

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

STATE OF DELAWARE,

v.

ID
Nos. 131000034
1309012464

DILIP NYALA,
MICHAEL IRWIN

Defendants.

BEFORE: HON. WILLIAM C. CARPENTER, JR., J.

TRANSCRIPT OF OCME EVIDENTIARY HEARING

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July 10, 2014
Courtroom No. 8C
10:00 a.m.

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DEPARTMENT OF JUSTICE
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for State of Delaware

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1 THE COURT: Good morning, everyone.

2 Mr. Collins, you may proceed.

3 MR. COLLINS: Thank you, Your Honor. We call
4 Joseph Bono.

5 JOSEPH BONO,

6 having been first called by the Defense was sworn
7 on oath, was examined and testified as follows:

8 DIRECT EXAMINATION

9 BY MR. COLLINS:

10 Q. Good morning, Mr. Bono.

11 A. Good morning.

12 Q. What is your current position?

13 A. I am currently an independent forensic
14 consultant.

15 Q. How long have you been doing that?

16 A. Since 2008.

17 Q. What is an independent forensic consultant?

18 A. I am currently available to consult mostly in
19 the areas of forensic laboratory accreditation and also
20 in the area of the federal analog case also going
21 through the courts right now.

22 Q. Explain what that is?

23 A. Federal analog case is a case that is brought

1 that deals with or involves the Federal Analog Act,
2 Controlled Substances Act, and definition of what
3 constitutes an analog for purposes of going forward
4 with prosecution, chemical trace aspects of those being
5 charged.

6 Q. Briefly, before your current position, what
7 did you do?

8 A. Before 2008, 2008 to 2011, I was also had a
9 graduate teaching appointment at Indiana University,
10 Purdue University in the forensic investigative
11 sciences program teaching graduate level courses in
12 forensic science in the law.

13 Q. And have you ever managed any forensic drug
14 laboratories?

15 A. Yes, sir I have.

16 Q. How many?

17 A. Five.

18 Q. Explain some of the recent drug labs that you
19 managed?

20 A. Most recent was in 2006, 2007, lab director of
21 the United States Secret Service laboratory in
22 Washington D.C.; prior to that, in terms of being a
23 laboratory director, I was laboratory director of the

1 DEA special testing research laboratory in McLean,
2 Virginia, later became Douglas, Virginia. Also I was
3 lab director of DEA Mid Atlantic in Washington, D.C.,
4 the Naval Criminal Investigative Service, which at that
5 time was NIS, regional forensic laboratory Europe in
6 Naples, Italy. Also lab director of St. Louis County
7 police department in laboratory in Clayton, Missouri.

8 Q. You may have to slow down for the court
9 reporter. Describe your education?

10 A. Bachelor of Science degree in chemistry from
11 the University of Missouri, also Master of Arts degree
12 in political science, emphasis in forensic science in
13 the courtroom.

14 Q. You have been present for the vast majority of
15 this hearing, right?

16 A. Yes, sir.

17 Q. Relevant to the proceedings in this case, are
18 you a member, or hold any positions in any relevant
19 professional societies.

20 A. I am past president of the American Academy of
21 Forensic Science, which includes 11 different sections
22 one of which is the criminalistics section which
23 includes forensic drug chemistry, also jurisprudence

1 section of the American Academy of Forensic Sciences
2 and going back to 2007, 2007, through I think 2005,
3 2006, I was tasked in 1997 with formulating the
4 scientific working group analysis of seized drugs,
5 otherwise known a SWGDRUG. I stayed with that, up
6 until the time I retired from DEA, at the time I left
7 DEA in 2006.

8 Q. When you say formulated SWGDRUG, what is that?

9 A. That means the scientific Working Group for
10 Analysis of Seized Drugs, that organization set not
11 standards, we set recommendations internationally for
12 best practices in forensic drug chemistry.

13 Q. What did you do, I don't understand what you
14 mean you helped formulate SWGDRUG?

15 A. 1997, my supervisor came to me and said I want
16 to start, that time it was SWGDRUG. So I was
17 responsible back in 1997, laying the groundwork in
18 inviting the initial group of people who would attend
19 that meeting to decide exactly what kind of a protocol
20 we are going to follow in terms of setting
21 recommendations for forensic drug analysis.

22 Q. Have you ever testified as an expert witness
23 in any jurisdiction?

1 A. Yes, sir.

2 Q. How about Delaware?

3 A. Never testified in Delaware.

4 Q. What other jurisdictions, you don't have to
5 list every one; what are some of the areas which you
6 have testified?

7 A. Sure, testified in State federal Court in
8 Missouri, testified in federal courts in Maryland,
9 Virginia, Alabama, California, Hawaii, testified in
10 military court in Arizona, Yuma, Arizona. That is just
11 a cross section.

12 MR. COLLINS: May I have a moment with
13 counsel, Your Honor.

14 THE COURT: Yes.

15 (Discussion held off the record.)

16 BY MR. COLLINS:

17 Q. When you do testify as an expert, normally
18 what sort of topics do you testify to? You have
19 already mentioned analog drug cases. You are
20 testifying in essence as a chemist on those?

21 A. Yes, sir.

22 Q. That plus what other topics do you testify
23 about as an expert?

1 A. Analysis of controlled substances. I have
2 also been called to testify on laboratory accreditation
3 issues.

4 Q. What sort of body would you be testifying
5 about laboratory accreditation issues?

6 A. That is usually on a State level, last
7 testimony was in Ft. Bennett County, Texas which is
8 right outside of Houston. I testified in a capital
9 murder case regarding the accreditation standards where
10 they asked to render an opinion whether they were being
11 met in a laboratory that rendered an opinion in that
12 case.

13 MR. COLLINS: We have premarked Mr. Bono's CV.
14 I move the admission of his CV and a biography that he
15 also submitted.

16 MR. GRUBB: No objection, Your Honor.

17 THE COURT: Admitted without objection.

18 THE CLERK: So marked.

19 BY MR. COLLINS:

20 Q. Did I hire you to serve as an expert in the
21 cases of State versus Nyala, and State versus Irwin?

22 A. Yes.

23 Q. In connection with that, did I ask you to

1 draft a report?

2 A. Yes, you did.

3 Q. I have a copy of your report. I would like to
4 ask you a couple questions about it. Your report is
5 termed preliminary, just reading from the first
6 section. The following is a preliminary opinion
7 letter. Why is it termed preliminary?

8 A. It is termed preliminary because I believe I
9 signed that report yesterday morning, and that letter
10 was based on what information I gathered up to that
11 point yesterday, both in the attendance of this hearing
12 on, I think, Tuesday afternoon. I also based that
13 letter on information that I received from your office
14 regarding documents associated with this case.

15 Q. So would it be fair to say that the testimony
16 you are going to give today is based on your report
17 through yesterday morning, and then additional
18 information you learned from yesterday's testimony?

19 A. Yes.

20 MR. COLLINS: Your Honor, I move the admission
21 of Mr. Bono's expert report, already been marked, I
22 believe.

23 MR. GRUBB: No objection, Your Honor.

1 THE COURT: Okay.

2 THE CLERK: Exhibit 2 so marked.

3 MR. COLLINS: I have extra copies. Would the
4 Court --

5 THE COURT: Obviously I haven't seen it since
6 he wrote it yesterday. That would be helpful.

7 MR. COLLINS: Those are extra copies. The
8 ones admitted are premarked.

9 BY MR. COLLINS:

10 Q. Back to what you started to say about the
11 materials reviewed. I furnished materials to review in
12 this case, right?

13 A. Yes.

14 Q. You listed them all on the report on page two?

15 A. Yes, I did.

16 Q. In addition to actual documents, materials
17 listed, would it be fair to say your report is based
18 also on testimony from this hearing?

19 A. Report is based on testimony up to the date I
20 signed it, also including information that was
21 garnered, that I heard on Tuesday afternoon.

22 Q. I would like to turn to the issue of
23 accreditation. Are there accreditation standards in

1 place for forensic controlled substance labs?

2 A. Yes.

3 Q. Base on your training and experience, do you
4 have familiarity with the accreditation process?

5 A. Yes, I do.

6 Q. How so?

7 A. I was responsible for the accreditation of the
8 eight DEA laboratories, which I got in that process in
9 1996, but more importantly was a member of the American
10 Society of Crime Laboratory Directors, laboratory
11 accreditation board which I was elected to the board of
12 directors. I served in that position from 2001 to
13 2005. During that time, we were implementing, we being
14 the accredited body, ISO 17025 standards.

15 Q. On page 20 of the Department of Justice
16 Preliminary Report, I am assuming you reviewed that
17 report, right?

18 A. I reviewed that report. Yes, sir.

19 Q. It indicates that the OCME is accredited by a
20 Forensic Quality Services. Are you familiar with that
21 entity?

22 A. Yes, sir.

23 Q. What is the purpose of accreditation?

1 A. Accreditation has almost become a pro forma
2 requirement in the US, and the purpose for
3 accreditation is to set requirements from forensic
4 science laboratories to ensure that the laboratories
5 are operating under documented protocols, under
6 documented policies and procedures. Not only to ensure
7 those policies and procedures are in place, but also
8 through a series of assessments otherwise known as
9 inspections, to make sure that the laboratories are
10 conforming to those requirements.

11 Q. You mentioned an accreditation agency which
12 you are a board member?

13 A. Yes.

14 Q. Is FQSI a different accreditation agency?

15 A. A different accreditation body. Yes, sir.

16 Q. Does FQSI publish standards and guidelines?

17 A. Yes.

18 Q. I note that you listed some standards and
19 guidelines in particular in your report on page three.
20 Where do those standards come from?

21 A. Those standards come from two different
22 places. FQSI is very similar to ASCLD-LAB. Those are
23 two prongs.

1 Q. You are saying --

2 A. ASCLD-LAB.

3 Q. When you use that acronym, you are referring
4 to what entities?

5 A. The entity that I served as a board member on.

6 Q. Just say the word?

7 A. Sorry. We have two sets of standards --

8 Q. That's okay, I'm just asking what does
9 A-S-C-L-D dash L-A-B mean?

10 A. American Society of Criminal Laboratory
11 Directors, Laboratory Accreditation Board.

12 Q. Sorry, you were saying there is standards and
13 you listed some in your report?

14 A. Yes, sir.

15 Q. What are the standards?

16 A. There are two sets, different documents and
17 FQS also has the same system in place. There is the
18 international standard, which is ISO 17025, which is a
19 document that delineates the standard for accreditation
20 of testing and calibration laboratories and FQS has the
21 same set of standards in place. There is also what are
22 called supplemental standards. Those supplemental
23 standards are specific to forensic science

1 laboratories. The numbering system standards FQSI uses
2 are almost exactly the same as ASCLD-LAB.

3 Q. I want to ask you about two of the standards
4 that you have listed in your report. You have a copy
5 up there with you?

6 A. Yes, I do.

7 Q. Page three you mentioned two particular
8 standards. You mentioned four, I want to ask you about
9 two. In the center, 5.8.4, 25.5.3.4, can you explain
10 what these standards require labs to do?

11 A. I am not going to read the standards, I'm
12 going to summarize it. What is required the laboratory
13 to do is ensure that evidence and anything that is in
14 that laboratory that can be used in a courtroom is
15 properly secured, and that those security processes are
16 there to protect the security and integrity of the
17 evidence. That is 5.8.4, that is an ISO 17025
18 standard.

19 Then the FQSI standard, again numbering on
20 that is a little bit different, wording is the same
21 compared to the standard that I helped implement, talks
22 about access to the laboratory, it has to be secure.
23 Access has to be limited to ensure that if someone has

1 access to an area where either work is being conducted
2 are as important to where evidence is being stored,
3 that no one can get into those areas, unless they are
4 authorized to be there.

5 Q. In your opinion, is the -- during the relevant
6 times of the Nyala and Irwin cases, was the Delaware
7 OCME CSU lab meeting those two standards?

8 A. Based on what I heard Tuesday afternoon, and
9 what I heard yesterday, no.

10 Q. Why is that?

11 A. It appeared as though people were -- I'm going
12 to use term going in and out. There was no real
13 control over the security of the vault. People were
14 allowed into the vault on -- allowed in that area on
15 weekends by themselves not accompanied, and based on
16 what I heard there were no -- there were no security
17 procedures in place that were being enforced. In other
18 words, it appeared as though the access was unfettered,
19 a lot of people were going in there.

20 Q. You said based on what you heard: Is the
21 opinion that the lab is not meeting those standards
22 also based on materials you reviewed? Is it solely
23 based on testimony you heard in the last two-and-a-half

1 days?

2 A. Transcripts that I read also indicated, many
3 of the people interviewed said basically the same thing
4 that control of the vault was not really being
5 implemented.

6 Q. What I was asking was; did you reach your
7 opinion solely based on testimony, or did you also base
8 your opinion that you just gave based on documents that
9 you reviewed?

10 A. Based on both.

11 Q. Okay.

12 THE COURT: Perhaps, for the record, this
13 might help, if he could list everything that he has
14 been given.

15 MR. COLLINS: It is listed in the report, but
16 I would be glad to have him review it if that would
17 help.

18 BY MR. COLLINS:

19 Q. Turn back to page two of your report letter.

20 A. Yes, sir.

21 Q. Please tell the Court what you have reviewed?

22 A. Gladly. I reviewed guidelines for the
23 collection and submission of forensic evidence, that is

1 published by the Delaware Department of Health and
2 Social Services, Office of the Chief Medical Examiner,
3 I also reviewed Office of the Chief Medical Examiner
4 Evidence Manual, OCME organization charts, transcripts
5 from Aretha Bailey, Farnam Daneshgar, Kelly Georgi,
6 James Daneshgar, James Woodson, Laura Nichols, Patricia
7 Phillips, Delaware Department of Justice document
8 entitled investigation of missing drug evidence
9 preliminary finding. A letter dated April 21st, to
10 Ferris Wharton from the Deputy Attorney General, lots
11 of news letters, were news articles, also, I was given.
12 Reviewed the chain of custody laboratory reports from
13 the Michael Irwin and Dilip Nyala case. I also
14 reviewed the transcript from the Tyrone Walker case, as
15 I put in I attended the court hearing June 8th.

16 Q. So you have given an opinion that with respect
17 to the accreditation standards that you mentioned that
18 the lab was not meeting them. Is it your understanding
19 in this case that there was an issue discovered in the
20 Tyrone Walker trial?

21 A. Yes.

22 Q. Then you have heard testimony that that led to
23 a preliminary investigation which led to a State Police

1 investigation?

2 A. Yes.

3 Q. When a forensic lab entity like CSU discovers
4 a problem, are there any standards governing what the
5 lab is supposed to do?

6 A. Yes, there are.

7 Q. What are those standards?

8 A. First they are defined, delineated on page
9 three of my report. They refer to conformance to
10 standards. If a policy or procedure has not been
11 implemented, corrected action, immediate corrective
12 action is required. In other words, something has to
13 happen to stop that problem right then and there.

14 Q. Okay. I am looking at your report, it says
15 standard 4.11.2 indicates that an investigation should
16 occur to determine the root cause of the problem. Is
17 that a quote from the standard?

18 A. That is taken right out of the standard as a
19 quote. Yes, sir.

20 Q. Two questions about that. One, do you think
21 that appropriate steps were taken to at least begin to
22 determine the root cause of the problem?

23 A. I think the initial steps were taken. They

1 started, let's put it that way.

2 Q. What were those?

3 A. The audit that was conducted by Delaware State
4 Police, that was probably -- that could be categorized
5 as a first step in the root cause analysis.

6 Q. How about locking access to the vault and
7 securing it, things like that, I mean, your testimony
8 seems to be that is the first thing that needs to get
9 done. That did get done here?

10 A. Yes, it did.

11 Q. And the other question I had: To date, based
12 on your understanding, has the root cause of the drug
13 lab problems been determined as yet?

14 A. No, they have not.

15 THE COURT: I guess the other piece of that,
16 sir, is, in your opinion, has the corrective action
17 been taken that sufficiently stopped and addressed, at
18 least at the moment, the problem that was there?

19 THE WITNESS: I don't think so, Your Honor.
20 If I can explain. The audit stopped the analysis, or
21 when the Delaware State Police shut down the
22 laboratory, I think it was February 20th, they stopped
23 the analysis of controlled substances in that facility.

1 I think they put a padlock on the door. But in terms
2 of the possible incidents that may have happened prior
3 to February 20th, that could impact specifically what
4 happens in Court, those particular determinations
5 regarding possible impacts were never addressed.

6 THE COURT: Okay. Maybe that was a bad
7 question. Would you agree that at least as of
8 February 20th, whatever problem was occurring at the
9 lab, perhaps not determining what has been arisen in
10 the past, but as of February 20th, the problem has
11 stopped?

12 A. Yes, Your Honor.

13 Q. Evidence has been secured, and whatever
14 evidence is, it is, but there is nothing that has been
15 done wrong since February 20th, in the sense of
16 securing the evidence; is that fair?

17 A. Yes, Your Honor.

18 BY MR. COLLINS:

19 Q. Picking up on His Honor's questions: So on
20 February 20th, things were put to a halt, and Delaware
21 State Police took over. That was an appropriate action
22 to take, right?

23 A. Yes, it was.

1 Q. Then what happened thereafter was that an
2 audit began; is that your understanding?

3 A. Correct.

4 Q. Was it a good idea to do what's been termed as
5 an audit?

6 A. Proceeding with an audit was an excellent
7 idea, yes.

8 Q. Have you ever had an occasion in your career
9 to go in and audit and inspect problematic drug labs?

10 A. Yes, I have.

11 Q. What agency were you working for when you did
12 those?

13 A. When I was with DEA, I was involved in a
14 number of situations where I was called in to find out
15 what had gone wrong in laboratories outside of DEA.

16 Q. And it is my understanding that you have
17 signed some non-disclosure agreements with regards to
18 some of that work?

19 A. Non-disclosure agreements were signed in a
20 laboratory that I audited after I retired from the
21 federal government, correct.

22 Q. But are you familiar with procedures to follow
23 when there are problems in drug labs?

1 A. Yes, I am.

2 Q. So you testified that the audit was a good
3 idea?

4 A. The idea of an audit is a good one.

5 Q. Talk about the audit itself. Was the audit
6 carried out properly?

7 A. Let me preface that by saying I believe the
8 intention and people who conducted the audit had the
9 best interest of the State of Delaware in mind when
10 they proceeded with that audit.

11 That said, I also believe that the standards
12 under which they were operating were not measuring up
13 to what I believe should have been done to conduct an
14 audit to determine; number one, if there was a problem.
15 Number two, where the problem existed; and number
16 three, how serious the problem might have been.

17 Q. What should have been done?

18 A. First thing that should have been done is a
19 series of protocols should have been set up on paper,
20 in other words, there should have been, for lack of a
21 better term, a flow sheet where every step that was
22 expected of the people conducting the audit should have
23 been written down, should have been documented.

1 There should have been someone in charge.
2 Everybody in this, probably crucial point, everybody
3 had to conform to the same standard to determine what a
4 deficiency is. Based on what I heard, there was no
5 standard to determine when a deficiency, I will put
6 that in quotation marks, was determined. We heard
7 terms like approximate weighing and what we thought was
8 best, and it just seems like there was no guidelines in
9 place that people were expected to follow.

10 Q. Who would be responsible, in your experience,
11 for promulgating those guidelines?

12 A. That would be left up to the body that is
13 conducting the audit.

14 Q. So I think what I am hearing you say is there
15 is no ISO or FQSI standard for what standards to employ
16 when doing an audit of a problematic drug lab. Do I
17 have that right?

18 A. Correct. May I add to that?

19 Q. Yes.

20 A. Part 4.11 says a laboratory shall establish
21 policies, procedures and designate appropriate
22 authority for implementing corrective action. So the
23 laboratory or organization that is going to investigate

1 the laboratory is responsible for setting those
2 standards. Those standards do not exist under the
3 accreditation requirements, but there is a requirement
4 they exist.

5 Q. Was it a good idea for the auditors to
6 visually inspect the envelopes and look for signs of
7 tampering and following as an initial matter?

8 A. As an initial matter. Yes, sir.

9 Q. Does the fact these drug cases where, I forget
10 if there is 46 or 51 or 52 listed in the preliminary
11 finding of the Department of Justice, are still
12 unsolved, for lack of a better term, impact how the
13 audits should have been conducted, in your opinion?

14 A. Yes, it does.

15 Q. How so?

16 A. When I read through the list of the Department
17 of Justice report, it identified deficiencies, but
18 never gave any additional information regarding what
19 led the examiners, or what led the investigators to
20 flag these particular cases. There were a number of
21 weight differences.

22 The investigators, I believe, and say this
23 based on experience, if you are going to identify a

1 deficiency, you have to do it with data. You have to
2 give numbers. Say, for instance, should have been
3 this, this is what it was.

4 THE COURT: Let's assume there is such
5 information, in your law enforcement background you did
6 not want to disclose to the public that type of
7 information at this juncture that would potentially
8 compromise a criminal investigation, you would agree
9 you would not do that, correct?

10 THE WITNESS: With my background in law
11 enforcement, I would agree with you, Your Honor.

12 BY MR. COLLINS:

13 Q. I want to distinguish the Court's question
14 from a simple matter of writing things down on a form,
15 though. Do you think circling yes or no on a form, and
16 moving on is an appropriate amount of documentation for
17 an audited item?

18 A. I will answer that by referring back to my
19 35 years of law enforcement. Yes or no is not the way,
20 preferable way to do anything. There has to be an
21 explanation that justifies that yes or no. A forensic
22 laboratory setting that is especially important.

23 Q. I think, according to the preliminary report,

1 plus Lt. Laird's testimony where at about, I don't
2 know, I'm going to say 52 cases in which there is
3 suspected tampering/missing evidence taking the form of
4 actual missing drugs, replaced pills, things like that.
5 Based on materials reviewed, testimony you heard, you
6 think the actual number is that number, or a higher
7 number, or lower number?

8 A. Based on everything I read, I believe it is a
9 higher number.

10 Q. And is that -- why do you say that you believe
11 the number is higher?

12 A. In that DOJ report, there is one piece of
13 information that jumped out at me immediately as a
14 laboratory director, and that number was about 705.
15 The discrepancy between the number of cases that were
16 in the vault, and I believe that was 8500 or
17 9200 cases. The evidence tracking system listed, I
18 believe it was 8500 cases. So there were 700 cases in
19 that vault, that according to the laboratory's own
20 evidence tracking system, were not supposed to be
21 there.

22 Q. What does that mean to you?

23 A. Are you asking for possibility? First of all,

1 the evidence tracking system either didn't work. First
2 of all, it wasn't working, or the inputs were wrong, or
3 the people who were inputting it were not putting the
4 evidence into the right category. It could also mean
5 that evidence was supposed to have been destroyed, it
6 wasn't destroyed. There are a number of possibilities
7 for what could have caused that.

8 But when you see that many cases in a vault
9 that are unaccounted for, that raises the possibility
10 that things, additional things could go wrong. In
11 other words, someone could take that evidence, no one
12 would ever know about it because it is not in the
13 system, which then leads to who is in charge? Who is
14 keeping track of all this. Are the people who are
15 responsible for that vault doing their jobs? Is
16 laboratory management doing their own jobs?

17 Q. Is there any requirement in the accreditation
18 standards that a lab such as this conduct inventories
19 of their evidence at periodic intervals?

20 A. There is a requirements that the laboratory
21 have a system in place to account for all evidence,
22 which in almost every laboratory I have ever been in
23 requires an annual inventory. So that if there are

1 additional issues they can be addressed right away, as
2 opposed to compounding those problems.

3 Q. Why is it a good practice to conduct periodic
4 inventories?

5 A. Periodic inventories are required to ensure
6 that what the evidence tracking system says is in the
7 vault, that those cases are actually there, and as
8 importantly; if there are cases that are not in the
9 evidence inventory, those also have to be identified.
10 After they have been identified, the reason has to be
11 found out, you have look for why is this happening.
12 You can't just let it go. There has to be a reason for
13 shortages, has to be a reason for, I will use the term,
14 overages.

15 Q. Besides 705 cases being red flagged, let me
16 ask you about that: Is it uncommon for there to be
17 some evidence in a lab found to be unaccounted for?

18 A. Sure, but not at that level. Talking about
19 maybe two or three cases on either side, but not 700,
20 over 700.

21 Q. I'm trying to do this in a way that is not
22 duplicative of testimony that's been already on the
23 record. Can you briefly describe what sort of issues

1 you learned about in reviewing materials, or hearing
2 testimony, that caused you to believe a number of
3 problematic cases are higher than the number 52?

4 A. First of all, again, there was the fact there
5 was no standard being met, that each person conducting
6 the audit -- I want to emphasize I believe their
7 intentions were good -- they were on target. There was
8 no measuring stick to determine what constituted a
9 deficiency.

10 Q. How about respect to the operation of the lab?

11 A. In relation to the -- regarding the operation
12 of the laboratory. Again, there was no oversight of
13 what was -- obvious there was no oversight of what was
14 happening in the laboratory. If there were, the
15 evidence tracking system would have been accurate. The
16 chain of custody documents would have been accurate.
17 The weights would have been accurate.

18 Q. I want to switch gears and ask you about some
19 data management issues. Referring to page four of your
20 report, this one I am going to read because it is only
21 one sentence.

22 "ISO 17025 requirement, 4.13.1.4, the
23 laboratory shall have procedures to protect and backup

1 records stored electronically to prevent unauthorized
2 access to, or amendment of these records." Is that a
3 direct quote from the standards?

4 A. Yes, it is.

5 Q. And speaking to what that standard means in
6 actual operation of a lab?

7 A. One of -- every aspect of a forensic science
8 laboratory is important, but the tracking of evidence
9 and the issuance of valid reports, of course, tracking
10 of evidence is probably the most crucial because as a
11 former laboratory director, you don't ever want to lose
12 evidence and you don't want to have that evidence
13 around that shouldn't be there. That means that
14 whoever is using that evidence entry system, I believe
15 existed in the OCME laboratory was called FLIMS, which
16 is Forensic Laboratory Information Management System, I
17 will talk about a generic laboratory management system
18 which probably every laboratory in the country has at
19 this point. Access to and the ability to this put data
20 into that laboratory system has to be restricted to
21 people working in the laboratory.

22 Q. Let me stop you there and ask you about some
23 testimony that occurred, I forget when, sometime during

1 this hearing, about a separate system called FA web, in
2 which, I guess, police officers, perhaps others were
3 permitted to pre-load or pre-log, I think it might have
4 been said, information into the system. Is that a good
5 practice?

6 A. No. My understanding is that information went
7 from FA web directly into FLIMS.

8 Q. Why is that problematic?

9 A. Because that means that the police officers
10 had access to the FLIMS system, because information
11 they were entering into FA web was going right into the
12 FLIMS system.

13 Q. In your experience, have you ever encountered
14 an add-on system that permits other people outside the
15 lab entity to enter information onto lab documents?

16 A. I have never heard of a system like that.

17 Q. I want to ask you about FLIMS, and I mean
18 there is nothing special about FLIMS, every lab has
19 some sort of thing like that, right?

20 A. Yes.

21 Q. In and of itself, is FLIMS an okay system?

22 A. If and of itself, most systems that I have
23 experience with that have been based on the Excel

1 platform, most of them work fairly well. The system
2 itself, the concept of a laboratory information
3 management system based on spread sheets work fairly
4 well.

5 Q. You had an opportunity to look at all the
6 Exhibits probably, and -- not probably, but in
7 preparation for your testimony, but also during the
8 hearing.

9 What is your opinion about the use of FLIMS as
10 it was deployed in the Nyala and Irwin cases?

11 A. I am going to answer that by saying there is
12 only one system worst than a system -- only one system
13 worst than no system and that is a system that
14 generates false documentation.

15 Because that false documentation, in other
16 words, dates, times, people who received evidence,
17 where evidence was stored, if that is not correct, that
18 information is flawed, the entire system is flawed.

19 Q. Let me follow-up to that and ask you this: If
20 problems are found on documentation through the course
21 of, I don't know, normal checking of work, are most
22 systems able to be edited by appropriately vetted
23 personnel?

1 A. Sure. Systems are designed knowing that human
2 beings are working with them, and as such there should
3 be a way to be -- has to be a way to be able to make
4 those corrections.

5 Q. I want to describe a scenario that occurred in
6 this hearing. Aretha Bailey turned in evidence at
7 1 o'clock, the chain of custody documents reflect that
8 it was a hand-to-hand transfer between the officer,
9 Aaron Lewis, and James Daneshgar at 3:36 p.m. So it
10 was established through testimony that it is the wrong
11 person, wrong time.

12 In the normal course of operations of drug
13 labs that you are familiar with, do appropriately
14 cleared personnel have the opportunity to go in and fix
15 that?

16 A. Yes, they do.

17 Q. And is that a practice that's done to check
18 over chain of custody to make sure that the documents
19 are accurate, or is it just locked in once it's in.

20 A. There has to be a way to make the correction.
21 I might also add if the correction is going to be made,
22 there has to be a section, I think comments section,
23 would be noted in there a mistake was made, and that

1 mistake has been corrected.

2 Q. So I don't want to put words in your mouth,
3 but it sounds like that part of FLIMS is somewhat
4 inflexible that entries cannot be fixed?

5 A. Based on what I heard, the system was
6 inflexible in terms its of correcting errors.

7 Q. Maybe that is a good thing, maybe it should be
8 locked in. What are your thoughts on that?

9 A. When you are dealing with human beings, there
10 has to be a provision to correct a mistake when it was
11 made. You can't just let it sit there.

12 Q. I want to switch gears again and turn your
13 attention to these two cases, Mr. Nyala and Mr. Irwin.
14 As you know, the State is going to seek to admit drug
15 evidence which has been described at length during this
16 hearing. Do you believe the evidence in either case is
17 reliable evidence?

18 A. Because of the issues that were identified in
19 the laboratory prior to February 20th, evidence in
20 these cases was stored in the vault, I don't believe it
21 is reliable.

22 Q. Generally speaking, what particular issues
23 about your findings cause you to believe that the

1 evidence is not reliable, before I get to the specifics
2 of each case?

3 A. One of the cases I believe there were, I
4 think, seven different evidence transfers that were
5 made. I don't know if they were -- how they were
6 conducted. I believe chain of custody documentation
7 showed eight different transfers. I believe that
8 people who were supposed actually conduct those
9 transfers, I don't believe they were accurately
10 described on the FLIMS documentation.

11 Q. Let me ask you a general question.

12 A. Sure.

13 Q. You have two cases here, Nyala and Irwin, none
14 listed in the DOJ report of 52 cases, does the fact
15 that the root cause has not been identified as to those
16 52 cases impact your opinion as to whether the evidence
17 is reliable in these two cases?

18 A. Because the problems that were identified by
19 the Delaware State Police were so pervasive, because of
20 the inaccuracy of the laboratory information management
21 system, anything that was discovered, anything that was
22 in that vault that was being tracked I believe is
23 subject to scrutiny, as such is not reliable.

1 Q. What about if the root cause had been
2 determined and corrected, would the laboratory, or DOJ,
3 or someone be able to be in a better position to make a
4 determination about reliability of evidence?

5 A. Yes.

6 Q. So let me just pitch you a hypothetical: If
7 it was found that there was one person who was just
8 simply stealing evidence everyday, that problem was
9 contained, a bag was put over it, the person was
10 arrested and every single case that person had ever
11 touched or worked on was completely eradicated. Would
12 that be a root cause and corrective action sort of
13 scenario?

14 A. Yes, it would be.

15 Q. How does a scenario like that differ from the
16 scenario we have here in Delaware?

17 A. There was no root cause. No one really, based
18 on what I have read, no one really knows why those
19 discrepancies -- first of all, why they were
20 documented; number two, how they occurred; number
21 three, there has never been an investigation to
22 determine whether someone was actually able to get into
23 those 46 different items on the DOJ report. How did

1 that happen? How did those discrepancies take place?
2 Keeping in mind those discrepancies are the baseline.
3 We are talking about hundreds of tablets disappearing.
4 I believe I also read that 2.5 kilograms of cocaine
5 disappeared. There has to be a reason for that. Why
6 did it happen? And that kind of investigation has not
7 been conducted yet.

8 Q. Now, getting more specific, you mentioned a
9 number of evidence transfers, things like that. Let
10 me -- you can still be a reliable accredited lab and
11 not be a perfect lab?

12 A. Absolutely. There is no perfect lab.

13 Q. If there are too many transfers in one case
14 than a professional like yourself would be happy with,
15 is it fair to say if everything was appropriately
16 tracked and documented, you would still be okay with
17 the reliability of that evidence?

18 A. Sure, if everything is documented for reasons
19 for those transfers are there, the reasons could be
20 valid.

21 Q. Do you believe that the tracking documentation
22 in these two cases was appropriate and accurate?

23 A. No.

1 Q. Okay, I want to ask you about the evidence
2 itself.

3 There was lengthy back and forth testimony
4 about the weight of evidence, and things like that.
5 I'm not going to rehash it, but does the fact that
6 weights in both cases, there --

7 Does the fact that there were disparities in
8 the weight in both cases, between what I am just going
9 to call police weight, versus NMS lab weight, does that
10 cause concern for you as to the reliability of the
11 actual evidence in these two cases?

12 A. In the absence of an explanation, I keep
13 emphasizing absence of an explanation I would look for.

14 THE COURT: You have to admit to the Court,
15 that in your experience, almost all the weights that
16 the police have, the weight that the lab gives is
17 different.

18 A. Yes, Your Honor.

19 Q. They use different procedures, they weigh
20 differently, they use different machines that are more
21 reliable and, in fact, the Court always insists that
22 the lab weight is the one that is most reliable. So
23 you would expect, as a matter of course, the numbers to

1 be different?

2 A. Yes, Your Honor.

3 THE COURT: You have to agree with that,
4 correct?

5 A. Yes, Your Honor.

6 Q. So that the significance of the difference may
7 play a part, the fact they are different would be
8 something you would expect, as a matter of course?

9 A. You would expect the weights to be different,
10 yes, Your Honor.

11 THE COURT: Thank you.

12 BY MR. COLLINS:

13 Q. Next I want to ask you about procedures taken
14 by the Department of Justice after their shutdown of
15 the lab, and access to it. Take certain evidence,
16 including the evidence in these two cases and send it
17 to an outside lab. Just to make the record, these are,
18 testimony has established, these are cases in which
19 evidence was not tested at Delaware CSU, but rather
20 audited, inventoried, and sent to an outside lab. In
21 your opinion, did that solve the problem of reliability
22 of this evidence?

23 A. No, it did not.

1 Q. Why is that?

2 A. Because the problem existed with the chain of
3 custody, and with the way evidence was being tracked
4 and the information which led to the conclusion there
5 was something going on in the vault that needed to be
6 investigated. So to take the evidence and send it to a
7 second-party laboratory does not right any possible
8 transgression -- not transgression, but questions on
9 the front end of how was the evidence stored? Was
10 there tampering going on? Why were there deficiencies?
11 That wasn't determined.

12 And to send it out for reanalysis, which again
13 is a noble cause, does not address that problem of what
14 happened to the evidence that was being stored in
15 vault.

16 MR. COLLINS: May I have a moment, Your Honor?

17 THE COURT: Yes.

18 (Discussion held off the record.)

19 MR. COLLINS: I don't have any other
20 questions. Thank you.

21 CROSS EXAMINATION

22 BY MR. GRUBB:

23 Q. Good morning, sir.

1 A. Good morning, Mr. Grubb.

2 Q. Mr. Bono, I assume you would agree with me
3 based on your report, certainly your testimony, there
4 were number of issues going on at the Office of the
5 Chief Medical Examiner in the Controlled Substance
6 Unit?

7 A. Yes, sir, there were.

8 Q. Mr. Collins asked you about a number of them,
9 but certainly there were issues regarding everything
10 that is in your report from the drug vault to the FLIMS
11 system, and management oversight, correct?

12 A. Yes, sir.

13 Q. We can certainly agree on that.

14 Now, throughout your report, you certainly
15 list a number of the ISO standards, and standards from
16 FQSI, correct, sir?

17 A. Yes, sir.

18 Q. Now, also throughout your report, you
19 certainly make a number of conclusions regarding the
20 reliability of evidence not only in the Nyala and Irwin
21 case, but overall for any drug evidence that went
22 through the Medical Examiner's Office, correct?

23 A. Yes, sir, I did.

1 Q. You don't include any citations as to what you
2 are basing those conclusions on after you make the
3 conclusions in your report, do you, sir?

4 A. I don't believe I did. No, sir.

5 Q. Probably would have been better if you did,
6 right?

7 A. Yes, it would have.

8 Q. Now, Mr. Collins asked you this, I just want
9 to make sure I am right. Certainly you have a number
10 of credentials, a lot of experience with respect to
11 forensic lab and law enforcement, specifically DEA?

12 A. Yes.

13 Q. Your previous testimony was with respect to
14 either being a chemist, or essentially in the capacity
15 that you are testifying now?

16 A. Yes, sir.

17 Q. Thank you.

18 Now, on the first page of your report, in the
19 very first sentence Mr. Collins asked you about the
20 word preliminary. I am going to ask you about the two
21 words after that. It says "opinion letter"; is that
22 accurate, Mr. Bono?

23 A. Yes, it is.

1 Q. So is this an expert report, or is this just
2 an opinion letter?

3 A. It is an opinion letter. I think based on --
4 forgive me citing law, I think 702 talks about expert
5 witness testimony.

6 Q. Everything that you say in this letter,
7 regardless of whether or not there are citations, it is
8 your testimony you are saying every single thing to a
9 reasonable degree of scientific certainty?

10 A. I don't know if we can talk about scientific
11 certainty. I think I use the term laboratory
12 management, forensic science certainty.

13 Q. You testified that you have previously offered
14 expert opinion with regards to this type of material,
15 lab management and reliability of drug evidence, right?

16 A. Yes, sir.

17 Q. So are you familiar with the Delaware Rules of
18 Evidence, sir?

19 A. No, I am not.

20 Q. Then I will just ask you directly: Are you
21 offering your opinion, every opinion that is in this
22 report, this 11-page report, to a reasonable degree of
23 certainty?

1 A. Yes.

2 Q. You are?

3 A. Yes.

4 Q. That reasonable degree of certainty is based
5 upon what?

6 A. Base on laboratory accreditation standards,
7 and my own experience as it relates to management of
8 drug sections in forensic science laboratories.

9 Q. Now, it is also based upon the materials that
10 you reviewed, correct?

11 A. Yes, sir.

12 Q. And you testified to them, also listed on page
13 two of your report?

14 A. Yes, sir.

15 Q. Just so we are all on the same page, you were
16 present in the courtroom when defense counsel showed
17 some of the witnesses what is termed the affidavit of
18 probable cause for some of the cases that are before
19 the Court now, correct?

20 A. I remember that. I don't remember what the
21 document said. I remember the term.

22 Q. I will be more direct: Did you review the
23 affidavit of probable cause in Dilip Nyala's case?

1 A. I don't remember whether I did or not. Right
2 now I have to say I don't think I did.

3 Q. If you did, you would have written it down
4 given the importance of your report in this hearing,
5 right?

6 A. Yes, sir.

7 Q. So you did not review the affidavit of
8 probable cause for Dilip Nyala. Did you review the
9 affidavit of probable cause for Michael Irwin?

10 A. No, sir.

11 Q. Did you review the police reports in either
12 Nyala or Irwin case?

13 A. No, sir.

14 Q. Did you inspect, yourself, the actual evidence
15 envelopes that apply to Irwin and Nyala cases?

16 A. No, sir, I did not.

17 Q. Did you interview anyone?

18 A. No, sir.

19 Q. So you didn't interview anyone from the
20 Delaware State Police, right?

21 A. No, sir, I did not.

22 Q. You did not interview anyone from the audit
23 team that we heard about, right?

1 MR. COLLINS: May we approach, Your Honor?

2 (The following sidebar conference was held.)

3 (Discussion held off the record.)

4 MR. COLLINS: I signed a stipulation that I
5 wouldn't investigate anything, in exchange for
6 production of certain statements so that I could
7 prepare for this hearing. I don't think it is fair to
8 ask my witness, who is bound by the same requirements
9 whether he went out and interviewed people I
10 specifically told him not to.

11 MR. GRUBB: Your Honor, I will disagree on
12 that I wasn't getting into any additional OCME employee
13 that the confidentiality agreement would bind us. By
14 agreement, it states nothing about the police reports
15 or affidavit for Irwin or Dilip. It states nothing
16 about the witnesses that were testifying at this
17 hearing, only the last few name which I divulged to
18 defense counsel when they asked.

19 THE COURT: Let's try to remember that we are
20 not presenting it to a jury who has no knowledge, no
21 background, 20 years of experience on the bench. The
22 fact that he did not interview people, I mean, that
23 simply could have been asked. On the other hand, what

1 is in the report, did you do anything else in regard,
2 the answer is going to be no. That kind of gets us
3 beyond that. So --

4 MR. GRUBB: I was just attempting to make a
5 record.

6 THE COURT: Records are good. That is the way
7 to make them. I think there is just a way to -- he
8 said what he interviewed -- what he reviewed. We
9 should leave it at that. Go on. Let's try to cut that
10 kind of stuff, credibility is credibility, it is what
11 he reviewed. That is based on his credibility. If you
12 want to question him further on other stuff --

13 MR. COLLINS: I think it is appropriate for
14 argument that later on that his credibility is not as
15 good as it could be. He did not review documents, fact
16 is a fact what is in his report --

17 THE COURT: Try to move on beyond that.

18 (Sidebar conference concluded.)

19 BY MR. GRUBB:

20 Q. Mr. Bono, on page two it referenced a letter
21 dated April 21st, 2014, to Ferris Wharton from Deputy
22 Attorney General M. Frawley. What case was that for?

23 A. I don't remember that. I don't remember what

1 that referred to. It was in the packet that I
2 received. I can't remember. I don't remember what it
3 says.

4 Q. Fair enough.

5 MR. COLLINS: May I have a moment with
6 counsel, Your Honor?

7 THE COURT: Yes.

8 (Discussion held off the record.)

9 BY MR. GRUBB:

10 Q. Mr. Bono, on direct examination, you certainly
11 spoke to root causes, correct?

12 A. Yes, sir.

13 Q. And without rehashing everything, how
14 investigation into the root cause certainly could have,
15 I guess, not necessarily, fixed everything, but would
16 have put everything in a better position; is that fair
17 to say?

18 A. That is fair to say. Yes, sir.

19 Q. I do want to be clear, though, perhaps you
20 just misspoke, you said that there was never an
21 investigation into the root causes. Then you
22 followed-up by saying we are unsure how it happened.
23 The two are not necessarily the same thing, right?

1 A. Two different issues. How it happened, how
2 the deficiencies happened, what caused them.

3 Q. Understood. We can agree there certainly was
4 an investigation in attempting to determine a root
5 cause, or multiple root causes?

6 A. Yes, sir.

7 THE COURT: Let me make sure that -- I think I
8 understand what you are saying, Mr. Bono. Is it fair
9 for the Court to assume that it is your opinion that
10 while the investigation could have been done better,
11 which -- the audit investigation could have been done
12 better, which may have helped determine what happened
13 here, but it has nothing to do at the moment with the
14 reliability of the evidence that was allegedly seized
15 from these two individuals.

16 Now, you can say generally it raises questions
17 concerning the lab, but these two individuals' evidence
18 was seized, it does not affect that, right?

19 THE WITNESS: I would have to agree to that,
20 Your Honor.

21 THE COURT: Thank you. Talking about the
22 audit piece.

23 THE WITNESS: Audit was done, identified

1 deficiencies in the cases they were looking to audit.

2 THE COURT: If there were more deficiencies,
3 it would maybe help you to understand what exactly went
4 wrong in the lab, but how that audit was done, does not
5 mean that drugs were not the drugs that were seized
6 from these individuals at the moment.

7 THE WITNESS: You said it better than I did.
8 The next step is how did those deficiencies occur, that
9 is the root cause.

10 BY MR. GRUBB:

11 Q. Along those same lines, on the bottom of page
12 three of your report, you're discussing in the last
13 paragraph changes in evidence described in the
14 June 19th report. Would it be fair to say you're
15 referring to the 46 cases, and 51 items referred to in
16 the report, or is there something else?

17 A. That is what I am referring to.

18 Q. Again, along the lines of the Court's
19 question, Michael Irwin, and Dilip Nyala's cases are
20 not a part of those 46 cases and 51 envelopes?

21 A. Not a part of those cases. No, sir.

22 Q. Now, on the bottom there of page three you
23 identify the first step. We already agreed the first

1 step was done, correct?

2 THE COURT: Where are you referring to?

3 MR. GRUBB: Bottom of page three, bleeding
4 into four where it says "The first step in that cause
5 analysis would be a detailed inventory and audit
6 comparing what was supposed to be in the vault, as
7 compared to what was identified as actually being in
8 the vault at the time the laboratory was closed."

9 THE WITNESS: Yes, sir, that is where those
10 numbers came from.

11 BY MR. GRUBB:

12 Q. Right. On page four, in that bleed over
13 paragraph, second -- last sentence, begins by reading,
14 "That action would have probably included"... You use
15 the word probably, Mr. Bono. Now, you would agree with
16 me probably is not to a reasonable degree of certainty,
17 right?

18 A. That is correct.

19 Q. And ISO standards certainly don't use the word
20 probably?

21 A. No, they don't.

22 Q. Moving to, I believe it's ISO standard
23 4.13.1.4.

1 A. Yes, sir.

2 Q. Mr. Bono, I assume your conclusion is based
3 off the premise that law enforcement would be in the
4 category of unauthorized, they don't work in the lab?

5 A. Anybody outside of the laboratory would not be
6 considered authorized, law enforcement or not.

7 Q. You are aware law enforcement did not
8 necessarily have access to FLIMS, they would put it in
9 FA web, that would scrape over to FLIMS. They did not
10 have direct access?

11 A. Using your definition, exactly as you said, I
12 have to agree to that. Again, considering it went from
13 FA web directly into FLIMS, to say there is a break, I
14 don't think I could agree with that. There was no
15 break. It went from FA web directly into FLIMS.

16 Q. Fair enough. Understanding there were
17 certainly issues at the OCME. But when OCME allowed
18 it, when they put that number in it would bleed over
19 into that case number?

20 A. That is what -- based on what I heard
21 yesterday, that is what happened.

22 Q. Understood.

23 Some of these are somewhat redundant from

1 direct but just so we are clear, 705 cases that you
2 refer to, as you outlined in your report, once again,
3 that is not Irwin, that is not Nyala, right, we agree?

4 A. I am not sure whether -- I never really got
5 information on whether their cases were in FLIMS. I
6 believe based on those evidence custody documents that
7 I saw, they were in FLIMS. So if that is the standard,
8 they were not included in the 705.

9 Q. So the last part of the last sentence, in the
10 last paragraph before we get to your overview section
11 reads, "[c]oupled with the inaccuracy of the records
12 documenting evidence transferred, this discrepancy"...
13 referring to 705, "...further validates an objective
14 evaluation and conclusion that the credibility of any
15 item of evidence stored in that vault can be deemed
16 reliable."

17 A. I still believe that.

18 Q. Sorry?

19 A. Yes, sir, I believe that.

20 Q. Hypothetically, you have a drug evidence
21 envelope where, just presume, FLIMS is pristine, it is
22 accurate, it lists everything at the exact date and
23 time that it should with the correct personnel, right?

1 A. Yes, sir.

2 Q. And the drug custodian brings the drugs to the
3 OCME, where the exterior of the envelope has zero
4 evidence of tampering or imperfections, okay. Exterior
5 of the envelope it says, contained within is .15 grams
6 of crack cocaine. That envelope is then opened,
7 weighed, tested by an outside lab, and it comes back to
8 be exactly .15 grams of crack cocaine.

9 Photograph it before, photographed after, all
10 these unique markings. Would the sheer fact that that
11 evidence envelope went to the OCME make that situation
12 unreliable?

13 A. I am going to answer that by referring back to
14 the DOJ report where those 46 envelopes were
15 identified, and if -- there was never any determination
16 made, based on what I read, as to whether someone
17 could, in fact, get into those evidence envelopes, and
18 modify what was in there. Maybe someone had a way to
19 do it. I have seen situations where evidence tape, you
20 can peel it right off. I hate to say it, I have seen
21 that. Maybe that happened there. I just don't know.
22 I don't have enough information.

23 Q. But with the information that I just gave you

1 in this hypothetical, that we all know does not exist,
2 your conclusion would be those drugs are just
3 inherently unreliable?

4 A. I would have to say that everything was
5 working in terms of insuring that evidence tape could
6 not be removed, someone did not have a way to get in
7 there without being notified, yeah, would have to be
8 deemed to be reliable. If all of those criteria are in
9 place, the fact of the matter is we don't know whether,
10 in fact, that situation of, call it, perfection in
11 sealing envelopes, making sure there was no way to get
12 into those envelopes. By the very fact there was more,
13 46 cases that were identified, the question remains how
14 did that happen? What happened to cause the
15 disappearance, alteration of what was in those 46
16 envelopes. I think that is crucial.

17 Q. Okay. I will move on.

18 You testified on direct examination that I
19 believe you said tracking evidence is the most crucial,
20 right?

21 A. I believe -- if I could explain that?

22 Q. Certainly.

23 A. Chain of custody is crucial. One of the

1 things that I teach police officers, I still get
2 involved with discussions is that the chain of custody
3 is crucial. A forensic law enforcement officer, even
4 attorney might not understand a lot of scientific
5 jargon. When we talk about chain of custody, it is
6 pretty cut and dry. Documentation has to correlate to
7 what actually happened.

8 Q. Understood. With tracking evidence being the
9 most crucial that it is, you did also testify, and you
10 explained, it would be okay and acceptable for a lab to
11 have unaccounted for items, right?

12 A. Yeah, I did say that. Making sure you
13 understand when we are talking about an inventory, it
14 is okay if something is noted during that inventory,
15 but you still have to look for what happened. Why is
16 it unaccounted for? That is the context of that
17 particular statement.

18 Q. You list a number of factors underneath your
19 categorized section overview of the deficiencies
20 discovered by DDOJ so far. Bottom of page four,
21 bleeding into page five, correct, sir?

22 A. Yes, sir.

23 Q. You preface that once again using the word

1 probable, you would agree with me, the bottom page
2 four, at the present time probable factors affecting
3 evidence include?

4 A. Correct.

5 Q. I would like to go through a few of them.

6 In Section B, we once again use the word
7 probable, right.

8 A. Yeah, I wrote the report.

9 Q. Are you getting that word probable from ISO or
10 FQSI, or anywhere, or is this a Mr. Bono word?

11 A. Not a Mr. Bono word, in the absence of
12 certainty, we have to say probable. There is certainty
13 probably in anything.

14 Q. There is a reasonable degree of certainty?

15 A. Reasonable degree of certainty still is not
16 absolute certainty. In the absence of absolute
17 certainty, we have to talk about high probability.

18 Q. Didn't say high probability?

19 A. Does not.

20 Q. Go to C, evidence that laboratory management
21 was able to account for all evidence in the lab by
22 scheduled documented inventories which included
23 verification of evidence seals?

1 A. Correct.

2 Q. Understanding that was certainly an issue
3 overall at the OCME. Specifically to our two gentlemen
4 here, Nyala and Irwin, we don't have that issue, right?

5 A. I don't know. Not that I am aware of.

6 Q. Fair enough. I will ask you the same question
7 for section D, about the drugs being transferred to a
8 second-party lab.

9 There are no known issues with respect to the
10 drugs being sent to the second-party lab?

11 A. Nothing has been brought to my attention
12 regarding that. No, sir.

13 Q. Section G, 46 cases, Irwin and Nyala are not
14 there. I will move on to H, determine whether the OCME
15 employed individuals who were qualified to meet their
16 requirements of their job description in the
17 laboratory. I assume you came to the conclusion that
18 the OCME employees in these cases were not qualified to
19 do what they were doing?

20 A. I am talking about people who were noted in
21 the interviews whose qualifications were questioned by
22 people within the laboratory whether they were
23 qualified.

1 Q. Then I speaks to proficiency testing, which is
2 not relevant for Irwin or Nyala, they were not tested
3 at the OCME?

4 A. Correct.

5 Q. K, the last sentence we note if there are no
6 such records, are we aware whether or not there are? I
7 know you had limited information, Mr. Bono?

8 A. I am not aware of any.

9 Q. Turning to page six, we're using the term
10 reanalyzed. We would agree that none of the drugs were
11 analyzed at the OCME in these two cases?

12 A. That I made a mistake in use of that term.

13 Q. Understood. I want to make sure we are all on
14 the same page.

15 A. Yes, sir.

16 Q. Now, then we talk about chain of custody.
17 What is -- are you aware, you certainly may not have a
18 reason to be, Mr. Bono, are you aware of the Delaware
19 statute, statutory language for chain of custody?

20 A. No, sir, I am not.

21 Q. Your conclusions, and comments with respect to
22 chain of custody, certainly based on your expertise in
23 the forensic scientific area, but not necessarily on

1 the Delaware statute or Delaware case law?

2 A. I'm not a lawyer. I don't -- not aware of
3 that statute in Delaware law.

4 Q. You then talk about the number of transfers
5 for each of the Irwin cases and the Nyala case,
6 correct, Mr. Bono?

7 A. Yes, sir.

8 Q. You would agree with me that certainly there
9 are additional transfers that would not have existed
10 but for the Delaware State Police shutting down the lab
11 and taking all the drugs out, and then having it sent
12 to a secondary private lab. So our numbers are a bit
13 inflated?

14 A. Yes, sir.

15 Q. Certainly, as you point out you want to keep
16 those numbers low for very obvious reasons as you
17 pointed out on direct examination?

18 A. I wouldn't say the numbers are inflated. I
19 documented, I event wasn't trying to --

20 Q. I apologize. I used the wrong term. I mean
21 inflated in the sense that but for the lab being shut
22 down by the State Police, and having to take it all out
23 of there to a troop, and then from the troop to a

1 separate lab that we normally don't use here in
2 Delaware, and then back, those transfers typically
3 would not exist?

4 A. Those transfers would not exist. No, sir.

5 Q. Page nine, after you list all transfers, page
6 nine into page ten, we have A through D that dictate
7 what one would expect to see. We don't have a citation
8 here. Are you gathering what one would expect to see
9 from ISO?

10 A. No, that is what in the laboratory I have
11 assessed, laboratories I have managed, number of
12 transfers is minimal, and usually follows a sequence of
13 it goes from evidence from police officer, or
14 registered mail, whatever, to the evidence custodian;
15 evidence custodian to the analyzing chemist; from the
16 chemist back to the evidence custodian, then back to
17 the submitting agency. That is what I am talking
18 about.

19 Q. For our particular cases, Irwin and Nyala for
20 A; evidence enters the laboratory evidence vault, may
21 not be to anyone's liking as to how and when, but we
22 know it went to the vault at some point in time?

23 A. Yes, sir.

1 Q. B, evidence transfers to the analyst. We know
2 for Nyala that never occurred, fair?

3 A. Correct.

4 Q. From what we know?

5 A. Yes, sir.

6 Q. For Irwin that did occur, but no testing
7 happened because of the shutdown?

8 A. Correct.

9 Q. We have B, as well. C, evidence goes back to
10 the vault. Once again, we know that happened, but
11 somewhat in an irregular form because it was ultimately
12 going to be taken out of the vault and taken to Troop 2
13 here?

14 A. Yes, sir.

15 Q. Then D, evidence then is returned to the
16 submitting agency. We know that occurred, but again
17 from the outside lab, we are not talking about the
18 Medical Examiner's Office. So D is present but of
19 little relevance, it was another lab?

20 A. Yes, sir.

21 Q. We have our A through D here?

22 A. We do have A through D. A1, A2, A3, probably
23 A through D.

1 Q. Then we get into a discussion of evidence
2 hearings. I apologize, before we do that next
3 paragraph, you talk about weight a bit.

4 You say amount of powder necessary to conduct
5 an analysis is in the 100 milligram window. Where are
6 we getting that?

7 A. That comes from my other experience looking at
8 a number of laboratory reports when I was with DEA in
9 terms of drug evidence. Usually that is about how much
10 is required to do a full drug analysis, which includes
11 probably color testing, GC screen, GCMS, it is not a
12 lot. Usually when you see a lot of evidence missing,
13 it can be accounted for, sometimes run a sample three
14 or four times, or a sample might be weak. That is
15 always noted. That is just a baseline.

16 Q. From your experience?

17 A. Yes, sir.

18 Q. And in response to the question, the Court's
19 question we all agree weights more times than not are
20 going to vary from the time of arrest, to the return
21 from the lab?

22 A. Yes, sir, they will.

23 Q. There is a number of reasons for that, right,

1 packaging, fair?

2 A. Yes, sir.

3 Q. Condition of drugs when they are seized by the
4 officer?

5 A. Yes, sir.

6 Q. For marijuana we have heard testimony that
7 marijuana dries out at times. That may affect the
8 weight to not make it identical?

9 A. That can happen. Yes, sir.

10 Q. Depends on what type of scale was used, that
11 could affect the weight, why it may be different?

12 A. Balances should have been calibrated, those
13 weights, in terms of if you weigh the same sample on
14 two different balances at the same time, they should be
15 relatively close. If you put a time gap in there, all
16 bets are off.

17 Q. We heard a little bit about heroin weight
18 yesterday. Are you familiar with how Delaware law
19 enforcement weighs their heroin?

20 A. No, I am not.

21 Q. I believe you said on direct examination,
22 there is no measuring stick with respect to what would
23 be an off weight; is that accurate?

1 A. There is -- that is usually determined by each
2 laboratory. Keep in mind that requirement is there has
3 to be a standard, but that standard can vary from
4 laboratory to laboratory or organization to
5 organization. There is usually a baseline.

6 Q. Turning then to the bottom of page ten, your
7 findings and conclusions section. Would it be an
8 accurate summary to say your conclusion is that any
9 drugs that even passed through the Office of the Chief
10 Medical Examiner Controlled Substance Unit are
11 inherently unreliable?

12 A. Where we stand right now without that cause
13 analysis; yes, sir.

14 Q. If we had a cause analysis, would that
15 automatically change it to where they would be
16 reliable, or would that depend?

17 A. If a cause were identified as to why there
18 were those discrepancies in weight, in other words, if
19 a reason were determined as to how this happened, and
20 what accounted for those discrepancies, in the absence
21 of a particular piece of evidence falling into that
22 category, you would have to say it would be probably
23 reliable, but without that cause analysis, if I can use

1 an example?

2 Q. Certainly.

3 A. Say in the area of selling pharmaceuticals, if
4 there is a problem, I think this happened a few years
5 ago in Illinois with the sale of Tylenol. You are
6 probably too young to remember. The problem with
7 Tylenol in the market, the company shuts down the
8 production sale, pulled everything off the market that
9 involved Tylenol capsules, because, again, they didn't
10 want -- none of that product was reliable. Before they
11 proceeded they had to do a cause analysis to figure out
12 what happened, instead of taking a risk chance that in
13 the absence of identification of a cause something
14 could have gone wrong, they just pulled everything
15 back. That is just an analogy to try to put this in
16 perspective.

17 Q. Thank you.

18 So your opinions as to the reliability of the
19 drugs are based on the Medical Examiner's Office's
20 failures, not the integrity of the evidence envelope as
21 to whether or not there is evidence of it being
22 tampered with; is that fair to say?

23 A. That is fair to say. Yes, sir.

1 Q. So for Irwin and Nyala, we have where there is
2 a number like a count for a baggy, you would agree with
3 me from the information provided to you from defense
4 counsel, the count as it exists today is identical to
5 the count as noted at the time of arrest for each
6 individual?

7 A. Yes, sir.

8 Q. So we have count that is correct, but weight
9 certainly is off, as Mr. Collins went through
10 yesterday?

11 A. Yes.

12 Q. We have zero testimony or evidence that the
13 envelopes pertaining to both Nyala and Irwin were
14 tampered with in anyway?

15 A. There is no testimony to that, no, sir. I
16 can't address it because I never saw the envelope.

17 Q. Understood.

18 Then we have, as defense counsel was going
19 through yesterday, those lab reports from an outside
20 lab where it illustrated certainly weight was
21 different, but it confirmed that the drugs the officer
22 said they were at the time of arrest are, in fact, the
23 drugs, right?

1 THE COURT: The question is bad because, it is
2 the same type of drugs.

3 THE WITNESS: Same type of drug. Same
4 category of drugs. Very careful in answering that.

5 BY MR. GRUBB:

6 Q. It was. Thank you, Your Honor, poor question
7 on my part.

8 A. Sorry for the hesitation.

9 Q. Hopefully I will ask it better. It was noted,
10 as you have seen through the Exhibits, as heroin for
11 Nyala's case and the lab report came back as
12 identifying the drugs as heroin?

13 A. Yes, sir.

14 Q. Without going through the whole song and
15 dance, we can agree that the same thing exists for the
16 marijuana, cocaine and ecstasy that was submitted?

17 MR. COLLINS: May we approach, Your Honor?

18 THE COURT: Yes.

19 (The following sidebar conference was held.)

20 (Discussion held off the record.)

21 MR. COLLINS: I get where Mr. Grubb is trying
22 to go. The problem is one of cases with Nyala is that
23 it is not ecstasy, that is kind of a trial issue, it's

1 a different substance, and I don't think that is the
2 record that he is trying to create. I just wanted to
3 call a halt, put that on the record that NMS came back
4 with a different substance, when it's really not on the
5 table for admissibility for the motion in limine,
6 that's how it came back. I want to make sure Mr. Grubb
7 was aware of that before proceeding.

8 MR. GRUBB: I will knock off ecstasy. That is
9 all I really have anyway, Your Honor.

10 (Sidebar conference concluded.)

11 BY MR. GRUBB:

12 Q. Mr. Bono, given the information that you have
13 been given, were those drugs, I will use one example,
14 does a reasonable probability exist that the heroin
15 purportedly seized from Dilip Nyala is actually heroin?

16 A. I don't know. NMS report came back as heroin.
17 But, again, without having all of that information
18 available, without having -- I haven't seen the
19 documentation on the lab reports. I did see the final
20 report, but I always ask to see all of the data. I
21 never render an opinion without seeing the data.

22 Q. Fair enough. You don't have enough
23 information to make that determination?

1 A. No, sir, I do not.

2 MR. GRUBB: I have no further questions, Your
3 Honor. Thank you.

4 REDIRECT EXAMINATION

5 BY MR. COLLINS:

6 Q. I have a couple. First of all, do any of the
7 questions you were asked by Mr. Grubb, or answers you
8 gave change the opinions that you have expressed in
9 your testimony today, or in your report?

10 A. No, they do not.

11 Q. Mainly I want to ask you about a question that
12 His Honor asked you. It has to do with the audit --
13 Michael, be quiet.

14 It has to do with the audit.

15 I am not going go through this dog and pony
16 show again. We established there were some testimony
17 established there were some significant differences in
18 weight, at least among some of the evidentiary items
19 that have been submitted in these cases?

20 A. Yes, sir, there were.

21 Q. It is in the record, but testimony established
22 there was a variation in marijuana from 30.9 grams from
23 the police to 16.1 grams from NMS. Another case,

1 66 grams versus 52 grams. Finally there was a heroin
2 weight difference of 17.14 grams versus 4.91 grams.
3 Now, I have some questions about that.

4 First of all, I think you have established on
5 cross examination, and in response to the Court's
6 question there are always differences in weight from
7 what the police do, to what a lab eventually comes up
8 with, right?

9 A. Correct.

10 Q. Nothing wrong with that?

11 A. No, sir.

12 Q. Going to be variances?

13 A. Yes, sir.

14 Q. Those are for reasons, including but not
15 limited to ones Mr. Grubb was asking you about, right?

16 A. Yes, sir.

17 Q. As a part of the audit, would it have been
18 helpful if the auditors had had standards by which to
19 assess the weight in light of normal variances
20 associated with those factors?

21 A. Yes, sir.

22 Q. Would you agree that they did not have any
23 standard to go by in conducting the audit?

1 A. Based on what I heard in the testimony
2 yesterday, documentation that was made available to me,
3 there were no standards for conducting of that audit.

4 Q. Okay. Now, that leads me to a question or two
5 about what His Honor asked you. There is a universe of
6 9502 cases analyzed of which, I can't remember if it is
7 46 or 52 cases were determined to be significantly
8 problematic, in terms of the discrepancy. Would you
9 agree that is where the DOJ report stands?

10 A. That is where the DOJ report stands. Yes,
11 sir.

12 Q. Given weight variances, and lack of standards
13 in terms of analyzing weight variances with respect to
14 at least some of the evidence in the Nyala and Irwin
15 cases, can you determine, or can it be determined
16 whether that evidence should have been included among
17 the 52 cases, or whether it should remain outside of
18 the problematic cases along with the other nine
19 thousand?

20 A. Without a standard, if you are asking me based
21 on a standard can I make that determination, I have to
22 say no. If you are asking me based on my experience,
23 if that was enough to trigger for me, a deficiency, I

1 would have to say that would be noted.

2 Q. All I am asking is had there been standards in
3 place, would the audit team have been in a better
4 position to determine whether the Nyala and Irwin cases
5 should have been flagged as a discrepancy?

6 A. If standards were in place, there would have
7 been more of a basis for making that determination.

8 Q. And the opposite is true, also, could have
9 been, if standards were in place, could have been --
10 those standards could have been easily applied to
11 exclude Irwin and Nyala evidence from discrepancies,
12 right?

13 A. Yes, sir.

14 Q. In the absence of standards, what
15 determinations can be made with respect to whether
16 there are discrepancies or not?

17 A. In the absence of standards, no determinations
18 can be made. There is no baseline, nothing to measure
19 a deficiency against.

20 MR. COLLINS: Thank you.

21 THE COURT: The answer to my question still
22 remains. If you want to explore the fact there were no
23 standards does not affect the -- what he is saying is

1 if there were more standards, and if there were more
2 deficiencies, it may lead me to better understand what
3 happened at the lab; and, therefore, what was the root
4 cause of the problem. It does not, however, affect the
5 issue of whether or not their drugs are the ones that
6 were seized. There is no relationship to -- the fact
7 is --

8 MR. COLLINS: Whether they were seized by a
9 police officer.

10 THE COURT: Whether the drugs that were seized
11 are the drugs that are being tested. The fact that
12 there are no standards, he would prefer that there be
13 standards, and therefore, perhaps, more discrepancies,
14 which, perhaps, would lead him to understand what the
15 root cause of the problem is, which would then be able
16 to give an opinion as to whether or not these drugs
17 have in some way been tainted, and, therefore, not
18 reliable. So the inventory, the audit that was done,
19 his objection to it is simply that it does not help in
20 determining the extent of the problem, I think. He
21 can't say because there is no standards, these
22 shouldn't be the drugs.

23 MR. COLLINS: Let me ask him a hypothetical.

1 THE COURT: I want to make sure we are on the
2 same page before he goes away. That is what he told
3 me. That is what appears to be the situation.

4 BY MR. COLLINS:

5 Q. You have a sample of marijuana that is written
6 on the evidence envelope 30.9 grams, PM, Plant
7 Material. Sometimes I think it says actually marijuana
8 right on it. The audit says no discrepancy. Off it
9 goes to a lab outside of this OCME.

10 Comes back weighing 16.01.

11 Now, we need to factor in all reasonable
12 inferences about police weight, and packaging, and all
13 kind of things like that, right?

14 A. Yes, sir.

15 Q. What if there was a standard in place, that if
16 the weight is off by more than 20 percent, then that is
17 counted as a discrepancy and investigated further?

18 A. Yes, sir.

19 Q. Would that standard have triggered a
20 discrepancy with respect to that piece of evidence?

21 A. Parameters you just described, yes, sir. If
22 the discrepancy is more than 20 percent, 20 percent of
23 30 grams is six grams. Here we are talking about a 15

1 gram discrepancy. 15 grams falls outside of that
2 six-gram threshold. So yes.

3 Q. So had there been that standard, and I am not
4 championing any standard as your testimony, I believe,
5 indicated, it does not matter necessarily what the
6 standard is as long as there is a standard. Had a
7 20 percent variant standard been employed with respect
8 to the drug marijuana, then that would have been
9 flagged as a discrepancy, and added to the number of
10 cases in the DOJ report?

11 A. As I just described, yes, sir.

12 MR. COLLINS: Thank all I have. I am not sure
13 if I got where you wanted me to get.

14 THE COURT: I am at where I am at.

15 MR. COLLINS: I guess where I want to get
16 doesn't have much of an -- I don't have anything
17 further.

18 MR. GRUBB: No other questions.

19 THE COURT: There will probably not be the
20 last time we see each other over the next few months. We
21 have looked to see if we could find another
22 jurisdiction in which a request for a finding has been
23 made that because of the condition of a lab, everything

1 that went in and out of that lab for a period of time
2 would be suppressed and not allowed to go forward. We
3 have seen a lot of cases from I can tell you, from West
4 Virginia, New York, Massachusetts, Minnesota, Texas,
5 Florida, that have identified a particular person at
6 the lab who is the problem.

7 A. Yes, sir.

8 Q. As a result, they take that evidence that was
9 touched by that person, address a remedy for that?

10 A. Yes, sir.

11 Q. I have found no case where an expert has said,
12 well, everything that the lab touched for two or three
13 years should be thrown out not considered reliable. Do
14 you know of any such case?

15 A. No, Your Honor. I have been involved in a
16 couple of those and, if I can speak as an -- I am not a
17 lawyer, but I follow what was going on. I believe
18 there are court cases where the court admitted
19 evidence. I know of no case, I follow that pretty
20 closely.

21 Q. I think in your -- I haven't had a chance to
22 read your report yet in total, but it would seem to me
23 what you are saying by the core issue has not been

1 addressed yet, if you were able to identify who the
2 core problem was, then you could address the remedy to
3 that core person?

4 A. That is what happened in those other cases.

5 Q. Those other cases it is usually a bad chemist,
6 in most cases?

7 A. Not going to say --

8 Q. A chemist whose conduct has been in question.
9 Therefore, they draft a remedy to deal with that
10 person's conduct. So I just want to make sure if you
11 knew there was somewhere everything that a lab had ever
12 done for a period of time had been thrown out, I can't
13 find it. If you don't, you don't?

14 A. If I can add to that, almost every one of
15 those cases also there was a question regarding
16 laboratory management. Absence of laboratory
17 management. I have been involved in a number of those.

18 THE COURT: Now, when I look at the chain of
19 custody in these gentlemen's case, recognizing you
20 prefer it not have been transferred as much as it did.
21 Can you see any irregularity in the chain of custody,
22 except for the initial inputting of information into
23 their system. In both cases, it appears to have

1 received by someone else, documented that it was
2 received by someone else, and some later date put into
3 the system by another person.

4 Assuming that is not appropriate management,
5 appropriate protocol, can you see any other deficiency
6 in the chain?

7 A. Information I had, Your Honor, there was
8 nothing to indicate that those other transfers were
9 incorrectly documented. I just don't know.

10 THE COURT: All right. Thank you. Anything
11 else?

12 MR. COLLINS: No, Your Honor.

13 MR. GRUBB: No, Your Honor.

14 THE COURT: We will see each other a lot more.
15 Thank you. Anything more from the defense?

16 MR. COLLINS: No, Your Honor.

17 THE COURT: You still have rebuttal?

18 MR. GRUBB: I could respectfully request a
19 five-minute recess.

20 THE COURT: We have been going for a couple
21 hours. Thank you.

22 (A brief recess was taken.)

23 MR. GRUBB: Apologize, Your Honor.

1 THE COURT: If you need more time.

2 MR. GRUBB: Thirty seconds.

3 THE COURT: If you need more just let me know.
4 I thought I would come down and find out where we are.

5 MR. GRUBB: Thank you, Your Honor. If it
6 pleases the Court, the State would call Detective Randy
7 Pfaff.

8 RANDOLPH PFAFF,

9 having been first called by the State was sworn on
10 oath, was examined and testified as follows:

11 THE COURT: Glad you got dressed up for court.

12 THE WITNESS: Sorry, Your Honor. I didn't
13 know until this morning I would be testifying.

14 DIRECT EXAMINATION

15 BY MR. GRUBB:

16 Q. Please tell us where you work?

17 A. City of Wilmington Police Department.

18 Q. How long have you been with the Wilmington
19 Police Department?

20 A. Since September 1996.

21 Q. You are a detective right now?

22 A. Yes, I am.

23 Q. Any particular unit or division?

1 A. I am assigned as a detective for the drug
2 organized crime and vice unit. I also work with the
3 Drug Enforcement Administration as a task force
4 officer.

5 Q. DEA.

6 A. Yes.

7 Q. How long have you done that type of work with
8 drugs, vice and DEA?

9 A. I was transferred to the drug unit in 2001,
10 started with DEA in 2009.

11 THE CLERK: State's Exhibit 28 so marked.

12 BY MR. GRUBB:

13 Q. Detective, I am going to hand you State's
14 Exhibit 28. Do you recognize it?

15 A. Yes, I do.

16 Q. What is it?

17 A. It would be my resume relating to drug
18 investigations as a detective for the City of
19 Wilmington Police.

20 Q. I will put that into evidence, not ask you to
21 read everything, but if you could give the Court the
22 highlights as to your experience with respect to drugs?

23 A. Again, I was assigned to the drug unit in

1 2001. Since 2001, I have on a daily basis assisted or
2 conducted investigations relating to drugs here in the
3 City of Wilmington, to include search warrants, control
4 purchases, street arrests. 2009, I was sworn in as a
5 task force officer with the Drug Enforcement
6 Administration. In my time there I have assisted or
7 conducted investigations locally, here within the
8 United States and international regarding various drug
9 investigations. I have conducted T-three wire
10 intercepts. Again, numerous hours of surveillance,
11 controlled purchases, numerous school as city, State,
12 federal level regarding drugs, drug investigations,
13 drug testimony, et cetera.

14 Q. Are you also what could be termed Chief
15 Investigative Officer for the pending case against
16 Dilip Nyala?

17 A. Yes, sir.

18 Q. Talk generally about drugs and their
19 corresponding weight?

20 A. Okay.

21 Q. Generally speaking, we have heard testimony
22 about weight with respect to drugs at the time of
23 arrest. Walk us through the process of what law

1 enforcement, giving your experience, in weighing. We
2 will start with crack cocaine?

3 A. Okay. When an arrest or seizure occurs,
4 members of the drug unit in the Wilmington Police
5 Department will take that evidence, and we will weigh
6 it on a scale. We will get the weight, from there it
7 will be field tested. The amount, count of it will be
8 looked over by a supervisor. We have a double account
9 system there, investigator, supervisor, then be tagged
10 in an evidence envelope with all pertinent information;
11 case number, location description, et cetera, sealed,
12 and then we placed in a temporary evidence vault.

13 Q. Sealed with Wilmington Police Department
14 evidence tape?

15 A. Yes.

16 Q. Now, what type of factors may impact the
17 weight that you would get as the weighing officer when
18 weighing crack cocaine?

19 A. Variables?

20 Q. Yes, sir.

21 A. There are several variables that alter the
22 weight; packaging, type of packaging material,
23 specifically with crack cocaine the moisture content.

1 Q. What do you mean by that?

2 A. During the course of a seizure, the seizure of
3 the crack cocaine occurred after it was recently
4 cooked, it will have more moisture, more water in it.
5 There is a drying process, if the seizure occurred with
6 crack that was made a period prior to that, it will be
7 dryer and the weight will be different then that of
8 crack that was seized recently after cooked.

9 Through time, evaporation, loss of moisture
10 the weight of that will go down.

11 Q. So if crack cocaine was wet, or moist at the
12 time that you seized it, would you expect the weight to
13 be different weeks down the road after you had
14 initially weighed it?

15 A. Yes.

16 Q. Specifically, crack cocaine that was seized in
17 the Dilip Nyala case, did that have any wetness or
18 moisture to it that would impact the weight?

19 A. Yes, it did.

20 Q. Speak to that very briefly?

21 A. Along with the crack cocaine was a packaging
22 material, digital scale, along with a glass Pyrex
23 measuring cup that was used to cook the crack cocaine,

1 that Pyrex measuring cup had residue in it that tested
2 positive for crack cocaine, which is an indicator of it
3 being recently cooked.

4 Q. Talk about marijuana, what are variables that
5 would come into play in getting a weight discrepancy
6 when weighing marijuana?

7 A. Again, same thing, marijuana is a plant, it
8 has moisture in it. As time would progress, moisture
9 evaporates and the plant itself decays. So that in
10 itself would lower the weight after a certain time
11 period.

12 Q. Would the same additional variables be present
13 with respect to packaging and scale used, so forth, so
14 on?

15 A. Correct. Different type of packages,
16 different scales.

17 Q. Given your experience, is it common for
18 marijuana to -- we have heard the term dry out, and
19 weigh less than it did when originally seized?

20 A. Correct.

21 Q. Talk about heroin.

22 How does the Wilmington Police Department
23 weigh heroin when it is seized?

1 A. The heroin weight Wilmington Police Department
2 does it is we do not weigh the heroin. We count each
3 bag, then we use a fixed weight to determine the amount
4 of heroin.

5 Q. Is that what you did in coming up with the
6 weights that are noted on Defendant's Exhibit A for
7 identification, your affidavit of probable cause for
8 Dilip Nyala.

9 A. Yes, it was.

10 Q. So that is how you came up with those numbers?

11 A. Yes.

12 THE COURT: Is there a reason why you do it
13 that way?

14 THE WITNESS: Yes, we do, Your Honor. If we
15 were to take total packaging, which depending on each
16 different case, consists of blue wax bags, clear
17 plastic heat seal or Ziploc bag, rubber bands, usually
18 several rubber bands per bundle, which is 13 bags.
19 Which is then, if it is a log state, which is ten
20 bundles of 13 bags which is now 130 bags, they will be
21 wrapped in kind of newspaper or a piece of magazine
22 like you would wrap a Christmas gift. If you were to
23 take one log of packaged heroin, weigh -- this is just

1 an example, might come out to 10 grams, when in reality
2 the actual weight is approximately 2.6 grams of heroin,
3 which in and of itself would change, alter, for the
4 defendant his bail, the actual charge, might get
5 charged with Tier V weight, in reality it's Tier II
6 weight.

7 So we use a -- just the ability to weigh the
8 heroin individually is a hazard in and of itself.

9 BY MR. GRUBB:

10 Q. Detective, you were in the courtroom when it
11 was asked of Mr. Bono whether or not a firm line
12 percentage would be helpful in determining whether or
13 not a weight difference would be a criminal
14 discrepancy, were you not?

15 A. Yes.

16 Q. Given your experience with Wilmington Police
17 Department, DEA, your drug cases, in your opinion is
18 that a good idea or bad idea to impose a standard fixed
19 percentage in making that determination?

20 A. That would be a bad idea.

21 Q. Elaborate on that, please?

22 A. Just too many variables, too many things that
23 can alter the weight.

1 Q. Any example you can give us that would support
2 your conclusion there?

3 A. Again, something -- crack cocaine, the close
4 proximity from seizure, from when it was actually
5 cooked. The cooking process itself, whether he used --
6 cook different amount of cocaine and baking powder
7 versus water. With the heroin there is so many
8 variables just in packaging of heroin, different types
9 of packaging. The amount versus cut. There is a lot
10 of things that can alter weight and have a fixed
11 number.

12 MR. GRUBB: Thank you. No further questions.

13 CROSS EXAMINATION

14 BY MR. COLLINS:

15 Q. Hello.

16 A. Good afternoon.

17 Q. I want to ask you about crack cocaine weights
18 and marijuana weights, kind of at the same time. You
19 testified that there are a lot of variables including
20 drying and things like that which could cause
21 differences down the road, with the actual weight of
22 the material. If it is so variable, why does the
23 police even weigh those drugs?

1 A. We use it as a standard so we know
2 approximately what the weight is for the charges,
3 depending on heroin, different tiers of heroin,
4 different tiers of weight for marijuana, different
5 tiers for crack cocaine. And we want to be as accurate
6 as possible at that given time, information we have at
7 that time. We weigh it, come up with the weight the
8 best as possible.

9 Q. So you're endeavoring to be as accurate as you
10 can, based on information you have at the time; is that
11 fair?

12 A. Yes.

13 Q. You gave some testimony specific to Dilip
14 Nyala's case about your suspicion that the crack
15 cocaine had been recently cooked, and therefore might
16 lose some moisture weight, right?

17 A. Yes.

18 Q. Do I have that right?

19 Did you note that in the report you did in
20 this case, or on the evidence envelope itself like be
21 careful, this is wetter crack cocaine than normal?

22 A. No, we don't know. We noted the Pyrex dish
23 that was seized, Pyrex measuring cup that was seized.

1 Q. That does not establish much; that Pyrex dish
2 may have been from a cook of ages ago, the person
3 wasn't very good at cleaning up the kitchen, right?

4 A. Yes, it could be.

5 Q. You mentioned, I think it was His Honor asking
6 you questions why not weigh heroin. You said something
7 like a log of heroin which is, in essence, a log is
8 considered 130 bags, right?

9 A. Yes.

10 Q. In the parlance of the trades it is a log, 130
11 bags.

12 Then you said that might only end up being, it
13 may weigh more, but may only end up being 2.6 grams of
14 heroin?

15 A. Yes.

16 Q. Why did you say that?

17 A. Because we use a fixed weight of .02 grams of
18 heroin per wax bag. That is how we come up with the
19 weight.

20 Q. Endeavoring to be as accurate as you can, at
21 the time, you are building in some factors for
22 packaging when you came up with the 2.6 grams?

23 A. Yes, that should be the amount of heroin not

1 to include all packaging, rubber bands, et cetera.

2 Q. In the warrant you swore out against Dilip
3 Nyala, Defendant's A for identification, charge
4 sequence two when you say 2.6 grams, in 130 small clear
5 Ziploc bags, that is your best way of estimating the
6 weight exclusive of the packaging; do I have that
7 right?

8 A. Yes.

9 Q. Lastly you were asked some questions about
10 variables, and whether -- I can't remember it did you
11 say you were here for the entirety of Mr. Bono's
12 testimony?

13 A. Today.

14 Q. That is the only time he testified.

15 So you gave an opinion based on your
16 experience that a fixed percentage would be a bad idea,
17 to use an a standard for determining whether there was
18 an -- I don't remember the term -- criminal
19 discrepancy. I think, perhaps, can I confer with
20 counsel?

21 Do you understand what I am talking about?

22 A. Yes.

23 Q. You said using a fixed percentage would be a

1 bad idea?

2 A. Correct.

3 Q. You said that was because there are so many
4 different variables?

5 A. Correct.

6 Q. Would it have been a good idea to take those
7 variables into account when conducting an audit of the
8 evidence, in your opinion?

9 A. Can you ask that again, please.

10 Q. Would it have been a good idea to take those
11 types of variables into account when conducting an
12 audit of evidence?

13 A. I personally was not involved in any part of
14 that. I don't know what they had in place.

15 Q. If you have -- let me pitch you a scenario.
16 If you have evidence that you suspect might have been
17 tampered with, you are trying to determine if it has
18 been tampered with, use weight as one of those factors.
19 It says one weight on the envelope, then it says
20 another weight on the scale while you are checking
21 things out. Would it have been a good idea to take
22 into account the different variables that you testified
23 about?

1 A. Again, without being present, I think you have
2 to look at everything. Was the package tampered with,
3 evidence envelope tampered with? Mere difference in
4 the weights, solely based on that. Again, I guess, you
5 would have to look at it. If it was something that was
6 not -- could not be explained.

7 Q. I don't want to get you into guessing at what
8 an audit should do, that wasn't my point. My point is
9 you said that using a fix percentage was a bad idea
10 because there is too many variables to use just a firm
11 percentage. Would it have been a good idea to take
12 into account some of the variables that you already
13 identified in your testimony?

14 A. To note the differences?

15 Q. Um-hmm.

16 A. I would assume, yes.

17 MR. COLLINS: Just a moment, Your Honor.

18 (Discussion held off the record.)

19 MR. COLLINS: That's all I have. Thank you.

20 MR. GRUBB: Nothing further, Your Honor.

21 THE COURT: You may step down. Thank you.

22 MR. GRUBB: I have no more witnesses, Your

23 Honor.

1 THE COURT: Obviously counsel has submitted
2 stuff to me. Do you want an opportunity to submit
3 something else?

4 MR. COLLINS: My proposal, Your Honor, which I
5 don't think is joined, is that we get the transcripts,
6 then three weeks post transcript for simultaneous
7 memoranda, like post-hearing memorandum, not
8 necessarily a formal brief. I would like the
9 opportunity to write something on this.

10 THE COURT: Okay. There is an outstanding
11 Motion to Suppress, I think.

12 MR. COLLINS: For the Nyala case. Yes, sir.

13 THE COURT: Which may affect whether this
14 issue remains or not.

15 MR. COLLINS: As to Mr. Nyala.

16 THE COURT: I have a hearing tentatively set
17 late July, July 26th, I think six or seven other cases.

18 MR. GRUBB: Public defender matters, I believe
19 that may be July 29th.

20 THE COURT: Whether one big decision is more
21 rational than two decisions, perhaps is something to be
22 talked about. I don't know how to raise this in the
23 context of a hearing, but we have included the

1 preliminary report from the Department of Justice. In
2 reviewing it, in the 46, which I now think is 47 cases
3 which there is some discrepancy noted, there are ten of
4 them that appear to have been sent to the lab, not
5 tested, but a discrepancy has been noted.

6 So they would not have, I assume, Medical
7 Examiner tape, things of that nature on the envelope.
8 I don't know if there is any way for, or if counsel
9 thinks there is any value to trying to identify those
10 ten cases, or what happened in those ten cases or not.
11 I just raise that something to think about, because it
12 does appear that it would have been one thing to have
13 those cases where no Medical Examiner tape was on, or
14 let me put it -- it would have been much cleaner to
15 have all cases in which discrepancies were noted had
16 been opened in some fashion by the Medical Examiner's
17 Office. That is not appearing what I have.

18 I am not asking for an instant response to
19 that, something to think about, whether or not that has
20 any bearing on this issue at all.

21 Mr. Grubb, you join in at least the
22 application to write something at some time?

23 MR. GRUBB: Respectfully, of course, I defer

1 to the Court. I don't think we need to -- State is
2 prepared to make argument. The law is the law. The
3 facts that we have heard we have all been present over
4 the last three days.

5 THE COURT: Here is my perspective, whatever
6 the Court rules in the next two groups of cases has a
7 dramatic affect on hundreds if not thousands of cases.
8 Not something that I think should just be argued and
9 say make a decision. I think it is important that both
10 Mr. Collins, we will get the Public Defender's cases,
11 all have an opportunity to address what they can.

12 The dilemma here, as Mr. Bono kind of
13 indicated, the best world for us would be to let the
14 investigation continue, then try to figure out what
15 happened, as he would say. Unfortunately there are
16 many defendants sitting in jail, waiting for their day,
17 and so waiting forever for that to occur is not very
18 efficient or fair, or should be done. We have to kind
19 of go with what we have.

20 So I think writing something in regards to
21 those first groups of cases is critical because the
22 opinion not only has an affect here, it has an affect
23 throughout the state in all cases that are pending in

1 all three counties. We should probably try to get, if
2 from your perspective having your input I will want
3 submissions at the end of the day. We will get the
4 transcripts, when I do the other hearing I will
5 probably set up a time frame where everything needs to
6 be filed by. We will go from there.

7 MR. COLLINS: All right. Thank you, Your
8 Honor.

9 THE COURT: Thank you all very much. Thank
10 you for finding three days to do the hearing, I
11 appreciate counsels' efforts. It was very well
12 presented. I appreciate that. Thank you. Stand in
13 recess.

14 (Whereupon the proceedings were adjourned.)
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CERTIFICATE OF COURT REPORTER

I, John P. Donnelly, RPR, Chief Court Reporter of the Superior Court, State of Delaware, do hereby certify that the foregoing is an accurate transcript of the proceedings had, as reported by me, in the Superior Court of the State of Delaware, in and for New Castle County, in the case herein stated, as the same remains of record in the Office of the Prothonotary at Wilmington, Delaware. This certification shall be considered null and void if this transcript is disassembled in any manner by any party without authorization of the signatory below.

WITNESS my hand this 18th day of JULY,
2014.

Cert. # 161-PS

/s/ John P. Donnelly, RPR
Chief Court Reporter