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IN THE COUNTY COURT OF THE
17TH JUDICIAL CIRCUIT IN AND
FOR BROWARD COUNTY, FLORIDA.

CASE NO: 16-3309MU10A

STATE OF FLORIDA,

Plaintiff,

vs.

TYLER MICHAEL DOUGHTERY,

Defendant.

_____ /

110 Southeast 6th street
28th Floor
Fort Lauderdale, FL 33301
April 20, 2017
3:06 p.m.

TELEPHONIC DEPOSITION
OF
MATTHEW E. MALHIOT

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APPEARANCES:

OFFICE OF THE STATE ATTORNEY
BY: JEFFERY CHUKWUMA, ESQ and
GARETT BERMAN, ESQ.
COUNSEL FOR PLAINTIFF

LAW OFFICES OF ROBERT DAVID MALOVE
BY: CARLOS LONDONO, ESQ. (VIA TELEPHONE)
COUNSEL FOR DEFENDANT

I-N-D-E-X

WITNESS: MR. MATTHEW E. MALHIOT

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Direct Examination	
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By Mr. Berman	7, 11

E-X-H-I-B-I-T-S

(None marked)

1 Telephonic deposition of MATTHEW E. MALHIOT, a
2 witness of lawful age, taken by the Plaintiff for the
3 purpose of discovery and for use as evidence in the
4 above-entitled cause, wherein THE STATE OF FLORIDA is the
5 Plaintiff, and TYLER MICHAEL DOUGHTERY is the Defendant,
6 pending in the Circuit Court of the 17th Judicial Circuit in
7 and for Broward County, pursuant to notice heretofore filed,
8 before Avril Severin, Court Reporter and Notary Public in
9 and for the State of Florida at Large, at 110 Tower, 110
10 Southeast 6th Street, 28th Floor, Fort Lauderdale, Florida
11 33301, on the 20th day of April, 2017, commencing at
12 3:07 p.m.

13 - - - - -

14 MR. CHUKWUMA: Mr. Londono?

15 MR. LONDONO: Yes, sir. I'm here.

16 MR. CHUKWUMA: Mr. Malhiot, we are going to have
17 to swear you in through the phone. We are going to
18 stipulate that you are telling the truth and raising
19 your right hand and swearing to tell the truth.

20 Hello?

21 MR. MALHIOT: Yes, my right hand is raised and
22 ready.

23 COURT REPORTER: Do you swear to tell the truth,
24 the whole truth and nothing but the truth?

25 MR. MALHIOT: Yes, I do.

1 COURT REPORTER: Thank you.

2 **DIRECT EXAMINATION**

3 **BY MR. CHUKWUMA:**

4 Q Mr. Malhiot, who are you retained by for this
5 case?

6 A Robert Malove's firm. Carlos, the attorney there
7 retained me back in January in this case.

8 Q And for what purpose were you retained?

9 A I was retained to review the arrest report, video,
10 breath test, breath test machine, and consult with counsel.

11 Q And how much did you charge in order to --

12 A I charge a flat fee of \$600 for the complete case
13 review, instrument review, and all the consultations, and
14 then I was retained as a testifying expert, and was paid
15 \$2,500. That includes travel for a single day in court down
16 there.

17 Q Okay. And after you reviewed this case, what was
18 your opinion?

19 A Numerous opinions. There was some error message
20 generated by the breath test machine that was unexplained.
21 It was taken out of service.

22 Q For the interest of organization, do you by any
23 chance have your evaluation in front of you?

24 A I do.

25 Q So, if we could just start from the beginning and,

1 you know, explain your opinions based on what you wrote in
2 your evaluation.

3 A Sure. First thing we did is look at the breath
4 test results and the times. We looked at the 20-minute
5 observation, then what we did is, we did a complete
6 instrument audit of the department's inspections and agency
7 inspections and breath test on the machine.

8 And we saw that on February 25th, there was an RFI for
9 an unknown reason. On April 25th, we found that it was out
10 of cards, out of calibration and could not be brought back
11 into calibration.

12 We looked at the videotape, we looked at the field
13 sobriety, walk and turn, and those types of things.

14 Q Okay. Starting with the field sobriety test on
15 Page 4 and in regards to there being no video, what is your
16 opinion as far as the accuracy of the field sobriety test
17 without there being a video?

18 A Well, the actual field sobriety cannot be
19 validated as far as proper instruction, proper
20 interpretation, proper following of training unless there is
21 a video. We just have to trust that the officer, his
22 testimony and written report is accurate and correct, and
23 there will be Cross-Examination and those types of things.
24 Counsel will be able to determine the validity of field
25 sobriety.

1 Q So, just because there is no video doesn't make
2 the field sobriety test invalid, correct?

3 A It does not.

4 Q Okay. And then, Mr. Malhiot, you were previously
5 a police officer, correct?

6 A I was.

7 Q And did you yourself conduct any field sobriety
8 exams?

9 A I did.

10 Q And about how many would you say?

11 A As a police officer and as an instructor, probably
12 thousands.

13 Q And did you have a video every time you conducted
14 one of those field sobriety exercises?

15 A I did not.

16 Q So, without a video, how would you determine
17 whether someone was actually impaired?

18 A Well, the video doesn't determine impairment.

19 Q Okay. As far as the actual exercises, can you
20 tell me about your opinion of each exercise that was
21 conducted?

22 A Well, not being able to validate, I do not have an
23 opinion other than the ones that were on the video that were
24 at the station house. But, as far as the field sobriety in
25 the field, I don't have an opinion as to whether they were

1 done accurate, whether they were validated clues, whether
2 they were performed properly. That's something that will
3 have to be determined. I don't know if counsel plans on
4 deposing the officer or just doing Cross-Examination.

5 BY MR. BERMAN:

6 Q Mr. Malhiot, obviously, if defense counsel did
7 depose the officer in this case with the veracity
8 administration of these field sobriety exercises and he
9 provided you a copy of that, would you then be able to
10 formulate an opinion as to whether or not the officer
11 administered the test properly and/or how the Defendant
12 performed?

13 A I would be able to tell more. I don't necessarily
14 know if I would be able to -- I would have to review the
15 document. It is very speculative.

16 Q Okay.

17 A If it was a complete and accurate representation
18 of what happened, I probably could, but I couldn't tell you
19 for sure without reviewing and see what -- it's a very
20 speculative question. Possibly, I could give an opinion,
21 possibly not, depending on what was in the document to be
22 reviewed.

23 Q Okay.

24 BY MR. CHUKWUMA:

25 Q How long after arrest should the breath test be

1 administered, what's the timeline?

2 A Well, if I remember correctly, I had a typo on my
3 report, but anyway, there is no specific timeline. The goal
4 is to have it done as quickly as possible at the time of
5 stop because Florida is the time of driving State, not a
6 time of test State.

7 Q So, there is no law that specifically requires for
8 it to happen within a certain amount of time?

9 A There is no statutory requirement. I think there
10 is -- and you would know better than I -- there is probably
11 case law that talks about what is reasonable, but I don't
12 have a time right off the top of my head, no.

13 Q Okay. And when is the peak of alcohol
14 consumption?

15 A Depends on when alcohol -- your question is -- let
16 me rephrase your question so I understand it. Your question
17 was, when is the peak of alcohol consumption. The actual
18 question I think you're trying to ask is, when is peak
19 alcohol achieved after consumption; is that correct?

20 Q Correct.

21 A Okay. After consumption, depending on the
22 consumption timeline and depending on food in the stomach,
23 and there's lot of variables, but it can be generally an
24 hour to three hours. Now, there are some circumstances
25 where it's less than that, but I have never seen more than

1 three hours.

2 Q So, if the breath test was conducted approximately
3 two hours after, it's possible it could be going up or down
4 the breath alcohol level, correct?

5 A Correct.

6 CONTINUED BY MR. BERMAN:

7 Q Mr. Malhiot, what's the research show with regards
8 to in a normal drinking environment what the timeframe is
9 for peak alcohol?

10 A Well, I have seen recent studies and it's
11 published in medical legal aspects of alcohol that an hour
12 or three, but there's also new studies done that say 20 to
13 40 minutes depending on food consumption and drinking habit.

14 Q Now, you say recent, like how recent?

15 A I don't know the date of the research -- within
16 the last ten years.

17 Q Ten years. Okay.

18 CONTINUED BY MR. CHUKWUMA:

19 Q And as far as the errors, you called it a machine
20 inspection, the instrument inspection I would call it, as
21 far as the errors, what errors did you notice?

22 A Well, it had a radio frequency error during the
23 2.0 simulator test the month following this breath test, and
24 it was documented as the unknown cause. And then, in April
25 it was taken out of service because it failed the .08

1 calibration check.

2 Q Well, the breath test was conducted on
3 February 13, 2016, correct?

4 A Correct.

5 Q And the test before that, it was in compliance,
6 correct?

7 A January 29th it was in compliance.

8 Q And then, the inspection after that on
9 February 25th, even with the RFI, radio frequency
10 interference, it was retested and it was also in compliance,
11 correct?

12 A It met the standards. However, they did not
13 define and determine the cause of the RFI, not that they
14 always can, but one of the requirements of the inspection is
15 if the test has to be repeated, the reason must be
16 documented, and evidently, they couldn't determine a reason,
17 but it did meet the requirements of the inspection on the
18 25th.

19 Q So, that would mean that the time the test was
20 conducted, the machine was, in fact, properly working and it
21 was properly inspected, correct?

22 A Well, it had a valid inspection before and after,
23 that is correct.

24 Q Okay. Were there any other errors you found?

25 A No, not during my audit other than the breath test

1 review where there was some exception messages generated
2 over breath testing, but nothing statistically abnormal,
3 just a few anomalies not met, no sample and refusal, but
4 those are not statistical anomalies to instrument
5 performance.

6 Q So, those aren't even considered errors; are they?

7 A Well, whether you call it an error message, an
8 exception message or just a message, it's not necessarily an
9 error with the machine, no.

10 Q Okay.

11 MR. BERMAN: Mr. Malhiot, I had couple questions.

12 CONTINUED BY MR. BERMAN:

13 Q I would like to kind of go back to the start of
14 your report. And on Page three, you kind of -- you list a
15 quote there from the Georgia Bureau of Investigation
16 Division of Forensic Sciences. It seems that something was
17 taken from an Intoxilyzer 9000 operator's manual; do you see
18 that?

19 A That's correct.

20 Q Obviously, we are not in Georgia, right?

21 A Correct, no.

22 Q And it just -- and even if we were to accept the
23 Georgia Bureau of Investigation training manual, it merely
24 only says that odor of an alcoholic beverage, flushed
25 appearance and bloodshot watery eyes may be an indication of

1 drinking, but are not highly correlated with a particular
2 level of alcohol. It doesn't necessarily mean that those
3 three things taken together don't necessarily show
4 impairment, correct?

5 A Could you rephrase the question?

6 Q Sure. Basically, what's there is that those three
7 things are an indication of drinking, not necessarily
8 correlated to a particular level of alcohol, but it doesn't
9 necessarily preclude that a person who sees those
10 observations on somebody else, that that somebody else is
11 not necessarily impaired?

12 A Correct.

13 Q Okay. Now, you also made note on Page four with
14 regards to the validation statement that occurs at the end
15 of Section eight of the standardized field sobriety testing
16 manual; are you familiar with that one?

17 A Yes.

18 Q Okay. And you are familiar, having been an FDLE
19 alcohol testing program, a department inspector and breath
20 test inspector, and you are an SFST instructor, you are
21 familiar that Florida treats standardized field sobriety
22 testing as lay opinion, correct?

23 A All but the HGN, that is correct.

24 Q Okay. So, the physical battery of the
25 standardized field sobriety tests are lay opinion?

1 A That's the way the courts consider them in the
2 State of Florida and my understanding of the case law, yes.

3 Q Okay. So, in that particular instance, it
4 wouldn't matter if any of testing elements is changed,
5 because we can't talk about the validity of those tests;
6 that kind of part of the SFST manual is kind of moot here in
7 Florida; wouldn't you agree?

8 A No, I would not agree, because the arrest/don't
9 arrest decision-making process by the officer is still based
10 on that. Whether it's admissible testimony in court is a
11 different question. And let me give you a hypothetical.

12 If the instructions are not given properly, and this is
13 pure hypothetical, if you tell an individual -- don't tell
14 the individual once you start do not stop during the walk
15 and turn, it wouldn't be fair to count the individual as
16 stopped walking when, in fact, you failed to instruct him of
17 that. And that is what the arrest/don't arrest decision --
18 those criteria is assisting the officer.

19 Now, as far as the pass/fail criteria and probability
20 of impairment and all of that as far as the courts go, that
21 may not be admissible, but the police officer does use that
22 standard in the arrest/don't arrest decision-making process.

23 Q Okay. So, by that rationale, if the officer did
24 not tell the officer -- I'm sorry. If the officer did not
25 tell the subject not to stop once they've started and they

1 stopped, but the officer does not count it against the
2 individual, what impact would that have?

3 A Well, that's fine. I mean, if he doesn't give the
4 instruction, doesn't count it, then that particular
5 instruction is moot.

6 Q Okay. So, in terms of giving the instructions as
7 they are in the manual, if an officer does not give an
8 instruction that's required, but then subsequently does not
9 mark the subject off for not following that instruction,
10 that's okay?

11 A It's -- when you say okay, I mean, it's kind of
12 moot, because if you are not counting it against him, then
13 failing to give the instruction is moot.

14 Q Okay. Now, can you say with any type of certainty
15 how much any of the validity is compromised from any of the
16 studies that were conducted on the standardized field
17 sobriety testing?

18 A No. Other than the 28 percent error rate with
19 four clues or less on HGN that's specifically graphed out
20 and shown in the standardized field sobriety manual, but as
21 to your question, the percentage of probability, no.

22 Q And since you mentioned it, when we turn to Page
23 18 of the Validation of the SFST Battery at BACs Below
24 0.10 Percent that was conducted in 1998, you referenced I
25 guess the 28 percent fail rate on Page 18; do you have study

1 with you?

2 A Yes.

3 Q Can you point out to me specifically where it says
4 a 28 percent fail rate?

5 A Well, if you take the arrest/don't arrest decision
6 process, and some of them should have been arrested and
7 weren't arrested, some were arrested who shouldn't have been
8 arrested, and that improper decision whether it be arrest or
9 not arrest was 28 percent when there were four clues
10 indicated on the HGN.

11 Q Okay. Can you give me the numbers that you are
12 going off of, because I don't see an actual 28 percent?

13 A Well, like I'm saying, you got to add them
14 together and look at the totality.

15 Q Okay. Which ones are you adding together then?

16 A Well, let me find the reference here. I don't
17 think the study was published in the new book here. Let
18 me --

19 Q No problem.

20 A I don't have the 2006 manual in front me here. I
21 may have to get back to you on that and email you that.

22 Q Okay.

23 A I just don't have it in front of me.

24 Q Okay, that would be fine.

25 A Let me write a note to it, email you that. I'll

1 email it through counsel.

2 Q Okay.

3 (Thereupon, a brief conversation was had off the
4 record, after which the deposition continued:)

5 MR. BERMAN: And so -- are you ready to go on,
6 Mr. Malhiot? I'm sorry.

7 THE WITNESS: Yes, go ahead.

8 MR. BERMAN: Okay.

9 CONTINUED BY MR. BERMAN

10 Q And then, looking at Page seven of your report,
11 you said that one of the -- it looks like one of the causes
12 that could contribute to poor performance on the walk and
13 turn test that was a -- excuse me -- identified by NHTSA
14 included, one of the things you put down was, distractions
15 created by others?

16 A Correct.

17 Q Okay. And can you tell me where in the manual
18 specifically that comes from?

19 A Certainly.

20 Q And also to which manual you are referring. I'm
21 sorry. Which year?

22 A Yes. Let me just find it and I will give you a
23 cite here.

24 I am going to get back, because I don't have that
25 manual in front of me. I have a different manual, so I

1 will --

2 Q Okay. Just out curiosity, which manual do you
3 currently have?

4 A I am looking at the '13 manual.

5 Q Okay. Does it say it in the 2013 manual?

6 A Let me flip through here. I do not see it in the
7 2013 manual.

8 Q Okay. So, if anything, you would be referring to
9 the 2006 manual, correct?

10 A Yes.

11 Q Okay. And if you would, I guess same thing with
12 the other -- could you find that in the --

13 A I have a note.

14 Q Okay. And I guess then the same question would go
15 for on Page eight where you referenced the same causes that
16 might contribute to poor performance for the one leg stand,
17 as well. You also listed distraction caused by others.

18 A Yes. I will get you that reference, also.

19 Q Okay. And then, also at the bottom of Page eight,
20 you referenced the finger to nose as not being an approved
21 NHTSA standardized field sobriety test.

22 A Correct.

23 Q You mentioned that they rejected it, but --

24 A They did.

25 Q -- they didn't actually reject it completely, they

1 just did not use it as the three test battery.

2 A Correct.

3 Q Okay. So, when you put, they rejected it, that's
4 kind of not the correct term. It's that they didn't use it
5 for the three test battery. They felt the other tests were
6 more indicative, correct?

7 A Well, they rejected it as far as out of the six
8 they evaluated, three they accepted and three they rejected.

9 Q Okay. But, they didn't reject using it at all,
10 correct?

11 A Well, no. What they said is they established no
12 scientific research for objective standards of that test.

13 Q Okay. And you are aware that drug recognition
14 experts also still use the finger to nose test, correct?

15 A Yes, they do.

16 Q And you also noted in your report that a handheld
17 breath test not completed in this case.

18 A Correct.

19 Q It was on Page nine.

20 A Yes.

21 Q Having been employed in Florida, you do know that
22 administration of a breath test in a regular DUI
23 investigation is actually not allowed, correct?

24 A There's some case where there is some confusion,
25 but I don't think it's prohibited that I'm aware of, unless

1 you're aware of something I don't know.

2 Q Okay. During your time as a FDLE department
3 inspector for the alcohol testing program, do you know if
4 there is any approved handheld breath test device for
5 evidential breath testing in the State of Florida?

6 A There is not.

7 Q Okay. So, any result that would be obtained from
8 a handheld breath test, would not necessarily be admissible
9 as evidence of an approved breath test. Correct?

10 A Correct. Under the implied consent requirement,
11 but it may be admissible as far as positive or negative for
12 alcohol or the fact it was given, but the numerical value
13 may not be.

14 Q Okay. Now, I think co-counsel asked you about the
15 February 25th inspection where there was an RFI detect.

16 A Correct.

17 Q Is radio frequency interference always
18 explainable?

19 A No.

20 Q So, as long as there is a radio frequency
21 interference of sufficient strength and sufficient duration,
22 that would trip the RFI detector in the instrument; is that
23 right?

24 A It could, yes.

25 Q Okay. And it could be something else; is that

1 right?

2 A What could be something else?

3 Q RFI, could it be something else other than the
4 sufficient duration and the sufficient strength of the radio
5 frequency?

6 A Well, there's many, many different electromagnetic
7 energies, meaning, it could be something else other than
8 police radio or cell phone, absolutely.

9 Q Okay. But, as far as that goes, when the
10 inspection was conducted, when they were doing the test
11 during that inspection and they got the RFI, those test
12 results would not be acceptable in the inspection. You'd
13 have to run that test again; is that correct?

14 A Correct. You would have to repeat that brief set
15 of simulator tests, which they did.

16 Q Okay. And they did and all of those results came
17 back within the tolerance range; is that right?

18 A They did.

19 Q Okay. And so, in your opinion, would that be an
20 inspection that is in compliance?

21 A The only thing I would question is their efforts
22 to determine cause, but other than that -- and we discussed
23 sometimes you can't.

24 Q Okay.

25 A But, that's the only question I would have.

1 Q Okay. And being aware of Florida's implied
2 consent scheme, are you aware of the Florida statutes with
3 regards to the breath test affidavit?

4 A I am familiar with them, yes.

5 Q Okay. Are you familiar with Florida Statute
6 316.1934 subsection (5)(a) through (e)?

7 A I don't have them memorized, but I'm familiar with
8 them.

9 Q Okay. And I believe that's the statute that says
10 that the affidavit is admissible as prima facie evidence of
11 an approved breath test if it lists the five things that are
12 listed in subsection (a) through (e), which are actually
13 contained on the breath test, meaning, the date of test, the
14 individual's name, the time of test, the fact that it's
15 reported as a numerical result; are you aware of that?

16 A Yes, yes.

17 Q Okay. And one of the last things I wanted to draw
18 your attention to was subsection (e), which actually says
19 that the affidavit has to have on it the date of the last --

20 A Agency inspection.

21 Q -- agency inspection, correct. And you are aware
22 of that?

23 A Yes.

24 Q And so, basically, at the time that the breath
25 test affidavit is generated then, all that would be required

1 for admissibility purposes is if the inspection prior to the
2 breath test was in compliance, correct?

3 A That's my understanding, but you're asking me for
4 a legal conclusion, but that is my understanding, yes.

5 Q Okay.

6 A Admissibility.

7 Q Okay. With regards to Page 11 of your report, you
8 actually talk about the following error message was
9 generated by the machine, and you listed three different
10 ones between January 1st and March 31st of 2016?

11 A Correct.

12 Q No sample provided, volume not met, and refusal,
13 correct?

14 A Correct.

15 Q And you would agree with me nowhere in the breath
16 test operator or agency inspector curricula is the word
17 error message ever used.

18 A No, that's correct. They changed the terminology.

19 Q Okay. And when you say change, it was actually
20 never in the original versions either, in the 2007 versions
21 for the Intoxilyzer 8000?

22 A The FDLE manuals, no. Correct.

23 Q And it's nowhere in the rules actually, the
24 Florida Administrative Code, Chapter 11D-8?

25 A Correct.

1 Q Okay. And it's not anywhere in the Florida
2 statutes?

3 A Correct.

4 Q Okay. And that term is actually not even used by
5 the manufacturer of the intoxilyzer, CMI, correct?

6 A Not anymore, no.

7 Q And you would agree that that's really a term
8 that's only used in the defense community, correct?

9 A No. It used to be used by FDLE and CMI, but they
10 changed it from -- three times. It used to be error
11 message, then they changed it to exception message, then
12 they changed it to just message, so -- but it is still used
13 in the defense community, yes.

14 Q Okay. And since using the Intoxilyzer 8000, since
15 we've already established that the 2007 curriculum for the
16 Intoxilyzer 8000 does not contain that word, error message,
17 since that time, it's been solely used by the defense
18 community, correct?

19 A I can't say that it was solely, but it is
20 inclusive of the defense community, yes.

21 Q And when you -- the messages that you put down in
22 Page 11 where it says, no sample provided, that's not
23 necessarily an error on the part of the instrument, that's
24 actually because the subject did not provide a sample,
25 correct?

1 A Correct. Just like all of these as I answered the
2 question earlier, all three of these may not show errors or
3 problems with the machine at all.

4 Q Okay. So, if it doesn't show errors or problems
5 with the instrument, then why would you put the following
6 error messages were found to have been generated by the
7 machine in your report?

8 A Because that's the way I call them, error
9 messages. There are errors in obtaining a complete breath
10 test, whether it's a machine error, a human error,
11 basically, the machine did not produce a complete breath
12 test those seven times, and just terminology I use in my
13 report.

14 Q Okay. Did you use that terminology when you were
15 with FDLE as a department inspector?

16 A For a short time, yes, and when I was in Montana,
17 but then they changed it to exception message.

18 Q Okay. Or a display message, maybe?

19 A Sometimes they call it display message, exception
20 message or just the term, message.

21 Q Or operational message, maybe?

22 A Very probable, yes.

23 Q Okay. And speaking about probability, going back
24 to when you said, peak alcohol after consumption occurs
25 between one to three hours; you do recall that, correct?

1 A I do.

2 Q Okay. How likely is that in a normal drinking
3 environment?

4 A I don't know. It depends -- there's too many
5 variables to be able to answer that question, including
6 assumption.

7 MR. LONDONO: Yes, I object to it.

8 MR. BERMAN: Okay.

9 CONTINUED BY MR. BERMAN:

10 Q And would you -- I guess, what would you normally
11 assume to be peak alcohol absorption -- I'm sorry -- peak
12 alcohol after consumption within that timeframe, would it be
13 one hour, two hours?

14 MR. LONDONO: Objection. I believe you already
15 asked him and he already answered that question.

16 MR. BERMAN: No. He gave me a range. I'm asking
17 him to narrow the range. I'm asking if he has a
18 general normal timeframe that he normally applies.

19 THE WITNESS: Normally, I use a minimum of one
20 hour when I'm asked to do a retrograde extrapolation,
21 and that's the time in which I basically use unless I
22 have a specific time. In other words, if it's not at
23 least an hour, I don't think it's fair to try and
24 extrapolate.

25 MR. BERMAN: Okay.

1 CONTINUED BY MR. BERMAN:

2 Q Did you do an extrapolation in this case?

3 A I have not.

4 Q Okay. Do you know if you're going to be asked to
5 do one?

6 A I do not know.

7 Q Okay. If you would be so kind if you are asked to
8 do so before testifying, if you could let us know, because I
9 might have some more questions with regards to that.

10 A I understand. Yes.

11 Q Thank you. As far as the Defendant's breath test
12 in this case goes, did you see any issues with regards to
13 the test that was conducted on February 23, 2016.

14 A Not based on the documents I reviewed.

15 Q Based on anything else?

16 A No.

17 Q Okay. And with respect to the inspection on
18 April 25th where the instrument was removed from service,
19 you would agree that just because the instrument is removed
20 from service that doesn't necessarily negate all of the
21 breath tests that have been conducted on it in the months
22 prior?

23 A That is correct.

24 Q Especially one where this is the third inspection
25 after the Defendant's breath test.

1 A Correct.

2 Q Okay. Give me just one moment.

3 Now, when you talk about the Defendant's breath test
4 being conducted two and-a-half hours after the traffic stop,
5 what issues do you have with that, aside from that it's too
6 long?

7 A None.

8 Q Okay. So, your only issue is that it should have
9 been done sooner?

10 A The goal is to get it done as quick to the time of
11 driving as possible, that's all I'm pointing out.

12 Q Okay. But other than that, the result as far as
13 you're concerned is accurate and reliable for when it was
14 taken?

15 A There's no errors or exceptions generated by the
16 machine at the time of the test, so there's nothing to show
17 that the numerical number is an error.

18 Q And can you say with any certainty based on those
19 two samples that were taken at 6:17 a.m., what the
20 Defendant's breath alcohol concentration would have been at
21 the time the officer made contact with him?

22 A I do not have that information.

23 Q Is there any information that you would need in
24 order to make that opinion?

25 A Well, if I am asked to extrapolate, there would be

1 a bunch of variables I'd be looking for, but I have not been
2 asked as of this time.

3 Q Okay. Now, you read the officer's report in this
4 case, the trooper's report?

5 A I did.

6 Q Okay. And you do see there where the Defendant
7 was passed out behind the wheel, the vehicle was running?

8 A I did read that.

9 Q The vehicle was in drive. Defendant's foot was on
10 the brake?

11 A I read that.

12 Q Okay. And you did see that the officer made
13 observations of an odor of alcohol coming from his breath,
14 slurred speech and glassy, bloodshot eyes?

15 A I did.

16 Q And did you also see where the officer -- I'm
17 sorry -- the trooper asked how much he had to drink, and
18 twice, the Defendant stated, nothing?

19 A Correct.

20 Q And based on the breath test that you found to be
21 accurate and reliable at the time that it was taken, that
22 wouldn't necessarily be true of the Defendant's statement,
23 correct?

24 A Well, it could or could not be. I mean --

25 Q And why do you say that it could be true?

1 A Well --

2 MR. LONDONO: He didn't say it could be true.

3 MR. BERMAN: Well, he said it could or -- I asked
4 him if it could be true, he said it could or could not
5 be.

6 THE WITNESS: It could be or not.

7 MR. BERMAN: So, I am asking him why he would say
8 that it could be true.

9 THE WITNESS: You are well aware there are other
10 ways of consumption of alcohol other than drinking.
11 Very rare, but as a pure could it be, yes. It could
12 be. Is it probable, probably not.

13 CONTINUED BY MR. BERMAN:

14 Q Okay. Let me ask you. Having read this entire
15 report, and based on your experience as a law enforcement
16 officer, if you had these set of facts leading from the time
17 you made contact with this Defendant and woke him up, to the
18 time that the trooper arrested, not including the breath
19 test, would you feel that you had enough probable cause to
20 arrest for the person being DUI?

21 A I don't know, because I don't have a video. I
22 wasn't there. I don't have the odor. These are very, very
23 subjective. I'm not saying he didn't. I just can't say
24 what I would have done.

25 Q Okay. Well, I am asking you as a hypothetical, as

1 an expert witness, you know, if all these -- if everything
2 in here in the trooper's report is taken to be true, would
3 you feel as an officer you would have enough probable cause
4 to have arrested him?

5 A Probably, yes.

6 Q Okay.

7 MR. BERMAN: I don't think I have anything else.
8 It's about 3:52, I think we started a little bit after
9 3:00. So, I guess I would ask if you want to read or
10 waive.

11 MR. MALHIOT: Read, please.

12 (Thereupon, a brief conversation was had off the
13 record, after which the deposition continued)

14 MR. BERMAN: Mr. Londono --

15 MR. LONDONO: Yes, sir.

16 MR. BERMAN: The court reporter is telling me that
17 they will contact Mr. Malhiot to come to their office
18 to read it, but they will not send it out unless it is
19 ordered so --

20 MR. LONDONO: Okay. Unless I order the --

21 MR. BERMAN: Correct, that's what she is telling
22 me.

23 MR. LONDONO: Okay. Do I have to make that
24 decision today, or can I talk to my client first and
25 them make that decision?

