therefore, the jury should  
9 be instructed on what the law is.

10 MR. FRIGO: And, Your Honor, I believe  
11 that this is also a back door to defense counsel's exhibit that  
12 she just tendered to the Court that was denied by the Court.  
13 The Court did not let in the Colorado Rules and Regulations  
14 with regard to the Board of Health rules as part of the  
15 evidence in the case. So there's no reason why, in my opinion,  
16 that the Court should allow those same, the substance of the  
17 same rules in a jury instruction.

18 MS. JOHNSON: Your Honor, the exhibit  
19 that the Court denied is much, much more extensive than this  
20 instruction, obviously.

21 THE COURT: The Court will find that the  
22 Colorado Board of Health rules, well, Colorado regulations  
23 would not assist the jury or is not the law that the jury is to  
24 follow in the determination that they need to make today.

25 While testimony was given regarding

1 compliance with certain rules and certain procedures, that was  
2 relevant to the cross-examination of a particular witness, but  
3 the actual Board of Health rules, the Court will find, would  
4 not assist the jury and is not proper.

5 The Court will mark those as tendered,  
6 but not given.

7 On the same basis, the Court is not going  
8 to give the instruction regarding Colorado Board of Health  
9 being a scientific and deliberative body.

10 MS. JOHNSON: That, Your Honor, is  
11 supported by case law, *People v Bauer*, 716 P.2d 471, Colorado  
12 1986. So that is supported by case law, which was part of the  
13 district attorney's objection.

14 MR. FRIGO: May I have that case again?  
15 716 P.2d --

16 MS. JOHNSON: P.2d 471.

17 MR. FRIGO: Thank you. Which one are you  
18 talking about here? He's talking about this second one here.

19 MS. JOHNSON: He said that he was talking  
20 about the scientific (not audible).

21 MR. FRIGO: And, Your Honor, just to  
22 clarify, referring to the second Colorado Board of Health Rules  
23 enumerating 7.1.2, correct?

24 THE COURT: No, that one I've already  
25 determined is not --

1 MR. FRIGO: All right. So we --

2 THE COURT: I've moved on to the Colorado  
3 Board of Health is a scientific and deliberative body charged  
4 with establishing protocols.

5 MR. FRIGO: Your Honor, I believe that  
6 the first paragraph is an accurate statement of the law. I  
7 believe that the second paragraph is argument.

8 THE COURT: So you have no objection to  
9 that first paragraph?

10 MR. FRIGO: As cumbersome as that might  
11 be to reproduce this without --

12 MS. JOHNSON: I don't have that ability,  
13 Your Honor. I'm sorry.

14 MR. FRIGO: Perhaps we can type it up  
15 quickly and e-mail it to your clerk.

16 THE COURT: That would be great. And I  
17 think what we would also like to do is the other instruction,  
18 the defense instruction, if we could put it in to the same form  
19 so that it reads the same way. The *Roybal* instruction --

20 MS. JOHNSON: The consumption of alcohol  
21 (not audible) is not inconsistent.

22 THE COURT: Do you have the ability to  
23 e-mail that to my clerk?

24 MS. JOHNSON: I don't have them on my  
25 laptop, Your Honor. My computer at work --

1                   MR. FRIGO: Perhaps that's something we  
2 can type up fairly quickly. Mr. Greenblatt would love to. I  
3 have a copy of it, Your Honor.

4                   THE COURT: Thanks.

5                   MR. FRIGO: And that's the voluntary  
6 consumption of alcohol?

7                   THE COURT: And in the first paragraph,  
8 the Board of Health is a scientific and deliberative body in a  
9 separate instruction.

10                   And then the final proposed defense  
11 instruction is Colorado law does not require the laboratory  
12 protocols used to analyze blood, et cetera. Any objection to  
13 that instruction?

14                   MR. FRIGO: The people would be objecting  
15 to that, Your Honor. I don't believe that there's any  
16 testimony to support this instruction. Again, I don't know if  
17 there's a case on this out there that I don't know about that  
18 supports this instruction either.

19                   MS. JOHNSON: I'm sorry, I'm shuffling  
20 papers.

21                   MR. FRIGO: I'm sorry.

22                   MS. JOHNSON: I believe that that again a  
23 based in the actual code (not audible).

24                   MR. FRIGO: Your Honor, again, there's  
25 been no testimony regarding a laboratory director, what her

1 role, her job would be in a particular case.

2 THE COURT: The Court will sustain the  
3 objection of the people and that instruction will not be given  
4 to the jury.

5 And with regard to the order, we have the  
6 cover page first. There's a place for jury instruction number  
7 on the cover page, does anybody ever number those?

8 MR. FRIGO: I apologize, Your Honor.

9 THE COURT: Does anybody ever number the  
10 cover page?

11 MR. FRIGO: No, Your Honor.

12 THE COURT: There's just a place for it,  
13 so I wasn't sure.

14 And then the first instruction will be  
15 the introductory instruction, members of the jury.

16 The second is the charge, defendant is  
17 charged with committing.

18 Instruction 3, the presumed innocent  
19 charge instruction.

20 Next, the mere number of witnesses does  
21 not necessarily prove or disprove.

22 Five, deciding what testimony to believe.

23 Six, evidence may be direct or  
24 circumstantial.

25 Seven will be the written questions

1 instruction.

2 Eight will be the separate offense

3 instruction.

4 Nine will be the expert witness

5 instruction.

6 Ten will be defendant's statements.

7 Any objection to doing the elementals

8 first and then the definitions?

9 MR. FRIGO: No, Your Honor, I would

10 prefer it that way that the elements would be before the

11 actual --

12 THE COURT: And then --

13 MR. FRIGO: By the elements, Your Honor,

14 I mean the due regard and the strict liability instruction

15 first and then the elements.

16 THE COURT: Any objection to that?

17 MS. JOHNSON: I believe that without due

18 regard is one of the definitions, so I would prefer that that

19 comes after the careless driving (not audible).

20 THE COURT: Well, since it's an

21 instruction regarding the culpable mental state and then we go

22 in to the elements, I think that --

23 MS. JOHNSON: I believe, Your Honor,

24 without due regard is again part of the definition, it's not a

25 mental state.

1 THE COURT: Is it reversible error if I  
2 just make up my mind what sounds more logical?

3 MS. JOHNSON: I believe it's more logical  
4 to give the elements of the crime of careless driving and then  
5 go in to the mental state with regard to that or with the  
6 definition of what without due regard is.

7 THE COURT: All right. I think I agree.  
8 What we'll do is we'll do the elementals first. So instruction  
9 11 will be the elements of driving under the influence.

10 MS. JOHNSON: And then you give the per  
11 se next?

12 THE COURT: I was going to do it in the  
13 order, Count 1 first, Count 2 would be the careless driving.  
14 So that would be Jury Instruction 12. And then the per se  
15 would be Jury Instruction 13. And then the DWAI instruction,  
16 14.

17 MS. JOHNSON: Which one?

18 THE COURT: The lesser included.

19 MR. FRIGO: It starts if you are not  
20 satisfied beyond a reasonable doubt. And that would be 14,  
21 Your Honor.

22 THE COURT: Yes.

23 MR. FRIGO: It's the two-page one.

24 THE COURT: And we'll do the, a crime is  
25 committed when the defendant has committed a voluntary act as

1 15.

2 DUI careless, DUI per se, definitions,

3 16.

4 17 will be in the (not audible) with  
5 driving under the influence or driving while ability impaired  
6 by alcohol and the BAC instructions.

7 MS. JOHNSON: The bailiff instruction,  
8 Your Honor, has Tammy Greene's name on it. I think that should  
9 (not audible).

10 MR. FRIGO: It does. I apologize. If I  
11 can just go grab my computer, I can bring it in here.

12 THE COURT: Okay. That would be great.

13 MR. FRIGO: It's still in A.

14 THE COURT: Okay.

15 MR. FRIGO: Mr. Greenblatt can pull it up  
16 on his.

17 THE COURT: All right. And then 18 will  
18 be the Roybal instruction. The voluntary consumption of  
19 alcoholic beverages is not inconsistent with the ability to  
20 lawfully operate a motor vehicle.

21 19 will be the Colorado Board of Health  
22 instruction, the first paragraph of defendant's proposed  
23 instruction.

24 And then the DUI with the lesser DWAI  
25 verdict form. The careless driving verdict form. And the DUI

1 per se verdict form.

2 MR. FRIGO: And then there should be one  
3 other verdict form, correct, Your Honor? Regarding the lesser  
4 included?

5 MS. JOHNSON: That was the first one.

6 THE COURT: That was the first one.

7 MR. FRIGO: I'm sorry.

8 THE COURT: DUI and DWAI.

9 MS. JOHNSON: So you're not going to use  
10 the one that's strictly driving under the influence. You're  
11 going to use the one with the --

12 THE COURT: With the lesser included --

13 MS. JOHNSON: -- DWAI lesser included on  
14 it.

15 THE COURT: Right.

16 SPEAKER: Sorry, Judge, it's just taking  
17 some time. Judge, would you like your middle name too?

18 THE COURT: That's okay.

19 MS. JOHNSON: I would like to just kind  
20 of off the record point out that it's been very difficult for  
21 me to hear the rulings from the bench because you're not  
22 speaking in to the microphone.

23 THE COURT: Thanks for letting me know.

24 MS. JOHNSON: I'm just letting you know.  
25 I appreciate that.

1 THE COURT: Let me turn up the --

2 MS. JOHNSON: And if you get people with  
3 hearing aids, it's going to be --

4 THE COURT: I'll just turn up my  
5 microphone a little bit --

6 MS. JOHNSON: That doesn't always work  
7 either. You get feed back.

8 THE COURT: It's up pretty high. Okay.  
9 Will both sides be able to keep the closing argument to 20  
10 minutes?

11 MS. JOHNSON: I suspect so, Your Honor.

12 MR. FRIGO: Your Honor, if I could just  
13 get a halfway point, a ten-minute warning.

14 THE COURT: Okay. A verbal one or?

15 MR. FRIGO: A verbal is fine.

16 THE COURT: Okay.

17 (Recess was taken at this time.)

18 SPEAKER: Judge, I also did redo that  
19 cover page for you so that it doesn't have jury instruction  
20 number and then a blank.

21 THE COURT: Okay. Except Stuart is  
22 spelled u-a, not a-u.

23 MR. GREENBLATT: That was Mr. Frigo. I  
24 was trying to go fast.

25 THE COURT: Any reason why I can't just

1 mark that out with a pen?

2 MR. FRIGO: It is your first jury trial,  
3 we should probably try to get that right.

4 THE COURT: That's okay.

5 MR. FRIGO: Morgan has it on her  
6 computer, she can just correct it right there and print a copy  
7 real fast.

8 THE COURT: Okay. And, Ms. Johnson, did  
9 you have a chance to review what the district attorney typed  
10 up?

11 MS. JOHNSON: I have, Your Honor. And  
12 except for the objections already stated, I have no objections.

13 THE COURT: All right. Anything else  
14 before we bring the jury in?

15 SPEAKER: Not from the people, Your  
16 Honor. Thank you.

17 MS. JOHNSON: No, Your Honor. Thank you.

18 THE COURT: All right.

19 MS. JOHNSON: Except I renew our motion  
20 for judgment of acquittal.

21 THE COURT: All right. And on the same  
22 standard, the Court will deny that motion.

23 (Jurors were brought into the courtroom  
24 at this time.)

25 THE COURT: The jury has been seated.

1 (Jury instructions were read to the jury  
2 at this time.)

3 THE COURT: Prosecution can give their  
4 closing argument at this time.

5 MR. FRIGO: Thank you, Your Honor. We  
6 have asked from the beginning, from our opening argument that  
7 you just follow the evidence. That's been the game plan all  
8 along. And that continues and remains to be the game plan for  
9 the prosecution.

10 We have to prove each and every element  
11 of the three crimes beyond a reasonable doubt. And what does  
12 that mean?

13 We talked about testimony during jury  
14 selection and where that evidence comes from. The evidence  
15 comes from here. This is evidence. Someone sitting, telling  
16 you what they observed and what they didn't.

17 Evidence doesn't come from where I stand  
18 and Mr. Greenblatt stands and defense counsel stands. This is  
19 not evidence.

20 So if I were to ask a question, isn't it  
21 true there's contamination in the blood? That's not evidence.  
22 That's just a question. The answer, no, there's not  
23 contamination in the blood. That's the evidence. And that's  
24 what you can consider.

25 You cannot speculate because someone asks

1 you to speculate. That's not going to work here.

2 Everyone is entitled to their own  
3 opinion, but not everyone is entitled to their own facts.

4 And what are the facts? What is the  
5 evidence? Well, we know we have Sheeba, I'm not going to use  
6 her last name because I'm terrible at pronouncing it, she's not  
7 here, so I hope she's not offended. Sheeba comes up here and  
8 testifies that she's sitting at this stoplight. And there's  
9 talk about the scene, this is a stoplight. It's a red light  
10 indicating cars to stop.

11 She indicated there were three cars in  
12 front of her. So now there's three cars with their brake  
13 lights on.

14 Next to those three cars, you're going to  
15 get this picture entered by defense counsel, there's traffic  
16 cones. She testified, and the officer testified, that the  
17 accident happened in the lane closest to the traffic cones.

18 Well, what does that tell a sober person?  
19 A stoplight, brake lights, traffic cones at night with  
20 reflective tape. Slow down. Slow down. And that's what sober  
21 people do. They pay attention to what's happening in front of  
22 them and around them. They slow down.

23 So why is this case important? The case  
24 is important because the defendant's BAC was a point 238. Why  
25 is that significant? Because drunk people on the road cause

1 accidents. That's what happened here.

2 She indicated her car was totalled. She  
3 looked in the rear-view mirror, she had been sitting at that  
4 stoplight for 30 seconds to one minute. This wasn't that  
5 circumstance that we talked about during jury selection when  
6 people slam on their brakes and there's chain reactions. This  
7 is not a chain reaction. There was no evidence of that. She  
8 was there for 30 seconds to one minute.

9 She doesn't know the defendant,  
10 Mr. Dugan. She's got no reason to come up here and say, you  
11 know, after speaking with him for a while, I noticed that he  
12 was intoxicated.

13 That didn't come at the suggestion of  
14 someone else in her car. That didn't come at the suggestion of  
15 the officer. That came from him. I noticed that he was  
16 intoxicated.

17 And what do people do that are in trouble  
18 and know that they've made mistakes, that they've broken the  
19 law? They try to deal their way out. They come up with  
20 excuses. Hey, let's not call the police. I can take care of  
21 this. I can just give you some money. That's what she  
22 testified to. She has no reason to say that. What's her bias?

23 She's calling the police. There's no  
24 evidence that there was no insurance in the case. She's  
25 calling the police. The defendant is trying to get himself out

1 of this situation because he knows he broke the law.

2                   And that's corroborated by the officer.  
3 Officer Beers or Agent Beers didn't come in here and say, hey,  
4 I talked to Sheeba and she told me that he was intoxicated so I  
5 walked up to him. There was no presumption there.

6                   When he walked on to the scene, he hadn't  
7 spoken to Sheeba, he hadn't spoken to Mr. Dugan. He made the  
8 assumption or he made the observation that defendant was  
9 intoxicated based on speaking with him. I noticed the odor of  
10 alcohol. I noticed the accident. I noticed the bloodshot,  
11 watery eyes. I noticed when I asked him for his driver's  
12 license that he flipped passed it in his wallet several times.

13                   Now the officer or the agent talked about  
14 divided attention tests. And that sober people, it's easier  
15 for them to understand and to do multiple tasks at one time.

16                   One of those tests is, as the officer  
17 testified, he asks for your license, your insurance and your  
18 registration. Three separate tasks at one time. And he's  
19 watching you as he gives you the tasks.

20                   Defendant is flipping through his wallet,  
21 still can't find his ID. His most common piece of  
22 identification in his pocket, his driver's license, and he has  
23 trouble finding it.

24                   At this point, the officer puts him  
25 through the series of roadblocks. Again, we have corroboration.

1                   Now defense counsel wants you to believe  
2 that, well, maybe the tests weren't done correct. Maybe the  
3 lighting wasn't correct. Maybe the road wasn't exactly how it  
4 should have been. But it's the totality of those roadsides  
5 that we should be taking in to consideration.

6                   The fact that he scored a six out of six  
7 on the horizontal gaze nystagmus. And the officer testified  
8 that he didn't perform that as a sober person.

9                   That he failed the walk and turn. That  
10 it was four clues out of eight on the walk and turn. Two  
11 initially and then two during the test.

12                   And then there's the one-leg stand and it  
13 was two clues on the one-leg stand.

14                   And I'm sure you all took notes, I  
15 watched you take notes throughout the entire trial. And don't  
16 use me and Mr. Greenblatt and defense counsel to refresh your  
17 memory, you should have that. You should rely on your own  
18 memory and your own notes.

19                   Closing argument aren't evidence. It's  
20 much like me standing (not audible). I'm relaying what the  
21 evidence was from the witness stand.

22                   So defense counsel cross-examined  
23 extensively regarding the standard field sobriety tests and all  
24 of these issues with the standard field sobriety tests. And  
25 how do we know? How do we know? How do we know? This is how

1 we know. We corroborate it. We take the observations of  
2 indicia of alcohol. We take the roadsides and then we have a  
3 blood test. Everything, one plus one plus one equals three.

4 And the indicia, the accident, the  
5 roadsides and the blood tests equal that the defendant was  
6 substantially incapable of driving the car on that date.

7 And what is Agent Beers bias? What was  
8 his reason for making these up, for saying that the defendant  
9 did something that he didn't.

10 You're not allowed to speculate. Defense  
11 counsel asked many questions about, well, you don't know if he  
12 has allergies. You don't know if he had caffeine in his  
13 system, that can cause HGN. Or how do you know that it wasn't  
14 diabetes that caused the blood to be so high? That's  
15 speculation. There was no one here that testified to anything  
16 like that.

17 And on the date in question the defendant  
18 never brought that, if that is the case, to the officer's  
19 attention. It seems pretty appropriate.

20 There was no one here, not even the  
21 defendant when he testified, testified that he's diabetic, that  
22 he drank a bunch of caffeine and that caused his HGN or that he  
23 had cigarettes and nicotine and that causes HGN. Pure  
24 speculation. It's an attempt to draw your eyes away from what  
25 really happened. Keep your eye on the ball.

1                   We talk a lot about the elements that we  
2 have to prove beyond a reasonable doubt. And you'll get these  
3 elements in the jury instructions that the Judge has already  
4 previously read to you.

5                   Careless driving, that the defendant, no  
6 question here. In the State of Colorado at or about the date  
7 or place charged, we know it's in Jefferson County. We know it  
8 happened September 9th of last year. Drove a motor vehicle, no  
9 question, the defendant admitted that he was driving that  
10 vehicle on that date. In a careless or imprudent manner  
11 without due regard for width, grade, curves, corners, traffic,  
12 and use of the streets or highways and all other attendant  
13 circumstances.

14                   Are we really arguing here? Are we  
15 arguing that there's an accident? Are we arguing that the  
16 accident was caused by the defendant? That he wasn't paying  
17 attention by his own admission, I was not paying attention.  
18 This should take you 30 seconds to find the defendant guilty of  
19 careless driving.

20                   Under the influence, excuse me, that the  
21 defendant, in the State of Colorado, on or about the date  
22 charged, drove any vehicle while under the influence of  
23 alcohol. Now there's inferences that can be drawn and we'll  
24 get to those inferences, but I want to go to the next  
25 instruction first.



1 (not audible)? Off the chart.

2 Driving around in Jefferson County,  
3 causes an accident. That's why we have these levels.

4 When you go back in to the jury room,  
5 please keep in mind that Mr. Greenblatt's and my duty is to  
6 prove the case beyond a reasonable doubt, not a doubt based on  
7 speculation. And a reasonable doubt is not beyond all doubt.

8 We can all say that we were not there on  
9 this date to observe the alcohol and the indicia on the  
10 defendant's breath, his bloodshot and watery eyes. We can all  
11 say that we weren't there for that blood draw. We could all  
12 say that we weren't there when the test was run by Erin Alex.

13 But your analysis is beyond a reasonable  
14 doubt, not beyond all doubt.

15 I would ask you to find him guilty of  
16 those three charges.

17 MS. JOHNSON: Thank you.

18 THE COURT: Ms. Johnson, would you also  
19 like a ten-minute warning?

20 MS. JOHNSON: Pardon?

21 THE COURT: Would you also like a  
22 ten-minute warning?

23 MS. JOHNSON: No, thank you.

24 THE COURT: All right. Now I want to  
25 talk a little bit about reasonable doubt and what it means.

1 The district attorney has hit on beyond a reasonable doubt.  
2 And it's not beyond a reasonable doubt, it's actually beyond  
3 every reasonable doubt on every element of every charge.

4 And the question is whether he has  
5 fulfilled that obligation.

6 Now it's not a smidgen of evidence. And  
7 it's not a suspicion. And it's not probable. And it's not  
8 preponderance or more likely than not. And it's not even clear  
9 and convincing. It's not even with a reasonable doubt.

10 No, it's beyond that. You must be  
11 convinced beyond all reasonable doubt, beyond any reasonable  
12 doubt every element of every charge.

13 Now the district attorney has also said  
14 that you should look at the evidence and I agree.

15 Let's look at what Ms. Ibiidunni said.  
16 She said she didn't notice he was intoxicated. The only thing  
17 she noticed was an odor of alcohol. And an odor of alcohol is  
18 not enough. He acted normally. He walked normally.  
19 Everything was fine. He gave her his information. They  
20 exchanged information. So he had to have had his license out  
21 at that point to exchange the information. She had that.

22 So the question is, did she notice he was  
23 intoxicated? No. She never said he was intoxicated.

24 And question about her car, the district  
25 attorney has said that it was totalled. Well, it was a

1 17-year-old car, 16-year-old car, whatever. And old cars, when  
2 they're hit, cost money to repair them. And frequently, it's  
3 not worth it to repair an old car. That's common sense.

4 And she wasn't really sure about a lot of  
5 things. And she said, again, 30 seconds to a minute she was  
6 stopped there. And she wasn't real sure about that. Give or  
7 take.

8 So the question is, the outcome is we  
9 don't really know how long she was sitting there.

10 And the district attorney made a point of  
11 looking, showing you the picture and that the light was red and  
12 there was traffic, well, you can't see the light. It's covered  
13 by the bridge. So, yes, the light may have been red. But that  
14 doesn't mean Mr. Dugan could see it.

15 So the question is, did he appear to  
16 Ms. Ibidunni to be intoxicated? And answer is, no.

17 Now the next question is the roadsides.  
18 You heard from the officer and he had done roadsides many, many  
19 times and he showed you how to do them. And if you noticed, he  
20 was wiggling slightly. I apologize, I'm trying to show you, I  
21 have difficulty myself, which is not evidence and I admit that  
22 and I apologize for the comments, but the question is, he kept  
23 saying they were tests, but they're not pass, fail. Have you  
24 ever taken a test that wasn't graded? That wasn't pass and  
25 fail and give or take? He based his decision on these tests.

1                   And when you were in school and you were  
2 taking tests, what did it take to pass them? Was it 50  
3 percent? Was it 70 percent?

4                   In this case the test, for instance, on  
5 the walk and turn, you had nine steps, you had an instruction  
6 phase, you had nine steps up, you had the turn and you had nine  
7 steps back. You had approximately 20 different chances to make  
8 mistakes and it only took two to fail.

9                   So the question is, was that fair? You  
10 know, Mr. Dugan wasn't told the purpose of the test. He wasn't  
11 told what was passing and failing. He didn't get to practice.  
12 He didn't, basically, get told anything other than the  
13 instructions, standing in the roadway, traffic going by, night,  
14 under a bridge with little light. Because as the officer said,  
15 there's light at one end, there's light at the other. Well,  
16 there isn't any light under the bridge.

17                   No lights, traffic passing, stressful  
18 situation. People are stressed when they're stopped by a  
19 police officer. The officer is standing there in uniform  
20 saying, I'm going to test you.

21                   Anxious. Had just had an accident.  
22 Could have been in shock.

23                   The officer asked, do you have any  
24 medical conditions? What does that mean? He didn't explain  
25 what the question meant. He knew there had been an accident.

1 He did not ask, did you hit your head? Do you have problems  
2 from the accident? No, he said, do you have medical  
3 conditions?

4 Many people think medical conditions  
5 means something serious, back injury, broken leg. It doesn't  
6 mean I have something that he hasn't been diagnosed for or  
7 checked out or anything else. It's medical conditions.

8 So the roadsides were done in a very  
9 stressful position, situation.

10 And you heard from Ms. Dugan, Mr. Dugan's  
11 daughter, that he told her the next day he had hit his head.  
12 And that there was a red lump on his forehead. And he had not  
13 been home in the meantime. So that was a source of many  
14 problems.

15 And you heard the officer say he gave the  
16 HGN test. And he was standing 12 to 15 inches from Mr. Dugan.  
17 And he didn't notice at all that he was wearing contacts. But  
18 he did notice that he had vertical gaze nystagmus. And he told  
19 you that that could be an indication of serious problems, but  
20 he didn't check on it. He didn't stop the test. He just said,  
21 oh yeah, it's there.

22 He knew that there had been an accident.  
23 He knew frequently there are complications, that there are  
24 ramifications of an accident. But he went ahead with the tests  
25 any way. He didn't, even given that he noticed the vertical

1 gaze nystagmus, he didn't ask and insist that Mr. Dugan be  
2 checked out. He just plowed right ahead.

3 So the walk and turn, it's difficult to  
4 do.

5 SPEAKER: Objection, Your Honor, that's  
6 an improper comment.

7 THE COURT: I'll overrule the objection.  
8 The closing arguments are argument, not evidence. And you are  
9 to not take them as evidence. Only the evidence that's  
10 presented during the course of the trial you can --

11 MS. JOHNSON: You've been instructed once  
12 like Mr. Dugan was. Go back and try it and see whether you can  
13 do it stone cold sober.

14 SPEAKER: Your Honor, I'm going to object  
15 to that as well, putting the jury in the shoes of the  
16 defendant, as improper.

17 THE COURT: Sustained.

18 MS. JOHNSON: Now again the officer  
19 stated that Mr. Dugan had heels on his boots and asked whether  
20 they were comfortable. But he also told you that the manual  
21 recommends that you not do the test if you have two inch or  
22 greater heels.

23 And the option of taking them off was  
24 given. Well, this was a construction zone. It's gravel, dirt,  
25 et cetera. He didn't offer to provide other shoes. So taking

1 them off and doing them barefoot could very easily have been  
2 very uncomfortable. But that option wasn't, to put on  
3 different shoes wasn't given to him. Just, well, you can take  
4 them off.

5 It was a cool night. 9:15, 9:20 at  
6 night. It's not something that a reasonable person would do.

7 He didn't let him practice. He didn't  
8 let him try it out. And indeed said, stand there until I tell  
9 you to start the test, but he had already started the test. He  
10 was grading Mr. Dugan on what he did during the instruction  
11 phase.

12 So the next point is the line that he did  
13 them on. There are lines on the pavement. Did he use an  
14 actual line? No. He took his flashlight, shined it and then  
15 turned it off and said, use the line. It's in your  
16 imagination. Use the line. And then decided in his mind  
17 whether he stepped off of it.

18 Didn't ask Mr. Dugan where the line went.  
19 Didn't say, Mr. Dugan, it must be going from here to here.  
20 Straight line. He said, there it is, turned it off, do it.

21 So his decision that he stepped off the  
22 line is based on his own idea of what the line was, not  
23 Mr. Dugan's.

24 And as I stated, he wasn't graded on a  
25 curve. Miss two and you're out. You've failed.

1                   The one-leg stand, again, two inch heels.  
2   It's not recommended that you do it with those high of heels,  
3   but he did it any way. And the only question was, are you  
4   comfortable? Are your shoes comfortable? That isn't the  
5   question.

6                   So again, didn't explain it. Didn't  
7   explain the scoring. Didn't explain what was going to happen.  
8   Didn't give written instructions. Didn't allow him to  
9   practice. Just said, foot six inches and stand there and  
10   count. Didn't tell him how long it would be. Just sit there  
11   with your foot up six inches and count.

12                  And again, in the walk and turn, there  
13   are eight different ways to fail at each step.

14                  On the one-leg stand there's four ways to  
15   fail. But did he explain that to Mr. Dugan? No.

16                  So the roadsides are pretty questionable.  
17   He didn't stop when he noticed there was vertical gaze  
18   nystagmus. He didn't stop when he, Mr. Dugan had two-inch  
19   heels. He just plowed right ahead. Even though there was an  
20   accident, could have been a head injury, he didn't even bother  
21   to ask, he just asked for medical conditions.

22                  And now let's turn to the blood test.  
23   You've heard extensive testimony from the tech who basically, a  
24   large percent of the time, her answer was, I don't know. She's  
25   a button pusher. She comes in, pushes the button on the -- she

1 mixes the tube by vortexing it, not by inversion. She's not  
2 gentle with it. It's a vortex. She pipettes a very small  
3 amount, 100 microliters, a tenth of a milliliter in to a large  
4 vial, 20 milliliter vial with a little bit of again, roughly 20  
5 times the amount of internal standard pipetted there. And puts  
6 it on the machine.

7 She assumes the pipette is working  
8 correctly. She assumes the machine is working correctly.

9 She pressing the button and out come the  
10 result.

11 She agreed that there were extra peaks on  
12 the test print out, the chromatograph. Again, the machine is a  
13 chromatogram. The printout is a chromatograph. Like telegram  
14 and telegraph.

15 She didn't know why they were there. She  
16 kept telling you that they were background noise. But the  
17 background noise decision was made by her supervising saying,  
18 well, anything below that, we get to ignore. We don't know why  
19 it's there. Don't know what it means. But we get to ignore  
20 it.

21 She admitted, she doesn't know whether  
22 there are other problems with the run, whether there might have  
23 been other contamination. She doesn't know. She said that.

24 SPEAKER: Objection, Your Honor. That's  
25 misstating the evidence.

1                   THE COURT: Again, I would remind the  
2 jury that you have to rely on your own recollection of what the  
3 evidence was, not what the attorney's recollection of that may  
4 be. Closing argument is just that, argument.

5                   MS. JOHNSON: So we have a person who  
6 pushes buttons for a living. And she gets a print out and she  
7 says, well, okay, it's a peak there, but I can ignore it, and  
8 sends the result out.

9                   And the result basically, she doesn't  
10 sign off on it. It's not her job to do that. She just sends  
11 it out.

12                   And the blood test kit is certified. But  
13 look at that certification. It doesn't tell you what company  
14 did it. It doesn't tell you anybody, any name, nobody signed  
15 saying, I am certifying that, under oath that that is true. It  
16 just says, oh, yeah, there it is.

17                   There are no lot numbers on there, so we  
18 don't know what was in there actually, just a simple list.  
19 There are no batch numbers on there.

20                   We don't know whether it refers to the  
21 kit that was used in this case or just is there. We don't know  
22 whether they were expired or not. We don't know anything about  
23 them.

24                   And she told you that the Colorado  
25 Department of Public Health and Environment has requirements

1 for a blood test. There are requirements for the amount of  
2 sodium fluoride. And that is because it has to be enough to  
3 stop any --

4 SPEAKER: Objection, Your Honor, defense  
5 counsel is now testifying to the purpose and affects of sodium  
6 fluoride --

7 THE COURT: Sustained.

8 MS. JOHNSON: The witness told you that  
9 the affects of sodium fluoride is to stop any growth of  
10 bacteria or fungus so that the alcohol level will not be  
11 elevated. But she didn't test to see whether there was a  
12 correct amount. She didn't test to see there was at least the  
13 point 9 percent. She doesn't know. She just printed the test  
14 out.

15 And she doesn't know whether the proper  
16 amount of potassium oxalate was there. She just printed the  
17 test out.

18 So we don't know whether this test was  
19 good or not, whether it complied with the regulations or not.  
20 And the regulations are there.

21 So they are asking you to believe, based  
22 on a piece of paper that has no names, no identifying numbers,  
23 no nothing, that this is good.

24 And they're asking you to believe that  
25 even though there's extra peaks and that that's background

1 noise, that this run is good and you should believe it.

2                   And the tech, Ms. Alex, didn't know  
3 whether it was refrigerated properly, didn't know whether it  
4 was handled properly.

5                   The officer didn't know whether he kept  
6 the test kits at a proper temperature. He didn't know anything  
7 about it. He just put them in his duty bag and carried them  
8 around.

9                   He doesn't rotate the stock. He doesn't  
10 know how long they had been in there.

11                   So they're asking you to accept  
12 everything is good without any knowledge.

13                   And they don't know whether there's any  
14 affects of any of that.

15                   The answer kept coming back, I don't  
16 know, from both the officer and the tech. I don't know. And  
17 that, ladies and gentlemen, is reasonable doubt.

18                   The officer's decision not to pay any  
19 attention to the vertical gaze nystagmus, the officer's  
20 decision to not follow the recommended procedure of not doing  
21 it when there's two-inch heels, the officer's decision not to  
22 use an actual line on the pavement instead of a flashlight  
23 that's turned off, the officer's decision that he can, that  
24 the, even though Mr. Dugan was walking normally and talking  
25 normally and looked normal, that, with all of these tests,

1 which could have had another physical reason for the results,  
2 he decided he could make the decision any way that he was  
3 possibly intoxicated. And that is reasonable doubt.

4 And the tech doing the test, seeing extra  
5 peaks, but they're too low, they're not big enough to make a  
6 difference --

7 THE COURT: Ms. Johnson --

8 MS. JOHNSON: -- that's reasonable doubt.

9 THE COURT: And the tech that doesn't  
10 know whether and when things are calibrated and checked and  
11 that's reasonable doubt.

12 SPEAKER: Your Honor, I'm going to object  
13 to that as well, as misstatement of the facts.

14 THE COURT: Again, I'll remind you to  
15 only base your deliberations on the evidence that you heard and  
16 what you remember.

17 Ms. Johnson, your time is up, so if you  
18 would like to wrap up now, please.

19 MS. JOHNSON: Ladies and gentlemen, there  
20 is doubt galore in this case. And Mr. Dugan, the district  
21 attorney must prove beyond every reasonable doubt, every one,  
22 that he's guilty and he has not done so.

23 You must find Mr. Dugan not guilty.

24 THE COURT: Any rebuttal argument?

25 SPEAKER: Thank you, Judge. When you all

1 walked in the door yesterday, it seems like a long time ago,  
2 but when you walked in those doors, not actually those doors,  
3 next door, those doors, you walked in with your life  
4 experience. You walked in with your common sense.

5                   And when you stood after you were picked  
6 to be one of these six jurors and you took that oath by that  
7 Judge, you did not promise to give up your common sense. You  
8 did not promise to use your common sense. You did not promise  
9 to use your life experience when looking at facts, evidence and  
10 testimony. And in fact, that's your duty as jurors.

11                   So let's look at this. Reasonable doubt,  
12 you have this instruction, it says, it is a doubt which is not  
13 vague, speculative or imaginary. This is extremely important  
14 and significant because if you look back at the questioning  
15 that was conducted by defense on the witnesses, isn't it  
16 possible, could it, couldn't he have seen it out of the corner  
17 of his eye, possibly didn't this happen, possibly didn't that  
18 happen. What is that? That's speculation. That's imaginary.

19                   Reasonable doubt is not those things.  
20 Reasonable doubt is something that when you're using your  
21 common sense and you're looking at facts, the evidence and the  
22 testimony and something just isn't adding up, that's not what  
23 we have in this case.

24                   So what is it that they're asking you to  
25 do? They're asking you to speculate and imagine a situation

1 that the facts don't support.

2                   They're asking you to speculate and  
3 imagine that the officer did not do his job correctly, that the  
4 EMT did not do his job correctly, that Mr. Kotke with Chemitox,  
5 the individual who received the pack did not do his job  
6 correctly, that Ms. Alex did not do her job correctly, that  
7 CDPHE, the Colorado Department of Public Health and Environment  
8 did not do their job correctly.

9                   In short, everyone messed up except him.  
10 That's what he asking you. That everyone else involved in this  
11 case screwed up except for me.

12                   Members of the jury, use your common  
13 sense. Ms. Johnson argues, well, the officer, he didn't tell  
14 him what clues he was looking for. Of course not. He's not  
15 going to give him an opportunity to cover up what he's trained  
16 to have to look for indicia of impairment.

17                   Well, she's also upset that the officer  
18 didn't give him an opportunity to practice the test. Well,  
19 again, of course not. He's not going to tell you, this is what  
20 clues (not audible) and if you're drunk or not, go ahead and  
21 practice this is few times. Are you ready? Okay. And then  
22 look. It doesn't make sense for the officer to do that.

23                   And I pose this question, why is it that  
24 an individual would need practice walking when he's been doing  
25 it for apparently 45 years give or take? It doesn't make

1 sense.

2 Common sense, you need to look at the  
3 evidence or in fact the lack thereof. You have a jury  
4 instruction that tells you that also.

5 Let's start with Ms. Dugan, his daughter.  
6 She told you that, yeah, I saw him the next day, I didn't see  
7 him at all on the 9th, I saw him the next day and he had a bump  
8 on his head. What didn't she tell you? She didn't tell you  
9 that he came home and said oh, it was a bad arrest. It was a  
10 false arrest. I wasn't intoxicated --

11 MS. JOHNSON: Objection, Your Honor, this  
12 is speculation.

13 SPEAKER: Judge, I can comment on lack of  
14 evidence.

15 THE COURT: Again, closing argument is  
16 just that, argument. And just rely on your own recollection of  
17 the evidence in the case.

18 SPEAKER: She didn't tell you, after he  
19 had just spent a night in detox, after he just had been  
20 arrested and is seeing his daughter for the first time, guess  
21 what happened to me? I was falsely arrested. I was falsely  
22 accused. I spent a night in detox when I wasn't intoxicated at  
23 all. I simply didn't see the red light. And we'll talk about  
24 what he claims he did see or didn't see. You didn't hear any  
25 of that. Why? Because that's not what happened.

1                   But if that were in fact what happened --  
2                   MS. JOHNSON: Again, Your Honor, this is  
3 speculation.

4                   THE COURT: Overruled.

5                   SPEAKER: If that were in fact what were  
6 to have happened, it would make sense for the daughter to come  
7 up and testify to that. Instead, no, he had a bump. And I  
8 asked her, okay, well, there's no documentation of that? No.

9                   But lo and behold, a month later they go  
10 out and document the area. But when he's supposedly injured in  
11 this accident to the point where it's affecting his ability to  
12 do these maneuvers and basically making him appear, in their  
13 belief, to be intoxicated, they don't document that.

14                   And when given the opportunity, (not  
15 audible). And in fact, what she could not tell you was what he  
16 was doing that day. She couldn't tell you what he was doing on  
17 the day of the accident. She couldn't tell you what he was  
18 doing the hours leading up to the accident. She couldn't tell  
19 you he wasn't out drinking.

20                   When it comes to the facts and elements  
21 that we have to prove in this matter, she could not tell you  
22 anything.

23                   So when you are presented with multiple  
24 explanations or possible explanations, the simplest one is  
25 usually the correct one. And what is the simplest explanation?

1 He had been drinking that day. He had been drinking to the  
2 point where he was unable to safely operate his motor vehicle.

3 But how do we know that? There was a  
4 stopped car. There was a line of traffic. Okay. He can't see  
5 the stoplight, we'll give him the benefit of the doubt on that.  
6 What about the three cars where the stoplight is in front of  
7 that? What about the construction barrels in his own exhibits  
8 that were there that night? And these aren't construction  
9 cones, members of the jury, you've seen these driving, they're  
10 big orange, bright orange construction barrels. Couldn't see  
11 those either?

12 Why? He had been impaired. His judgment  
13 had been compromised.

14 But it doesn't stop there. He gets out  
15 of the car and tries to get her to not call the police and  
16 offers to cover it all right there on the spot. Why? Because  
17 he knows he's in trouble. Because he's been drinking.

18 And she smelled the alcohol on him. This  
19 wasn't a point that she was being interviewed by the law  
20 enforcement. No, she told you, I smelled it before I even  
21 called the cops.

22 She has no motivation to come in here and  
23 make up, she had never met him before. The officer had never  
24 met him before. Ms. Alex had never met him before. No bad  
25 blood between anyone.

1                   It goes on. It's consistent. The  
2 officer then smelled alcohol on him. The officer saw all of  
3 these clues on him.

4                   And what's important is that the officer  
5 told you he observe the defendant pass over his license  
6 multiple times. Ms. Johnson just told you, well, he already  
7 had it out once to show the victim. So if he already had it  
8 out minutes earlier, why would he pass over it several times  
9 minutes later when the officer is there? Because his judgment  
10 has been compromised. Why? Because he was drinking.

11                   The HGN, there are built in fail safes.  
12 The officer told you about the test and what he looks for. He  
13 looks for equal pupil size, equal tracking. Because if those  
14 aren't present, it's indicative to him that there could be  
15 something else going on and he's not going to run those tests.  
16 None of that was present.

17                   The vertical gaze nystagmus, he told you  
18 that's indicative of extreme intoxication. And he told you and  
19 Ms. Johnson told you that was present. Vertical gaze nystagmus  
20 was present.

21                   The walk and turn, he missed heel to toe.  
22 The officer told you if they miss it by six inches or more, I  
23 mark that. And if they step off the line, I mark that.  
24 Whether it's an imaginary line, and I asked him on redirect  
25 quite pointedly, I said, is this something that you're telling

1 them just to go ahead and walk a line, but you have an  
2 imaginary line in your own head? He said, no, it's literally  
3 just walking step to step. And he showed you at the witness  
4 stand stepping off the line is coming away from a linear  
5 fashion. He demonstrated that for you with his hands.

6 Now let's talk about the blood test  
7 quickly, that there are other peaks. Okay. Sure. But what's  
8 important about those other peaks is that they were consistent  
9 across the board. That's how fine in precision this instrument  
10 is. It was detecting them across the board.

11 Why is that important? Because it's  
12 telling you that the machine is operating correctly. If they  
13 had been in some and not in others, then we've got a problem.  
14 But it's across the board, they're all there.

15 And what else did Ms. Alex tell you?  
16 Isopropanol doesn't affect ethyl alcohol. It's two different  
17 elements. They don't impact one another.

18 And she told you it's a plus or minus 5  
19 percent margin of error. Okay. Give him the benefit of the  
20 doubt, point 226, still above the legal limit.

21 And for driving with excessive alcohol  
22 content what we have to prove is that it was him driving that  
23 motor vehicle at that date and that time and that his BAC was  
24 above point 08 within two hours. That's it.

25 What you heard is that the accident

1 happened around 9:11, 9:13 somewhere in there, that's when  
2 officers arrived. So give him the benefit of the doubt and go  
3 back ten minutes, 9:00. The blood draw was at 9:59. That's  
4 within two hours.

5 THE COURT: Mr. Greenblatt, you need to  
6 wrap up.

7 MR. GREENBLATT: Members of the jury,  
8 when you go back in to that room use your common sense. Follow  
9 the facts, follow the evidence and follow the testimony.

10 Give him the benefit of the doubt on the  
11 numbers, he's still over the limit.

12 And his one out, his one out that he had  
13 was that he was possibly on the phone, no, he told you himself,  
14 I wasn't on the phone.

15 The only other explanation, his judgment  
16 had been compromised.

17 Find him guilty.

18 THE COURT: Members of the jury, the  
19 bailiff will now escort you to the jury room. Upon reaching  
20 the jury room, you are to select one of your members to be the  
21 foreperson of the jury. Your foreperson will preside over your  
22 deliberations and shall sign whatever verdicts you reach.

23 Each verdict must represent the  
24 considered judgment of each juror. In order to return a  
25 verdict, it is necessary that each juror agree to it. Each

1 verdict must be unanimous.

2                   You will be provided with verdict forms  
3 as to each charge. When you've unanimously agreed upon your  
4 verdict, you will select the portion of each form which  
5 reflects your verdict.

6                   Each form, there's one for each count, if  
7 you find the defendant not guilty of that charge, you would  
8 sign the top portion of this. If you find the defendant  
9 guilty, you would sign the bottom portion.

10                   The driving under the influence and the  
11 lesser included of driving while ability impaired has an option  
12 if you find the defendant guilty of one of those two.

13                   The foreperson will complete the portion,  
14 if necessary sign that portion, and the verdict forms shall be  
15 returned with no other markings on them.

16                   No inferences are to be drawn from the  
17 order in which the Court reads the verdict.

18                   At this time I'll swear in the bailiff.

19                   (Bailiff was sworn in at this time.)

20                   THE COURT: You can follow the bailiff  
21 out of the courtroom now.

22                   (Jurors left the courtroom at this time.)

23                   THE COURT: The jury has left the  
24 courtroom. Anything that either side would like to put on the  
25 record?

1 SPEAKER: Not from the people, Your  
2 Honor. Thank you.

3 MS. JOHNSON: No, Your Honor.

4 THE COURT: Okay. And where will you be?  
5 What number should we call to reach you?

6 MS. JOHNSON: I will be hanging around  
7 the courthouse actually.

8 THE COURT: Okay.

9 MS. JOHNSON: Let me give you my cell  
10 phone number.

11 THE COURT: All right.

12 SPEAKER: Your Honor, we will be in  
13 victim witness.

14 THE COURT: Okay.

15 SPEAKER: 6550. Is that correct?  
16 Extension 6550.

17 THE COURT: All right. Thank you. And  
18 thank you counsel for your presentation of the evidence.

19 (Recess was taken at this time.)

20 MS. JOHNSON: Are you going to have the  
21 defendant stand or not?

22 THE COURT: I will have him stand. And I  
23 actually have another instruction that I have to read to the  
24 jury that I didn't bring in with me, so I will step off the  
25 bench for a moment and grab that and then we'll bring the jury

1 in.

2 MS. JOHNSON: Okay.

3 (Recess was taken at this time.)

4 THE COURT: Anything before we bring the  
5 jury in?

6 SPEAKER: No, thank you.

7 THE COURT: All right.

8 (Jury was brought into the courtroom at  
9 this time.)

10 THE COURT: Members of the jury, have you  
11 selected a foreperson?

12 JUROR: Yes.

13 THE COURT: Is that you, Ms. Weing,  
14 Simpson.

15 JUROR: Simpson, yes.

16 THE COURT: Please hand the bailiff,  
17 excuse me, hand the verdict to the bailiff.

18 JUROR: Do you want (not audible) too?

19 THE COURT: You can give that to her as  
20 well. Thank you.

21 Mr. Dugan, if you and your attorney could  
22 please rise. As to Count 1, we the jury find the defendant,  
23 Mark Anthony Dugan guilty of driving under the influence.

24 As to Count 2, the charge of careless  
25 driving, we the jury find the defendant, Mark Anthony Dugan,

1 guilty of careless driving.

2 As to Count 3, the verdict reads as  
3 follows: We the jury find the defendant, Mark Anthony Dugan,  
4 guilty of driving under the influence per se.

5 Ms. Simpson, is this, is the verdict as  
6 read accurate?

7 JUROR: Yes, sir.

8 THE COURT: And was it unanimous?

9 JUROR: Yes, sir.

10 THE COURT: Does either side request a  
11 polling of the jury?

12 MS. JOHNSON: We do, Your Honor.

13 THE COURT: Okay. Ms. Thomas, was the  
14 verdict as read your verdict?

15 JUROR: Yes.

16 THE COURT: Ms. Hall, was the verdict as  
17 read your verdict?

18 JUROR: Yes.

19 THE COURT: Sir, was the verdict as read  
20 your verdict?

21 JUROR: Yes.

22 THE COURT: Ms. Bell, was the verdict as  
23 read your verdict?

24 JUROR: Yes.

25 THE COURT: Ma'am, was the verdict as

1 read your verdict?

2 JUROR: Yes.

3 THE COURT: And madam foreperson, was the  
4 verdict as read your verdict?

5 JUROR: Yes, sir.

6 THE COURT: All right. You have now  
7 completed your duties as jurors in this case and are discharged  
8 with the thanks of the Court.

9 The question may arise whether you may  
10 now discuss this case with the lawyers, defendants or other  
11 persons. For your guidance, the Court instructs you that  
12 whether you talk to anyone is entirely your own decision.

13 It is proper for others to discuss the  
14 case with you and you may talk with them, but you need not.

15 If you talk to them, you may tell them as  
16 much or as little as you would like about your deliberations or  
17 the facts that influenced with your decision.

18 If any person persists in discussing the  
19 case over your objection or becomes critical of your service  
20 either before or after any discussion has begun, please report  
21 it to me or my staff.

22 All right. Thank you. And the bailiff  
23 will escort you back to the jury room. And if you could just  
24 hold on for a few minutes, I would like to come back and talk  
25 to you.

1 (Jurors left the courtroom at this time.)

2 THE COURT: All right. I think based  
3 upon the blood alcohol level we'll need to order an alcohol  
4 evaluation.

5 SPEAKER: Agree, Your Honor.

6 THE COURT: Are there priors?

7 MS. JOHNSON: No.

8 SPEAKER: I don't believe there are  
9 priors, Your Honor.

10 THE COURT: Okay.

11 MS. JOHNSON: This can go to immediate  
12 sentencing, Your Honor.

13 THE COURT: I would like to have an  
14 alcohol evaluation based upon the blood alcohol level.

15 MS. JOHNSON: I just want to check  
16 because the jury did not find over point 2, so I don't think  
17 that you can --

18 SPEAKER: He was found guilty on  
19 everything.

20 THE COURT: Well, the --

21 MS. JOHNSON: (Not audible) over a point  
22 2, what is a sentence enhancer.

23 SPEAKER: That's correct. And the Court  
24 (not audible) regarding sentencing (not audible) --

25 MS. JOHNSON: That's correct. But I'm

1 saying --

2 SPEAKER: The people would ask the Court  
3 to find the sentence enhancer in this case.

4 THE COURT: The Court will find, based  
5 upon the evidence presented, that the blood alcohol level was  
6 above a point 2 and will request or order an alcohol  
7 evaluation.

8 MS. JOHNSON: Because the jury did not  
9 find that, we would object to that, Your Honor. This is a jury  
10 trial and the jury must find that fact in order for the Court  
11 to sentence him based on that.

12 And if the Court wants me to bring case  
13 law concerning that, I will.

14 THE COURT: Well, at sentencing, I'll  
15 certainly allow you to do so.

16 MS. JOHNSON: Thank you.

17 THE COURT: So Mr. Dugan, you're ordered  
18 to cooperate with that alcohol evaluation. And you can see my  
19 clerk about getting the documentation that you need for that.

20 THE DEFENDANT: Yes, sir.

21 THE COURT: Okay. Anything else?

22 SPEAKER: Judge, will Your Honor let them  
23 know that it was, at least I'll be sticking around, I don't  
24 think Mr. Frigo (not audible) but Ms. Johnson (not audible) as  
25 well, if they're wanting to chat, I always find it beneficial

1 to get feedback. But it's up to them.

2 THE COURT: And in the courtroom?

3 SPEAKER: Wherever's, defer to them.

4 THE COURT: All right. Thank you very  
5 much.

6 MS. JOHNSON: Thank you.

7 SPEAKER: Thank you, Your Honor.

8 (WHEREUPON, the digitally recorded  
9 proceeding concluded.)

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TRANSCRIPTIONIST'S CERTIFICATE

I, Kristie R. Karol-Chik, transcriptionist, duly appointed to transcribe the digitally recorded proceeding, certify that I have transcribed the hearing and the above is a true and correct transcribed copy of that digitally recorded hearing.

DATED this 23rd day of December, 2012.

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Kristie R. Karol-Chik  
Transcriptionist