

IN THE COUNTY COURT OF THE SEVENTEENTH  
JUDICIAL CIRCUIT IN AND FOR BROWARD  
COUNTY FLORIDA

MISDEMEANOR DIVISION

CASE NO. 16-011795MU10A

JUDGE GOTTLIEB

STATE OF FLORIDA, )  
Plaintiff, )  
vs. )  
BRYAN CARTER, )  
Defendant. )  
\_\_\_\_\_ )

**COPY**

Broward County Courthouse, Room 6160  
201 Southeast 6<sup>th</sup> Street  
Fort Lauderdale, Florida  
August 16, 2018

Continuation of proceedings in the above-entitled  
cause which came on for hearing before the Honorable KENNETH  
GOTTLIEB, Presiding Judge.

APPEARANCES: MICHAEL J. SATZ, State Attorney, by  
GARRET BERMAN,  
Assistant State Attorney,  
Appearing on behalf of the State.  
  
CARLOS CANET, ESQ.,  
Appearing on behalf of the Defendant.

I N D E X

<u>DATE</u>	<u>PROCEEDINGS</u>	<u>PAGES</u>			
8-16-18	Hearing	62 - 169			
	<u>WITNESSES</u>	<u>D</u>	<u>C</u>	<u>RD</u>	<u>RC</u>
	Stefan Rose, M.D.		62	106	114
	Matthew Malhoit	130	140	150	152

1       WHEREUPON:

2               The following proceedings were had:

3               THE COURT:  Okay.  We ready?

4               MR. BERMAN:  Yes, Judge.

5               MR. CANET:  Yes.

6               THE COURT:  Okay.  Are you ready?

7               THE WITNESS:  Yes, sir.

8               THE COURT:  Okay.

9               MR. BERMAN:  Good afternoon, Doctor.

10              THE WITNESS:  Good afternoon.  That's a pretty  
11              big stack there (indicating).

12              MR. BERMAN:  Yes.  It is.

13       CROSS-EXAMINATION

14       BY MR. BERMAN:

15              Q       When you kind of -- You stated earlier that  
16              you had been involved in laboratory research since '74.  
17              Is that right?

18              A       Yes.

19              Q       Okay.  You didn't obtain your bachelors of  
20              arts in biological science until 1981, correct?

21              A       Correct.

22              Q       Okay.  How long did it take you to get your  
23              bachelor of arts?

24              A       Well, I guess that depends on how you  
25              calculate it.  I graduated high school in 1970.  So, I

1 earned my bachelor's degree in 1981. So, that time  
2 period was 11 years. However, I spent about three and a  
3 half years doing majority of my work, from 1978 to 1981,  
4 to earn my -- my degree. So, most of the time in  
5 between was spent working and saving money and, then,  
6 having enough money to go to school.

7 Q Okay. So, you weren't a full-time student  
8 then?

9 A I was a full-time student starting in '78.

10 Q Okay. But before that just part-time?

11 A Boy, I -- That's a -- That's a historical fact  
12 I'd have to go check on; it's been a long time. But I  
13 basically was working, you know, all the time after high  
14 school so that was the major delay.

15 Q Okay. And when you were the head of the  
16 University of Miami Toxicology Lab, did you have written  
17 procedures for testing any of the deionized water that  
18 you used?

19 A Well, first of all I think we -- we had a  
20 distiller. I think we used to distill then condition  
21 water. I'm not exactly sure what the procedure was but  
22 we had written procedures for -- either had or were  
23 writing because it was a new lab procedure for  
24 everything we did.

25 Q Okay. When you say you had -- What'd you say

1 a faucet -- spigot for deionized or distilled water?

2 A We were talking about the water that was used  
3 at FIU for the experiments on the 8000 now.

4 Q No. I am actually talking about the  
5 University of Miami. Did you have an actual spigot,  
6 faucet, reservoir of distilled or deionized water?

7 A I'm not sure how we stored the water. We  
8 probably had a carboy of some sort to store the water  
9 after it was made.

10 Q Did you make it or did you buy it?

11 A Again, my recollection is we had a distiller  
12 and we may have finished it through some kind of any ion  
13 exchange resin.

14 Q Okay. Ion exchange meaning there was some  
15 sort of a device -- cartridge type ion exchange system  
16 that was hooked up to a specific faucet at your  
17 laboratory?

18 A I don't recall the specifics.

19 Q Are you certain you had one or not certain?

20 A No. I'm not certain. That was my  
21 recollection so, I can't tell you all the details on  
22 that; it was a long time ago.

23 Q Okay. And you don't have a copy of any  
24 procedures that you would've used that showed that, you  
25 know, similar to the standard operating procedures

1 manual that you referenced from FDLE in 2014 that had a  
2 section for testing distilled or deionized water before  
3 using it as either a blank or a negative control?

4 A I -- I don't have any documentation.

5 Q Okay.

6 A You know, this I do remember though --

7 Q I -- I -- You answered my question, Doctor.

8 A Pardon me?

9 Q You answered my question.

10 MR. CANET: Judge, I'm going to ask that the  
11 witness be permitted to answer the question.

12 MR. BERMAN: Judge, I asked --

13 THE COURT: Okay. Is it regarding the  
14 question?

15 THE WITNESS: Yes. What I do remember --

16 THE COURT: Then I'll let him answer it.

17 THE WITNESS: Thank you.

18 A (Continuing) What I do remember is that we  
19 used a dual column GCFID instrument for the testing.  
20 And the testing done --

21 MR. CANET: Judge --

22 A (Continuing) -- in this case is --

23 MR. CANET: -- I'm objecting.

24 A (Continuing) -- a single column.

25 MR. CANET: I'm objecting. It's non-

1 responsive. I asked about specific water and the  
2 procedures --

3 THE COURT: Okay. I'm going to sustain the  
4 objection. You can continue.

5 MR. CANET: Thank you.

6 THE COURT: If you'd like to ask him something  
7 on re-direct, you can.

8 Q (By Mr. Berman) Now, for the specific test  
9 that you talked about at FIU, did you have, before you  
10 started, any written procedures or protocols for the  
11 testing in that experiment?

12 A I think I testified about that in my  
13 deposition. I'm not sure what I said.

14 Q Let me ask you this --

15 A I think -- I think -- I think -- I think we  
16 had some and I think we were writing them up as we were  
17 going along because it was a new test procedure.

18 Q Okay. So, then, the answer would be: No.  
19 You didn't really have any if you were writing them as  
20 you go along.

21 A Well, that's not really fair -- fair  
22 assessment. A new test procedure, you know, by  
23 definition is not really going to have a finished set of  
24 protocols. This was a, you know, a brand new test  
25 procedure on the Intoxilyzer 8000. So -- And in a

1 research setting -- And in a research setting, you know,  
2 you do the testing as necessary and you make your  
3 changes as you go along during the research. That's  
4 different than a production lab like we're talking about  
5 here today.

6 Q Okay. So, then, if they're two different  
7 things you wouldn't -- you wouldn't really be able to  
8 equate one to the other then?

9 A Well --

10 Q What you did in your 2009 testing because it's  
11 only a research lab and the protocols are ever changing  
12 versus an evidential forensic laboratory where they have  
13 set procedures? You can't really combine the two, can  
14 you?

15 A I'm not combining the two. They're -- In  
16 fact, they're two different purposes -- two different  
17 finesses for the purpose and it depends on what the  
18 mission is at the time. The mission for the FDLE ATP  
19 Procedure Manual is quite different than the mission for  
20 bench research in a laboratory setting. They are two  
21 completely different things; I agree.

22 Q Okay. So, I -- I think I misspoke; I used the  
23 word combining. You can't really compare the two?

24 A Sir --

25 Q Correct?



1           A     Sure you can compare the two.

2           Q     So, you're -- you're saying it's okay to  
3     compare what FDLE has in specific procedures and  
4     protocols that must be followed. But in your testing,  
5     that you talk about here today that you referenced in  
6     direct examination, it's okay to not have those  
7     procedures and protocols and kind of change them as you  
8     go along. That's what you're saying?

9           A     I -- I'm not sure I understand the question  
10    because I'm not comparing two things, you are. I said  
11    what I did in the research arena. I'm testifying about  
12    what happens in this FDLE arena. They're two completely  
13    different things.

14                    There are some similarities, I'll agree with  
15    you in terms of: There's chemicals and there's  
16    instruments and there's test results. But if you want  
17    to compare one specific thing to another specific thing  
18    that's how it has to be done.

19           Q     Okay. So, in your 2009 experiment at FIU, did  
20    you have procedures for testing the deionized water that  
21    you used to mix in to the Wet Bath Simulators that you  
22    discussed on direct?

23                    MR. CANET: You know something, I think that  
24    I -- I 've heard a couple of these questions now in  
25    this line of question but at this point I have to

1 interpose an objection and challenge Mr. Berman to  
2 explain the relevancy of any of this as it relates  
3 to compliance by the FDLE with Section 2.18 of its  
4 own procedures manual. I don't see the connection.

5 MR. BERMAN: Judge, this is own witness. He  
6 questioned his own witness. He talked about, with  
7 his own witness on direct, about the experiment  
8 that he did; Wet Bath Simulators that he tested on  
9 the Intoxilyzer 8000 that Mr. Canet used as the  
10 basis when he worked his way up the ladder from the  
11 local testing all the way to the State testing.

12 MR. CANET: Only to explain that Dr. Rose  
13 knows what an 8000 is and he's working with it,  
14 Judge. Not to try to use it as a basis for any of  
15 his opinions regarding compliance with section  
16 2.18.

17 MR. BERMAN: Judge, it goes to his  
18 credibility.

19 THE COURT: Okay. I'm --

20 MR. CANET: I thought we agreed that, you  
21 know, we weren't going to challenge witness's  
22 credentials because we are accepting them as  
23 experts.

24 MR. BERMAN: No. I'm accepting him as an  
25 expert; I have no problem with that. I'm still

1           allowed to discuss his credibility because he's  
2           comparing two different things as he just stated.

3           MR. CANET: And I would say not by challenging  
4           his credentials since you've agreed that he's an  
5           expert.

6           MR. BERMAN: I'm not challenging his  
7           credentials.

8           THE COURT: I'm going to allow you to continue  
9           but I'm only going to rely on what I think is  
10          important.

11          MR. BERMAN: Fair enough.

12          THE COURT: There's no jury here. And this  
13          way I get to hear and make my decision.

14          Q     (By Mr. Berman) So, Dr. Rose, you remember  
15          the question?

16          A     No.

17          Q     Yeah. Neither do I. It's okay.

18                 So, in your procedures for your 2009 FIU  
19          experiment, did you have any section that required the  
20          testing of distilled or deionized water that you mixed  
21          your chemicals or your blanks into the simulators?

22          A     You'd have to give me more information about  
23          what you're asking about. I'm -- I'm not sure what that  
24          means.

25          Q     Okay.

1           A     If we tested a sample in the -- in the  
2 simulator by itself, of just water, that's one kind of  
3 test.

4           Q     Okay.

5           A     If you're asking if we tested our water by  
6 GCMS or GCFID for use on the Intoxilyzer 8000, no.

7           Q     Okay.

8           A     Not that I recall.

9           Q     So, you -- you know the 67-page report that  
10 you provided to Mr. Canet? I believe this was back in  
11 June or July of 2009.

12          A     Right.

13          Q     This was for a different hearing.

14          A     (No verbal response.)

15          Q     Okay. In any of those -- Now, correct me if  
16 I'm wrong. You actually -- For any of the simulators  
17 that contained any of the volatile organic compounds,  
18 you actually mixed those VOCs with distilled or  
19 deionized water, correct?

20          A     Correct.

21          Q     Okay. And, then, if it was just a deionized  
22 water sample itself that was just deionized water,  
23 correct?

24          A     That's my recollection.

25          Q     Okay. Do you have any -- Did you have or do

1 you have now any procedures for testing the deionized  
2 water that you used in this experiment?

3 A Well --

4 Q On --

5 A -- there's two procedures.

6 Q On a GC?

7 A No. No there's not -- There wasn't a  
8 procedure tested on a GC.

9 Q Thank you. Okay. And --

10 A Different purpose.

11 Q And in all of your testing in these VOC  
12 experiments, none of the deionized water -- wet bath  
13 sample solutions actually came back with any  
14 interference, correct?

15 A Are you asking about the -- the water blanks  
16 only?

17 Q Yes. Just the deionized water.

18 A You know, I don't recall. I'd have to look at  
19 the data.

20 Q Okay. Would that refresh your recollection?

21 A Perhaps.

22 MR. BERMAN: Okay. May I approach, Judge?

23 THE COURT: Sure.

24 Q (By Mr. Berman) Doctor, I'm showing you what  
25 is -- looks to be an Excel spreadsheet. The title on

1 the top is Intoxilyzer 8000 VOC Experiment. Date at the  
2 bottom right corner is 1-20-2009. It says page one of  
3 67. There are comments in there that indicate that some  
4 trials were conducted by yourself, Eladio Mendez and  
5 Howard Holness. If you could, please take a look at  
6 that and see if that refreshes your recollection.

7 A What is it specifically that you would like me  
8 to look at? Otherwise I'll have to sit and review each  
9 of these 67 pages which is going to take me some time.

10 Q Well, Doctor, isn't it true that none of the  
11 deionized water-only sample wet bath simulators that you  
12 used had interference detecting it? Isn't that true?

13 MR. CANET: Judge, you know, I know what your  
14 comment was about you're going to filter out, you  
15 know, what you think is relevant. But I think this  
16 a stretch now and I do have to get up and object.  
17 What does any of this have to do, even remotely,  
18 with compliance with section 2.18? What he did in  
19 a lab for a completely different purpose -- for a  
20 research purpose? What does that have to do with  
21 the law enforcement agency's requirement to comply  
22 with its own lab procedures?

23 THE COURT: Okay.

24 MR. CANET: I don't see the connection at all.

25 THE COURT: Can I maybe ask?

1 MR. CANET: Yeah. Sure.

2 THE COURT: I believe it would be important.  
3 Maybe I'm not correct about it but its one thing to  
4 not follow the standard that they're required to  
5 follow. I think he's trying to point out that even  
6 if they did not follow the standard with regard to  
7 the point you're raising, that it doesn't matter.

8 MR. CANET: You know something? And -- And  
9 that's --

10 THE COURT: And he's the expert who was  
11 involved in that.

12 MR. CANET: And -- And my problem with that is  
13 that what he did in his lab in 2009 for a different  
14 purpose all together hasn't yet been connected or  
15 shown to have some sort of relationship to what the  
16 FDLE has been doing in their lab or should be doing  
17 in their lab.

18 THE COURT: I agree with that. In fact he  
19 said that there is -- they're separate. However, I  
20 think he's allowed to -- he would be allowed to ask  
21 questions about that.

22 MR. CANET: Okay.

23 MR. BERMAN: I'll tell you what. Let me back  
24 up. I'll actually use some of Mr. Canet's  
25 questions then.

1 Q (By Mr. Berman) Doctor, when Mr. Canet was  
2 questioning you --

3 THE COURT: Wait. One second.

4 (To The Witness): Do you need more time?

5 THE WITNESS: I'm on page 18. Would you like  
6 me to go through the whole dataset or are you going  
7 to --

8 MR. BERMAN: I mean I --

9 THE WITNESS: -- are you going to say that  
10 they're all negative?

11 MR. BERMAN: They are all negative, Doctor. I  
12 mean, would -- would -- would you disagree with me  
13 that --

14 THE WITNESS: I'll go along with that.

15 THE COURT: Okay.

16 Q (By Mr. Berman) I mean -- I -- I think it  
17 speaks for itself but I believe they're all negative.  
18 Otherwise, I'm pretty certain you would've at least  
19 pointed at least one of them out to me by this point.  
20 And in fact, I actually referenced in -- in the  
21 deposition with you and I think you agreed with me that  
22 there wasn't any -- any interference during any of your  
23 deionized water?

24 A I -- If there's -- If they're all negative  
25 then they're all negative.



1 Q Okay.

2 A That's the data.

3 Q Okay. But -- But let me work on the (cannot  
4 be clearly heard). Mr. Canet was talking to you about  
5 when -- when the agencies locally test the Intoxilyzer  
6 using wet bath simulators, correct? He spoke to you  
7 about that?

8 A Yes.

9 Q Okay. And that use certain alcohol reference  
10 solutions to test the Intoxilyzer during their agency or  
11 monthly inspection, right?

12 A Yes.

13 Q Okay. And that is, I guess, he was using the  
14 term calibration check?

15 A Yes.

16 Q Okay. So, he was -- that was a wet bath  
17 simulator. You -- You hook it up, you know what  
18 concentrations are in the wet bath simulators and you're  
19 supposed to get a response, plus or minus, a certain  
20 range. Correct?

21 A Well, the -- there's a presumption of what the  
22 concentrations are in the simulators and then there's an  
23 assumption that we'll get a certain result on the  
24 Intoxilyzer. I would just finesse it a little more like  
25 that.

1 Q Okay. But, basically we know what the  
2 concentration is going in, we should get that same  
3 result, plus or minus, a given deviation, correct?

4 A If the concentrations are correct.

5 Q Okay. And if those concentrations come from a  
6 place that has NIST traceability, like you said. NIST,  
7 N-I-S-T.

8 A If -- If all the quality control steps are in  
9 place in a proper quality assurance program, then the  
10 reliability of the solutions used would be high.

11 Q Okay. And that's kind of similar to what you  
12 were doing here with your experiment. And that you were  
13 taking known concentrations of volatile organic  
14 compounds, putting them in a wet bath simulator. And  
15 putting him through the Intoxilyzer 8000.

16 A I wouldn't say -- I wouldn't say it's that  
17 similar at all. What we were doing was a bench-  
18 research-project, which is very different than what's  
19 being litigated here today and we were doing it in real-  
20 time. You know, we weren't making up solutions, storing  
21 them, having them passed from person to person, place to  
22 place and all those things that can happen in storage.  
23 We were making up the solutions at the time, in real  
24 time, and, then, testing them in real time.

25 Q Okay. But getting back to the basics of it:

1 You were taking something, putting it into a wet bath  
2 simulator, putting it through the Intoxilyzer to see if  
3 you would get or elicit some sort of a response.

4 Correct?

5 A Well, that's the basics of it. We --

6 Q Okay.

7 A We were preparing the solutions and  
8 challenging the instrument to see what would happen.

9 Q Okay. And you were going to publish a paper  
10 on that, correct? But you didn't because I guess  
11 somebody else beat you to the punch. Is that correct?

12 A Watterson.

13 Q Watterson. And that was the -- that was the  
14 paper about -- I think it was called "Assessment of the  
15 response of the Intoxilyzer 8000c to certain volatile  
16 organic compounds." Correct?

17 A Close enough.

18 Q Okay. Correct me if I'm wrong but isn't the  
19 conclusion of that study that -- that the possibility of  
20 volatile organic compounds actually affecting a person's  
21 alcohol concentration -- Didn't he say that that would  
22 be low?

23 A You know, authors can conclude whatever they  
24 like; it's the data that's important.

25 Q Okay. But I mean if that was the case -- If

1 the possibility of getting a false positive or false  
2 (could not be clearly heard) would be low and your data  
3 seems to suggest that the Intoxilyzer doesn't pick out  
4 all these VOCs. Why wouldn't you have published your  
5 results?

6 A Our results are similar. As I say, authors  
7 can say whatever they like. I often see conclusions  
8 that are exactly the opposite of what the data shows.  
9 So, you know, if you want to know why he made that  
10 conclusion you would have to ask that author.

11 Q Okay. But you are aware he made that  
12 conclusion? The conclusion that --

13 A Right. Right. He's in a pro law enforcement  
14 lab and that conclusion is -- is the type of conclusion  
15 that I often see in those kinds of -- of publications.  
16 You know, so, it's part the business in science and  
17 forensic science.

18 Q Okay. But yet you still didn't choose to  
19 publish your paper which said that the -- or your  
20 experiments which basically show that -- or purport to  
21 show that the Intoxilyzer cannot distinguish between  
22 these VOCs. Correct?

23 A The Intoxilyzer, depending on the  
24 concentration and the combination, will give false  
25 positive results. But that's also what Watterson's

1 paper showed in his data and it's, you know --

2 Q But he said the --

3 A It -- It's just part infrared spectral

4 photometry. It's not surprising.

5 Q But he said the possibility is low, correct?

6 A He can say whatever he wants; he's an

7 independent author.

8 Q Okay. What was the probability in your

9 experiment?

10 A There's no way to calculate, you know, total

11 probability. You just have to look at the data.

12 Q Okay. Now, Mr. Canet, came back -- after he

13 was finished, he came back and he asked you a couple of

14 questions. One of things he asked you was the

15 difference between a blank and a negative control,

16 correct?

17 A Yes.

18 Q Now correct me if I'm wrong, if I were to look

19 at the chromatogram of a blank, I'd see nothing in the

20 chromatogram, right? I wouldn't see a peak?

21 A Well, you may see an injection peak.

22 Q Okay. But that would be it, correct?

23 A Well, it depends on what's in the blank.

24 Q Well, if it's just water.

25 A It depends what's in the water.

1 Q If there's nothing -- Assuming there's nothing  
2 in the water, Doctor.

3 A It depends -- I'm going to give a slightly  
4 extended answer. It depends what's in the sample.  
5 What's in the sample can come from the septa in the cap,  
6 the air in the room, the water that's in the sample and  
7 in any part of the instrument that's connected to the  
8 sample when it's analyzing the sample.

9 Q Okay. So -- And actually you brought up a  
10 good point. You talked about the septa in the cap.  
11 What's the septa in the cap?

12 A The sample vial typically is a glass vial  
13 about this (demonstrating) high that has an aluminum cap  
14 with an open center. The open center has a -- a disc  
15 often made of some kind of a silicone and it's called a  
16 septa because it covers the top of the sample vial.

17 Q Okay. And when you say something from the  
18 septa in the cap could get in to the vial, what are you  
19 talking about there?

20 A I'm talking about volatile organic compounds  
21 that outgas from the septa.

22 Q Okay. That would be similar to ethanol?

23 A It could be similar or dissimilar. Okay.  
24 It's a --

25 Q It could be anything.

1           A     It's an unknown.

2           Q     Okay.  We -- We would never know --

3           A     Well, you could --

4           Q     -- if it's close to ethanol or not.

5           A     You would know if you ran a blank.

6           Q     Okay.

7           A     And, then, you could investigate it further if

8           one wanted to.

9           Q     Okay.  And correct me if I'm wrong, during the

10          deposition you actually talked about how this happened

11          to you at the University of Miami Toxicology Lab,

12          correct?

13          A     Correct.

14          Q     Okay.  I actually asked you have you had an

15          instance where there was when you ran a deionized water

16          blank and got a response back that said that there was

17          something other than just water in there.  And this was

18          the example you gave, correct?

19          A     I think so.

20          Q     Or something similar?  Okay.

21          A     I think so.  Yeah.

22          Q     And you investigated it and you found out that

23          it wasn't the water, it was actually the septa in the

24          cap, correct?

25          A     Correct.

1 Q Okay. But aside from that, you couldn't  
2 actually point out to me any instances of when you were  
3 testing deionized water at the University of Miami  
4 Toxicology Lab where you found something similar to  
5 ethanol in the deionized water. Correct?

6 A Well, yeah. That's the point of making good water  
7 is you're not supposed to find anything in there.

8 Q Okay. So -- But in all your time with the  
9 University of Miami Toxicology Lab, all the years that  
10 you were there, never had that issue?

11 A I -- I don't recall. I don't recall having  
12 that issue.

13 Q Okay. Thank you. And getting back to my  
14 original question about the blank versus negative  
15 control. So, aside from maybe that injection peak,  
16 assuming that the deionized water is VOC free or as free  
17 as possible, you would expect to have a chromatogram  
18 that really has no peak or maybe just the air peak in --  
19 or injection peak? Excuse me.

20 A If the blank is clean and everything else in  
21 the system is clean, I would expect a clean baseline.

22 Q Okay. And the same would be for an air blank,  
23 correct? Assuming that there was just air in the tube  
24 you would probably just see that injection peak -- the  
25 little injection peak and nothing else, correct?



1           A     It would depend on how polluted the air in the  
2 lab was when you're -- you're making the sample. Some  
3 labs are, you know, the air is dirty with VOCs, some are  
4 cleaner. It just depends that's why you have to run the  
5 sample.

6           Q     Okay. But in both of those instances, how  
7 would you know that anything is wrong at all if aside  
8 from the injection peak there are no other peaks? What  
9 I'm saying is: If a normal chromatogram would have  
10 nothing on if it everything is -- if there's no volatile  
11 organic compounds in whatever it is you're testing, how  
12 could you actually say that you tested anything? I  
13 mean, isn't that the purpose? That's why you have --  
14 That's why FDLE runs the negative control with the  
15 enpropanol so that they can actually say something was  
16 tested, correct?

17          A     I'm not sure if I understand the question.  
18 The blank and the negative control are two completely  
19 different samples used for two completely different  
20 reasons. And, further, the blank -- in order to run a  
21 blank properly, the blank should be run for a longer  
22 period of time then four and a half to five minutes as I  
23 saw on your chromatograms.

24          Q     Okay. Not what I asked you.

25               MR. CANET: Judge, I'm going to --

1 MR. BERMAN: I didn't ask anything.

2 MR. CANET: -- ask Mr. Berman to please allow  
3 the witness to finish his response.

4 MR. BERMAN: When the response is to the  
5 question I asked, Judge, that's fine.

6 THE COURT: I'm okay with him answering the  
7 full question.

8 MR. CANET: Thank you.

9 THE COURT: You could continue your answer.

10 THE WITNESS: Thank you, sir.

11 A (Continuing) Yeah. The blank and the  
12 negative controls are two completely different samples  
13 run for two completely different reasons. And the blank  
14 should've been more properly used to run for -- analyze  
15 for a longer period of time to address exactly the  
16 problem that you just brought up. That if you see a  
17 clean baseline with a blank that only tells you that the  
18 baseline is clean for four and a half minutes.

19 The length of analysis in these chromatograms  
20 -- four and half or five minutes. You should really run  
21 the blank for 20 or 30 minutes or maybe even longer in  
22 this type of technique to see if there are any other  
23 contaminants that take longer than four and half minutes  
24 to be detected in the analysis.

25 Q (By Mr. Berman) Okay. And that's what you

1 did with your procedures at the University of Miami  
2 Toxicology Lab, correct?

3 A Well, again, you know, my recollection is not  
4 complete of everything that we did then. I'm telling  
5 you what should be done and that's what is often done  
6 when setting up a method and checking reagents. So,  
7 that's what should be done.

8 Q Okay.

9 A And -- And -- And -- I'm finished.

10 Q You sure?

11 A I'm finished.

12 Q I -- The Judge will let you go on.

13 A I'm finished.

14 Q Okay.

15 A Thank you.

16 Q And, so, you said that's what's normally done.  
17 When I asked you in deposition if you could point me to  
18 a specific study, article or laboratory that actually  
19 includes these procedures, you could not give me one.  
20 Correct?

21 MR. CANET: Judge, I'm going to object to  
22 improper impeachment at this point. Is Mr. Berman  
23 trying to impeach the witness? If he is, it's not  
24 the right way to do it so I'm objecting.

25 MR. BERMAN: Okay. I'll rephrase it, Judge.

1 THE COURT: Okay. I'll sustain it. Okay.

2 Q (By Mr. Berman) Can you give the Judge now a  
3 study, article or a specific laboratory that actually  
4 requires the testing of the deionized water as a blank  
5 or negative control prior to using it with any other  
6 testing?

7 A With any other what?

8 Q Testing. Testing of mouth alcohol, acetone,  
9 other samples.

10 A But -- Well, you're asking me to produce  
11 somebody else's method.

12 Q I'm asking you -- Not necessarily the method.  
13 Do you know of a study that says it should be done? An  
14 article?

15 A I'm going to have to answer your question by  
16 saying most of the things that are published are  
17 general. You're asking for something very specific that  
18 would be contained in a laboratory method where they  
19 would say this is how we're going to comply with a  
20 general provision of quality assurance and quality  
21 control and fitness for purpose we're going to  
22 specifically do this step. That's where you'd find  
23 that.

24 Q Okay. So, now I'm going to kind of take a  
25 couple steps back to what I was talking about -- still

1 about the blank and the negative control. If you have a  
2 chromatogram from something that was run on a GC, okay,  
3 that you get no response on aside from injection site.  
4 How would you be able, other than coming in and  
5 testifying "I did something", that that was water or if  
6 it was air or if it was nothing at all? How could you  
7 prove that?

8 A Am I part of the laboratory or an outside  
9 reviewer?

10 Q Either way. If -- If you wanted to come in  
11 and say "I ran these ten samples of deionized water."

12 A Um-hum (affirmative).

13 Q And the chromatogram show nothing.

14 A Um-hum (affirmative).

15 Q Maybe aside from an injection peak.

16 A Um-hum (affirmative).

17 Q How would you be able to, other than coming in  
18 and saying "I tested it", say that anything was even  
19 tested if you would get that's same response for  
20 deionized water, air or no sample at all?

21 A Um-hum (affirmative). Well, that's why -- why  
22 I asked to clarify if I was part of the laboratory or an  
23 outside reviewer. I'll give you the answer for both.

24 Q Go ahead. Give me the answer for both.

25 A If I'm inside the laboratory then it would

1 either be documented as the method or it would be the  
2 analyst, him or herself that prepared that sample,  
3 loaded it onto the instrument and did the analysis;  
4 you'd get direct testimony. If I'm an outside reviewer,  
5 then I would rely on the documentation of the written  
6 method, their published method, their sample list and  
7 all of the other documents in the -- in their internal  
8 chain of custody that would prove what they say their  
9 doing is accurate and correct.

10 Q Okay. So, having somebody come in and  
11 testify, that's one way. Or the fact that it's written  
12 down as a method -- documented as a method, correct?

13 A Not just that. No. My -- My answer was more  
14 complete than that. It would have to be -- First, as an  
15 outside reviewer, I would look at the method, I would  
16 read the method. I would then look at the sample list  
17 which is a -- it's a Word-processed list with the  
18 samples and their identity. Then I would look at the  
19 data in terms of the chromatograms. And, then, I might  
20 even look at the raw data from the instrument detector  
21 itself and reprocess it myself.

22 So, that would be a multistep, multilevel  
23 procedure to go through to verify that the data I'm  
24 looking at comports with the sample that it's supposed  
25 to be.

1 Q And if you did that and you received no  
2 response then using it in any subsequent testing, either  
3 as a blank, a negative control, or as part of the  
4 solution sample that's being mixed, you would expect to  
5 receive no -- you would be able to show that whatever  
6 the interferent is -- or if there's an interferent or  
7 VOC, it's not coming from the water. Is that right?

8 A Boy, could you break that down into --

9 Q Sure.

10 A -- smaller, bite-sized pieces?

11 Q If you're using the water that you just tested  
12 in subsequent tests.

13 A Okay.

14 Q You'd be able to say that any interferent that  
15 you received isn't actually part of the water.

16 A Well --

17 Q It must be part of something else. Correct?

18 A -- the answer -- the answer to that question  
19 is: Perhaps. Because the water could get contaminated  
20 subsequent to its initial analysis. It could also be  
21 external contamination from some other source and there  
22 are many sources in a laboratory setting.

23 Q Okay. So, if the answer is "perhaps", then, I  
24 mean, why bother testing the water at all if there's a  
25 possibility that it could still come from the water to

1 begin with? Meaning, if you've already tested the water  
2 and, then, you're using it subsequent testing. And  
3 you're saying that the answer is the interferent perhaps  
4 could come from the water, perhaps not. Why even bother  
5 testing it?

6 A Well, in -- in fact my answer is exactly 180  
7 degrees opposed to your question. It's that more  
8 testing is necessary not less because contamination of  
9 samples in a laboratory setting can occur from many  
10 different sources. And you bring up the water as  
11 example; water can grow microbes in a laboratory setting  
12 and produce VOCs. So, if it's in storage for a long  
13 period of time you have a greater chance that it's going  
14 to be contaminated with microbes, grow, produce VOCs and  
15 interfere with the testing. That's why more testing is  
16 done, not less, in a good quality control setup.

17 Q Okay. Now, you've read the standard operating  
18 procedures manual, correct? You -- You have -- I think  
19 you said you have 2004, 2005, 2007, 2011, 2014, 2016,  
20 2017, correct?

21 A Eight. Yes.

22 Q Okay. And in all of those procedures, there  
23 is actually a section in there that specifically states  
24 in the preface that "It's not intended to supersede, and  
25 when in conflict, is subordinate to, information and



1 processes in the Florida Statutes, Florida  
2 Administrative Code, or Florida Department of Law  
3 Enforcement policies and procedures." Correct?

4 A You've got to tell me which manual and what  
5 page.

6 Q Every manual in the preface. Probably the  
7 second or third page in.

8 A (Reviews document.) Okay. That's -- Looking  
9 at the 2017 manual on the fourth page and they've got it  
10 lined. So, lines 86 through 89 I think you're referring  
11 to.

12 Q Okay. And if you look at all the rest of the  
13 -- of the standard operating procedures manual, it's  
14 also contained on all of those, correct?

15 A I haven't checked. I'll take your word for  
16 it.

17 THE COURT: Can you restate what it says?

18 MR. BERMAN: Yes. "It is not intended to  
19 supersede, and when in conflict, is subordinate to,  
20 information and processes in the Florida Statutes,  
21 Florida Administrative Code, or Florida Department  
22 of Law Enforcement policies and procedures."

23 Q (By Mr. Berman) And, Doctor, that section  
24 also goes on to state that "Nothing contained in this  
25 Manual shall affect the accuracy or reliability of any

1 breath or blood alcohol test which otherwise complies  
2 Florida laws and Chapter 11-D8, FAC." Correct?

3 A That part I find this manual. The first part  
4 that you said, I don't find here. So, maybe it's a  
5 different part of this manual.

6 Q Isn't it the 2014 manual that -- that you had  
7 discussed on direct examination with Mr. Canet?

8 A I don't know. I'd have to look.

9 Q Please do.

10 A Yeah. It's in the '014 (sic) manual.

11 Q Okay. And -- Now if you would -- if you could  
12 take a look at I believe it's the 2014 manual.

13 MR. BERMAN: Your Honor, it's tab 16 in the  
14 State's book if you want to turn there.

15 Q (By Mr. Berman) Now, if you look at alcohol  
16 reference solution under section 2.14, page 17.

17 A I'm on 17.

18 Q Okay. And in that particular section, is  
19 there any reference that distilled or deionized water  
20 analyzed 2.18 must be used?

21 A I don't know. I'd have to look.

22 Q I mean you could probably do a search for  
23 2.18.

24 A So, if I understand your question, for  
25 clarification, are you asking me is there any reference

1 in section 2.14 that the water tested in section 2.18  
2 would be used section 2.14? Is that what you're asking  
3 me?

4 Q Yes. It is.

5 A Okay. All right.

6 Q Specifically 2.18.

7 A Well, it doesn't say deionized water from  
8 section 2.18 but it does say deionized water. So --

9 Q Okay. So, it just says deionized water?

10 A Right.

11 Q Okay.

12 A Several times.

13 Q Okay. And no reference to 2.18 in that  
14 section. Is there -- If you turn to section 2.15 which  
15 is Mouth Alcohol Solution Preparation and Analysis.  
16 That starts at the bottom of page 20 but the full text  
17 actually begins on page 21. Do you see any reference to  
18 the water tested under section 2.18 required to be used  
19 in section 2.15?

20 A Again, it says deionized water, it doesn't say  
21 where from.

22 Q Okay. And the same thing for section 2.16 on  
23 page -- starting on page 23. There's no reference in  
24 there to water tested under 2.18 must be used in 2.16,  
25 correct?

1 A It just says deionized water. That's right.

2 Q Okay. And actually in 2.18 which begins on  
3 page 26 -- I'll skip that. I'll go on for a moment.

4 So, you -- you mentioned earlier on direct  
5 about traceability to NIST standards.

6 A Um-hum (affirmative).

7 Q Do you recall that?

8 A Yes.

9 Q Okay. And have you ever taken a look at what  
10 the NIST standards are for Good Laboratory Practice for  
11 the Purity of Water? I think it's actually a document  
12 provided by NIST called GLP 10.

13 A Well, what I have is from ASTM, designation D,  
14 Delta, 1193-06 (Reapproved 2018): Standard Specification  
15 for Reagent Water.

16 Q Okay. And -- And that was -- I'm sorry. What  
17 did you say? ASTM?

18 A Yes.

19 Q American Standards for Testing and Materials?

20 A Yes.

21 Q Okay. And that was ASTM D1193?

22 A Yes. Dash, 06.

23 Q Dash, 06. 2018, correct?

24 A Well, it says dash, 06, then in parenthesis  
25 "Reapproved 2018."

1           Q     And it has -- Looks to me it has five  
2 subsections: 1.1, 1.2, 1.3, 1.4, 1.5. And, then, 1.5  
3 has two subsections, A and B, is that right?

4           A     Well, what I'm looking at has up to subsection  
5 1.9. 1.5 does not have subsections.

6           Q     Okay. And -- Okay. And in that isn't it  
7 correct and I believe in section 1.5 it states that "It  
8 is the responsibility of the users of this specification  
9 to ensure that the selected water types or grades are  
10 suitable for their intended use."

11          A     Yes.

12          Q     And the sentence right before that says that  
13 "Although these water types and associated grades have  
14 been defined specifically for use with ASTM standards,  
15 they may be appropriate for other applications."  
16 Correct?

17          A     Yes.

18          Q     Okay. So, you can't necessarily apply these  
19 standards to some entity or some laboratory that does  
20 not necessarily follow ASTM standards, correct?

21          A     Boy, I guess you'd have to ask ASTM and the  
22 laboratory of interest that question. This is a guide  
23 of the standards as -- have been agreed upon with Types  
24 I, II, III and IV water. And, you know, there's a page  
25 that lists what the water quality is.

1 Q Um-hum (affirmative).

2 A And the person in charge of the lab that's  
3 going to use the water has to decide which water type  
4 they need to use.

5 Q Okay. And --

6 A So, that, you know, that's a quality assurance  
7 administrative decision.

8 Q Okay. And we're you using this when you were  
9 with the University of Miami Toxicology Lab? These  
10 standards or something similar?

11 A This standard -- This standard wasn't --

12 Q Wasn't in place?

13 A -- wasn't -- No. This is a 06 - '018 (sic)  
14 standard.

15 Q Okay. And you -- you mentioned something  
16 about a table. Is that the table for conductivity and  
17 resistivity specifications for water?

18 A It's got all the specs. It's table 1.

19 Q Table 1. Yeah.

20 A Yeah. Table 1.

21 Q All right. And does actually list what the  
22 electrical resistivity minimum should be for Type I  
23 water. Correct?

24 A Yes. That and more.

25 Q And -- Type I, Type II, Type III, Type IV,

1 correct?

2 A Correct.

3 Q Okay. And for Type I it actually says the  
4 electrical resistivity minimum -- I don't know if that's  
5 micrometers. I can't -- I don't have the scientific  
6 knowledge. It's M-Omega centimeters at 298 Kelvin (25  
7 degrees Celsius). Is that right?

8 A I don't know if we're looking at the same  
9 document.

10 Q We're probably not looking at the same  
11 document. I'm just trying to -- the table I think  
12 should be the same.

13 A They -- They have four different Type I waters  
14 but it looks like they have -- let me see. It looks  
15 like the conductivity is the same. Yeah.

16 Q Not conductivity, resistivity.

17 A Resist -- Well it's the inverse. So --

18 Q Correct.

19 A It's the big M with the --

20 Q Omega-3.

21 A Yeah.

22 Q Okay.

23 A (Cannot be clearly heard.)

24 Q Okay. And for Type I, that number -- that  
25 minimum is 18, correct?

1           A     Yeah.  That's what they say.

2           Q     That's what ASTM says?

3           A     Yeah.  Right.

4           Q     Okay.  And for Type II, it's 1.0?

5           A     Type II is 1.0.

6           Q     For Type III is 4.0?

7           A     Correct.

8           Q     And for Type IV its 0.20, correct?

9           A     Correct.

10          Q     Okay.  So, if that's the type of water that's  
11                being used -- I don't see anywhere here in ASTM  
12                standards Specification for Reagent Water that it would  
13                require further analysis on a GC, correct?

14          A     I don't think you'll find that anywhere in a  
15                standard like this.  The requirement for further  
16                analysis by GC is an independent decision made by the  
17                person -- people in the lab.

18          Q     Okay.  But according to ASTM, that you  
19                referenced earlier, that's good enough for American  
20                Standards of Testing Materials to use water that is of  
21                that type -- that meets those minimum specifications to  
22                be used for its purity, correct?

23          A     I think I understand.  So, if -- if a lab  
24                needed to use a Type I water with these specifications,  
25                they would buy it from a vendor that would say that we



1 make our water to that specification that's published by  
2 ASTM. Now whether or not the lab does an independent  
3 test to verify that, it's up to them. It just depends.

4 Q Okay. But you would agree with me that you  
5 don't necessarily have to buy deionized water that meets  
6 this specification. You would agree that you can have a  
7 system in place, like you had at the University of  
8 Miami, that produces deionized water that could meet  
9 these specs, correct?

10 A That's correct.

11 Q Okay. So, then, if that was the case, there'd  
12 be no issue in using that type of water for any testing,  
13 correct?

14 A If everything was right, I agree.

15 Q Okay. Great.

16 A If -- If the water was made to the  
17 specification for the use intended and the fitness for  
18 purpose --

19 Q Okay.

20 A Sure.

21 Q All right. And, Doctor, you're also familiar  
22 with American Board of Forensic Toxicology, correct?

23 A I'm familiar with it as an entity. Yes.

24 Q Okay. Are you familiar with their -- their  
25 Forensic Toxicology Laboratory Accreditation Manual --

1 what they require for accreditation?

2 A I think I may have reviewed it in the past but  
3 I can't cite you, you know, chapter and verse on it.

4 Q Okay. If I were to refer to something --  
5 Would looking at the accreditation manual actually  
6 refresh your recollection if I were to point something  
7 out to you?

8 A Maybe.

9 MR. BERMAN: Okay. Doctor, may I approach?  
10 I'm sorry. Judge, may I approach?

11 THE COURT: (No verbal response.)

12 MR. BERMAN: Sorry.

13 Q (By Mr. Berman) Doctor, I'm showing you  
14 what's titled American Board of Forensic Toxicology:  
15 Forensic Toxicology Laboratory Accreditation Manual. It  
16 is affective November 1st, 2013. Specifically, I want  
17 you to refer to section G-3 on page 26.

18 MR. BERMAN: Judge, would you like a copy as  
19 well? I don't think it's in the book that I  
20 provided.

21 THE COURT: No.

22 A (Continuing) Okay. I'm on page 26.

23 Q (By Mr. Berman) Okay. And in section G-3  
24 and it actually states -- The title of that section is  
25 that: For the qualitative and quantitative assays the

1 laboratory must analyze positive and negative controls  
2 concurrently with each batch of specimens. Correct?

3 A It does say that.

4 Q Okay. And if you turn to section G-5, which  
5 is on the next page -- page 27. It actually says  
6 that -- And I believe this is in the second to last  
7 sentence in the first paragraph. "A negative control or  
8 blank must insure that no significant analyte signal is  
9 contributed by the reagents or sample matrix." And,  
10 that, "The 'blank' sample is not considered a  
11 calibrator." Correct?

12 A It does say that.

13 Q Okay. So, one following the American Board of  
14 Forensic Toxicology Laboratory Manual, would not  
15 necessarily have to run the blank as you specifically  
16 stated? Correct?

17 A They don't say that.

18 Q Okay. And -- So, a laboratory that uses Type  
19 I deionized water that meets the ASTM standards - and  
20 uses that water without further testing in its negative  
21 controls: mouth alcohol, acetone and alcohol reference  
22 solution samples analysis - would, according to ASTM and  
23 American Board of Forensic Toxicology, be exercising  
24 good laboratory practice, correct?

25 A I don't know the answer to that question.

1 What are you referring to?

2 Q Well, I'm referring to the American Board of  
3 Forensic Toxicology Laboratory Accreditation.

4 A No. What tests -- What tests are you  
5 referring to?

6 Q What do you mean what tests? I'm talking  
7 about testing samples of mouth alcohol, alcohol  
8 reference solution and acetone solutions.

9 A Okay. Again, I'm not clear what -- what tests  
10 you're referring to. Perhaps I can clarify my question.  
11 The -- The deionized water in the FDLE manual is being  
12 tested for purity. Okay? That's different than using a  
13 batch of deionized water that's been tested for purity  
14 to be used to make up the solutions than to test the  
15 instruments. That's different than running a batch of  
16 samples that you're eluding to hear in the ABFT Manual.  
17 That's a different process and procedure.

18 Q Okay.

19 A One is doing a purity check of the chemicals  
20 to be used in a test. The other is actually doing the  
21 test. So, those are two different applications.

22 Q Okay. But, Doctor, you just said that if the  
23 water meets the specifications set forth by the ASTM  
24 that there's no need for further testing. If there's no  
25 need for further testing -- If that water is what FDLE

1 has why can't they just use it in testing?

2 A Well, I found no documentation to show that  
3 the water FDLE was using was traceable back to ASTM.

4 Q Okay. And if I ask FDLE now to produce any  
5 documentation, if they had it, would that change your  
6 opinion?

7 A If they had documentation to show purity and  
8 traceability to ASTM or NIST I would review it.

9 Q Okay. Well, I guess I'm --

10 MR. CANET: Judge, I'm going to ask Mr. Berman  
11 does he have it? If he does, please produce it.

12 MR. BERMAN: I'm going to make that request,  
13 Judge.

14 MR. CANET: Oh. Okay.

15 MR. BERMAN: I don't know if it exists at this  
16 point. I'm going to make the request.

17 MR. CANET: I see. So, you're flying blind?

18 MR. BERMAN: Well, this wasn't really an issue  
19 and it wasn't something that came up on deposition.  
20 So, if that's all that he needs, traceability to  
21 ASTM standards which just shows that the water  
22 being used meets this type, then that's new to me  
23 because I've never argued that issue before.

24 So, if -- if I ask, you know, I can ask FDLE  
25 to see if they have that for where they got their

1 water from. I don't know if I'm going to get it  
2 today, Judge. But, you know, I will ask for it.

3 THE COURT: Do you want to keep going?

4 MR. BERMAN: Sure.

5 Q (By Mr. Berman) So -- Now you talked about  
6 fit-for-purpose, Doctor. You said, you know, fit for  
7 purpose is to be decided by whoever runs the particular  
8 laboratory. Is that right?

9 A Or the committee, or the group, or the entity,  
10 or whoever hires them, the customer -- it just depends.

11 Q Okay. And, so, somebody could have a  
12 different opinion from yours that fit for purpose does  
13 not necessarily require pretesting of deionized water?  
14 Correct?

15 A There -- There may be many different opinions  
16 about the very same topic. I agree.

17 Q Okay. And do you have any -- Can you point me  
18 to any particular protocols, procedures, guidelines from  
19 any entity that would -- that actually, specifically,  
20 requires pretesting of deionized water before using it  
21 in any subsequent sample testing?

22 A I can't give you a document that says exactly  
23 what you said, however purity testing is common in a  
24 chemistry lab. So, the extent to which purity testing  
25 is done is related to how important the purity of the

1 chemical that's being used in the analysis is. So, if  
2 you think that criminal evidence is important, then  
3 purity checks are important and purity testing is  
4 important.

5 Q Okay. But you can still consider criminal  
6 evidence -- criminal testing important and still not  
7 necessarily have that. Correct?

8 A Well --

9 Q I mean that's --

10 A -- someone else might think that but I don't  
11 think that.

12 MR. BERMAN: Okay. All right. Just a moment,  
13 Judge. No further questions here.

14 THE COURT: You ready?

15 MR. CANET: I have just a few judge.

16 THE COURT: Take as many as you want.

17 REDIRECT EXAMINATION

18 BY MR CANET:

19 Q Dr. Rose, Mr. Berman just asked you a minute  
20 ago if you could point to any entity, body, I guess lab  
21 that requires purity testing or pretesting of its  
22 deionized water. Do you recall that question just a  
23 moment ago?

24 A Yes.

25 Q Doesn't the FDLE require that?

1 A Yes. I interpreted it to mean any other lab.

2 Q Okay. But -- But in this context the lab --  
3 the very lab that we're talking requires it?

4 A It is a purity test.

5 Q Okay. Now, you -- he also asked you about the  
6 determination for purity testing in a specific lab and  
7 that that's going to be decided by the committee, the  
8 group or whatever who authors the procedures for that  
9 lab, correct?

10 A Yes.

11 Q Looking at the procedures -- at the procedures  
12 manual that we've been talking about all afternoon,  
13 would it be safe to assume that the committee or persons  
14 or individuals responsible for that -- that manual --  
15 for the requirements in that manual, determine that  
16 purity testing was required for this procedure?

17 MR. BERMAN: Objection. Speculation. If he's  
18 going to assume but -- It's fine if he wants to  
19 answer it I'll have a follow up question.

20 THE COURT: Okay. You can answer the  
21 question.

22 A (Continuing) Somebody made a decision to put  
23 the purity test of deionized water in the manual.

24 Q (By Mr. Canet) Given your background and  
25 experience in laboratory science and as a scientist,



1 would there be any reason to think that section 2.18  
2 doesn't refer to the references to deionized or  
3 distilled in the sections that we've been talking about  
4 this afternoon?

5 A That's how I took it.

6 Q I mean, would there be any reason to take it  
7 otherwise?

8 MR. BERMAN: Objection. Asked and answered.  
9 Same question formed differently.

10 THE COURT: Okay.

11 MR. BERMAN: He just asked if there was any  
12 reason--

13 THE COURT: I'm going to overrule the  
14 objection.

15 A (Continuing) If you're trying to play an  
16 April Fool's joke on somebody and it was mistake --

17 MR. BERMAN: Objection. Judge, come on.

18 THE COURT: I think he was just trying to make  
19 a joke.

20 MR. BERMAN: Yeah. I -- I know. I'm --  
21 I'm -- I know his humor.

22 THE COURT: Doesn't always mean everybody's  
23 funny.

24 Q (By Mr. Canet) You referenced the difference  
25 between testing your blank for four and half minutes and

1 testing it for twenty. Why would that make a  
2 difference? Why is that important?

3 MR. BERMAN: Judge, I'm going to object.

4 Beyond the scope. I objected the -- I'm --

5 MR. CANET: He brought it up.

6 MR. BERMAN: I'm objecting beyond the scope.  
7 If counsel recalls, I didn't bring it up. I  
8 actually argued he was being non-responsive to my  
9 question but the Court let him answer it anyways.  
10 I never went into the time of testing for the  
11 samples.

12 THE COURT: He said it in his answer to your  
13 question. Even though in your opinion it was  
14 nonresponsive, he did say it during your question.  
15 I'm going to allow him to answer it.

16 Q (By Mr. Canet) Please respond.

17 A These compounds we're talking about, volatile  
18 organic compounds, many of them take longer than four  
19 and half minutes to be detected. So, if you only run  
20 the analysis for four and a half or five minutes, you  
21 won't see all the ones that come out after four and half  
22 and five minutes. So, in order to avoid that mistake  
23 when doing a purity check, you run the analysis for an  
24 extended period of time.

25 Q To be able to fund more stuff floating around

1 in the water?

2 A That's correct.

3 Q You also referenced the difference between  
4 dual and single column GC's.

5 A Yes.

6 Q What does that have to with anything we're  
7 talking about?

8 MR. BERMAN: Same objection, Judge. I didn't  
9 go into dual and single column GCs. He -- He  
10 stated it in an answer that was nonresponsive to my  
11 question. I never asked anything about that.

12 MR. CANET: Judge, Mr. Berman made --

13 THE COURT: Overruled.

14 MR. CANET: Okay.

15 A (Continuing) Single column gas  
16 chromatographic analysis is not sufficient for detecting  
17 all VOCs that may be in a sample. Dual column is  
18 analysis is preferred.

19 Q (By Mr. Canet) Now, what does four and a half  
20 minutes and dual column versus single column have to do  
21 with anything we're talking about here this afternoon?

22 A It would give greater reliability.

23 Q Where does -- Where did you get the four and a  
24 half minutes from? Where did that come from?

25 A The chromatograms that were provided to me in

1 discovery.

2 Q Chromatograms from where?

3 A FDLE.

4 Q So -- So --

5 A That -- That did -- Yes. The testing in this

6 case.

7 Q Done by the lab that we've been talking about?

8 A Yes.

9 Q And where did you get the single column thing

10 from?

11 A I can tell from the chromatograms that it's a

12 single column analysis.

13 Q Did the lab --

14 A And from the methods that's in the manual.

15 Q Okay. When you were doing your research at

16 FIU, what were the -- what were the results going to be

17 used for?

18 A Which research?

19 Q On the Intoxilyzer 8000. The one that you

20 were questioned on at length by Mr. Berman.

21 A Oh. For publication.

22 Q Not for prosecution?

23 A No. For publication in the scientific

24 literature.

25 Q Okay. So, with the fitness of (sic) purpose

1 analysis that you've been referencing all afternoon, how  
2 would it apply to what we're talking about here?

3 A The fitness for purpose for criminal evidence  
4 should be the highest standard.

5 THE COURT: Can I ask you a question, Mr.  
6 Canet?

7 MR. CANET: Yes, sir.

8 THE COURT: I've allowed all the evidence and  
9 testimony in that both sides have been asking for.  
10 But with respect to the actual scope of the motion,  
11 it's based on the water as it was described in the  
12 FDLE requirement as opposed to saying that  
13 requirement itself is bad. Am I correct in stating  
14 that?

15 MR. CANET: The requirements fine.

16 THE COURT: Okay. So, the testing as to  
17 whether -- what they could do, what they should do,  
18 is really not as relevant to the scope of the  
19 motion as opposed to the issues dealing with  
20 whether the water was pure or not.

21 MR. CANET: Right. And -- And --

22 THE COURT: So, I don't know if that was Mr.  
23 Berman's motion or not but with respect to the four  
24 and a half and the 20 minutes, I'm probably not  
25 going to rely on that with making my decision.

1 MR. CANET: All right. Okay, Judge.

2 THE COURT: Now that I've heard it from both  
3 of you.

4 Q (By Mr. Canet) Mr. Berman asked you about if  
5 he could produce documentation showing that the lab was  
6 somehow producing, back in 2016, Type I deionized water  
7 I guess compliant with ASTM or NIST standards. Do you  
8 remember those questions?

9 A Yes.

10 Q Okay. How would that impact compliance --  
11 actual compliance with section 2.18?

12 A It would not. The compliance with that  
13 section requires a purity check.

14 Q So -- So, whether or not they can demonstrate  
15 -- whether or not they can demonstrate that doesn't  
16 really make a difference with respect to whether there  
17 should be compliance with section 2.18?

18 MR. BERMAN: Objection. That's a legal  
19 conclusion for the Court to make.

20 MR. CANET: No. It's a scientific --

21 MR. BERMAN: No. You're -- You're asking  
22 if --

23 THE COURT: What's your specific question  
24 again?

25 MR. CANET: Whether or not they can show that

1 any water produced in 2016, according to, you know,  
2 via Type I deionized to -- in compliance with ASTM  
3 standards, wouldn't affect compliance with section  
4 2.18.

5 MR. BERMAN: That's for the Court to make a  
6 determination.

7 MR. CANET: I don't think so. That's a lab  
8 procedure.

9 THE COURT: Well, I think the way you asked it  
10 might be considered a legal conclusion. If you  
11 asked it little bit differently, I think you could  
12 be correct.

13 Q (By Mr. Canet) Okay. For purposes of  
14 determining purity, is the fact that they can  
15 hypothetically produce water that is Type I deionized  
16 compliant with ASTM, does that have to do with -- in the  
17 lab, does that have anything to with their requirement  
18 for purity -- the analysis for requirements for purity?

19 A No. It's different. The -- The ASTM standard  
20 gives a higher confidence of the water quality. The  
21 purity check by running it on the gas chromatograph  
22 proves it.

23 MR. CANET: I have nothing further, Judge.

24 RE-CROSS EXAMINATION

25 BY MR. BERMAN:

1           Q     Doctor, that's not what you said on cross  
2           examination.  You -- You actually said that if there was  
3           documentation -- that if it could be shown that the  
4           water that they were using was of ASTM standards then it  
5           really wouldn't matter for purity's sake because it  
6           would be shown by ASTM standards to be pure.

7           MR. CANET:  I'm going to object.  Those are  
8           facts not in evidence.  That was not his question  
9           and that was not his response.

10          MR. BERMAN:  That actually was his -- He  
11          agreed with me.

12          MR. CANET:  He said he would review and that's  
13          all he said.

14          MR. BERMAN:  But, hypothetically when I asked  
15          him, he agreed with me.

16          THE COURT:  He said he would review it.

17          MR. CANET:  To review it.

18          MR. BERMAN:  He actually said he agreed with  
19          me that that would meet that particular standard  
20          for purity.

21          THE COURT:  Yeah.  I think he just said he  
22          would look at it.

23          MR. BERMAN:  Okay.  That's if I produce that  
24          documentation.

25          THE COURT:  Yes.



1 Q (By Mr. Berman) But, Doctor, Are you saying  
2 that ASTM -- You've already said that the ASTM standards  
3 do not require subsequent testing on a GC, correct?

4 A The ASTM standard is for setting the limits of  
5 purity on the water. Proving it is by virtue of  
6 documentation and/or direct testing. In this case you'd  
7 want to use direct testing to prove it.

8 Q But that's not what you said on cross. What  
9 you said is if you had the documentation to show that  
10 they were getting it from a deionized water faucet or  
11 spigot that met that the -- the certifications of ASTM  
12 standards then that would be -- that would show that the  
13 water would be pure.

14 A I think I said I would review it if you had  
15 the documents.

16 Q Well --

17 A And that's different --

18 Q -- hypothetically --

19 A If I may. That's different than direct proof  
20 by testing it in the lab.

21 Q Hypothetically, Doctor.

22 A We're really -- We're really talking about --

23 Q Hypothetically, Doctor.

24 A -- two different topics here.

25 Q Hypothetically Doctor, if you had

1 documentation that would show that water tested -- Okay.  
2 I'm sorry. Not tested but water that came from  
3 deionized water spigot or faucet meets the resistivity  
4 qualifications of ASTM standards. You're saying that  
5 you would require further testing of that water before  
6 using it.

7 A Well -- Well I guess, you know, that question  
8 I'd have to answer yes because --

9 Q Okay.

10 A -- because there is --

11 Q Okay.

12 A -- because there is a VOC parameter here or  
13 organic parameter in the water and that's what you're  
14 concerned with. And if you want direct evidence then  
15 you test it directly.

16 Q Okay. But again there is no requirement in  
17 ASTM standards for that, is there? ASTM basically says,  
18 if it meets the specification, purity --

19 A No. No. ASTM says this is the standard for  
20 this type of water.

21 Q Correct.

22 A They don't say who produces the documents to  
23 prove it.

24 Q Okay. Actually, NIST as adopted those actual  
25 parameters as well, haven't they?

1           A     I suspect that they work together; that the  
2 committees talk to each other.

3           Q     Okay. So, big conspiracy or they just work  
4 together?

5           A     Pardon me?

6           Q     Big conspiracy or they just work together?

7           A     It's not a conspired world but rather  
8 collegial.

9           Q     Oh okay. Again, no requirement that you  
10 continue to test the water after it's been shown to meet  
11 those purity standards.

12          A     The ASTM is not showing requirements for the  
13 laboratory use, just the standard of, you know, purity  
14 and composition. That's different. The requirement for  
15 purity check is a laboratory based decision.

16          Q     Okay.

17          A     And it appears that FDLE had that as a  
18 laboratory based decision.

19          Q     Okay. But again you didn't do that when you  
20 were at UM or you have no documentation that says that  
21 you did that when you were at UM, correct?

22          A     I can't tell you -- I can't tell you  
23 specifically what we did or didn't do in this fact.

24          Q     All right. And can you then tell me, based on  
25 everything, how many of the defendant's samples in this

1 case were affected?

2 MR. CANET: Judge -- No. I'm going to --

3 A (Continuing) Well, I'm not sure what you  
4 mean.

5 Q (By Mr. Berman) Okay. So, they -- they  
6 didn't test the water the way that -- that, you know,  
7 it's written in the procedures --

8 A Oh okay.

9 Q -- as Mr. Canet says?

10 A Yeah. Then there's a --

11 Q Tell -- Tell me how that --

12 A Yeah.

13 Q -- relates.

14 A Sure.

15 Q Tell me specifically --

16 A Okay. Well --

17 Q -- how the defendant's breath test results  
18 were affected if they were.

19 A Yeah. It -- It shows that there's a lower  
20 confidence in the reliability and accuracy of the test  
21 results. That's specifically what that means.

22 Q Not -- Not what I asked. Show me specifically  
23 in the defendant's breath test results how they were  
24 affected.

25 A Well, that's not possible.

1 Q Oh.

2 A There's not enough information to answer your  
3 question.

4 Q Okay. Okay. Now one of the last things Mr.  
5 Canet asked you about the requirements is that -- I  
6 believe it was -- Let me make sure I have it right. Lab  
7 producing Type I deionized water compliant with ASTM  
8 standards, how would that impact compliance with 2.18  
9 and you said that it would not; you still have still  
10 have to run 2.18. Correct?

11 A Yes.

12 Q Okay. So, if someone determined that 2.18 was  
13 unnecessary considering that they're getting water from  
14 a Type I, cartridge based, ion exchange, deionized  
15 system or faucet, then that would be okay?

16 MR. CANET: Judge, that is a legal conclusion  
17 for you to determine not Dr. Rose.

18 MR. BERMAN: That's -- That's the same  
19 question he that he asked --

20 MR. CANET: No. It's not. He's arguing --  
21 He's arguing that that is now substantial  
22 compliance. That he's somehow going to prove this  
23 and that that somehow equals substantial  
24 compliance. That's for you to decide, Judge.

25 MR. BERMAN: Well, I'm asking the inverse of

1 Mr. Canet asked.

2 THE COURT: Okay. I -- Maybe I'm confused  
3 with the question. Are you asking the -- whether  
4 using the tap water is going to --

5 MR. BERMAN: Not tap water, Judge.

6 THE COURT: Okay.

7 MR. CANET: Oh yes it is.

8 THE COURT: I think that you're saying it in a  
9 much different way. But you're saying you turn on  
10 the spigot, the water comes out. That if he uses  
11 that water and it meets with this --

12 MR. BERMAN: Meets with ASTM standards.

13 THE COURT: -- is that going to be a problem.  
14 Is that what you're asking?

15 MR. BERMAN: No.

16 THE COURT: Or are you saying whether he's  
17 guilty, not guilty --

18 MR. BERMAN: I'll ask him -- I'll ask him --

19 THE COURT: I mean --

20 MR. BERMAN: No. No. No.

21 THE COURT: -- that's why I asked him to  
22 rephrase the question.

23 MR. BERMAN: I'll rephrase it, Judge. I'll  
24 rephrase it.

25 Q (By Mr. Berman) Okay. Doctor, you understand

1 that there's a difference between when someone says tap  
2 water -- Okay.

3 THE COURT: You know, I understand the  
4 difference of --

5 MR. BERMAN: No. I --

6 THE COURT: -- what you're trying to say if  
7 you want to go through a whole line of questions  
8 with regard to that. I was just trying--

9 MR. BERMAN: It was just going to be two.

10 THE COURT: -- trying to respond to you  
11 simply.

12 MR. BERMAN: I got you, Judge.

13 THE COURT: You're using a lot of technical  
14 words just like the expert is, which is fine and  
15 I'm listening that way but I was just trying to cut  
16 through it.

17 MR. BERMAN: Okay.

18 Q (By Mr. Berman) Doctor, you understand what I  
19 -- what I mean when I say, you know, cartridge based,  
20 ion exchanged, deionized water spigot? That that's not  
21 regular tap water that I could just run down to the  
22 bathroom and get it.

23 A I understand that.

24 Q Okay. And that would've been -- that would've  
25 been the same spigot or faucet that you were using at

1 the University of Miami Toxicology Lab, correct?

2 A Not -- Not the same.

3 Q Something similar?

4 A Not the same but we were using a conditioned  
5 water.

6 Q Okay. Something similar to get distilled or  
7 deionized water?

8 A I agree

9 Q Not trying to trick you.

10 A I agree.

11 Q Okay. So, when you say that even if the  
12 lab -- when you say that it wouldn't make any difference  
13 about the impact of the application of 2.18 if a lab  
14 were to produce documentation -- If the documentation  
15 exists, hypothetically, it wouldn't make any difference  
16 because 2.18 still exists as a procedure, correct?

17 A It doesn't replace doing 2.18.

18 Q Okay. But you would agree that someone in the  
19 lab could come along and say we don't need that  
20 requirement anymore and, then, remove it. Correct?

21 MR. CANET: Judge, that question -- that  
22 hypothetical is announcing facts that are not in  
23 evidence.

24 MR. BERMAN: Well, actually it is in evidence,  
25 Judge. It's actually in the standard operating



1 procedures manual 2017 where they removed that  
2 procedure.

3 THE COURT: I'm going to overrule the  
4 objection. Can you state the question again so he  
5 can --

6 MR. BERMAN: Okay.

7 Q (By Mr. Berman) So, that could actually be  
8 the basis for someone at FDLE removing that requirement  
9 completely, correct?

10 A There's a lot of coulds (sic) in the decision  
11 making process. You'd have to ask the person who made  
12 that decision why they made that decision.

13 Q Okay. So, on direct you were okay with what  
14 FDLE assumed or what they were thinking but now you have  
15 a problem with that?

16 A If you're talking --

17 MR. CANET: Judge, I'm going to -- I'm going  
18 to object. Now he's being argumentative.

19 THE COURT: Sustained.

20 MR. CANET: He's been that way all afternoon.

21 THE COURT: Sustained.

22 Q (By Mr. Berman) And -- So, you cannot  
23 actually say that FDLE is remiss in actually removing  
24 that in the 2017 Standard Operating Procedures Manual if  
25 that's what they determined?

1 MR. CANET: Judge, I'm going to object to  
2 legal relevance. I mean, how is that even  
3 relevant?

4 THE COURT: How is that relevant?

5 MR. BERMAN: It's the exact opposite question  
6 that he asked about whether or not they should  
7 still comply with it if it's still in there.

8 MR. CANET: And -- And he's now asked it four  
9 or five different times.

10 MR. BERMAN: No. It's a -- It's a -- It's a  
11 different question.

12 MR. CANET: And Dr. Rose has responded. And  
13 Mr. Berman doesn't like the response so he keeps  
14 asking the question.

15 MR. BERMAN: Because maybe he hasn't answered  
16 the question.

17 MR. CANET: Well -- Well, maybe you should  
18 just live with response, Garrett.

19 MR. BERMAN: No.

20 MR. CANET: Accept it. That's it.

21 THE COURT: Okay. Instead of the cross-talk,  
22 I am going to overrule the objection. You can ask  
23 it again.

24 MR. BERMAN: Okay.

25 Q (By Mr. Berman) Doctor, FDLE is not

1 necessarily remiss for removing that as a requirement,  
2 correct?

3 A It depends under what context you're asking me  
4 that.

5 Q All right.

6 A If you're asking me that in terms of  
7 guaranteeing purity, yes they are remiss. If -- If it's  
8 because they can do it and it's allowed well no they're  
9 not remiss. But generally speaking, in a laboratory  
10 setting, more data is better. More purity checks are  
11 better. More quality control is better. Not less.

12 Q Okay. And in looking at any of the  
13 chromatograms that were provided for any of the alcohol  
14 reference solution lots that you were given or the mouth  
15 alcohol acetone lot, can you point to any specific  
16 instances where there was an interferent in any of the  
17 negative controls that use deionized water that appeared  
18 in any of those chromatograms?

19 A There's no way to tell for sure without doing  
20 dual column, different columns and longer run times.

21 Q Okay. And even if you did that you would  
22 expect to see the same blip or peak in all the  
23 chromatograms?

24 A The same injection peak?

25 Q No. No. The same interferent peak in all of

1 the chromatograms.

2 A It -- It -- It depends. It can be variable.

3 Q Well, if you're using the same water --

4 A No. Because these VOCs are tricky. They can  
5 elude -- they can come out of the column or be detected  
6 at different times in a series of samples that are run  
7 in an instrumental run. It's not -- It's not --

8 Q Well, I'm not going to --

9 A It's not a simple -- It's a simple affair.

10 Q The Judge said he wasn't going to take that  
11 under advisement so, I'm not going to get into that.

12 A Pardon?

13 Q The Judge said he -- it wasn't going to make a  
14 difference for the basis of his ruling so I'm not going  
15 to get into that.

16 MR. BERMAN: So, no further questions.

17 THE COURT: Okay. You could step down.

18 THE WITNESS: Am I released, Your Honor?

19 THE COURT: If you'd like to be.

20 THE WITNESS: Thank you. As long as Mr. Canet  
21 doesn't need me for anything else.

22 THE COURT: I don't know what he needs.

23 MR. CANET: No. You're done, man. You're  
24 done.

25 THE WITNESS: Thank you.

1 THE COURT: Okay. So, I assume you have  
2 another witness?  
3 MR. CANET: One more witness. Yes, sir.  
4 THE COURT: Okay. If you want to keep going.  
5 MR. CANET: I want to keep going.  
6 THE COURT: Okay.  
7 He doesn't want to leave. He's having a great  
8 time.  
9 MR. CANET: He looks comfortable, Your Honor.  
10 THE WITNESS: It'll just take me another  
11 second to shut this down.  
12 THE COURT: No worries.  
13 Just curiosity, how long is this going to  
14 take?  
15 MR. CANET: I'm going to try and make it very  
16 short.  
17 THE COURT: Okay. Well -- But do you have an  
18 expectation?  
19 MR. CANET: Probably 15 to 20 minutes.  
20 THE COURT: Is that with the usual?  
21 MR. CANET: With his -- I don't know. With  
22 his cross examination, I don't know.  
23 THE COURT: Oh. That's just your direct?  
24 MR. CANET: Right.  
25 THE COURT: Okay.

1                   How long do you think the witness will be?  
2                   MR. BERMAN: It depends on what he says and  
3                   what he's allowed to say, Judge.  
4                   THE COURT: In the typical format of how we  
5                   run our courtroom.  
6                   MR. BERMAN: I would like to be out of here by  
7                   5:00. I've had a fever since yesterday, so --  
8                   THE COURT: I apologize for that.  
9                   MR. BERMAN: No. Judge, I mean --  
10                  (Witness exits.)  
11                  THE COURT: Please don't breathe on me.  
12                  MR. BERMAN: I actually -- I went to the  
13                  doctor late, last night. I had a 101 fever and --  
14                  but I didn't want to cancel this.  
15                  (Witness enters.)  
16                  MR. CANET: Now you tell us?  
17                  MR. BERMAN: Well --  
18                  MR. CANET: Now you tell us.  
19                  MR. BERMAN: I knew he was coming into town. I  
20                  knew you had him coming --  
21                  MR. CANET: If I get sick --  
22                  THE COURT: You are indeed a trooper.  
23                  MR. CANET: If I -- If I get sick --  
24                  MR. BERMAN: Well --  
25                  MR. CANET: -- I'm holding him directly

1 responsible.

2 MR. BERMAN: That's fine. You've held me  
3 responsible for more than that.

4 MR. CANET: I don't want to get sick.

5 THE COURT: Please raise your right hand.

6 THE WITNESS: Complies.

7 WHEREUPON:

8 MATTHEW MALHOIT  
9 was called as a witness on behalf of the Defense, and  
10 being first duly sworn, was examined and testified on  
11 his oath as follows:

12 THE COURT: State your name and spell your  
13 last name.

14 THE WITNESS: Thank you, Your Honor. Matthew  
15 E. Malhiot, M-A-L-H-I-O-T and phonetically  
16 pronounced Myit, M-Y-I-T.

17 DIRECT EXAMINATION

18 BY MR. CANET:

19 Q How are you employed, sir?

20 A I am currently the proprietor of Forensic  
21 Alcohol Consulting and Training; a limited liability  
22 corporation based in Canton, Georgia.

23 Q Okay. Were you ever put --

24 THE COURT: We did put all of this on the  
25 record last week or two weeks ago.

1           MR. CANET: I'm cutting right through it,  
2           Judge.

3           MR. BERMAN: He did, Judge. I don't -- I  
4           don't have an objection to Mr. Malhoit being an  
5           expert in the Intoxilyzer 8000.

6           THE COURT: Okay.

7           Q     (By Mr. Canet) Have you ever worked for the  
8           FDLE?

9           A     I did from 2002 through 2010.

10          Q     In what capacity?

11          A     I was a department inspector responsible for  
12          approximately 100 law enforcement agencies breath  
13          testing program. I was also part of the team that did  
14          the evaluation process and approval and updates of the  
15          Intoxilyzer 8000. Including the Breath Test Operator  
16          Manual, Agency Inspector Manual, Procedures Manual, rule  
17          revisions, form revisions.

18          Q     Would it be safe to say that you were a -- a  
19          member of the crew directly responsible for the approval  
20          of the 8000 -- Intoxilyzer 8000 here for use in the  
21          state of Florida?

22          A     Yes. I was.

23          Q     Okay. What familiarity do you -- In your  
24          capacity as an employee for the FDLE that you've just  
25          described, what was your familiarity with the creation



1 of a procedures manual? I mean, what part did you find  
2 that?

3 A Well, specifically, a lot of the 8000  
4 procedures -- I personally wrote the calibration  
5 procedures for the 8000 and we took the CMI  
6 calibration --

7 Q Let me stop you. Are you talking about the  
8 thing that we've been reading all afternoon?

9 A Yes.

10 Q Your words and your hand writing?

11 A In the earlier versions, yes.

12 Q Okay.

13 A In parts of it.

14 MR. BERMAN: Object. I was just going to ask  
15 if he can clarify which versions.

16 THE WITNESS: Probably the initial versions up  
17 through 2010 when I left FDLE.

18 THE COURT: And is this in handwriting?

19 MR. BERMAN: Tablet.

20 Q (By Mr. Canet) So, you have personal, direct  
21 knowledge as to the contents and the creation of at  
22 least some of the documents?

23 A I do.

24 Q The sections involving the analysis of  
25 reference solution, mouth alcohol solution, acetone,

1 stock solution and preparation, was that part of the  
2 early versions of this manual?

3 A Yes. They were evolved from checklist and  
4 procedure letters to a combined employee handbook or  
5 manual.

6 Q Why was it decided to create a procedures --  
7 Do you know why it was decided to create a procedures  
8 manual?

9 A I do.

10 Q Why -- Why was it?

11 A At the time a few things were going on. We  
12 were evolving to the 8000, we were increasing --

13 MR. BERMAN: Objection. Cause for hearsay  
14 unless he can state otherwise.

15 MR. CANET: He was there. He did it.

16 MR. BERMAN: No. He said he was there for  
17 some of the earlier manuals. I don't know how far  
18 back that goes.

19 THE COURT: Okay. Well, I'm going to let him  
20 answer the question then.

21 A (Continuing) The quality assurance was  
22 evolving in the forensic breath alcohol testing and  
23 blood alcohol testing. At the time we were also at FDLE  
24 as an employee. We were going through performance  
25 standards to grade employees and -- and meet standards,

1 exceed standards, fall below standards. So, they were  
2 trying to come up with procedural standards that we, the  
3 employees, as a department inspector must meet. And it  
4 evolved into the internal procedures we were to perform.

5 At the time the rule directed agency -- do  
6 agency inspections and -- and those types of things.  
7 But internal procedures were pretty much nonexistent  
8 that was the evolution. We were talking about the  
9 National Safety Council was coming up with standards of  
10 breath testing and it was evolving very rapidly. At the  
11 same time the Intoxilyzer 8000 was being introduced and  
12 evaluated.

13 Q (By Mr. Berman) Was there a scientific  
14 objective at all?

15 A Yes. The -- The -- We always referred back to  
16 our statutory responsibility as FDLE to ensure the  
17 scientific reliability of the results. That's -- That's  
18 the bottom line. Everything referred back to that.

19 Q Okay. So -- All right. Now, was the creation  
20 of the procedures manual a -- a -- an individual process  
21 or a committee process? How did that operate?

22 A Individuals on the team -- Different  
23 department inspectors had different inputs. I  
24 personally was responsible for the calibration  
25 procedures. Mr. Skipper was responsible for a different

1 part. Mr. Suereth was responsible. Ms. Barfield was  
2 responsible. Then we would have team meetings and have  
3 cross discussions and cross feedback between the  
4 sections and the parts until a final manual revision was  
5 published.

6 Q Okay. And was the Department mission always  
7 kept in mind in formulating these procedures?

8 A Most of them. Some of them were kind of  
9 irrelevant to scientific reliability. For instance, if  
10 you look at some of the administrative stuff that was in  
11 the earlier manuals -- filling out travel vouchers,  
12 public records. But the Department inspector and those  
13 responsibilities would always refer back to our  
14 statutory responsibility of -- to ensure the scientific  
15 reliability of the results. That -- That's -- We  
16 always, I guess for lack of a better term, a mission  
17 statement.

18 Q Okay. What was the expectation as far as  
19 compliance with the procedures manuals?

20 A We, as employees, were evaluated on our  
21 performance standards based on compliance of the  
22 manuals. As we went through, in my history, persons  
23 were disciplined as employees for noncompliance of that  
24 manual and some were terminated because of noncompliance  
25 with the -- those things in that manual.

1 Q Okay. Was compliance with the procedures laid  
2 out in the manuals a part of achieving the mission goal?

3 A Could you rephrase that? I'm sorry. I -- I  
4 don't think I understood.

5 Q I mean if the goal is to -- if the goal is to  
6 ensure accurate, reliable results for use of criminal  
7 prosecutions, was compliance with the procedures in the  
8 manuals part of that goal?

9 A Well, yes. That's why they were written.  
10 That's why they were -- It was all a systematic quality  
11 assurance program to ensure the reliability and the  
12 ultimate reliability.

13 Q Was the -- Were the procedures outlined in the  
14 written document something that the Department could  
15 always go back to, to compare what should be done with  
16 was actually being done?

17 A Well, we would hope they were the same thing.

18 Q All right. Okay.

19 A But, yes. That comparison could be made but  
20 the goal was to make sure that was supposed to be done  
21 was being done.

22 Q Okay. Did FDLE at your level ever have a  
23 concern with the purity of water for use in calibration  
24 checks?

25 A During the -- When you say the term

1 calibration check, I just need to clarify your question  
2 because that's a very generalized -- The agency  
3 inspection, the Department inspection and the approval  
4 of alcohol reference solutions. The agency inspection,  
5 there was litigation years ago in reference to somebody  
6 using tap water from the sink. That was a big  
7 litigation completely --

8 Q I'm familiar with that by the way.

9 A I know you are. So, yes. Back then that was  
10 a concern for not using distilled or deionized water.

11 Q Did that concern find its way into the  
12 procedures manual?

13 A I'm not sure if it was a direct result but it  
14 was about the same time that the procedures manual was  
15 being evolved over a new version.

16 Q Is that -- Is that the reason for the  
17 requirement for distilled or deionized water?

18 MR. BERMAN: Objection. Lack of foundation as  
19 to how he would know.

20 THE COURT: I'm going to --

21 Q (By Mr. Canet) Would you know whether or not  
22 that was the foundation?

23 A (Continuing) For the --

24 MR. BERMAN: And how he knows might be  
25 hearsay.

1 THE COURT: It might be.

2 A (Continuing) Could you repeat the question?

3 Q (By Mr. Canet) Was that the reason for -- Was  
4 that concern the reason for requiring deionized and  
5 distilled water in the procedures manual?

6 A It was simultaneously about the same time.  
7 I'm not sure if it was exact cause.

8 Q Okay. What was your understanding of the  
9 requirement of compliance with the procedures manual?

10 MR. BERMAN: Objection. Relevance. That's --

11 Q (By Mr. Canet) In your capacity as the  
12 department inspector, employee of the --

13 THE COURT: I'm going to sustain the  
14 objection.

15 MR. CANET: All right.

16 Q (By Mr. Canet) What was the Department's --

17 THE COURT: That's what were here to  
18 determine.

19 MR. CANET: Okay.

20 Q (By Mr. Canet) From what you -- From your  
21 knowledge of the creation of the procedures manual, what  
22 was the Department's expectation as far as compliance  
23 with these procedures?

24 MR. BERMAN: Objection. Cause for hearsay.

25 What their expectations were?

1 THE COURT: Overruled.

2 A (Continuing) Those were minimums of  
3 performance standards as employees of Florida Department  
4 of Law Enforcement. Those were the -- the minimum  
5 requirements for the position of department inspector or  
6 any of the different positions within.

7 Q (By Mr. Canet) Were you aware of any  
8 consequences for noncompliance?

9 A Yes.

10 Q What were they?

11 A Well, I know three people were terminated and  
12 others were reprimanded for noncompliance with that and  
13 rule.

14 Q Was the creation of these manuals originally  
15 something that was formulated by Laura Barfield?

16 A She was there at the time.

17 MR. BERMAN: Objection. Relevance.

18 THE COURT: Sustained. I think we all agreed  
19 that the rules were good. So, I don't know that we  
20 need to go into -- That's not what you're  
21 challenging.

22 MR. CANET: Right. Correct. I have nothing  
23 further, Judge.

24 THE COURT: Any questions.

25 MR. BERMAN: I'm sorry -- Sorry.



1 CROSS-EXAMINATION

2 BY MR. BERMAN:

3 Q Mr. Malhoit, you didn't have anything to do  
4 with to do with rules 2.1 -- Or you didn't have anything  
5 to do with the rules regarding the analysis of the mouth  
6 alcohol solution, did you?

7 A I did have discussion. I did not write it but  
8 there were discussions between myself and Ms. Barfield  
9 as far as the standard when we went from the 5000 to the  
10 8000. On the mouth alcohol specifically in quantitative  
11 versus qualitative analysis because it was no longer  
12 used as an alcohol solution to mix reference solutions.  
13 So, the qualitative was important but quantitative was  
14 not as important.

15 Q Okay. How about with the acetone procedure?

16 A I did not.

17 Q Okay. The alcohol reference solution  
18 procedure?

19 A I may have an input during meetings but not  
20 specific writings in that area.

21 Q Okay. And the distilled or deionized water  
22 analysis?

23 A I did not write that.

24 Q Okay. So, you can't say why it was even  
25 included, correct?

1           A     I don't have firsthand knowledge of why it  
2 specifically was included or -- or --

3           Q     Okay. Are -- are you aware of when that --  
4 when that particular procedure was actually added into  
5 the Standard Operations --

6           A     I -- I don't know the --

7           Q     -- Procedures manual?

8           A     I don't know the specific year.

9           Q     Okay. And have you taken a look at all the  
10 documentations the State sent in discovery to Mr. Canet?

11          A     I don't know what all the documentation --  
12 I've looked at eight different manuals, motions.

13          Q     Okay.

14          A     I don't know what other documents. I  
15 certainly didn't look at a book as thick you have on  
16 your desk.

17          Q     Okay. So, looking at -- You had a copy of the  
18 2004 manual?

19          A     I did.

20          Q     Is that what you said? Okay. 2005?

21          A     I did.

22          Q     Okay. So, you're aware that in 2004 there  
23 actually was no requirement for distilled or deionized  
24 water analysis, correct?

25          A     Without reviewing them, I'll take your word.

1 I'm sure you would misrepresent that at this time.

2 Q And that it actually only started popping up  
3 in the 2005 version as section 4.05?

4 A I do remember it was under section 4, yes.

5 Q Okay. And subsequently when the --

6 A 2007 manual.

7 Q -- 2007, it remained in section 4?

8 A I believe 4.2 at that time.

9 Q No. It's still 4.5.

10 A Okay.

11 Q In fact all those four stayed in the same --  
12 the same listing -- the same order in 2005, 2007. And,  
13 then, they moved from in section 4 to -- I think section  
14 was -- It started from 4.01 to 4.05. They actually  
15 moved to what they are now, 2.14 to 2.18 --

16 A Understand.

17 Q -- in 2011. Okay. And you are that FDLE has  
18 since gone and determined that the section 2.18,  
19 Distilled or Deionized Water Analysis, is no longer  
20 needed scientifically, correct?

21 MR. CANET: Judge, I'm going to object that  
22 that has -- I mean this is now Mr. Berman  
23 testifying. These facts are not in evidence. If  
24 he wants to put on a case and bring in his people  
25 to explain all that, that's fine. But I'm going to

1 object to his testifying.

2 THE COURT: Okay. I'll sustain that since  
3 there's no argument against it.

4 MR. BERMAN: You -- You -- Well, just because  
5 he argued against it?

6 THE COURT: No. That you had no argument  
7 against his.

8 MR. BERMAN: Well, I was waiting -- I was  
9 waiting. Okay.

10 Q (By Mr. Berman) You are aware they have since  
11 removed that part from the Standard Operating Procedures  
12 Manual, correct?

13 A I am.

14 Q Okay. And you don't necessarily have any  
15 experience in gas chromatography, do you?

16 A No. Other than basic training and  
17 familiarization.

18 Q Okay. And when you were with FDLE have you  
19 ever run the process that was required under the  
20 previous 4.05 or current 2.18, up until the most recent  
21 version of the Standard Operating Procedures Manual?

22 A I have not.

23 Q Okay. And you would agree with me though that  
24 just because that particular procedure wasn't run, it  
25 doesn't necessarily mean that the breath test results in

1 any given case are inaccurate or unreliable. Correct?

2 MR. CANET: Judge, wait a minute. I mean he's  
3 just questioned him about his lack of familiarity,  
4 the GC and now he wants him to answer a question  
5 regarding the use of compliance with section 2.18  
6 which is all about using a GC? I'm going to  
7 object. He hasn't --

8 MR. BERMAN: No. No. No.

9 MR. CANET: -- established a foundation.

10 MR. BERMAN: I -- I didn't ask about using the  
11 GC. I just said compliance with section 2.18.

12 MR. CANET: And he just finished asking him as  
13 series of questions about: "You don't know why this  
14 written?" "You don't know why this was put in  
15 here?" "You have nothing to do with this section?"  
16 And now he wants him to render that opinion? I'm  
17 going to object. He's had -- hadn't established a  
18 foundation.

19 MR. BERMAN: Judge, he's -- he's an expert in  
20 the Intoxilyzer 8000.

21 THE COURT: I'm going to overrule the  
22 objection.

23 MR. BERMAN: Okay.

24 Q (By Mr. Berman) So, with regards to the  
25 Intoxilyzer 8000, can you say specifically how not

1 complying with the -- the requirements of 2.18 affects a  
2 defendant's breath test results?

3 A Section 2.18 was a section for  
4 distilled/deionized water being evaluated independently  
5 and separately for preparation of alcohol solution,  
6 verification, mouth alcohol and acetone. I did not  
7 perform those tasks and I don't know what the results of  
8 the quality of the acetone and mouth alcohol is. So, I  
9 really don't know if I'm qualified to make the next leap  
10 to say how it would affect the breath test.

11 These are the solutions that are used during  
12 the agency and department inspection and are provided to  
13 us. I don't make it so I don't know if I'm really  
14 qualified to say it goes to the next step.

15 Q Okay. And having been a department inspector  
16 you actually testified on behalf of FDLE with regards to  
17 the Florida Administrative Code Rules that govern breath  
18 testing, correct?

19 A I have.

20 Q Okay. And you're familiar with Florida  
21 Administrative Code section 11D 8.0035, correct?

22 A What's the title of that section? I'll tell  
23 you from -- I'm sure I am but -- but I --

24 Q It is the --

25 A -- don't memorize numbers.

1 Q -- Approval of Alcohol Reference Solution and  
2 Sources.

3 A I am.

4 Q Okay. Is -- To your knowledge -- And I can  
5 show you a copy of the rule if you'd like. But to your  
6 knowledge, is there any reference to using deionized  
7 water in that rule itself?

8 MR. CANET: Judge, let me -- I'm going to  
9 object. Because how is this within the scope of my  
10 direct examination?

11 MR. BERMAN: Judge, he's an -- he's an expert.  
12 He's -- He --

13 MR. CANET: But I didn't ask him anything  
14 about the FDLE rights.

15 MR. BERMAN: No. He asked about the statutes  
16 and he tied in the statutes with --

17 MR. CANET: No. I asked him about the  
18 procedures manual.

19 MR. BERMAN: The witness asked about the  
20 procedures manual and why it was used. And the  
21 witness actually answered that they were all --  
22 always following Florida Statutes to ensure  
23 accurate and reliable results.

24 MR. CANET: That did not open this door.

25 MR. BERMAN: The Florida Administrative Code

1 is basically what they must follow.

2 MR. CANET: No. They -- That did not open  
3 this door, Judge. I'm going to object.

4 THE COURT: I'm going to -- I'll sustain the  
5 objection.

6 MR. CANET: Okay.

7 Q (By Mr. Berman) So, Mr. Malhoit, when you say  
8 that you followed the statutory requirements for  
9 ensuring accurate and reliable results, what were you  
10 talking about? Are there rules to follow?

11 MR. CANET: Judge, this goes beyond the scope  
12 of my direct examination.

13 MR. BERMAN: I'm tying it all together, Judge.

14 MR. CANET: Still goes --

15 MR. BERMAN: He talked about the statutory  
16 requirements.

17 MR. CANET: Just because he mentioned the word  
18 statute now Mr. Berman is going to go into all the  
19 regs -- all the statutes?

20 THE COURT: He said he really didn't have much  
21 understanding of --

22 MR. CANET: Yeah.

23 MR. BERMAN: I'm not asking about the  
24 procedures.

25 THE COURT: -- the 2.18.



1 MR. BERMAN: I'm not --

2 THE COURT: Wasn't that what the issue is?

3 MR. BERMAN: I am but I'm -- I'm asking him  
4 something completely different.

5 THE COURT: Okay.

6 MR. BERMAN: And -- And --

7 MR. CANET: And it's not --

8 MR. BERMAN: And as for stating --

9 MR. CANET: And it's objectionable.

10 MR. BERMAN: And as for stating the word --

11 THE COURT: Well, what's the relevance to the  
12 case if --

13 MR. BERMAN: Judge, I --

14 THE COURT: Not to the case but to the issue  
15 that we are here to --

16 MR. BERMAN: Because I'm going to show that  
17 aside from it being an internal procedure there is  
18 not rule that is being violated.

19 MR. CANET: He can do that through his own  
20 case, Judge. I'm going to object.

21 MR. BERMAN: It -- It doesn't -- He's there  
22 expert, Jude.

23 THE COURT: Well, if you want to ask him that  
24 question, you could ask him that question. If you  
25 ask him the question you asked I'm going to sustain

1 the objection.

2 MR. BERMAN: Okay.

3 Q (By Mr. Berman) So, Mr. Malhoit, can you  
4 point out to me a specific rule under the Florida  
5 Administrative Code that's being violated here?

6 A By not following sub 18?

7 Q Sub -- Subsection 2.18 in the 2011, 2014 or  
8 2016 Standard Operating Procedure Manual?

9 A It would be an interpretation of the rule  
10 and --

11 Q Okay. So --

12 MR. CANET: You're not going to let him finish  
13 answering, Mr. Berman?

14 THE COURT: Yeah. Let him finish.

15 MR. BERMAN: Well, if it's an interpretation  
16 then the answer is: No.

17 THE COURT: Well, I don't think he finished.

18 MR. BERMAN: Okay.

19 A (Continuing) The interpretation -- The  
20 procedure manual defines what deionized/distilled water  
21 process is supposed to be and the rule requires the use  
22 of distilled or deionized water.

23 Q (By Mr. Berman) Is there any rule that  
24 requires the precepts of 2.18 to be followed?

25 A I don't believe the language is specific in

1 the rule that says, "Thou shall follow."

2 Q Okay. To your knowledge is there any  
3 reference to section 2.18 of the Florida Department of  
4 Law Enforcement Alcohol Testing Program Standard  
5 Operating Procedures Manual in the rules?

6 A No.

7 MR. BERMAN: Nothing further, Judge.

8 THE COURT: Okay. Anything to redirect?

9 MR. CANET: Just a couple.

10 REDIRECT EXAMINATION

11 BY MR. CANET:

12 Q Those -- All those references that he just  
13 made do reference distilled -- the requirement for  
14 distilled and deionized water. Is that right?

15 A Chapter 11D-8?

16 Q Yeah.

17 A Yes.

18 Q Okay. You are in a position to say whether or  
19 not compliance is required to assure accuracy and  
20 reliability is that right?

21 MR. BERMAN: That's for the Court to determine  
22 and he's not in that position anymore.

23 THE COURT: I don't understand your question.

24 MR. CANET: Okay.

25 THE COURT: So, you can rephrase it.

1 MR. CANET: All right.

2 Q (By Mr. Canet) Back when you worked --

3 THE COURT: That way you can get to what you  
4 need.

5 Q (By Mr. Canet) Back when you worked for the  
6 Department, was it your understand that compliance was  
7 required to assure accuracy and reliability?

8 A That was the purpose. Yes.

9 Q Okay. Now the -- the inclusion of distilled  
10 and deionized water in the procedures manual coincided  
11 with the issues that were being raised concerning the  
12 use of water here in South Florida. Is that right?

13 A My recollection of the time is pretty close.  
14 I don't know the exact --

15 MR. BERMAN: Objection, Judge. I didn't go  
16 into any of the tap water issues from 2005 --

17 MR. CANET: He absolutely did.

18 MR. BERMAN: No I didn't.

19 MR. CANET: He did.

20 MR. BERMAN: I asked him nothing.

21 THE COURT: I don't think he got into the  
22 timing of --

23 MR. CANET: Yeah.

24 THE COURT: -- the previous case of -- that  
25 you had many years ago. But he did answer that all

1 before so I'm going to sustain the objection.

2 MR. CANET: All right. I have nothing  
3 further.

4 THE COURT: Okay.

5 MR. BERMAN: Judge, can I just ask one  
6 question to clarify?

7 MR. CANET: I'm -- I'm going to object, Judge.  
8 I am.

9 MR. BERMAN: I -- I -- Okay.

10 THE COURT: He gets a right to re-cross if  
11 it's within the scope of the couple questions that  
12 you asked.

13 MR. BERMAN: It was the first question he  
14 asked.

15 RE-CROSS EXAMINATION

16 BY MR. BERMAN:

17 Q One of the questions he asked you was whether  
18 was a -- whether the rules that I had talked about on  
19 cross was for the requirement for the de-I (sic) water  
20 can you recall that? You said, "Yes. It was."

21 A Now, you've confused me. Could you please  
22 rephrase the question?

23 Q Sure. He -- Mr. Canet asked you, in  
24 everything that I was talking about, that there was --  
25 that there was a requirement for the de-I (sic) water,

1 everything that we had just talked about. Correct? And  
2 you said, "Yes."

3 A Yes. Chapter 11D-8: The procedures of the  
4 agency inspection/department inspection require the use  
5 of deionized or distilled water.

6 Q Okay. But nothing else -- There's no -- It  
7 requires the use of it not the testing of it, correct?

8 MR. CANET: Judge, this question has been  
9 asked and answered by Mr. Berman at least three or  
10 four times of this witness already. It's the  
11 reason why I got up and asked that question on my  
12 redirect. So, I'm going to say asked answered.

13 MR. BERMAN: No. Because, Judge, there's a  
14 difference between to saying there's a requirement  
15 to use and there's a requirement to test. Those  
16 are two totally different things. There's a  
17 requirement that -- that -- where it says that  
18 deionized water. There's deionized water  
19 everywhere in the rules but there's no requirement  
20 to test it.

21 MR. CANET: Yes there is. It's in the  
22 procedures manual and that's how the connection was  
23 made.

24 MR. BERMAN: Which the witness as already  
25 there is no connection.

1 THE COURT: Okay. Then why do you need to  
2 ask --  
3 MR. CANET: Yeah.  
4 THE COURT: -- the same question again?  
5 MR. BERMAN: Okay. Then if my point is made,  
6 then my point is made.  
7 THE COURT: Okay. You can step down. Thank  
8 you.  
9 THE WITNESS: Thank you, Your Honor.  
10 (Witness exits.)  
11 THE COURT: Okay. Any other witnesses?  
12 MR. CANET: No. We rest.  
13 THE COURT: Okay. Do you want to keep going  
14 or do you --  
15 MR. BERMAN: Well, no, Judge. I don't have  
16 any witnesses to put on at this time.  
17 THE COURT: Okay.  
18 MR. BERMAN: So --  
19 THE COURT: You said we were bifurcating.  
20 So --  
21 MR. BERMAN: We -- Yes. Yes.  
22 THE COURT: That's why I asked that question.  
23 MR. BERMAN: I will -- I will --  
24 THE COURT: You see, I do listen.  
25 MR. BERMAN: I never said you didn't, Judge.

1 I will contact my witnesses. I will get a  
2 date from -- from Your Honor's JA. I will get  
3 dates from Mr. Canet. I will try to do it as soon  
4 as possible because I have three witnesses. Judge,  
5 two are from Tallahassee, one is from Gainesville;  
6 I would prefer if we could, in the abundance of  
7 caution, take an entire day.

8 THE COURT: Okay.

9 MR. BERMAN: Not that it would go that long  
10 but I -- I don't think we would be able to get done  
11 in an afternoon with three witnesses.

12 THE COURT: Well, you'll ask -- you'll get a  
13 few dates that are good for you and Mr. Canet.  
14 And, then, I will see if I can get other judges to  
15 cover my docket --

16 MR. BERMAN: Okay.

17 THE COURT: -- that day if it's the best day  
18 possible.

19 MR. CANET: I -- I'm also going to ask the  
20 Court to consider the following: Mr. Berman has  
21 suggested that there is evidence that he's going to  
22 uncover or find that he hasn't yet disclosed and  
23 that --

24 THE COURT: Well, I think he -- Just to be a  
25 little bit more fair, it's not that he didn't



1 disclose, he never even got it because he didn't  
2 think of it. So, it was not an issue before.

3 MR. CANET: If --

4 THE COURT: And this is an unusual motion or I  
5 should say the first of its kind in maybe a long  
6 time.

7 MR. CANET: If he -- If he does find it and  
8 produce it, I'm going to ask that if my -- if  
9 either one of my experts have some comment  
10 concerning its contents that they be allowed to  
11 come back and express whatever opinions might be  
12 formulated as a result.

13 MR. BERMAN: Absolutely.

14 THE COURT: Well, let me ask you both this:  
15 Let's say the water comes back and it's tested and  
16 there's a contaminant in it. Will you guys talk  
17 about this from at least a case by case standpoint?

18 MR. CANET: This just affects Mr. Carter's  
19 case as far as I know, Judge.

20 THE COURT: Okay. Well, the ruling -- I don't  
21 know that it does based on the way you made your  
22 motion.

23 MR. CANET: I'm only concerned with Mr.  
24 Carter.

25 THE COURT: I understand that but the

1 ramifications of the ruling would have --

2 MR. BERMAN: I have -- have --

3 THE COURT: -- an impact on a wide variety of  
4 DUI cases.

5 MR. CANET: Well, I -- and not necessarily,  
6 Judge. And not necessarily because --

7 THE COURT: What's that?

8 MR. CANET: Well, I don't know if Mr. Berman  
9 will agree with me but not necessarily because they  
10 changed this procedures manual in 2016. Right,  
11 Garret?

12 MR. BERMAN: They changed I believe 2016.  
13 Yeah. November 2016 I think they did that, Judge.

14 MR. CANET: That's all --

15 MR. BERMAN: But -- But the problem is --

16 THE COURT: And that, in the new manual, it  
17 doesn't require it?

18 MR. BERMAN: It doesn't require it.

19 MR. CANET: Right.

20 MR. BERMAN: But the issue then Judge is, you  
21 know, I don't know how many cases are still  
22 outstanding that occurred between 2015 and 2016  
23 where you know --

24 MR. CANET: In this division, probably zero.

25 MR. BERMAN: Well, but, other divisions --

1 THE COURT: Thank you very much.

2 MR. CANET: In this division probably zero.

3 MR. BERMAN: But other divisions?

4 THE COURT: But there is not zero.

5 MR. BERMAN: It's possible. So, I -- I --

6 THE COURT: We have capiases.

7 MR. BERMAN: Well if they get three years  
8 old, we just dismiss those now.

9 THE COURT: Anything from -- I think the  
10 administrative order now --

11 MR. BERMAN: 2013.

12 THE COURT: -- is 2013.

13 MR. BERMAN: Yeah. Yeah.

14 THE COURT: So, it'll be 2013 to 2016 that  
15 would be affected.

16 MR. BERMAN: I mean I think -- Well two  
17 things, and I have to say it's good because none of  
18 this was actually brought up. And I don't know if  
19 it's just legal argument or not but one of the  
20 other issues -- and I don't know if Counsel is  
21 going to still be arguing it. I'm pretty sure  
22 he -- he will be. But one of the issues that was  
23 brought up was -- was whether or not this rule even  
24 needs to be promulgated. Whether the producers  
25 have to be promulgated as a rule versus an internal

1 procedure.

2 Now, since the Court determined it was Mr.  
3 Canet's burden to go forward, there's no evidence  
4 that it should have been promulgated as an actual  
5 rule under the Administrative Procedures Act. So,  
6 I'm asking the Court to find he hasn't met his  
7 burden on that and that he shouldn't be allowed to  
8 then question all of my witnesses with regards to  
9 that seeing as though he hasn't met his burden.

10 MR. CANET: That -- I mean, I completely  
11 disagree with him. I have completely met that  
12 burden. Okay? This -- This procedures manual is  
13 the very definition of a Florida Administrative  
14 Regulation. I mean, you -- you can't get any  
15 closer. It is published, it is of general  
16 applicability and compliance is required. Those  
17 are the three elements.

18 MR. BERMAN: No one has testified to that.

19 MR. CANET: And it -- And it was never -- And  
20 it was never promulgated. So, it is an invalid  
21 exercise of delegated legislative authority and I  
22 have carried that burden. And I can question these  
23 people about whether it's a general applicability,  
24 whether compliance is required and whether it's  
25 been published.

1 MR. BERMAN: What -- Besides that being  
2 argument there's been no evidence of that.

3 MR. CANET: There's been totally evidence of  
4 that.

5 MR. BERMAN: No.

6 THE COURT: Woah.

7 MR. BERMAN: There has not.

8 MR. CANET: Garret --

9 MR. BERMAN: There has been --

10 MR. CANET: The stipulations: It hasn't been  
11 followed, we know it's published --

12 MR. BERMAN: No. No. No. No.

13 MR. CANET: -- and the FDLE is required to  
14 follow it.

15 MR. BERMAN: Okay. So, by that rationale  
16 anything that they publish and they follow  
17 internally must be a rule?

18 MR. CANET: No, Garret. Just what we're  
19 talking about here today.

20 MR. BERMAN: No. Because that's the point,  
21 Judge.

22 MR. CANET: Please don't -- Please don't make  
23 that kind of an argument because it gets tiresome  
24 and I -- and I mean that --

25 MR. BERMAN: No.

1 MR. CANET: -- in a positive way.  
2 MR. BERMAN: That --  
3 MR. CANET: All right, Garret?  
4 MR. BERMAN: Judge --  
5 MR. CANET: Because -- Because I'm -- Because  
6 it is --  
7 THE COURT: One at a time. One at a time.  
8 MR. CANET: It is quite tiresome to hear, "Oh.  
9 You haven't met your burden." I absolutely have.  
10 Okay? I've shown that they don't follow it because  
11 he agreed that they don't follow it. It has been  
12 published because it's several exhibits. And we  
13 know that compliance is required and it's of  
14 general applicability. That's all I need to show  
15 with respect to whether or not this thing is rule.  
16 MR. BERMAN: So, by that rationale, Judge --  
17 MR. CANET: Not by that --  
18 MR. BERMAN: -- It would -- it would -- Excuse  
19 me. It will apply.  
20 THE COURT: Let him argue it.  
21 MR. CANET: Yeah. Okay.  
22 MR. BERMAN: It will apply.  
23 THE COURT: I will let you go back.  
24 MR. BERMAN: It will apply to everybody,  
25 Judge. Because apparently even though --

1 THE COURT: I think it does.

2 MR. BERMAN: -- even though we took it out --  
3 even though it was taken out then there's still  
4 that argument to be had. So, it doesn't end the  
5 argument. It's still going to apply to, you know,  
6 he says "Well, it's not going to apply anybody  
7 after November 2016." No. Apparently it will.

8 THE COURT: It could.

9 MR. BERMAN: Because you're making that  
10 argument. So, they haven't shown that it actually  
11 has applied; shown that it should be promulgated as  
12 a rule. It's an internal procedure that's implicit  
13 to all of the other testing that they do.

14 MR. CANET: And my response is: So what? The  
15 only thing I need to show is that it required it  
16 compliance, it's of general applicability and it's  
17 been published. That's it. None of that -- None  
18 of that other stuff that I -- that I don't know why  
19 he's even mentioning it --

20 MR. BERMAN: It's not --

21 THE COURT: No. I --

22 MR. CANET: -- other than to try to scare you.

23 THE COURT: No. I --

24 MR. CANET: It matters here.

25 THE COURT: Well, I brought it up but I don't

1 think it matters whether you bring up an issue that  
2 just helps your client or whether it affects  
3 everyone in the whole world to help your client. I  
4 don't think that matters. Okay? I'm just saying  
5 that with respect to the conversation that went on  
6 in here; the results, he finds what the water was  
7 like, it has contaminants in it. Are you guys  
8 going to talk about that? That's what I'm asking.

9 MR. BERMAN: Well, they haven't shown that  
10 there was any.

11 THE COURT: That was all I asked that led into  
12 this big argument.

13 MR. BERMAN: Judge, if -- if that -- if  
14 that -- if that's the case, I'm open to talk about  
15 anything but so far I haven't heard anything about  
16 any water --

17 THE COURT: Well, you didn't get the --

18 MR. BERMAN: -- or anything.

19 THE COURT: -- you didn't get the results yet.

20 MR. BERMAN: Correct. But -- But, I'm saying  
21 even if that's the case I haven't seen anything  
22 that actually had any contaminants in it.

23 THE COURT: But also my next question is: If  
24 he gets water and there's nothing, it's actually  
25 pretty much exactly the same as the deionized water



1 that's required in their rules manual, are you  
2 going to talk?

3 MR. CANET: Well, my expert has already  
4 addressed that issue, Judge. So, there would be no  
5 reason for me --

6 THE COURT: He said he -- No.

7 MR. CANET: -- to talk additional also.

8 THE COURT: Your expert said he would look at  
9 it and --

10 MR. CANET: Oh.

11 THE COURT: -- study it. But I'm saying,  
12 he --

13 MR. BERMAN: I'm sure he'll find something  
14 wrong.

15 THE COURT: Well --

16 MR. CANET: Well -- Well --

17 THE COURT: He did say, I mean, numerous times  
18 and I don't know if it was for the testimony or not  
19 and I think he was correct in saying it. But he  
20 always said, like, even if you had deionized water,  
21 you know, it wouldn't matter for the purity because  
22 something could change the minute you put the  
23 water, you know, basically down next to you. So --  
24 But if he looks at it and it shows a clear signal,  
25 are you guys going to talk?

1 MR. CANET: Sure.

2 THE COURT: Or is this just --

3 MR. CANET: Oh. Absolutely no. I will -- I  
4 will -- We will -- I'll talk to Mr. Garret. You  
5 bet, Judge.

6 THE COURT: Okay.

7 MR. BERMAN: Judge, I'm confident that even if  
8 it exists and even if there's nothing in it, that I  
9 -- I think it won't make any difference with Dr.  
10 Rose.

11 THE COURT: Well, I -- he's not the one who  
12 makes the decision; I am.

13 MR. BERMAN: No. I -- I understand. But --

14 THE COURT: And Mr. Canet is the one who  
15 represents his client and I'm just -- There was a  
16 good representation. I don't think you -- like,  
17 when you were up there it's like a light went off.  
18 I could see it in your face as well as, you know,  
19 you basically saying it out loud.

20 And, so, I don't think it was in bad faith  
21 that he didn't give you that evidence. And I don't  
22 think he's getting the evidence to create a problem  
23 so, the two of you can talk about that.

24 MR. CANET: I would definitely. Absolutely.

25 THE COURT: Or we can spend a whole day

1 together.

2 MR. CANET: No. Or I -- Or I --

3 THE COURT: I do like --

4 MR. BERMAN: I'm going to send -- I'm going to  
5 send --

6 THE COURT: -- being with you.

7 MR. CANET: Or we could -- Or we could set a  
8 status and I can come to you and I can tell you  
9 I've looked at this stuff, Dr. Rose has looked at  
10 it, the State doesn't need to do anything.

11 MR. BERMAN: Judge, I'm going to send an e-  
12 mail right now to the program manager and I'm going  
13 to request this. So, you know, the soon as I get  
14 it, I will file it as supplemental discovery. You  
15 know, in the meantime I'll -- I'll coordinate to  
16 get new dates.

17 THE COURT: Okay. And how about -- How long  
18 will it take to get that and study it? Like two  
19 years?

20 MR. CANET: No.

21 MR. BERMAN: I don't -- I'm -- I'm hoping  
22 maybe like one --

23 MR. CANET: Thirty days.

24 MR. BERMAN: -- or two weeks?

25 I mean 30 -- 30 days should be enough for me

1 to get it.

2 MR. CANET: Thirty days to --

3 MR. BERMAN: and -- and, then, forward it.

4 THE COURT: Okay. Sounds like a great plan.

5 I will set this for -- How about we set it for the

6 13th. Am I allowed to set things on that day?

7 THE CLERK: Yes, Judge.

8 THE COURT: I have my hands tied by so many

9 people.

10 MR. BERMAN: I'm sorry. What day, Judge?

11 THE COURT: 9:00 o'clock for a status.

12 MR. BERMAN: September?

13 THE COURT: Thirteenth. It's a Thursday.

14 It's the week of Rosh Hashanah.

15 MR. BERMAN: It -- It is, Judge. That's --

16 That's fine for me if I can just have one of the

17 normal ASA's in here -- maybe just stand in

18 because --

19 THE COURT: As long as you talk to them --

20 MR. BERMAN: Yes.

21 THE COURT: And tell them what's happening.

22 MR. BERMAN: Absolutely. I just -- I'm

23 conducting training for our new hires that -- those

24 two weeks; the 10th and the 17th. So --

25 THE COURT: And what are you going to train

1           them to do?

2           MR. BERMAN: I don't know yet. Everything  
3           that's right, hopefully.

4           THE COURT: That would be good. I would  
5           assume you've never taught them to do anything  
6           wrong.

7           Okay.

8           MR. BERMAN: No. That they learned from  
9           someone else.

10          THE COURT: Yeah. Okay.

11          Do you concur Mr. Canet?

12          MR. CANET: It's -- It -- For me, it sends  
13          shivers down my spine that these courtrooms will be  
14          inhabited by prosecutors trained by Mr. Berman  
15          because Mr. Berman sends shivers down my spine.

16          THE COURT: Okay.

17          MR. BERMAN: I -- I honest -- I honestly --

18          THE COURT: That is the nicest compliment I  
19          think he ever gave.

20          MR. BERMAN: -- like going up against Mr.  
21          Canet. It keeps me on my toes. Seriously.

22          MR. CANET: There's a -- There's a reason why  
23          I --

24          MR. BERMAN: Seriously.

25          MR. CANET: -- invite him every year to come

1           and speak at the Masters of DUI seminar.

2           THE COURT: That's nice.

3           (Whereupon the hearing was concluded.)

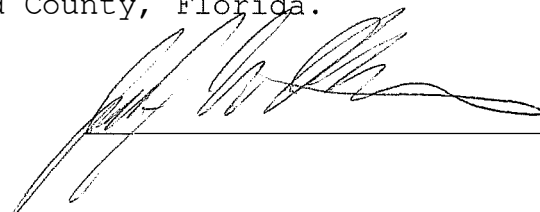
C E R T I F I C A T E

STATE OF FLORIDA )

COUNTY OF BROWARD )

I, JEFFREY BISNATH, hereby certify that the foregoing transcript, pages 60 to and including 169, is a true and accurate transcript of the record of the proceedings.

Dated this 8<sup>TH</sup> day of October, 2018, in the City of Fort Lauderdale, Broward County, Florida.

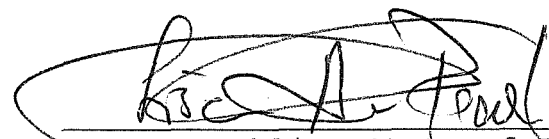


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STATE OF FLORIDA )

COUNTY OF BROWARD )

Sworn to and subscribed before me this 8<sup>th</sup> day of October, 2018.



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Notary Public, State of Florida



LISSA PEART  
MY COMMISSION # FF 975084  
EXPIRES: May 18, 2020  
Bonded Thru Budget Notary Services