

1
2
3
4
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IN THE COUNTY COURT OF THE
17TH JUDICIAL CIRCUIT IN AND FOR
BROWARD COUNTY, FLORIDA
CASE NO.: 16025766MU10A

STATE OF FLORIDA,
Plaintiff,

vs.

KRISTIN PEACOCK,
Defendant.

_____ /

DEPOSITION OF
MATTHEW MALHIOT
TAKEN ON BEHALF OF THE PLAINTIFF
MARCH 29, 2018
2:36 p.m. - 3:29 p.m.

REPORTED BY:
GABRIELA GONZALEZ, COURT REPORTER
NOTARY PUBLIC, STATE OF FLORIDA

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2
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4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

INDEX TO APPEARANCES

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2
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5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

INDEX TO EXAMINATIONS

DIRECT EXAMINATION

Page

Mr. Garrett Berman, Esq.

4

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

DEPOSITION OF
MATTHEW MALHIOT
MARCH 29, 2018

MATTHEW MALHIOT,
having first been duly sworn, testified as follows:

MR. BERMAN: Okay, so we are here on State of Florida versus Kristen Peacock. It is case number 16025766MU10A. Present for the State is myself, Garrett Berman. Also present is --

MS. LEVY: I'll say it. Nondace Levy. Spelled N-O-N-D-A-C-E. Last name Levy, L-E-V-Y on behalf of Kristin Peacock.

MR. BERMAN: And also present for the State is Assistant State Attorney, Michael White and Assistant State Attorney Aaron Passy.

DIRECT EXAMINATION

BY MR. GARETT BERMAN, ESQ.:

Q (MR. BERMAN) Okay, so Mr. Malhiot can you please state your name, spell your last name for the record?

A Certainly. Matthew E. Malhiot. M-A-L-H-I-O-T.

Q Okay, and how are you employed sir?

A I am the proprietor of forensic alcohol

1 consulting and training.

2 Q Okay, and how long have you held that position?

3 A Since 2010.

4 Q Okay and what is your -- what did you do prior
5 to 2010?

6 A I was a department inspector with the Florida
7 Department of Law Enforcement's alcohol testing program.

8 Q And prior to that?

9 A I was an air force police officer for 20 years
10 and a reserved deputy in Cascade County, Montana.

11 Q So, me personally I'm kind of familiar with
12 your background, so I'm not going to waste everyone's
13 time in going through that. I'm just going to kind of
14 jump right in. So I'm looking at a report that you
15 authored, looks like you completed it on 2/26/2018 with
16 regards to this particular case State versus Peacock.
17 Do you recall that?

18 A Yes, a total of 11 pages including cover page.

19 Q Okay, so I'm just going to kind of go in order
20 with regards to some of the things that you wrote in
21 your report. The first thing was the incident occurred
22 back in October 14, 2016. You weren't present with the
23 defendant on that date, correct?

24 A I was not.

25 Q Okay. And one of the things that you talk

1 about in the section in your report called "Vehicle in
2 Motion", is that there was no video from Lieutenant
3 Johnson who was the stopping officer, is that right?

4 A That's correct.

5 Q And you also mentioned that in your report in
6 order to validate the driving patterns described in his
7 report, there was no video?

8 A Correct.

9 Q Can you tell me as far as why one would need a
10 video if the Lieutenant was going to testify under oath
11 with regards to what happened?

12 A Well I'm just saying pended validation, not
13 necessarily that I'm disputing the officers testimony
14 and truthfulness. It's just a validation, that's all.

15 Q Okay. But obviously just because there's no
16 video with regards to the incident leading to why the
17 Lieutenant pulled him over, it doesn't necessarily make
18 any testimony that he would give as far as that goes,
19 wouldn't mean that its untruthful?

20 A Not simply because a lack of video. The
21 truthfulness or untruthfulness of testimony is dependent
22 on the finder of facts. So I'm not here to dispute or
23 say that the Lieutenant is being less than truthful, no.

24 Q Okay. And again, same thing with the statement
25 that you wrote in your report, I think it's the last

1 sentence of that same paragraph. Failure to capture
2 encounters between law enforcement officials and public
3 on video is a failure to provide a true and accurate
4 representation of the evidence observed and recorded by
5 law enforcement. So you can kind of see where I'm
6 having a little bit of a quandary and if it's a failure
7 to provide a true and accurate representation, how
8 necessarily would the officer testifying to it on a
9 stand not be truthful?

10 A Well I'm not saying truthful. I'm not saying
11 that he's being less than truthful, what I'm saying is
12 independent video validates his testimony and a video is
13 a lot more descriptive than just a word picture.

14 Q Okay. And during your time as an air force
15 police officer, did you have video with you every time
16 you made a stop?

17 A You know as well as I do, back then there
18 wasn't as much video. Nowadays we have so much video on
19 everything. Video is a lot more prevalent, but to
20 answer your question, no not necessarily.

21 Q Okay. And just because there was no video, you
22 yourself when you went to testify, I mean you weren't
23 necessarily lying or being untruthful about anything
24 that happened, correct?

25 A That is correct.

1 Q Okay. And the lines that you talked about
2 where you say the failure to provide a true and accurate
3 representation of the evidence that's observed and
4 reported by law enforcement, are you getting that from
5 any sort of manual, like training manual or is that just
6 your opinion?

7 A That is my opinion.

8 Q Okay. And do you know if Lieutenant Johnson
9 even has a video camera in his vehicle?

10 A I do not.

11 Q Okay. Did you make any inquiries as far as
12 that goes?

13 A I did not.

14 Q Okay. And moving on to I think the second page
15 or third page of your report, excuse me. There is --
16 you talked about some of the indications that the
17 officer Lieutenant Johnson made when he first made
18 contact with Ms. Peacock and some of the things he
19 noticed was an odor of an unknown alcoholic beverage
20 coming from the vehicle and that Ms. Peacock's eyes were
21 red and watery.

22 A Correct.

23 Q Okay. And I think later on on that same page
24 you also make reference to an Intoxilyzer 9000 Operators
25 Manual from Georgia. Do you recall that?

1 A Yes, I have that in front of me.

2 Q Okay. And it does say and I did check the
3 manual, where it does say manifestation such as an odor
4 of an alcoholic beverage, flushed appearance and
5 bloodshot watery eyes may be an indication of drinking,
6 but are not highly correlated with a particular level of
7 alcohol, is that right?

8 A Correct.

9 Q Now as far as that goes looking at page 13 of
10 the Georgia Bureau Of Investigation Intoxilyzer 9000,
11 Georgia operators training manual, that's on a page with
12 kind of like a little bit of a chart that I guess parses
13 out the different possible driving impairment
14 observations for a particular BAC range, is that right?

15 A I believe -- I don't have the manual in front
16 of me, but I don't dispute what you're saying.

17 Q Okay. So let's say for example, different
18 stages of possible intoxication near sobriety before
19 excitement and then it kind of gets --

20 A Yeah, that's Dr. Dubowski's alcohol, acute
21 alcohol manifestations -- yes I'm familiar with that.

22 Q And the quote that you have in your report on
23 page 3 -- actually as you note, comes from page 13 but
24 it's actually a note. Isn't that really just to say
25 that odor of alcohol, flushed appearance and bloodshot

1 watery eyes don't correlate to a specific BAC level, not
2 that it doesn't correlate to impairment?

3 A No, I disagree with you. I mean hypothetically
4 if someone goes out and has a glass of wine, you can
5 smell the wine on their breath, but it doesn't mean
6 there's impairment. On a reverse side if you have an
7 impaired person, you may smell the odor of alcoholic
8 beverage.

9 Q Okay, but of course as an officer, would you
10 ever just look at the fact that someone had an odor of
11 alcohol or flushed appearance or bloodshot watery eyes
12 on their own independently and individually to make a
13 determination of impairment?

14 A Probably not, no.

15 Q Okay. And you would take all of those then in
16 totality of the circumstances, correct?

17 A Yes.

18 Q So not just the physical observations that you
19 could see, but also driving pattern, how they act, how
20 they talk, performance on standardize field sobriety
21 test, correct?

22 A Correct and is there evidence depending on the
23 jurisdiction and the TBT and many different things or
24 you may not know a driving pattern, so yes, when you say
25 the totality, it's a very accurate statement.

1 Q Okay. So I mean getting back to what you said
2 about just someone who had been drinking, may show those
3 signs of or may show those observations, like the odor
4 of alcohol. If you've been drinking, you would agree
5 you may have an odor of alcohol on your breath?

6 A Correct.

7 Q Doesn't necessarily mean that you're impaired
8 or at a specific BAC correct?

9 A Correct.

10 Q So realistically then, odor, flushed face,
11 bloodshot watery eyes, could possibly be in almost every
12 stage of potential intoxication, correct?

13 A I would expect to potentially see those
14 indicators, yes.

15 Q But as far as what the manual has in that note
16 section, just those three either by themselves or
17 together, they don't actually correlate to a specific
18 BAC, is what that was saying, correct?

19 A That is what it's saying, yes.

20 Q Okay. And then kind of moving on with the
21 field sobriety exercises and I may just for the record,
22 I may use test and exercises interchangeably. Obviously
23 here in Florida in court they referred to as exercises.
24 I'm sure you know that?

25 A I'm fully aware of Florida's limitations on the

1 evaluations.

2 Q Okay. With regards to the -- I see that you
3 put the NHTSA statement from the 2006 manual with
4 regards to the validation and if any of the elements of
5 the SFST's are changed the validity is compromised. You
6 do have that in your report? You see that there?

7 A I do.

8 Q Okay. Now you are using the 2006 manual,
9 correct?

10 A Yes, on these references.

11 Q Okay. Do you know specifically if that same
12 reference is contained in the later SFST manuals like
13 the 2008, 2013, and 2015?

14 A 2015 I believe it was removed. I mean 2013 I
15 believe it was a removed. 2015 it was put back in and
16 with a slight variation. The validity is compromised
17 and they changed it to I believe, I'm not quoting them,
18 but the validity may be compromised.

19 Q Okay. And when its talking about the validity,
20 it's talking about the percentages for the correct
21 arrest or non-arrest decisions that were taken from the
22 validation studies, is that right?

23 A I couldn't answer that question. I don't know.
24 I'm just quoting it as it's written. Whether it's
25 specifically on the percentages of the validation study

1 or what their intent is, I'm just quoting them right out
2 of their manual. Whether that be first to their
3 validation studies is unknown.

4 Q So you can't say whether or not it applies to
5 the validation of the studies or the validation of the
6 officers observations out on the scene?

7 A Correct.

8 Q Okay. Now with regards to the HGN test that
9 the officer performed, I believe you reviewed the video?

10 A I did.

11 Q Okay. And I think from the video you said that
12 the officer I guess did too fast of a pass at one point,
13 do you recall that?

14 A Yes.

15 Q And do you recall on which part of the HGN test
16 that was for?

17 A I believe Distinct and Sustained Nystagmus at
18 Maximum Deviation.

19 Q So it was an issue to the pass instead of being
20 two seconds out to the side was less than two seconds?

21 A No, no. I think it was at the time -- I'm
22 reviewing my report.

23 Q Okay.

24 A I believe I was referring to the fact that the
25 stimulus was not held at Maximum Deviation for a minimum

1 of four seconds.

2 Q Okay. And are you -- give me one second.
3 Actually let me go back because I think I jumped ahead
4 of myself. One of the things that I saw in your report
5 was that you noted that the Trooper Johnson and Trooper
6 Moraley's vehicles emergency lights were still activated
7 during the HGN test, correct?

8 A Correct.

9 Q And do you know if that actually did affect the
10 HGN test or the results?

11 A No, I do not know. Factually it could. That's
12 what I said.

13 Q Okay, and do you recall in what direction Ms.
14 Peacock was facing when Trooper Moraley administered the
15 HGN test?

16 A I don't recall off the top -- and my
17 recollection was perpendicular to the patrol vehicles.

18 Q Okay so she wouldn't have been looking directly
19 at either of the lights?

20 A Correct.

21 Q And so the optokinetic nystagmus, you don't
22 necessarily know if that's what the officer was seeing
23 because of the way that Ms. Peacock was positioned?

24 A Well that's a compound question. One, I don't
25 know if that's what the officer observed and two, I

1 don't know that the way she was facing was a cause or
2 not. So it's a no, no.

3 Q Okay. And you said in part of your report,
4 says the officer should turn off their emergency
5 flashing lights during the HGN testing and looks like
6 you got that from the 2013 manual. Do you know
7 specifically where? You mentioned section 8 page 13.

8 A Well, no, I think the type -- what I was
9 referencing was not necessarily the officer should turn
10 off their lights. I was not quoting that from the
11 manual.

12 Q Okay.

13 A The optokinetic nystagmus, that can be caused
14 by flashing or locating lights for this type of
15 nystagmus, but the officer should, is my opinion not
16 necessarily quoted from the manual.

17 Q Okay. The only reason I ask that is because
18 the cite comes after that last sentence rather than
19 after the optokinetic.

20 A Fair enough.

21 Q Okay. Give me just one moment. With regards
22 to HDN, would you agree that HGN is a progressive type
23 test? Do you understand what I mean by that?

24 A Yes. Meaning that you're not going to have
25 onset of 45 if you don't have it at a maximum deviation.

1 Q Would that also include if you're seeing onset
2 prior to 45 degrees, that you would necessarily have the
3 Distinct Sustained Nystagmus at Maximum Deviation?

4 A Yes, I would agree with that.

5 Q Okay. So would you also agree that if the
6 officer did not hold the stimulus for four seconds on
7 the pass, that you noted on your report, but he was
8 still seeing onset of Nystagmus prior to 45 degrees,
9 that it would be that it was either actually that
10 prevalent or it didn't actually matter in the course of
11 administering that SFST?

12 A What do you mean by -- I'm going to ask you to
13 rephrase. What you mean by that prevalent?

14 Q Well meaning that if he has an onset of
15 Nystagmus prior to 45 degrees, then does the fact that
16 he only held the stimulus during the onset portion of
17 the test, I'm sorry during the Distinct and Sustained
18 Nystagmus at Maximum Deviation part of the test, that
19 he only held it for let's say three seconds or two
20 seconds, just meant that it was that prevalent that he
21 was seeing it?

22 A No. I disagree. He may have been seen it, but
23 the manual is very specific that most persons will have
24 a Nystagmus, but it must be maintained and sustained and
25 distinct. Sustained meaning it must be exhibited beyond

1 the four second point or at least to the four second
2 point. Now having said that, if he correctly observed
3 Nystagmus onset prior to 45 degrees there was probably
4 Nystagmus at Maximum Deviation Sustained and Distinct,
5 but it wasn't properly tested or evaluated.

6 Q Okay. And so, let me ask you this. When you
7 say he didn't hold it for four seconds, on which pass
8 during that part of the test did he not hold it for four
9 seconds?

10 A I don't know I would have to review it again.
11 I don't know exactly which pass.

12 Q Do you recall if it was more than one pass?

13 A I don't.

14 Q Okay. And would you agree that if he only
15 missed it on say, one pass, but saw it on the remaining
16 passes provided he properly held the Nystagmus for the
17 minimum amount for four seconds, that really wouldn't
18 have any effect on his observations for the HGN test?

19 A Well here's where I disagree. Your
20 hypothetical right there is that he did it properly 75
21 percent of the time. If that was the case, then why
22 bother doing it four times? Was it probably there?
23 It's possible, but there's a specific procedure and
24 following the procedure only 75 percent of the time is
25 just that.

1 Q Okay, but you would still agree that like you
2 said before, if he saw the Nystagmus prior to 45
3 degrees, that it was probably there? Most likely it
4 would've been there onset -- I'm sorry that it was
5 distinct and sustained Nystagmus?

6 A Yeah, probably.

7 Q Even if let's say that part of the test was
8 incorrectly done and you were to exclude those
9 particular clues. If he still had lack of smooth
10 pursuit and onset of Nystagmus prior to 45 degrees in
11 both eyes, that would still provide four out of the six
12 clues, correct?

13 A Well, yes, but that contradicts what you said
14 earlier where it's a progressive test, but yes.

15 Q And having four out of the six clues would
16 still qualify under the validation studies for a BAC
17 over a point 10 or .08?

18 A Depending on which study, yes.

19 Q You also talked about the other causes of
20 Nystagmus other than alcohol in your report. One of the
21 things you mentioned was the stimulant problems.

22 A Right.

23 Q Do you know if the defendant had any inner ear
24 problems?

25 A I do not have any firsthand knowledge of any of

1 that.

2 Q And of the doctors reports that you reviewed
3 that were provided to the State Attorney's office, did
4 you see anything in there that would indicate any inner
5 ear of the stimulant problem?

6 A I did not.

7 Q And also you noted rotational Nystagmus as
8 another type of Nystagmus. Do you have any information
9 that the defendant was involved in a crash or spun
10 around quickly prior to the officer administering the
11 test?

12 A I do not.

13 Q Same thing with post rotational Nystagmus?

14 A No.

15 Q Same thing with caloric nystagmus?

16 A No.

17 Q Positional alcohol Nystagmus?

18 A No. I have no first-hand knowledge on any of
19 those. I just listed them as NHTSA's citing them as
20 potential.

21 Q Same thing with the neural Nystagmus as far as,
22 I know the lights were there for the optokinetic, but
23 you don't know if that was actually affecting the
24 Nystagmus at the time, correct?

25 A I do not.

1 Q And also any pathological disorders or
2 diseases. Do you know if the defendant has any that
3 would cause or create Nystagmus?

4 A I do not.

5 Q And one of the things for the walk and turn
6 test that you noted, was that Trooper reported five
7 observed clues for impairment, correct?

8 A Correct.

9 Q And you also noted that the using arms for
10 balance should only be documented if the person raises
11 their arms more than 6 inches from their side in order
12 to maintain balance during the walking stage of the
13 test, correct?

14 A Correct.

15 Q Did you see that at all when you viewed the
16 video?

17 A Let me just review here. I noted that I did
18 not observe the raised arms.

19 Q Okay. And you also stated here that the
20 defendant missed heel to toe and that it could be
21 documented that if a person missed heel to toe by more
22 than a half inch, were you able to see any missed heel
23 to toe?

24 A I believe I marked on mine that I did.

25 Q Do you know where?

1 A I don't.

2 Q In your report.

3 A Where what?

4 Q Where you would have noted that she missed heel
5 to toe or that she did not miss heel to toe, I'm sorry.

6 A No, I did not say that. I said I did observe
7 that she missed heel to toe in the video review.

8 Q Okay, I'm sorry. I misunderstood you then.

9 A No problem.

10 Q And also could not keep balance while listening
11 to the instructions. I think you noted that prior to
12 conducting the test, that the officer had instructed the
13 person to remain the heel to toe stance in order for the
14 clue to be counted. Did you see him do that?

15 A Well, yes, but -- and after he gave the proper
16 instructions, she did. She did step out of the
17 instructional stance at the very very beginning, but
18 once she was in the stance she maintained it until told
19 to begin the test.

20 Q Okay. So, she was put in the stance, she
21 stepped out in the beginning, but then she was able to
22 maintain it. Would that still count as a clue?

23 A I would not have counted it as a clue because I
24 don't believe the officer had told her to maintain that
25 position until I tell you to start the test until after

1 she got back in the stance. It's a very borderline
2 clue. I would have given her the benefit of the doubt
3 and not considered that as a valid clue.

4 Q Okay. And how about stepping off the line, did
5 you --

6 A I did see that.

7 Q You did see that. Okay. All right. And how
8 about stopping while walking?

9 A I did see that.

10 Q Okay. So she did have missed heel to toe,
11 steps off the line, and stops while walking. And even
12 though the officer marked couldn't keep a balance while
13 listening to instructions as well as raised arms for
14 balance, and even though you would disagree with those
15 particular clues, those two clues, would you agree that
16 the defendant still had at least three of the eight
17 clues present?

18 A Yes.

19 Q And do you know what the minimum number of
20 clues is on the walk and turn test?

21 A Based on the validation studies, two or more
22 clues.

23 Q Okay. So this would qualify for possibly
24 relating this to impairment based on the validation
25 studies, correct?

1 A Based on the objective standards of the
2 testing, yes.

3 Q Did you also notice the turn that the defendant
4 made on the video?

5 A I did.

6 Q Okay. Did you find that to be a correct turn?

7 A No, I marked it as an improper turn, but the
8 officer did not mark it that way.

9 Q So in your opinion she would have or she should
10 have had been marked for four clues, would that be
11 correct?

12 A Yes.

13 Q Okay. Now towards the end of that section on
14 the walk and turn, you also noted that there are some
15 other causes that are identified by NHTSA. Some of
16 those include leg, knee, or back problems, is that
17 right?

18 A Correct.

19 Q Okay. At any time during test, do you recall
20 the defendant complained of any leg, knee or back
21 problems?

22 A I did not.

23 Q Did you ever speak with the defendant at all
24 about whether or not she had any leg, knee or back
25 problems?

1 A I did not.

2 Q Was there anything in her medical records to
3 indicate she had any leg, knee, or back problems?

4 A Not that I remember.

5 Q Same thing with that inner ear problems. She
6 didn't say anything to the officer what she had?

7 A Correct.

8 Q And also distractions created by others. Did
9 she say she was distracted by what some other people
10 were doing?

11 A She did not.

12 Q Do you know specifically where this is in the
13 NHTSA manual?

14 A I cited it once before. I'd have to look it up
15 again and send you the cite. It's not in the ordinary
16 list, but it's there.

17 Q Okay.

18 A I'll send you the cite.

19 Q Okay, if you could and I'll just remind Defense
20 Counsel for that.

21 A As a matter of fact I'll send it to her and she
22 can forward it.

23 Q That'd be great. So moving on to the one leg
24 stand, do you recall how many times the Trooper
25 attempted to administer the test from the one leg stand?

1 A I don't recall.

2 Q Would it make a difference if he had to
3 actually instruct her twice on how to do it?

4 A Not to me necessarily, no.

5 Q You wouldn't note that as a possible indicator
6 of impairment?

7 A I might. I don't know.

8 Q Or how about if she had to actually attempt the
9 test a second time?

10 A Well it depends on the circumstances. I might.
11 It depends on what's going on. I don't recall exactly
12 the specifics on the video.

13 Q You noted that the two clues that were reported
14 by the officer was that she swayed, and I think you
15 noted if the person tested sways from side to side or
16 from front to back, is that right?

17 A Correct.

18 Q And did you see that in the video that she was
19 swaying?

20 A I did.

21 Q And also putting foot down, did you see that as
22 well?

23 A I did.

24 Q Okay, do you recall how many times?

25 A I don't.

1 Q And it doesn't really matter how many times for
2 the purposes of counting it as a clue, is that right?

3 A Correct.

4 Q So based on the clues that you saw on the one
5 leg stand, the two clues, that would also count as a
6 possible correlation to the validity of the correct
7 arrest decisions from the validation studies, correct?

8 A Correct.

9 Q Okay. And you need a minimum of two out of
10 four clues for that particular test, correct?

11 A Correct.

12 Q And again, you also cited some of the other
13 causes identified by NHTSA for poor performance on that
14 test include the same that we just went over. The leg,
15 knee, or back problems, inner ear and balance problems
16 and the distraction problems, correct?

17 A That is correct.

18 Q Okay and I'm assuming your answer is exactly
19 the same for just for it was for the other ones that you
20 didn't see her complain about any of this?

21 A That is correct.

22 Q And you don't know -- you didn't speak to her
23 about any of these either, correct?

24 A I have not.

25 Q Now also the trooper administered the Romberg

1 Alphabet or an Alphabet test to the defendant, is that
2 right?

3 A Yes.

4 Q And I know you noted it's not a standardized
5 test, but when you were viewing the video was the
6 defendant able to recite her ABCs without singing them?

7 A I don't recall.

8 Q Do you recall if she was able to recite her
9 ABCs at all?

10 A I don't recall.

11 Q If you were asking someone who you believed to
12 be impaired to recite their ABCs and they could not,
13 would that be a possible indicator to you of impairment
14 along with everything else you had had up until that
15 point?

16 A It could possibly, yes.

17 Q So then you didn't notice as far as when she
18 was saying her ABCs she would say I forget?

19 A I didn't note it.

20 Q You also saw that the officer or the trooper
21 administered a finger to nose test, is that right?

22 A Yes.

23 Q And did you make any specific observations as
24 far as her performance on the finger to nose?

25 A I did not.

1 Q And you are aware that drug recognition experts
2 actually do use the finger to nose test as part of their
3 administration of field sobriety tests?

4 A As part of their DRE protocol, yes.

5 Q And you also noted here that there was a
6 handheld breath, but none was completed in this case,
7 well not that there was. You have a section for
8 handheld breath and noted that none was completed in
9 this case, is that right?

10 A Correct.

11 Q And are you aware in Florida that officers are
12 not allowed to administer a portable breath test or a
13 handheld breath test as part of a DUI investigation?

14 A Well I would disagree with that, but it gets
15 into legal jurisdiction because my understanding may be
16 different than yours and you're a practicing attorney
17 down there, would know better than I. My understanding
18 is that there may be some confusion between consent and
19 handheld breath tests, however an appropriate warning
20 that the handheld is voluntarily and not necessarily
21 with the state administered chemical analysis so, but I
22 don't know if it's prohibited.

23 Q I hear you. Okay. I actually would agree with
24 you. I would love it if we can do that consensually.
25 Okay, so an evidential breath test, that was also not

1 completed in this case, correct?

2 A Correct.

3 Q Okay, and do you know why?

4 A I'm sure it's here in my notes, but not off the
5 top of my head.

6 Q Basically because the defendant refused?

7 A That's my understanding, yes.

8 Q So moving on to I guess you have a section on
9 page 10 with regards to medical diagnosis?

10 A Correct.

11 Q Okay. And you did review the defendant's
12 medical records and saw that she had been diagnosed with
13 an anxiety disorder, correct?

14 A Correct.

15 Q You're not a doctor, correct?

16 A I am not.

17 Q Not a neurologist?

18 A I am not.

19 Q No training in neurology?

20 A No.

21 Q Neuropathy?

22 A No.

23 Q Psychology?

24 A No.

25 Q When you were reading her medical records,

1 there was no actual specific anxiety disorder she was
2 diagnosed with, it was just listed as just a general
3 anxiety disorder, correct?

4 A Correct. And if I remember correctly and I
5 speak from personal experience, generalized anxiety
6 disorder is a diagnosis by itself even if there not a
7 specific variation, but you're correct, it's just a
8 general anxiety disorder is my understanding.

9 Q Do you recall reading in her medical records
10 that the doctor that she saw made certain reminders to
11 her about what she should do now that she's been
12 diagnosed with this particular disorder?

13 A I don't recall that off the top of my head.

14 Q Did you see at all that the defendant admitted
15 to using alcohol five times a week?

16 A I did not.

17 Q Did you see in the medical records that the
18 defendant had been described Xanax, 2 milligrams a day
19 in the medical records?

20 A I did see that.

21 Q And did you also see that she was getting her
22 refills every month?

23 A I didn't go through her refills, no.

24 Q I mean not going through her refills, but
25 actually in the medical history, every time she went to

1 the doctor -- every time it was a new record they would
2 note that she got her pills refilled?

3 A Correct. That I did know.

4 Q Did you also notice that in her medical records
5 there were times when the doctors would put notes and I
6 believe they put no issues with mobility or dexterity
7 each and every time they saw her?

8 A I did see that.

9 Q I'm sorry you did or did not?

10 A I did.

11 Q And are you aware based on the medical records
12 that she never actually saw a doctor, she only saw a
13 physician assistant?

14 A Yes, I did note that.

15 Q And are you aware that after the first two
16 months that she had been going to this particular
17 medical center, none of the medical records actually
18 indicated that she had any neurological issues
19 associated with anxiety?

20 A I did not note any.

21 Q And are you aware that generalized anxiety
22 disorders like the one that Ms. Peacock was diagnosed
23 with actually improves with psychotherapy and
24 medication?

25 A It can.

1 Q Are you aware that according to the doctors
2 notes they had actually recommended that Ms. Peacock go
3 see a psychotherapist or a psychologist, but that each
4 time she refused?

5 A I did not note that.

6 Q Did you see that in the records?

7 A I did.

8 Q You did. Okay.

9 A Yes.

10 Q I mean did that cause you as far as the fact
11 that she's been diagnosed with a general anxiety
12 disorder and they have been prescribing her Xanax each
13 month and she's been refilling them each month, but that
14 she consistently refuses to get the recommended
15 treatment. Did that cause you any concern for the
16 possibility that she may have an addiction to the pills?

17 A Nope.

18 Q Okay. Based on your training and experience as
19 far as a law enforcement officer, you didn't find that
20 to be concerning?

21 A No, not at all.

22 MS. LEVY: Object to the form.

23 Q (MR. BERMAN) So as far as the things that you
24 list in your report, with regards to the reference to
25 the diagnostic and statistical manual of mental

1 disorders for the American Psychiatric Association,
2 that's just you repeating what's in the manual, correct?
3 That's not your opinion?

4 A Correct. I believe my opinion and I'd like to
5 refer to the page because I want to make sure because
6 obviously the diagnostic manual did not talk about --
7 yes, my opinion is after that.

8 Q Okay. I'll get to that in just a moment. And
9 when it says here people often have more than one
10 anxiety disorder, again that's coming from the book,
11 correct?

12 A Correct.

13 Q Did you ever speak with her doctor at all?

14 A I did not.

15 Q Okay. So you know nothing about what she may
16 have been feeling that night or any night leading up to
17 that based on her medical diagnosis?

18 A No.

19 Q Did you speak to her doctor as far as whether
20 or not she has any other anxiety disorders?

21 A I did not.

22 Q And your opinion is I'm assuming the last
23 sentence of that page?

24 A As I flip through to make sure ---

25 Q At the bottom of page ten?

1 A Yes.

2 Q So your opinion is because an anxiety disorder
3 is a mental health issue, it can and does affect a
4 person's performance during standardized field sobriety
5 testing?

6 A Yes.

7 Q Do you have any experience in administering
8 standardized field sobriety testing to individuals who
9 you knew you had anxiety disorders?

10 A Yes.

11 Q Okay. Do you have any records of those?

12 A My wife has anxiety disorders, generalized
13 anxiety and others and I have done testing with her
14 numerous times.

15 Q Okay, how many times?

16 A Probably 10 to 12.

17 Q Over the course of how many years?

18 A Seven.

19 Q And is this also when she's impaired by
20 alcohol?

21 A Alcohol free and alcohol consumption.

22 Q Do you have any results of those reports?

23 A No, I didn't do any reports. They were
24 personal knowledge.

25 Q Are you aware of any studies -- well, let me

1 ask you, are you aware of a study by Michael Hogan
2 titled "Divided Attention In Older But Not Younger
3 Adults Is Impaired By Anxiety"?

4 A I am not aware of that study.

5 Q So you wouldn't be aware of the fact that what
6 this study says, was that the hypothesis that a higher
7 anxiety is associated with poor divided attention
8 performance in older, but not younger adults was
9 actually supported?

10 A I would not be able to comment on that. I was
11 not aware of that study.

12 Q Now not having spoken to the defendant in this
13 case, Ms. Peacock, you don't actually know if she was
14 having any type of issues associated with her anxiety
15 disorder at that time, correct?

16 A Not specifically, no.

17 Q So at this point, as far as your observation
18 goes as it applies to Ms. Peacock, that's still purely
19 hypothetical?

20 A Correct.

21 Q And did you note, I may have asked you this
22 before and I'm sorry if I'm repeating myself. Did the
23 defendant at any time, do you remember on video, ever
24 state to the trooper that she was having any sort of
25 anxiety attack?

1 A I don't recall.

2 Q Did you also watch the video of Ms. Peacock as
3 she was sitting waiting in the trooper's vehicle?

4 A I did.

5 Q And also as they were driving to the jail of
6 that facility?

7 A I did.

8 Q And did you see, excuse me hear anything during
9 that time that you think might go to whether or not she
10 was impaired?

11 A I don't recall.

12 Q Let's see. And as far as your background, you
13 have a bachelor of science, correct?

14 A Correct.

15 Q Okay, and what is that in?

16 A Criminal justice administration.

17 Q And is that considered a natural science?

18 A It is not.

19 Q I'm assuming you took chemistry and different
20 biology courses?

21 A I did.

22 Q Any masters, PhD or bachelors in any of the
23 natural sciences?

24 A No, sir.

25 Q Give me just one moment. Would you agree with

1 me that the standardized field sobriety tests are
2 exercises -- are a decision making tool?

3 A Yes.

4 Q Based on your review of the troopers report,
5 the review of the video in this case and the
6 standardized field sobriety test, do you believe Ms.
7 Peacock was impaired?

8 A I don't know.

9 Q Okay, so based off of the observations that the
10 officer is providing, his recitation of the field
11 sobriety test, your observation of them on scene, you
12 cannot provide an opinion whether or not she would or
13 would not be impaired?

14 A I cannot.

15 Q Likewise, you also cannot then provide an
16 opinion whether or not she was or had a breath alcohol
17 concentration over a .08?

18 A No, I don't think anybody can make that opinion
19 without a breath test.

20 Q Okay. I mean don't the standardized field
21 sobriety test validation studies make a correlation to
22 possibly being over a certain BAC?

23 A Well that's the intent and the purpose, but
24 there are also extenuating circumstances and the way you
25 phrase your question, I wouldn't be comfortable saying

1 she was above a .08.

2 Q Okay, but you wouldn't be comfortable saying
3 she wasn't over a .08, correct?

4 A Right.

5 Q So it's kind of you don't have an answer either
6 way?

7 A Correct.

8 Q Okay. One other thing and I don't know if it
9 was in this case or another case where we spoke, but at
10 one point -- you know what I can't remember if it was
11 from this case, so I'm not going to go into it. The
12 manual I guess that you referred to with regards to Ms.
13 Peacocks anxiety disorders, the diagnostic and
14 statistical manual medical disorders.

15 A Yes.

16 Q Did you actually read the entire chapter that
17 you listed?

18 A I did not.

19 Q You did not, okay. So you only -- can you tell
20 me specifically where you pulled those references from?

21 A From a PDF online.

22 Q Okay. Did you read the whole six pages that
23 you cited? 189 to 195.

24 A Yes, I did.

25 Q Okay. So then you would have read that a

1 person who has generalized anxiety disorders, that
2 certain key features would include physical symptoms
3 like restlessness or feeling keyed up?

4 A Yes.

5 Q Easily fatigued?

6 A Yes.

7 Q Difficulty concentrating?

8 A Yes.

9 Q Mind going blank?

10 A Yes.

11 Q Irritability?

12 A Yes.

13 Q Muscle tension?

14 A Yes.

15 Q Sleep disturbance?

16 A Yes.

17 Q Let's focus -- well, aside from the difficulty
18 concentrating or mind going blank, did you see any of
19 the others that we just discussed as possible features
20 of a generalized anxiety disorder present on the video?

21 A No and some of them would be very difficult to
22 see on video, but no.

23 Q All right. But as far as difficulty
24 concentrating or mind going blank, wouldn't you think or
25 would you agree that that could be an issue regardless

1 of whether a persons impaired or not driving an
2 automobile?

3 A It could.

4 Q And would that type of feature be exasperated
5 by the fact that the person was under the influence of
6 alcohol?

7 A It could.

8 Q Should that person be operating a motor vehicle
9 then?

10 A That's up to their doctor and their medication
11 and stability. I don't -- I can't tell you that answer
12 to that.

13 Q Okay. Well, let me ask you this. Would you
14 feel comfortable getting into a vehicle with a person
15 who had those issues and was also under the influence of
16 alcohol?

17 MS. LEVY: Object to the form of the question.

18 Q (MR. BERMAN) Okay. You can answer it.

19 A Probably not.

20 Q Probably not?

21 A Probably not.

22 Q And what if you knew they also had -- they were
23 also taking Xanax as a medication?

24 A Probably not.

25 Q Okay. Interesting. And do you recall when the

1 defendant was first diagnosed with the generalized
2 anxiety disorder?

3 A No, I'd have to review the medical record
4 again. I don't know off the top of my head.

5 Q And did you see any reference in the report or
6 did the defendant at any time state that they were
7 experiencing heavy sweating?

8 A I do not recall that.

9 Q Nausea?

10 A No.

11 Q Diarrhea?

12 A No.

13 Q Any exaggerated startled responses?

14 A No.

15 Q Headaches?

16 A No.

17 Q Or irritable bowel syndrome?

18 A No.

19 Q I think that's all I have. Counsel I don't
20 know if you have any questions?

21 MS. Levy: No questions.

22 MR. BERMAN: I think we started at about 2:30, but
23 I know Mr. Malhiot we did have you on standby since
24 about 2 o'clock.

25 THE WITNESS: Correct.

1 MR. BERMAN: So it's about 3:30 now. I'm going to
2 go ahead and conclude the deposition. Would you like to
3 read or waive?

4 THE WITNESS: I'll read please.

5 MR. BERMAN: How do we?

6 THE COURT: I just need an address for him.

7 MR. BERMAN: Okay. Mr. Malhiot could you give --
8 email or physical?

9 THE COURT: It doesn't matter, whichever.

10 THE WITNESS: Email is
11 mmalhiot@foresnicalcohol.com. So it's my first initial,
12 last name, @forensicalcohol.com.

13 THE COURT: Okay, thank you.

14 MR. BERMAN: All right.

15 THE WITNESS: And what I normally do is when I get
16 it I review it, fill out the errata sheet, scan it, and
17 email it back.

18 MR. WHITE: We have trial on April 3rd.

19 MR. BERMAN: Okie dokie. Okay I guess there's a
20 trial on April 3rd.

21 MS. LEVY: That's right. We're coming up close.

22 MR. BERMAN: Okay, no problem.

23 MS. LEVY: How long does it take to get the
24 transcript?

25 THE COURT: 10 days standard.

1 MR. BERMAN: 10 days.

2 MR. LEVY: 10 days. Okay, I guess we got to move
3 then.

4 MR. BERMAN: Okay.

5 MR. LEVY: All right. Thank you guys.

6 (Deposition concluded at 3:29 p.m.)

7 (Reading and signing of the deposition by the
8 witness has been reserved.)

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VERBATIM SUPPORT SERVICES
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FORT LAUDERDALE, FL 33301

April 4, 2018

ATTN: Matthew Malhiot
mmalhiot@forensicalcohol.com

IN RE: State of Florida vs. Kristin Peacock

Dear Mr. Malhiot, CASE No. 16025766MU10A

Please be advised that your deposition taken on March 29, 2018, in the case described above has been transcribed and is ready for your review. Please contact us for an appointment to read and sign this deposition at your earliest convenience.

If you do not read and sign the deposition within 30 days, the original, which has already been forwarded to the ordering attorney, may be filed with Clerk of the Court. If you wish to waive your signature, sign your name at the bottom of this letter and return it to us. If you have any questions regarding this matter, please feel free to contact us at (954) 467-8204.

Sincerely,
Gabriela Gonzalez
Reporter and Notary Public

I WAIVE MY SIGNATURE _____

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CERTIFICATE OF REPORTER

STATE OF FLORIDA
COUNTY OF BROWARD

I, GABRIELA GONZALEZ, do hereby certify that the foregoing testimony was taken before me; that the witness was duly sworn by me; and that the foregoing pages constitute a true record of the testimony given by said witness.

I further certify that I am not a relative or employee or attorney or counsel of any of the parties, or a relative or employee of such attorney or counsel, Nor financially interested in the action.

Under penalties of perjury, I declare that I have read the foregoing certificate and that the facts stated herein are true.

Signed this 29TH day of MARCH 2018.



GABRIELA GONZALEZ

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CERTIFICATE OF OATH

STATE OF FLORIDA
COUNTY OF BROWARD

I, the undersigned authority, certify that
MATTHEW MALHIOT, personally appeared before me and was
duly sworn.

Witness my hand and official seal this 29TH day
of MARCH 2018.



Gabriela Gonzalez, Court Reporter
Notary Public, State of Florida
Commission No.: FF 963750
Commission Expiration: 02/23/2020