

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

MISDEMEANOR DIVISION

CASE NO. 18-026463MU10A

JUDGE CARPENTER-TOYE

STATE OF FLORIDA, )  
Plaintiff, )  
vs. )  
ROBERT EBERSTEIN, )  
Defendant. )  
\_\_\_\_\_ )

**ORIGINAL**

Broward County Courthouse, Room 6175  
201 Southeast 6<sup>th</sup> Street  
Fort Lauderdale, Florida  
November 18, 2019

The above-entitled cause came on for hearing before  
the Honorable DEBORAH CARPENTER-TOYE, Presiding Judge.

APPEARANCES: MICHAEL J. SATZ, State Attorney, by  
GARETT BERMAN,  
Assistant State Attorney,  
Appearing on behalf of the State.

CAREY MELDON, ESQ.,  
Appearing on behalf of the Defendant.

ALSO PRESENT: CRAIG BURGER, Video Operations.  
ASHLEY SEFCHOK, State Attorney's Office.

I N D E X

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1 WHEREUPON:

2 The following proceedings were had:

3 THE COURT: Okay. We're ready to start on the  
4 case of State of Florida vs. Robert Mario  
5 Eberstein.

6 If you'd just announce your presence for the  
7 court reporters, please.

8 MR. MELDON: Yes. Carey Meldon, attorney for  
9 Mr. Robert Eberstein.

10 MR. BERMAN: Garrett Berman on behalf of the  
11 State.

12 THE COURT: Okay. So, we are here --  
13 Sir, can you --

14 MR. MELDON: He's --

15 THE COURT: -- announce your --

16 MR. MELDON: He's muted right now, Judge.

17 THE COURT: He's muted.

18 MR. MELDON: I didn't -- I was waiting --

19 THE COURT: Okay.

20 MR. MELDON: -- for you to tell me --

21 THE COURT: Sh.

22 MR. MELDON: -- if it's all right to send  
23 audio to him.

24 THE COURT: So, I just want the record to be  
25 set as to what we're doing here, so that there's a

1 clear record. The record should reflect that Mr.  
2 Meldon, Mr. Berman, and myself are in the  
3 courtroom; that the witness, whose name is --

4 MR. MELDON: Matthew Malhiot, Your Honor.

5 THE COURT: -- Matthew Malhiot, is going to  
6 appear via closed circuit, and that we can all see  
7 him on the closed circuit, and it appears there's  
8 somebody else there.

9 Is he hearing me, or not?

10 MR. MELDON: Yes, Judge.

11 THE COURT: Okay.

12 MR. MALHIOT: Yes. I just (cannot be clearly  
13 heard) -- Judge, unmuted I can hear you loud and  
14 clear, ma'am.

15 THE COURT: Okay. So, I'm just trying to get  
16 the record straight as to exactly what's happening  
17 here in the courtroom and who's present. It looks  
18 like there's somebody present in your office there  
19 with you.

20 MR. MALHIOT: Yes. I have a notary with me in  
21 case you needed to have a notary to swear me in.

22 THE COURT: Okay.

23 You want me to have him sworn in through the  
24 clerk here?

25 MR. BERMAN: I -- I mean, I think for the

1 purposes -- Since it's not telephone, Judge, and --  
2 and we can see him, I mean, I think our clerk can  
3 do it here.

4 THE COURT: Okay.

5 So, if you could --

6 MR. BERMAN: I don't think --

7 THE COURT: -- just --

8 MR. BERMAN: -- that's a problem.

9 THE COURT: -- raise your right hand.

10 THE WITNESS: (Complies.)

11 THE COURT: Can you see my clerk?

12 THE WITNESS: I can see your clerk.

13 THE COURT: Okay.

14 (Whereupon the witness was duly sworn by the clerk.)

15 THE CLERK: Thank you. Say your full name,  
16 spell your last name for the record.

17 THE WITNESS: Matthew E. Malhiot, M-A-L-H-I-O-  
18 T. And it's phonetically pronounced Myit, M-Y-I-T.

19 THE COURT: T. Okay.

20 We are here on a motion. The -- Appears that  
21 the Defense has listed Mr. Malhiot as a witness in  
22 a defendant's reciprocal discovery disclosure, and  
23 the State filed an objection requesting a hearing  
24 pursuant to Daubert. Is that correct?

25 MR. BERMAN: Yes, Judge. And just on a brief

1 conversation I had with Mr. Meldon beforehand, he  
2 indicated that Mr. Malhiot was not going to be  
3 testifying as to the field sobriety exercises. So,  
4 in terms of my objection to that portion, I'll go  
5 ahead and withdraw it.

6 THE COURT: Okay. So -- maybe we could narrow  
7 the scope of what it is you anticipate Mr. Malhiot  
8 would be testifying to if he were permitted to do  
9 so.

10 MR. MELDON: Your Honor, if he were permitted  
11 to do so, we'd ask him to be able to testify as to  
12 the particular subject matter of alcohol  
13 absorption.

14 THE COURT: Okay. All right.

15 MR. BERMAN: When -- If I could just clarify,  
16 Judge.

17 THE COURT: Yes.

18 MR. BERMAN: When you say alcohol absorption,  
19 are you just talking about just absorption,  
20 elimination rates? Are you talking about  
21 retrograde, Widmark's?

22 MR. MELDON: So, we're not going to -- He's  
23 qualified to testify as to Widmark's and retrograde  
24 extrapolation, but we're not going to be seeking  
25 that type of testimony in this case. We're just

1 going to be seeking his ability to testify as to  
2 the issues of alcohol absorption and elimination.  
3 And I think that's what -- what he had written in  
4 his report that was his expert opinion.

5 THE COURT: Okay.

6 And have you seen a copy of the report?

7 MR. BERMAN: Judge, I have. And -- And the  
8 only I'm -- I'm trying to clarify is because there  
9 is a statement in there that says, "due to the  
10 delay in breath alcohol testing, the result of the  
11 evidential breath alcohol test in Mr. Eberstein's  
12 case is **NOT...**" -- and that's capitalized and  
13 bolded -- "... an accurate representation of his  
14 actual alcohol concentration at the time of  
15 driving. In fact, it is estimated that Mr.  
16 Eberstein's alcohol concentration at the time of  
17 driving was significantly lower than the alcohol  
18 concentration reported at the time of breath  
19 testing."

20 So, in reading that, my concern was whether or  
21 not he was going to be able to give a result if he  
22 was doing Widmark's or extrapolation at all.

23 THE COURT: Well, it sounds like, based on  
24 that statement that you would be intending to try  
25 to have him use something to make that statement,

1 right? I mean --

2 MR. BERMAN: I mean, that's what -- that's  
3 what it sounded like, but --

4 MR. MELDON: That's correct, Your Honor.

5 THE COURT: But if you're saying he's just  
6 going to testify as to the subject matter of  
7 alcohol absorption and elimination in general,  
8 there's -- that's different than what the statement  
9 is in the report.

10 MR. MELDON: Well, I should say that's the  
11 subject matter on which he's going to, hopefully,  
12 be qualified as an expert. He had two  
13 opportunities to interview my client and talk to  
14 him about the facts of the case. And, so, he has  
15 information based upon his conversations with the  
16 client, review of the entire case file, as well as  
17 his expertise and background in this subject  
18 matter, to be able to testify as to alcohol  
19 absorption and how it relates to this case in terms  
20 of whether my client was -- was absorbing alcohol  
21 or eliminating alcohol at the time that he was  
22 tested versus the time that he was driving.

23 THE COURT: Okay. But that's very different  
24 than whether or not he's -- you're going to -- he's  
25 going to be called upon to offer an opinion based

1 on being an expert, that the alcohol -- the breath  
2 alcohol reading at the -- that we're -- you're  
3 dealing with in this case is not accurate, which is  
4 what the report seems to indicate.

5 MR. MELDON: Correct.

6 THE COURT: So, that's why I need to hear --  
7 Do we need him to be hearing the discussion?  
8 Maybe --

9 MR. BERMAN: I mean, probably not. We could  
10 probably mute him.

11 THE COURT: Probably not. Can we mute him --

12 MR. BURGER: Mute them?

13 THE COURT: -- for a minute?

14 MR. BURGER: Yes.

15 Okay.

16 THE COURT: Okay.

17 MR. BERMAN: And --

18 THE COURT: He gave the thumbs up, just so --

19 MR. BERMAN: And just to be clear, Judge, I --  
20 Again, I -- I know Mr. Malhiot. I've -- I've dealt  
21 with him as a State witness several times.

22 THE COURT: I know that.

23 MR. BERMAN: I've --

24 THE COURT: I know.

25 MR. BERMAN: -- cross-examined him as a

1 defense witness several times. I'm not challenging  
2 his --

3 THE COURT: Expertise.

4 MR. BERMAN: -- expertise. I -- I know he can  
5 -- he has the training and experience to discuss  
6 the issues at bay. What I'm --

7 THE COURT: The issues being alcohol  
8 absorption and elimination.

9 MR. BERMAN: Correct. My review of his report  
10 and what I've seen in the video and the officer's  
11 report, I don't feel that under Daubert he is  
12 giving a reliable opinion, one that is reliably --  
13 that he's not reliably applying the science to the  
14 facts of the case, which is one of the prongs under  
15 90.702.

16 MR. MELDON: Your Honor, so, when a -- If the  
17 State's conceding that he has expertise in this  
18 field, then Daubert looks at a different prong in  
19 terms of examining --

20 THE COURT: Well, right. I mean, if --

21 MR. MELDON: Yeah.

22 THE COURT: If they're conceding that the  
23 first part of it is that he is proffering or that  
24 the testimony that I'm going to hear today is in  
25 fact expert testimony, and that he qualifies as an

1 expert based on his knowledge, training,  
2 experience, and then the next issue is is that  
3 testimony relevant to the issue at hand? Right?

4 MR. BERMAN: Relevancy in the terms of that  
5 he's reliably applying that science --

6 MR. MELDON: Correct.

7 MR. BERMAN: -- to the facts of the case.

8 THE COURT: Okay. So, there's some case law  
9 that suggests that -- And I read all the cases that  
10 you gave me.

11 And I read the cases you gave me.

12 And I've read some other cases as well. But  
13 the -- It seems to me that the case law stands for  
14 the proposition that if you're stipulating that  
15 he's an expert and you're stipulating that he's  
16 qualified, and your objection is to his opinion in  
17 this particular case, factually based -- applying  
18 the science to the facts in this case, then that's  
19 something that would be more towards the weight  
20 rather than the admissibility.

21 MR. BERMAN: Not under Daubert. And -- And --

22 THE COURT: Okay.

23 MR. BERMAN: Because Daubert encompasses both  
24 that the Court has a gatekeeping function to find  
25 that the testimony is scientific, so that it is

1 expert.

2 THE COURT: Okay. And you're stipulating to  
3 that?

4 MR. BERMAN: I agree. He --

5 THE COURT: He --

6 MR. BERMAN: He's going to be qualified as an  
7 expert whether or not I stipulate to it or not.

8 THE COURT: Okay.

9 MR. BERMAN: I -- I -- I know that of Mr.  
10 Malhiot.

11 But, in addition, the Court has to find that  
12 what he is talking about, that his opinion has an  
13 underlying method of reliability to it. And one of  
14 those factors is not just to say that he's an  
15 expert and he's using an expert formula or a  
16 scientific formula that's proven to be reliable.  
17 It's is he looking at the case and taking facts and  
18 putting it into the case that would give a reliable  
19 result? I -- I'm familiar with the Vitiello case  
20 that just came out with Dr. Goldberger.

21 THE COURT: Okay.

22 MR. BERMAN: But if you read that case  
23 closely, that doesn't just say that retrograde is  
24 admissible, nor when making assumptions is it  
25 admissible. In that particular case, Judge, I

1 don't think there was any indication of when the  
2 defendant had even stopped drinking.

3 In this case it's a little bit different,  
4 because there are several statements that the  
5 defendant makes, at least on video, to the officer,  
6 and Mr. Meldon has said Mr. Malhiot has spoken to  
7 the defendant several times. So, now the question  
8 becomes is (sic) what is he taking as truth, and  
9 what is he applying as fact to the actual case?  
10 And I think under that, under Daubert, and when you  
11 look under 97.02, the third prong of 97.02 is  
12 specifically whether the witness has applied the  
13 principles and methods reliably to the facts of  
14 this case. And that's the prong that I don't think  
15 he meets.

16 THE COURT: Because you don't know which facts  
17 he's using.

18 MR. BERMAN: Well, because he -- he -- he  
19 hasn't stated which ones. But, again, there are  
20 all sorts of facts that we don't know about; we  
21 don't know where he's taking them from; we don't  
22 know what the statements are.

23 THE COURT: So, for purposes of today's  
24 hearing, then, you're thinking that the only thing  
25 that the Court needs to determine is whether or

1 not --

2 If, let's say, we stipulate that he's an  
3 expert and he stipulate (sic) -- is an expert in --

4 I mean, Mr. Meldon said he doesn't need to  
5 stipulate that he's going to be an expert in  
6 retrograde extrapolation or Widmark, just in  
7 alcohol absorption and elimination.

8 MR. BERMAN: I --

9 THE COURT: If that's the case, he's got to  
10 have an explanation as -- how he gets to his  
11 conclusion.

12 MR. BERMAN: Correct.

13 THE COURT: Right? So, that's what we'd hear  
14 today. And you would be able to cross-examine him  
15 about how he got to that conclusion. And then the  
16 issue for the Court is whether or not that would be  
17 admissible under the --

18 I mean, I think that the --

19 MR. BERMAN: Did he get there --

20 THE COURT: -- Vitiello case --

21 MR. BERMAN: -- reliably --

22 THE COURT: Because --

23 MR. BERMAN: -- is --

24 THE COURT: -- you're saying it's not -- his  
25 end conclusion is not reliable.

1 MR. BERMAN: No. I'm not looking at the end  
2 conclusion. And -- And in fact, Daubert says we  
3 don't look at the end conclusion.

4 THE COURT: Okay.

5 MR. BERMAN: We don't care about the results,  
6 because you can have two equally --

7 THE COURT: But you're saying he's --

8 MR. BERMAN: -- experts.

9 THE COURT: -- not applying the science to the  
10 facts?

11 MR. BERMAN: Reliably, yes. And I keep saying  
12 "reliably," Judge, because that -- that is what  
13 Daubert's all about --

14 THE COURT: Right.

15 MR. BERMAN: -- is doing it reliably.

16 THE COURT: Okay. And, so, what do you have  
17 to say that he's not doing that?

18 MR. BERMAN: Well --

19 THE COURT: Because you don't really know now.

20 MR. BERMAN: Actually, I -- I do in looking  
21 just at his report and what I know is on the video  
22 that I've seen. I -- I know --

23 THE COURT: But you said there's --

24 MR. BERMAN: -- it's not reliable.

25 THE COURT: -- conflicting statements about

1           when he stopped drinking.

2           MR. BERMAN: Well --

3           THE COURT: And, so, you don't know which one  
4           of those he's using.

5           MR. BERMAN: Not -- There -- There are those.  
6           But the fact that he gives a -- a blanket statement  
7           about when the drinking reportedly stopped.  
8           There's -- You know, there's nothing in there that  
9           indicates that it is as he says in his report.

10          THE COURT: So, how do you square that with  
11          the Vitiello case, where they talk about the fact  
12          that the absorption testimony without knowledge of  
13          certain facts --

14          MR. MELDON: Um-hum (affirmative).

15          THE COURT: -- is admissible, because it goes  
16          to the weight rather than the admissibility?

17          MR. BERMAN: Because in -- in Vitiello, they  
18          -- the doctor -- and -- and I would stress --  
19          doctor of toxicology took forth certain assumptions  
20          that were okay, but he gave a range; he didn't give  
21          a specific number. The other thing is, if you look  
22          at -- if you look at Vitiello, it specifically says  
23          that if that --

24          I want to get the wording correct, Judge.

25          THE COURT: Okay.

1 MR. BERMAN: So, it says if the expert has  
2 considered such additional factors as the expert's  
3 (sic) performance on the field sobriety test and  
4 observations of the suspect's behavior to confirm  
5 his or her opinion, which --

6 THE COURT: Where are you reading?

7 MR. BERMAN: I'm sorry. That is on the case  
8 that was provided by the Defense. It is the  
9 second-to-last --

10 THE COURT: Okay. Well, I have my own copy --

11 MR. BERMAN: I'm sorry.

12 THE COURT: -- but it --

13 MR. BERMAN: -- third-to-last page.

14 THE COURT: -- (cannot be clearly heard) the  
15 page number.

16 MR. BERMAN: I do not -- He didn't -- He --  
17 There's no page numbers on here, Judge. It is the  
18 third page from the end. And it starts at the very  
19 bottom. It says, "We believe that the lack of  
20 information cited by Vitiello, which was presented  
21 and argued to the jury, goes to the weight of Dr.  
22 Goldberger's testimony ... not its admissibility,  
23 when, as here, the expert testifies that he or she  
24 considered such additional..." factors --  
25 "... facts ... as the suspect's performance on the

1 field sobriety tests and observations of the  
2 suspect's behavior to confirm his or her opinion."

3 THE COURT: Okay.

4 MR. BERMAN: And the fact is, Judge, in  
5 writing this report, it says a lot of things about  
6 performance on the field sobriety tests and the --  
7 and the breath test, and the time of drinking. In  
8 fact, this case, there's even more information,  
9 because there is information -- evidence about the  
10 time of drinking.

11 THE COURT: But Mr. Meldon's indicated he's  
12 not going to have him testify as to anything to do  
13 with the field sobriety exercises.

14 MR. BERMAN: I know.

15 THE COURT: So --

16 MR. BERMAN: That --

17 THE COURT: -- if we --

18 MR. BERMAN: That is -- That is my concern,  
19 then. Then how is he coming to any opinion if he's  
20 not relying on what Dr. Goldberger --

21 THE COURT: Well, isn't --

22 MR. BERMAN: -- relied on as well.

23 THE COURT: Okay. Well, that's what we have  
24 to find out today, right?

25 MR. BERMAN: Right. No, I --

1 THE COURT: Okay. So --

2 MR. BERMAN: -- I understand.

3 THE COURT: -- for purposes of the hearing,  
4 though, if we can cut down on you having to --  
5 Unless you want him to go through all of his  
6 expertise in --

7 MR. BERMAN: No, I -- I -- I think just  
8 admitting his CV into evidence I think would be  
9 fine, Judge.

10 THE COURT: Okay.

11 MR. BERMAN: Like I said, I mean, I -- I take  
12 him as an expert.

13 THE COURT: Okay. And, then, I'll just listen  
14 to the testimony and your cross-examination to  
15 make --

16 MR. BERMAN: Sure.

17 THE COURT: -- and then hear arguments with  
18 regard --

19 MR. BERMAN: Yeah, it's fine.

20 THE COURT: -- to that --

21 MR. BERMAN: It's the same one --

22 THE COURT: -- admissibility --

23 MR. BERMAN: -- he always has.

24 THE COURT: -- as to that, specifically.

25 MR. BERMAN: Okay. Thank you --

1 MR. MELDON: Your Honor --  
2 MR. BERMAN: -- Judge.  
3 MR. MELDON: -- may I approach with the  
4 curriculum vitae?  
5 THE COURT: We just have marked -- Needs to be  
6 marked and offered.  
7 MR. BERMAN: Just trying to streamline  
8 everything.  
9 THE COURT: Okay.  
10 MR. MELDON: Your Honor, for the record,  
11 Defense would offer what has been pre-marked State  
12 -- Defense Exhibit --  
13 Is it A or 1?  
14 THE CLERK: A.  
15 MR. MELDON: -- A as Defense Exhibit A.  
16 THE COURT: 1.  
17 MR. MELDON: 1. 1?  
18 MR. BERMAN: 1.  
19 THE COURT: So, Defense A becomes Defense 1.  
20 And it is his CV.  
21 MR. MELDON: Correct.  
22 THE COURT: Is that right?  
23 MR. MELDON: Correct --  
24 THE COURT: Okay.  
25 MR. MELDON: -- Your Honor.

1 (Whereupon Defense Exhibit No. 1 was received into  
2 evidence.)

3 THE COURT: Okay. So, then, I'm going to let  
4 you -- We'll just -- I'll -- We'll take him off  
5 mute and, then, we'll tell him that there's been a  
6 stipulation and his CV has been introduced, and  
7 they're stipulated that he's qualified as an expert  
8 in the field of --

9 MR. MELDON: Absorption and elimination of  
10 alcohol, Your Honor, I believe.

11 THE COURT: Okay.

12 MR. BERMAN: Okay.

13 MR. BURGER: You're unmuted.

14 THE COURT: Okay.

15 Okay, Mr. Malhiot, the --

16 MR. MALHIOT: Yes, Your Honor.

17 THE COURT: -- the State and the Defense have  
18 stipulated to you being qualified as an expert in  
19 the field of alcohol absorption and elimination,  
20 and your CV has been introduced into evidence in  
21 this case. And I'm going to call on Mr. Meldon now  
22 to ask questions.

23 Could I see the CV, please.

24 THE PARTIES: (No verbal response.)

25 MR. MELDON: MR. Malhiot, I --



1 was called as a witness on behalf of the Defense, and  
2 being previously duly sworn, was examined and testified  
3 on his oath as follows:

4 DIRECT EXAMINATION

5 BY MR. MELDON:

6 Q So, I'm going to skip down a little bit and  
7 get into the -- the issues in this case. Did you have  
8 an opportunity to meet with me regarding a client by the  
9 name of Robert Eberstein?

10 A You and I have had numerous phone  
11 consultations in reference to this case.

12 Q And have you had a (sic) opportunity to speak  
13 with the client himself?

14 A Yes. In fact, I have had two phone  
15 consultations with the defendant in this case.

16 Q And with regards to your report and  
17 examination of this case, what was included was a -- an  
18 opinion regarding alcohol absorption; is that correct?

19 A An alcohol concentration at time of testing  
20 versus time of driving as a result of an absorption,  
21 yes.

22 Q Okay. And --

23 THE COURT: Okay. Well, that's a little  
24 different than what --

25 MR. MELDON: Well --

1 THE COURT: Okay. Go ahead.

2 MR. MELDON: That -- Judge, you're -- you're  
3 correct.

4 THE COURT: Okay.

5 MR. MELDON: And I'm --

6 Q (By Mr. Meldon) But in this case you never  
7 rendered an opinion as to the actual breath alcohol  
8 content of Mr. Eberstein in terms of using a Widmark or  
9 retrograde extrapolation theory, correct?

10 A I did not use either of those calculations for  
11 this particular case, no.

12 Q Any particular reason why you did not use any  
13 of those theories with regards to the application of  
14 this -- this case?

15 A Yes. A retrograde extrapolation would require  
16 him to be on the elimination phase and past peak, and is  
17 designed to take a test time and go backwards up the  
18 elimination phase to an alcohol concentration of time of  
19 incident. That calculation was inappropriate because  
20 there was not enough time between last drink and time of  
21 incident to scientifically and reliably use that  
22 calculation.

23 Q And --

24 A The --

25 Q -- can you explain what Widmark's is to the --

1 to the Court?

2 A Yes. Widmark is an alcohol concentration peak  
3 estimator, meaning using the variables of human body  
4 weight, height, those types of things -- male --  
5 calculate the number of drinks will give you an  
6 estimated peak alcohol based on consumption. I did not  
7 use either of those calculations to determine my  
8 findings or my opinion in this case.

9 Q And was there a particular reason that you did  
10 not use Widmark's in this case?

11 A Because I didn't think it was appropriate for  
12 what we were trying to establish in this case.

13 MR. MELDON: All right.

14 Your Honor, do you have any questions before I  
15 -- I proceed?

16 THE COURT: That's not for me to ask  
17 questions --

18 MR. MELDON: All right.

19 THE COURT: -- at this stage. You go ahead.

20 MR. MELDON: All right.

21 Q (By Mr. Meldon) So, what was -- After  
22 reviewing this case, what was your expert opinion when  
23 reviewing the facts after speaking to the client and  
24 examining, you know, all of the information that you  
25 were able to -- to receive, including the -- the

1 reports, the video, and the conversations with me and  
2 Mr. Eberstein?

3 A That the alcohol consumption was not fully  
4 absorbed and had not reached peak alcohol at time of  
5 driving, and continued to absorb alcohol well past the  
6 driving phase, and the alcohol continued to rise;  
7 therefore, his alcohol concentration at driving was  
8 lower - significantly lower - than it was at time of  
9 test.

10 Q So, in this case, if you had to characterize  
11 what you -- you would be able to testify to in terms of  
12 your expertise, how would -- what would you say is your  
13 -- your -- your formal opinion?

14 A My formal opinion is that the alcohol  
15 concentration at time of test does not represent the  
16 alcohol concentration at time of driving, and  
17 potentially the up to two drinks that were consumed  
18 before driving were not fully absorbed, and his alcohol  
19 would have been potentially probably under a .08 at time  
20 of driving.

21 Q And when you say "probably," why do you say  
22 the word "probably"?

23 A Because it's not an absolute. What I did is I  
24 took the average absorption of a standard drink and took  
25 the amount that he had consumed prior to driving -

1 immediately prior to driving, in the 30 minutes prior -  
2 and subtracted those from the alcohol concentration at  
3 time of testing because those two drinks, in my opinion,  
4 were probably not absorbed into the blood and would not  
5 have been measured lower at time of driving than time of  
6 test.

7 Q Do you feel that your testimony would aid the  
8 finder of fact in this case to understanding the -- the  
9 issues with regards to the reliability of the breath  
10 test?

11 MR. BERMAN: Objection, Judge. That's for  
12 the --

13 THE COURT: That --

14 MR. BERMAN: -- Court to determine.

15 THE COURT: That is for me to decide.

16 Q (By Mr. Meldon) Do you feel that the -- the  
17 breath test that was revealed to you through the  
18 documents was an accurate representation of Mr.  
19 Eberstein's breath alcohol level at the time that he was  
20 driving?

21 MR. BERMAN: Objection, Judge.

22 A (Continuing) It is my opinion --

23 THE COURT: Oh, wait. Wait, wait, wait.

24 What's your objection?

25 MR. BERMAN: Objection, Judge. He hasn't laid

1 a sufficient foundation for that --

2 THE COURT: Sustained.

3 MR. BERMAN: -- part --

4 THE COURT: Sustained.

5 MR. MELDON: All right.

6 Q (By Mr. Meldon) So, without getting into too  
7 many details regarding the conversation, were you able  
8 to determine how much Mr. Eberstein had to drink prior  
9 to the -- or prior -- prior to driving?

10 A Yes.

11 Q Okay. And before we get into that, have --  
12 have you had any kind of knowledge with regards to the  
13 theory of alcohol absorption?

14 A Knowledge, training, education, personal  
15 experience, research, extensive training, yes.

16 Q All right. Well, can you go into your  
17 training with regards to the area of alcohol  
18 absorption/elimination?

19 A Certainly. It would start with my high  
20 school, as I went to a vocational high school and  
21 studied medical occupations and studied anatomy,  
22 physiology, and digestive system. It continued with my  
23 police training in DWI/DUI enforcement, alcohol  
24 absorption, alcohol impairment. It continued with  
25 training from the National Highway Traffic Safety

1 Administration on DWI detection and standardized field  
2 sobriety, with effects of alcohol. It continued on with  
3 specific training in alcohol toxicology, alcohol  
4 pharmacology, in the area of alcohol absorption and  
5 elimination as I was employed with the Florida  
6 Department of Law Enforcement's Alcohol Testing Program.

7 Q And you said you've also read studies  
8 regarding the -- this issue as -- as well, correct?

9 A Numerous different studies, yes.

10 Q Okay. And have these studies -- You said they  
11 have been tested. Is that correct?

12 A Yes, they -- Numerous of them are peer  
13 reviewed. And I have personally done alcohol dosing  
14 studies, non-published, in the area of alcohol  
15 absorption from time of drink to time of test.

16 Q And what information would you need to be able  
17 to render an opinion with regards to alcohol absorption?

18 A Well, alcohol absorption's a very wide  
19 category. In this particular case, the information  
20 needed was time of drinking, time of test, and time of  
21 traffic stop.

22 Q Would you know the -- Would you want to know  
23 the amount of the drinks that were consumed as well?

24 A Yes, the amount and time line and -- of  
25 consumption.

1 Q And were you able to -- to learn all of these  
2 -- these -- this information from your interviews with  
3 the -- the client?

4 A I was.

5 Q So, do you feel satisfied that you can render  
6 an expert opinion with regards to whether the alcohol  
7 that Mr. Eberstein had consumed was being absorbed?

8 MR. BERMAN: Objection, Judge. That's for the  
9 Court. I mean --

10 THE COURT: (Cannot be clearly heard) --

11 MR. BERMAN: -- obviously, he did, because he  
12 came to his opinion.

13 THE COURT: Right. So, at this point I'm a  
14 bit confused, because the parties have  
15 stipulated --

16 MR. MELDON: Yeah.

17 THE COURT: -- before we started that Mr.  
18 Malhiot is an expert in the area of alcohol  
19 absorption and elimination. And, so, that being  
20 said, the next part is: Is there a proper  
21 predicate? That's what the objection was from the  
22 -- from the State, for him to offer an opinion.  
23 So, that's why I sustained that objection. So, the  
24 fact that he's already been declared -- stipulated  
25 as an expert; that's not really what the -- the

1 reason I sustained the objection. It was because  
2 of the predicate.

3 MR. MELDON: Yes, Your Honor. I'm -- I'm  
4 attempting to elicit --

5 THE COURT: With --

6 MR. MELDON: -- facts --

7 THE COURT: -- regard to the facts of this  
8 particular case.

9 MR. MELDON: Right.

10 THE COURT: Is that right, Mr. Berman?

11 MR. BERMAN: Yes, Judge.

12 THE COURT: Okay.

13 MR. MELDON: So, at this time we believe  
14 that --

15 Well, I would move -- Well, I'll go -- I'll --  
16 I'll just move forward with my questioning, Your  
17 Honor.

18 THE COURT: Okay.

19 Q (By Mr. Meldon) Why was the information that  
20 Mr. Eberstein gave you sufficient basis to render an  
21 opinion in this case?

22 A Well, in conjunction with the published  
23 literature in this particular area, it filled in the  
24 variables, allowing me to make an expert opinion.

25 Q Okay. And in your experience and your

1 expertise in this subject matter, were you able to apply  
2 that reliably to the facts in this case as you were able  
3 to learn them through the documentation and the  
4 discussions with Mr. Eberstein?

5 MR. BERMAN: Objection. That's for the  
6 Court's determination.

7 THE COURT: It is -- That is the ultimate  
8 issue for me to decide. So, I sustain the  
9 objection.

10 Q (By Mr. Meldon) Does -- Or -- Do you require  
11 subjective or objective interpretation with regards to  
12 this subject matter?

13 A There are objective standards that are applied  
14 with variances, meaning an average elimination rate, an  
15 average absorption rate, average alcohol concentration  
16 per drink. Those are scientifically accepted variables,  
17 but they are objective standards.

18 Q And were these techniques used with regards to  
19 this particular case?

20 A They were.

21 Q And in what manner were they used?

22 A Well the specific details of the -- of the  
23 consumption were applied to the scientifically accepted  
24 alcohol concentrations for those and absorption rates.

25 Q Do you feel another person in your field would

1 have interpreted your technique in the same way that you  
2 have?

3 MR. BERMAN: Objection, Judge. That's  
4 improper bolstering.

5 THE COURT: Sustained.

6 Q (By Mr. Meldon) Mr. Malhiot, would you like  
7 me to repeat that?

8 MR. BERMAN: The objection was sustained.

9 A (Continuing) I think --

10 MR. MELDON: Oh.

11 A (Continuing) -- she sustained the objection.

12 MR. MELDON: Oh. (Cannot be clearly heard.)

13 THE COURT: I did.

14 Q (By Mr. Meldon) Is there a way to cross-check  
15 the -- your interpretation for accuracy with regards to  
16 any subjective subject matter?

17 MR. BERMAN: Objection. Calls for  
18 speculation.

19 THE COURT: Sustained.

20 Rephrase the question. I'm not sure I  
21 understood the question.

22 MR. MELDON: Your Honor, the question -- And  
23 -- And, for the Court's purpose of this -- This is  
24 my first Daubert hearing. I'm getting these  
25 questions from previous Daubert hearings. So, I'm

1 not trying to mislead the Court or --

2 THE COURT: No, no. I --

3 MR. MELDON: You know, I'm trying --

4 THE COURT: So --

5 MR. MELDON: -- to get it within my -- you  
6 know, I'm trying to attack the issues that I don't  
7 want to leave out, just in case.

8 THE COURT: Okay. I'm just saying rephrase  
9 that question. I didn't --

10 Q (By Mr. Meldon) Is there -- Is there a way to  
11 cross-check this -- the interpretation for accuracy than  
12 subjective interpretation for accuracy, with regards to  
13 the facts that were given to you by Mr. Eberstein?

14 A Yes, it can be cross-checked --

15 MR. BERMAN: Objection --

16 A (Continuing) -- because --

17 MR. BERMAN: -- Judge.

18 THE COURT: Wait.

19 MR. BERMAN: Again --

20 THE COURT: Wait, wait.

21 MR. BERMAN: -- it's -- It's --

22 THE COURT: What's the --

23 MR. BERMAN: -- speculation.

24 THE COURT: -- objection?

25 MR. BERMAN: I don't think that --

1           That was the same question; the Court  
2           sustained the objection.

3           THE COURT:   It's just he --  
4           You asked him if he could cross-check?

5           MR. MELDON:   This objective interpretation  
6           with regards to the subjective subject matter --

7           THE COURT:   If --

8           MR. MELDON:   -- that he --

9           THE COURT:   -- he can, or somebody else can?

10          MR. MELDON:   Well, is there a way I should say  
11          -- "Is there a way to cross-check" is what --

12          THE COURT:   That's what --

13          MR. MELDON:   -- I said.

14          THE COURT:   -- you said. "Is ..." --

15          MR. MELDON:   Yeah, that's what --

16          THE COURT:   -- "... there a way?"   The answer  
17          to that would be yes or no.   And then "What is the  
18          way?"   And --

19          MR. MELDON:   Right.

20          THE COURT:   -- then if it's -- if it's  
21          speculation, it's speculation.

22          MR. MELDON:   Right.

23          THE COURT:   So --

24          Is there a way to do that?

25          THE WITNESS:   Yes, there is, Your Honor.

1 THE COURT: Okay. And what is that way?

2 THE WITNESS: To use the same variables I did  
3 and do the math again. I could cross-check it, or  
4 provide that same variables (sic) to another expert  
5 and allow them to apply the same scientific  
6 variables to cross-check the information.

7 THE COURT: Okay.

8 Q (By Mr. Meldon) Is this information -- I'm  
9 sorry.

10 Does (sic) your theories with regard to  
11 alcohol absorption -- Do they have a known or potential  
12 rate of error?

13 A Well, unlike statistical error rates, for  
14 example - and I'll give the hypothetical to help explain  
15 error rate -- The Intoxilyzer 8000 has an error rate for  
16 accuracy standard of plus or minus five percent. This  
17 particular calculation error rate is based on the  
18 variables. Hypothetically, for example, one single  
19 drink will have anywhere between a .015 and a .02  
20 alcohol concentration. So, that is the variable, and  
21 that would be -- it's not expressed in percentage of  
22 error rate; it's expressed in tolerance or variabilities  
23 of the unknowns.

24 Q And have you used this theory - the alcohol  
25 absorption theory is what I'll -- I'll refer to it as -

1 outside the purposes of litigation?

2 A Yes, I have.

3 Q And in -- in what instances?

4 A Well, in training, in research, in validation  
5 of instrument accuracy, and part of my training and  
6 training of police officers.

7 Q Was the theory altered this time because of  
8 this particular case, because of this litigation?

9 A No, not at all.

10 Q So, my final couple of questions are: What  
11 would be your expert opinion that you would render in  
12 this case if called to court as a (sic) expert witness?

13 MR. BERMAN: Objection. Asked and answered  
14 twice.

15 MR. MELDON: That's fine, Your Honor.

16 THE COURT: Okay.

17 MR. MELDON: I just wanted to make sure I  
18 covered --

19 THE COURT: Well --

20 MR. MELDON: I -- I got it in.

21 THE COURT: -- you asked him -- You objected  
22 to that, saying there was no predicate to that.  
23 So --

24 MR. BERMAN: Well, he -- he did give it. He  
25 -- he gave his -- he gave his opinion, and --

1 THE COURT: He gave his opinion that the --  
2 based on the information he got, the alcohol had  
3 not begun -- the two drinks that he might have had  
4 just before driving were not absorbed. And  
5 therefore, the breath alcohol reading was lower at  
6 the time of driving than at the time of the test.  
7 Right?

8 MR. BERMAN: I believe he said "significantly  
9 lower," and then he said -- I think -- I think, on  
10 the second time, he quantified that by saying  
11 "potentially, probably."

12 THE COURT: Okay.

13 All right. So, that's been asked and  
14 answered.

15 MR. MELDON: So, Your Honor, has the Court  
16 found that the State's objection is still  
17 sustained, that we have not laid proper predicate  
18 with regards to --

19 THE COURT: Well, I didn't hear an -- There's  
20 not an objection pending right now. So --

21 MR. BERMAN: Well, I mean, they're -- I mean,  
22 are they -- is -- are they done? I mean, if -- if  
23 they're done, I think my objection still stands.

24 THE COURT: Okay. What -- What's your  
25 objection?

1 MR. BERMAN: Well, Judge --

2 THE COURT: Wait a second. I'm not to the  
3 ultimate issue. I don't --

4 MR. BERMAN: Oh.

5 THE COURT: Not an objection to the ultimate  
6 issue as to whether or not what he's going to  
7 testify to is admissible or not.

8 MR. BERMAN: Oh. I thought --

9 THE COURT: It's a --

10 MR. BERMAN: -- that's what's --

11 THE COURT: -- question --

12 MR. BERMAN: -- Counsel's asking.

13 THE COURT: -- of whether or not, if you are  
14 done answering questions, it's time for you to  
15 cross-examine.

16 MR. BERMAN: Yeah.

17 THE COURT: So, he's rendered what opinion he  
18 says he's going to give if permitted to do so.

19 MR. BERMAN: Um-hum (affirmative).

20 MR. MELDON: Correct.

21 THE COURT: Which is that the alcohol  
22 absorption had not occurred because of the  
23 timeliness of the drinks, he is not fully -- it had  
24 not fully been -- absorbed at the time of driving.

25 MR. MELDON: Correct, Your Honor.

1 THE COURT: Which would make the test  
2 significantly different than what it would -- been  
3 according to him.

4 So, if you have any other questions, you can  
5 ask them. If not, Mr. Berman's --

6 MR. MELDON: Well, Your Honor, it's hard  
7 without getting into his background as an expert.  
8 I'm having difficulty trying to figure out how  
9 to --

10 THE COURT: Well, rather --

11 MR. MELDON: -- you know --

12 THE COURT: -- than his background as an  
13 expert is how he is going to offer that opinion --

14 MR. MELDON: Right.

15 THE COURT: -- in this case. I mean, Mr.  
16 Berman was very clear that he thinks he's an  
17 expert.

18 MR. MELDON: Yeah.

19 THE COURT: He agrees he's an expert. He  
20 should be permitted to testify as an expert. But  
21 in this particular case, the Court has to make a  
22 determination as to whether or not he is applying  
23 the scientific theory appropriately to the facts in  
24 this case. Mr. Berman disagrees with you in that  
25 regard.

1 MR. MELDON: I understand that --

2 THE COURT: Okay.

3 MR. MELDON: -- Your Honor.

4 THE COURT: So, if there's any other questions  
5 you need or want to ask him about this particular  
6 case, now's the time.

7 MR. MELDON: Now's the time.

8 Q (By Mr. Meldon) Mr. Malhiot, with regards to  
9 your training and your experience with -- within the  
10 field of alcohol absorption and elimination, would you  
11 be able to assist a jury, or would you be able to  
12 testify --

13 THE COURT: That's for me to decide.

14 Q (By Mr. Meldon) -- if -- if admitted --

15 THE COURT: That's for me to decide. That's  
16 one of the issues that I have to decide.

17 MR. MELDON: Okay.

18 Q (By Mr. Meldon) Mr. Malhiot, was there any  
19 other information that was not given to you in this case  
20 that could have assisted you in -- in reaching a  
21 conclusion as to your opinion in this case?

22 MR. BERMAN: Objection. Calls for --

23 THE COURT: What's your objection?

24 MR. BERMAN: Calls for speculation. That --  
25 That could be anything.

1 THE COURT: Well, he can answer the question,  
2 but --

3 MR. BERMAN: Okay.

4 THE COURT: -- it's overruled -- the  
5 objection.

6 Any information not given to you that might  
7 have been helpful?

8 MR. MELDON: Correct --

9 THE COURT: Is that --

10 MR. MELDON: -- Your Honor.

11 THE COURT: -- what you said?

12 MR. MELDON: Yeah.

13 A (Continuing) I -- I -- I -- I don't believe  
14 I've been provided enough information to make a  
15 scientifically reliable estimation and opinion in this  
16 case.

17 MR. MELDON: All right. I have no further  
18 questions, Your Honor.

19 THE COURT: Okay.

20 MR. BERMAN: So, Judge, at -- at this time I  
21 don't believe the Defense has met their burden in  
22 this case.

23 THE COURT: Okay. You want to not ask any  
24 questions?

25 MR. BERMAN: I don't. I -- I -- I'm asking

1 the Court --

2 THE COURT: I want to --

3 MR. BERMAN: -- to make --

4 THE COURT: -- give everybody the opportunity  
5 to be heard. I'm not going to rule --

6 MR. BERMAN: Okay.

7 THE COURT: -- you know --

8 MR. BERMAN: All right.

9 THE COURT: -- before I hear everything.

10 MR. BERMAN: Okay.

11 Good afternoon, Mr. Malhiot. Can you hear me  
12 okay?

13 THE WITNESS: I can hear you loud and clear,  
14 sir. Thank you.

15 MR. BERMAN: Okay.

16 CROSS-EXAMINATION

17 BY MR. BERMAN:

18 Q Now Mr. Malhiot, you would agree with me that  
19 probably one of the most vital keys with regards to  
20 giving any opinion on absorption and elimination would  
21 be to know when the defendant stopped drinking, correct?

22 A That's one of the variables, yes.

23 Q Okay. Have you ever referred to it as -- as a  
24 vital key before? Maybe in lecturing?

25 A I -- I -- I very well may have.

1 Q Okay. And you have at times lectured when I  
2 was the Traffic Safety Resource Prosecutor for the State  
3 of Florida, for me, during prosecution conferences,  
4 correct?

5 A Yes, back when I was employed by the Florida  
6 Department of Law Enforcement.

7 Q Okay. And when --

8 Do you ever recall giving a statement at one  
9 of those --

10 Well, let me ask you this: You said you  
11 needed an hour in between the last drink and the time of  
12 the stop - traffic stop. Is that correct?

13 A Need an hour for what?

14 Q In order for the person to reach peak  
15 absorption.

16 A We use that one-hour timeline when we are  
17 talking about doing a retrograde extrapolation. We want  
18 to have, to try to insure that they're in the  
19 elimination phase. So, the one-hour timeline is usually  
20 a general rule of thumb used in the extrapolation world.  
21 And it -- it can vary up or down. But yes, that one  
22 hour is referred to in the many different times in -- in  
23 absorption calculations.

24 Q Okay. And you said part of your opinion was  
25 that the alcohol consumption was not fully peaked at the

1 time of driving. Did I hear that correct (sic)?

2 A That is correct.

3 Q Okay. And how much time did you find was  
4 between the last alcohol consumption and the traffic  
5 stop by the officer in this case?

6 A I believe it was approximately 12 minutes.

7 Q Okay. And where are you getting the 12  
8 minutes from?

9 A Interview with the defendant and the police  
10 reports.

11 Q Okay. Did you look at the bodywear camera  
12 from the incident?

13 A I did.

14 Q Okay. So, then, are you aware that almost  
15 immediately after the stop the officer asked the  
16 defendant when he consumed his last drink, and the  
17 defendant said, "About an hour ago"?

18 A Yes, I remember that.

19 Q Okay. Did you take that into consideration,  
20 or did you just ignore that and go with what the  
21 defendant told you?

22 A I -- I didn't ignore it. I talked to the  
23 defendant at length and clarified that, and used the 12  
24 minutes.

25 Q Okay. Well, when you say "used the 12

1 minutes," how did you come to 12 minutes? Did the  
2 defendant --

3 You would agree with me there's a -- there's a  
4 big difference between 12 minutes and one hour being the  
5 last time of drinking, correct?

6 A Yes. A 45-minute difference, approximately,  
7 yes.

8 Q Okay. So, why did you objectively determine  
9 to use what the defendant told you as 12 minutes versus  
10 the hour that he admitted to the officer?

11 A Because I believed that to be truthfully  
12 honest when he told me that and we discussed it.

13 Q Okay. And, of course, the defendant has a lot  
14 to lose in this case, correct?

15 MR. MELDON: Your Honor, I'm going to object  
16 as to the --

17 THE COURT: Sustained.

18 MR. MELDON: -- form of the --

19 MR. BERMAN: Okay.

20 Q (By Mr. Berman) Mr. Malhiot, isn't it true  
21 that the defendant has a bias as to not to say the  
22 truth?

23 MR. MELDON: Your Honor, I'm going to object  
24 once again. I think it's -- it calls for  
25 speculation, when he's --

1 THE COURT: Overruled. Let him answer the  
2 question.

3 A (Continuing) Well, he has a bias not to tell  
4 the truth if he understands forensic calculations. He  
5 would have to know that the one hour versus 12 minutes,  
6 one would be detrimental to him.

7 Q (By Mr. Berman) Okay. But, Mr. Malhiot,  
8 isn't it true that when you lectured to prosecutors, one  
9 of the things you actually told them was that the  
10 defendant has a bias not to say the truth? And that  
11 statement was not qualified by what you qualified it  
12 today.

13 A Well, that sounded like a -- like a multipart  
14 question. Part 1, yes, I've lectured that the accused  
15 many times will not tell the truth.

16 Q Okay. And you -- you didn't qualify that  
17 statement in the past with the defendant needing to know  
18 about all sorts of absorption and elimination rates,  
19 correct?

20 A Well, it was more of a generalized statement  
21 of many different training questions. But no, I had not  
22 qualified that.

23 Q Okay. And when you were an officer, did you  
24 assume that the defendant was telling you the truth, or  
25 assume that the defendant was actually not telling you

1 the truth?

2 A Well, I normally didn't make an assumption  
3 either way. I would probably look at the totality of  
4 the circumstances. For instance, if an individual was  
5 falling down out of the car and couldn't stand, and told  
6 me he had nothing to drink, I -- I would be suspicious  
7 of that statement.

8 Q Okay. And wouldn't you also be suspicious if  
9 the defendant said they only had two or three or four  
10 beers, yet they're blowing a .112 or a .12?

11 MR. MELDON: Your Honor, I'm going to object.  
12 I don't understand a -- A .12 is not relevant to  
13 this case.

14 MR. BERMAN: Well, actually, Judge, I -- I  
15 have questions here with regards to Mr. Malhiot's  
16 -- how he has stated things in the past with  
17 regards to defendants telling the truth, one of  
18 which is -- I mean, I could just go ahead and ask  
19 it, but one of things is that during a lecture he  
20 actually mocked a defendant saying that they only  
21 had two beers. Well, then, why is his breath  
22 result a .16?

23 MR. MELDON: Judge, this seems --

24 THE COURT: Okay. That's --

25 MR. MELDON: -- to go towards --

1 THE COURT: -- not really relevant to this.

2 So (cannot be clearly heard) if you're --

3 MR. BERMAN: Well, Judge, I think -- I think  
4 it's relevant because Counsel talked about that  
5 there's -- that there's nothing --

6 THE COURT: Else he --

7 MR. BERMAN: -- that --

8 THE COURT: -- could have heard.

9 MR. BERMAN: -- everything is objective.

10 THE COURT: Okay.

11 MR. BERMAN: Okay. And my point is that it is  
12 objective because he's taking what he wants --

13 THE COURT: I get --

14 MR. BERMAN: -- as fact.

15 THE COURT: I get your point.

16 MR. BERMAN: Okay.

17 THE COURT: Okay.

18 MR. MELDON: And, Judge, I would go that --  
19 That goes towards weight, not admissibility, I  
20 would argue.

21 MR. BERMAN: Oh.

22 THE COURT: Okay. Well, so that's what --

23 MR. BERMAN: I would --

24 THE COURT: -- we're going to --

25 MR. BERMAN: -- say no.

1 THE COURT: -- talk about later. So, right  
2 now I'm going to let him answer the question, and  
3 you can --

4 MR. BERMAN: Okay.

5 THE COURT: -- ask the question.

6 MR. BERMAN: Thank you, Judge.

7 Q (By Mr. Berman) So, Mr. Malhiot, it -- Isn't  
8 it true that when you were lecturing to a group of  
9 prosecutors back in 2010, when you were still with FDLE,  
10 that you kind of mocked a defendant giving the answer of  
11 two beers when their breath result showed them to be  
12 well over the illegal limit?

13 A It's very possible. I can't recall the exact  
14 phraseology, but yes, it's very possible I did that.

15 Q Okay. If I showed you an actual video of  
16 that, would that refresh your recollection?

17 MR. MELDON: Your Honor, he -- he said yes. I  
18 don't think you need to show a video to --

19 THE COURT: He said --

20 MR. MELDON: -- impeach.

21 THE COURT: -- it's possible.

22 A (Continuing) I -- I don't think there's any  
23 need to do that, because I'm not denying the statement.  
24 I just --

25 Q (By Mr. Berman) Okay.

1 A It's very probable that's what I said.

2 Q Okay. And when --

3 So, let's get back to this 12 minutes. What  
4 exactly did the defendant say to you with regards to how  
5 he came to 12 minutes?

6 A If I recall correctly, he told me what time he  
7 stopped drinking, and I compared that to the time of the  
8 traffic stop.

9 Q Okay. And what time did he say he stopped  
10 drinking?

11 A Let me refer to my notes.

12 Q Okay.

13 A (Reviews notes.) Approximately 12:50.

14 Q 12:50. So, about --

15 And you're taking the time of the stop to be  
16 1:07 in the morning?

17 A No. I'm sorry. (Cannot be clearly heard)  
18 have 1:02. So, it's approximately 12:55 would be his  
19 last drink.

20 Q Is that what you have in your notes, or you're  
21 just saying that because of the 1:07 I just said?

22 A No, I just -- It's -- It's -- I looked at the  
23 1:07 as a 1:02, and subtracted the 12. I'm sorry.

24 Q Okay.

25 A My notes have 12:55, time of last drink.

1 Q Okay. And did you watch the bodywear camera  
2 video before or after speaking with the defendant?

3 A Before.

4 Q Okay. So, at point you already knew that he  
5 had admitted to the officer that he stopped drinking an  
6 hour before, correct?

7 A I recall that, yes.

8 Q Okay. Did you ask the defendant anything  
9 about why there's such a big discrepancy in his answers?

10 A I didn't specifically ask that. I did ask how  
11 he knew and how sure he was about the 12:55 cease of  
12 drinking.

13 Q And in doing so --  
14 When did you say you spoke with the defendant?

15 A The exact date I don't have in my notes. It  
16 was prior to the previously scheduled hearing.

17 Q Okay. Would you say closer in time to the  
18 previous scheduled hearing, or well before that?

19 A Within a couple of days of the previous  
20 hearing.

21 Q Okay. But your report was completed on March  
22 7, 2019. And the previous hearing was scheduled only  
23 about a month ago, correct?

24 A Well, yes, but that -- As I spoke earlier, I  
25 had spoken to him more once. In fact, he called me very

1 much at the beginning of this process, and I had called  
2 him back and had a discussion prior to the previous  
3 hearing.

4 Q Okay. And when was the first time you spoke  
5 to the defendant?

6 A I was retained in February of this year for  
7 this case, and it would have been approximately February  
8 20th.

9 Q Okay. So, the first time he told you about  
10 the 12 minutes would have been February 20, 2019,  
11 correct?

12 A Approximately, yes.

13 Q Okay. And you said you had watched the video  
14 before then, correct?

15 A No, no, no. I had watched the video after the  
16 first -- initially speaking to him, prior to writing the  
17 report. And then I spoke to him again, just days before  
18 the previously scheduled hearing.

19 Q Okay. So, just make sure I have my time lines  
20 right. You spoke --

21 A (Cannot be clearly heard) --

22 Q You spoke to him February 20, 2019; he tells  
23 you about the 12 minutes, correct?

24 A Approximately, yes.

25 Q Approximately. I'm -- I'm not holding you to

1 that date. And then you wrote your report on March 7,  
2 2019, correct?

3 A Yes.

4 Q Okay. And somewhere between -- On or about --  
5 Around February 20th to March 7, 2019, you watch the  
6 bodywear camera video from this case, correct?

7 A I did.

8 Q Okay. So, you already had in your mind 12  
9 minutes from the defendant as the time between last  
10 drink and time -- time of stop.

11 A Yes, I did.

12 Q Okay. And when you wrote your report, did you  
13 go back after you had watched the video and speak with  
14 the defendant about why there was such a large  
15 discrepancy between what he said was the last drink time  
16 and what he told the officer?

17 A I did not --

18 Q Okay.

19 A -- until such time as the previous hearing was  
20 scheduled, and I talked to him again about it prior to  
21 the hearing.

22 Q Okay. And that's when he was - I guess, in  
23 your words - more confident with his answer? I don't  
24 think you used those words, but was he more confident  
25 with his answer in 12 minutes at that point?

1           A     More confident than what? Than the video of  
2     him with the police officer?

3           Q     Well, you had two answers before you, and you  
4     said you spoke to him before the last -- the -- the  
5     previously scheduled hearing. That didn't cause you any  
6     concern for your opinion?

7           A     No, it didn't. I felt more confident in his  
8     answers to me than I did in the video statement.

9           Q     Okay. So, when Counsel asked you about  
10    whether or not you're taking anything subjective or  
11    objective, that decision to use his statement is a  
12    subjective decision, correct?

13          A     Well, it's an objective time. Now, if the  
14    time is incorrect, it's incorrect. But just like his  
15    body weight, if he weighs 50 pounds more than he says,  
16    you know, they're objective numbers but they're not  
17    perfect numbers in that -- that -- So, I don't consider  
18    that subjective. I consider the time of 12:55 an  
19    objective time.

20          Q     Okay. But your decision to rely on what you  
21    felt was an objective time from the defendant was your  
22    subjective decision, correct?

23          A     Oh, correct. It was my subjective decision  
24    that the 12:55 was probably a more accurate time. Yes.

25          Q     Okay. And, again, other than the defendant

1 saying so, what else led you to the conclusion that it  
2 was a --

3 You know what? I -- I'm going to scratch  
4 that.

5 When -- When -- Did you do any consideration,  
6 did you formulate any opinion as to what the breath test  
7 or the alcohol concentration would have been at the time  
8 of driving had it been an hour before the stop?

9 A I did not.

10 Q Okay. Can you opine now, giving all the  
11 information that you have, because I believe you --

12 One of the last questions Counsel asked you  
13 was "You have been given enough information to give a  
14 sufficient opinion in this case." So, all things being  
15 equal in this case, can you opine as to what his alcohol  
16 concentration would have been if it had been an hour  
17 between time of last drink and the time of the traffic  
18 stop?

19 A Are you asking me to retrograde based on test  
20 results with an hour between time of stop and time of  
21 last drink?

22 Q No. I'm asking you --

23 Well, let me break this down, then.

24 You said that there wasn't enough time, that  
25 there would have been a two-drink difference, correct?

1 A Correct.

2 Q Potentially? Probably? Those were the words  
3 you used?

4 A Yes.

5 Q Okay. And you said that you estimate anywhere  
6 between -- One drink would equal anywhere between a .015  
7 and a .020, correct?

8 A That is correct.

9 Q Okay. And most -- oftentimes experts use  
10 .018. Is that right?

11 A That is correct.

12 Q Okay. And if you take .018 and you multiply  
13 it by two, that's a .036, correct?

14 A Correct.

15 Q Okay. And subtracting that from the lowest  
16 breath test result that was given in this case, would  
17 have been a .079. Is that right?

18 A (No verbal response.)

19 Q Maybe .069. Excuse me.

20 A So, say .069?

21 Q Yeah.

22 A Yes, sir.

23 Q Okay. And what if he was fully absorbed?

24 What if the defendant was fully absorbed and those two  
25 drinks were actually part of the calculation? Would

1 that make a difference?

2 A That -- If he was fully absorbed at time of  
3 stop?

4 Q Yes.

5 A Hypothetically, yes.

6 Q Okay. So, when you said earlier that you take  
7 an hour, you want to be -- And -- And I believe you --  
8 you've -- in the past you've actually stated that  
9 research shows in normal social drinking environments  
10 within ten to 20 minutes of your last dranked (sic) you  
11 are peaked. Would you agree with that?

12 A Well, there has been research. Ten to twenty  
13 minutes is -- is what one researcher -- but there's also  
14 a lot research that talks ten minutes to an hour, but --  
15 but I don't disagree with that.

16 Q Okay. And you -- you -- I believe in the past  
17 you've also said that you like to use an hour just to be  
18 three times as sure, correct?

19 A I don't know if I used that phraseology; it's  
20 very possible. My training with retrograde  
21 extrapolation specifically talks about a one-hour time  
22 line between last drink and time of incident to insure  
23 scientific certainty. But, yes, a three-time is not a  
24 bad thing.

25 Q Okay. But, again, you've actually lectured to

1 prosecutors saying peak time within ten to 20 minutes,  
2 correct?

3 A Very possible. I don't recall specifically --

4 Q Okay.

5 A -- but it's very possible; I don't doubt it.

6 Q If -- If you don't recall, would you like for  
7 me to play the video?

8 A No, I said I don't doubt it.

9 Q Okay.

10 A So, no need to play the video. It's --

11 Q Okay. And, so, if the -- If there was a full  
12 hour, as the defendant said on video to the officer --  
13 If there was a full hour between time of last drinking  
14 and time of the traffic stop, that would mean -- that  
15 would mean that the defendant, at the time of the  
16 traffic stop, when he was driving, was fully peaked,  
17 fully absorbed, correct?

18 A Probably.

19 Q Potentially probably?

20 A Probably.

21 Q Okay. And if he was in fact fully peaked,  
22 fully absorbed, then the breath test result an hour,  
23 hour and a half later would still be indicative of what  
24 he was at the time of driving, possibly even more,  
25 correct?

1           A     No, I think you said that backwards.  The --  
2     The breath test was probably more?

3           Q     Could be more?

4           A     It -- Could you rephrase the question?  I  
5     think you said --

6           Q     Sure.

7           A     -- it backwards, but go ahead.

8           Q     If the defendant was fully peaked, fully  
9     absorbed at the time of driving, then a breath test  
10    result an hour, hour and a half later would be  
11    indicative of -- I'm sorry.  You're right; I did have it  
12    backwards.  -- either the same or lower than it was at  
13    the time of driving, meaning at the time of driving he  
14    could have been higher than what his alcohol  
15    concentration was at the time of test, correct?

16          A     If he was fully absorbed at time of stop, that  
17    is a true statement.

18               MR. BERMAN:  Okay.  I have nothing more, Your  
19    Honor.

20               THE COURT:  Okay.

21               Do you have any other questions?

22               MR. MELDON:  No, Your Honor.

23               THE COURT:  Okay.

24               Thank you.

25               Should we discontinue the --

1 MR. BERMAN: I believe so --

2 THE COURT: -- closed --

3 MR. BERMAN: -- Judge.

4 THE COURT: -- captioning --

5 MR. MELDON: Thank you. Thank you, Mr.

6 Malhiot.

7 THE COURT: Thank you, Mr. Malhiot.

8 MR. MALHIOT: Thank you.

9 (Whereupon the Court briefly addressed an unrelated  
10 matter, after which the hearing continued as follows.)

11 THE COURT: Okay.

12 Mr. Meldon, I'm going to hear from you first.

13 MR. MELDON: Yes, Your Honor.

14 THE COURT: So, let me just get it clear on  
15 the record where we are as far as the stipulations.  
16 The stipulation is that the -- Mr. Malhiot is a  
17 (sic) expert in the field of absorption, and both  
18 sides agree to that. Is that right?

19 MR. BERMAN: I believe it was absorption and  
20 elimination of --

21 THE COURT: Yes.

22 MR. BERMAN: -- alcohol --

23 THE COURT: Absorption --

24 MR. BERMAN: -- Judge.

25 THE COURT: -- and --

1 MR. BERMAN: Yes.

2 THE COURT: -- elimination. Okay.

3 MR. MELDON: Let me know when you want me to  
4 start --

5 THE COURT: I will.

6 MR. MELDON: -- Your Honor.

7 Thank you, Judge.

8 THE COURT: Okay. I'll hear from you. I just  
9 wanted to make that note to myself.

10 MR. MELDON: So, Your Honor, because Mr.  
11 Malhiot was conceded to be an expert in the field  
12 of absorption and elimination of alcohol, I think  
13 that the Court should look at the -- The three  
14 questions that the Court should essentially look at  
15 are as follows: How his experience led to an  
16 opinion; why the experience is sufficient basis for  
17 an opinion; and how is your experience reliably  
18 applied to the facts?

19 The -- The answers to these questions were  
20 testified to by Mr. Malhiot during direct  
21 examination. He explained what his experience was  
22 and -- and how he rendered an opinion based upon  
23 his experience as a State witness, as a Defense  
24 witness, training and his -- his own studies in the  
25 field. I asked him whether his -- the experience

1           -- I asked him if he had a sufficient amount of  
2           information to render an opinion, and he testified  
3           that he did. And the third question is how is his  
4           experience reliably applied to the facts.

5           THE COURT: What did you say the second  
6           question was?

7           MR. MELDON: Oh. Why the experience is  
8           sufficient basis for an opinion.

9           THE COURT: Okay.

10          MR. MELDON: And I think that the -- the  
11          State's going to focus on the third one, from what  
12          I can tell during our preliminary discussions, is  
13          how it was -- whether his experience was reliably  
14          applied to the facts in this case. I don't want to  
15          speak on behalf of the State, but that was my  
16          anticipation.

17          And in this case he testified that based upon  
18          his expertise in the field, which was stipulated  
19          to, that based upon his -- the information that he  
20          was able to obtain from Mr. Eberstein, that based  
21          upon his statements and his knowledge in his field,  
22          that he would be able to -- to make an opinion that  
23          the driver was absorbing alcohol at the time that  
24          he was driving; he was in the process of absorbing  
25          alcohol at the time that he was stopped. And

1           therefore the breath test result, which was a .105,  
2           .112, was not an accurate reflection of the  
3           individual's breath alcohol level at the time that  
4           he was driving.

5           The -- The State has a lot of information to  
6           impeach my witness on -- I'm assuming; I didn't see  
7           the videos, but I'm assuming that's what they were  
8           alluding to during their questioning. But it  
9           appeared to me that the -- the entire cross-  
10          examination of my witness had to do with the facts  
11          -- whether the facts that he was relying on were  
12          reliable facts, and that would go towards the  
13          weight of this testimony, not the admissibility of  
14          his testimony.

15          I think the State alluded to that new case  
16          that came out, Vitiello, which I have provided to  
17          the State and to the Court prior to this hearing.  
18          And that -- In that case, Dr. Goldberger, who's  
19          also an expert in the field just like Mr. Malhiot  
20          was, did not have any information because he was a  
21          State's witness, and therefore the State's witness  
22          was not able to interview the client. So, he has  
23          less information than my -- than my witness did,  
24          and he was able to testify with regards to his  
25          belief based on what the court considered

1 circumstantial evidence as to the field of  
2 retrograde extrapolation. And, in fact --

3 And I'm sorry, Your Honor, I -- I use  
4 Fastcase, but on page 6 of 7 of --

5 THE COURT: That's okay. I have --

6 MR. MELDON: -- the Vitiello --

7 THE COURT: -- your copy as well as a copy I  
8 already had. So, let me just -- Let's see here.  
9 Your copy is on page 6 of 7, you said?

10 MR. MELDON: Yes, Your Honor.

11 THE COURT: Wait a second.

12 MR. BURGER: Judge, may I be excused?

13 THE COURT: Yes. Everybody --

14 MR. BURGER: Okay.

15 THE COURT: Everybody okay?

16 MR. MELDON: Yeah. Thank you --

17 THE COURT: Thank you --

18 MR. MELDON: -- very much --

19 THE COURT: -- very much --

20 MR. MELDON: -- for helping --

21 THE COURT: -- for your help.

22 MR. MELDON: -- out.

23 MR. BERMAN: Thank you --

24 MR. MELDON: Appreciate --

25 MR. BERMAN: -- Craig.

1 MR. BURGER: All right, Judge, we'll --

2 THE COURT: We --

3 MR. BURGER: -- pull that out in the morning.

4 THE COURT: All right. We appreciate your  
5 help. Thank you.

6 So, page 6 of 7. And you are reading from  
7 where?

8 MR. MELDON: The indented paragraph probably  
9 two-thirds down the page, where they're -- they're  
10 actually reviewing the Florida Supreme Court case  
11 in Miller v. State. And it starts with the -- the  
12 statement "[I]n some circumstances."

13 MR. BERMAN: I'm sorry. What page?

14 MR. MELDON: Page 6 of 7 on Vitiello.

15 On -- On my --

16 MR. BERMAN: Oh.

17 MR. MELDON: -- copy, Your Honor.

18 MR. BERMAN: Oh, the one -- Okay.

19 MR. MELDON: Right here (indicating).

20 MR. BERMAN: I'm trying to --

21 THE COURT: Okay.

22 MR. BERMAN: -- because this --

23 THE COURT: So --

24 MR. BERMAN: -- was the copy you -- your  
25 secretary sent me.

1 MR. MELDON: Your Honor, I'm sorry. I -- I'm  
2 -- I'm reading from a different copy than you have.  
3 I apologize.

4 THE COURT: Okay.

5 MR. MELDON: But --

6 THE COURT: So, tell me where you are.

7 MR. MELDON: I'm -- I'm on the -- near the end  
8 of the opinion. I would say two paragraphs from  
9 the end of the opinion --

10 THE COURT: Okay.

11 MR. MELDON: -- prior to the footnotes.

12 THE COURT: Okay. And where's -- what's the  
13 first word?

14 MR. MELDON: It says Haas v. State, right -- I  
15 would guess it would be "[I]n some circumstances,"  
16 when they're actually citing Miller v. State, which  
17 is the Florida Supreme Court case.

18 THE COURT: Okay. I see "[I]n some  
19 circumstances."

20 MR. BERMAN: This is --

21 MR. MELDON: "[I]n some circumstances,  
22 evidence of blood-alcohol content obtained a  
23 significant time after a person is stopped on  
24 suspicion of driving under the influence may be  
25 relevant and probative .... Clearly, there are

1           circumstances under which the evidence of blood-  
2           alcohol content would be relevant and probative  
3           even though a significant amount of time has passed  
4           after the defendant was stopped and even where the  
5           State cannot establish probable blood-alcohol  
6           content at the time the defendant was in control  
7           of..." the "...vehicle.

8           "[T]he inability of the State to 'relate back'  
9           blood-alcohol evidence to the time the defendant  
10          was driving ... is a question of credibility and  
11          weight-of-the-evidence, not of admissibility,  
12          provided the test is conducted within a reasonable  
13          time after the defendant is stopped.

14          "What is 'reasonable' in this context will  
15          depend upon the facts of the case."

16          And then they -- they go on to say,  
17          "Similarly, the deficiencies in an expert's  
18          testimony would go..." towards "... the weight of  
19          the expert's testimony and not its admissibility  
20          when, as here, the expert testifies that he or she  
21          considered additional facts such as the..."  
22          defendant's "... performance on the field sobriety  
23          tests and observations of the suspect's behavior to  
24          confirm his or her opinion.

25          "For these reasons we hold..." that -- that

1            "... information ... Dr. Goldberger lacked goes to  
2            the weight to be given to his testimony, not the  
3            admissibility."

4            And in this case, Dr. Goldberger had much less  
5            information than my -- than my expert did, and --  
6            and -- be able to render that expert opinion.

7            So, I guess the question that the Court needs  
8            to determine is whether or not the fact that the  
9            client said something different on the video to the  
10           police officer versus what he said to the expert  
11           goes towards the admissibility of the expert's  
12           testimony as to this issue in this field, as to  
13           whether my client was absorbing alcohol or not.

14           The jury can listen to my expert and, if they  
15           believe him, I don't think there's any -- there is  
16           any question that if they believe him and his  
17           conclusion, that they will most likely believe that  
18           the driver was absorbing alcohol, that they believe  
19           through cross-examination that, you know, my expert  
20           was relying on the -- the wrong facts, that indeed  
21           Mr. Eberstein drove -- or drank an hour before the  
22           time of the test, then the jury can use that  
23           information. And I think that's not confusing to  
24           the jury.

25           This is not an issue as to the scientific

1 nature of the -- of the expert's testimony; it goes  
2 towards the facts of the case. And, so, I don't  
3 think that putting the jury in that position would  
4 be confusing or would -- would abrogate the whole  
5 reason that we have Daubert in the first place,  
6 which is to make sure that they're not given the --  
7 the -- the -- the high task of having to determine  
8 which scientific is -- evidence is reliable and  
9 which scientific evidence is not reliable.

10 We're not asking that question. We're saying  
11 that if it's -- if this is the time, then it's  
12 reliable. If you believe that this is the time,  
13 then that -- then -- then what the State would  
14 argue is reliable, that it's at the peak, which  
15 would be at .105, .112.

16 So, I think what Mr. Berman did was, you know,  
17 didn't attack the credibility of my -- my expert  
18 with regards to his expertise in the field. I  
19 think what he was doing was attacking his --

20 THE COURT: The number --

21 MR. MELDON: -- reliance on my --

22 THE COURT: The number -- The number that he  
23 used.

24 MR. MELDON: You're right. Our --

25 THE COURT: But --

1 MR. MELDON: Our reliance on my client's --

2 THE COURT: Information.

3 MR. MELDON: -- statement to him instead of  
4 relying on what he told the police officer. But,  
5 as this Court knows, people may say different  
6 things to different people, and I think that's  
7 something that the jury can make a decision as to  
8 whether to rely on my expert's version of the  
9 testimony. And I think, you know, in this case Mr.  
10 Eberstein would have to testify and -- and lay a --  
11 a proper foundation as well, in order to be able to  
12 get the testimony of the expert. And I know you  
13 don't have to, but I think in this case it would --  
14 we would be prepared to.

15 THE COURT: Okay.

16 Let me hear from you, Mr. Berman.

17 MR. BERMAN: Yes, Judge.

18 So, Judge, I'm just going to back up a second  
19 because before I even started questioning Mr.  
20 Malhiot, I don't believe that Defense had actually  
21 met their burden. And the reason for that was is  
22 because, Judge, Mr. Malhiot did a very job around  
23 -- about -- did a very good job of tap-dancing  
24 around what the actual opinion and the reasons for  
25 how he came to his opinion were. He wasn't giving

1 any facts. You know, the question was asked,  
2 "Well, where did you get this information from?"

3 "Got it from the defendant."

4 That was it. No -- No reason behind it, no  
5 nothing, you know. And at that point, Judge, I --  
6 I just feel that the Defense hadn't met their  
7 burden. And after I questioned and cross-examined  
8 Mr. Malhiot, I'm convinced of that.

9 Not only did he not reliably apply anything;  
10 he's an expert. He went ahead and subjectively  
11 determined, without any reason, "I'm using what the  
12 defendant said." Why? Because it gets him to  
13 where the defendant wants him. Twelve minutes. He  
14 gave no reason for it beyond, "I listened to him;  
15 sounded good." That's not what Daubert is. That  
16 is what is called ipse dixit. It is because I say  
17 so. Mr. Malhiot wants to come here and say it's  
18 below, it's -- it's a lower -- it's a significantly  
19 lower alcohol concentration. Why?

20 THE COURT: Well, he says he --

21 Oh, go ahead. Sorry. I don't want to --

22 MR. BERMAN: I mean, the terms used, Judge,  
23 and -- and without getting into the numbers. Okay,  
24 without getting into the numbers. His report and  
25 what he stated in his opinion says it -- "It is

1 estimated that Mr. Eberstein's alcohol  
2 concentration at the time of driving was  
3 significantly lower than the alcohol concentration  
4 reported at the time of breath alcohol testing."  
5 And -- Well, why is that? Because he chose to use  
6 12 minutes because the defendant said so. And as  
7 much as Counsel wanted to make it seem like Mr.  
8 Malhiot was going off of objective criteria, he  
9 wasn't. The --

10 THE COURT: Well, he said that the objective  
11 criteria is (sic) the time of stop, time of -- time  
12 of stop, time of stop drinking, and --

13 MR. BERMAN: Correct.

14 THE COURT: -- and then the test. So --

15 MR. BERMAN: Time to start --

16 THE COURT: -- those are the --

17 MR. BERMAN: -- drinking --

18 THE COURT: -- objectives that -- objective  
19 considerations. But he did say that --

20 MR. BERMAN: Right.

21 THE COURT: -- if - in cross-examination and  
22 even before -- that if he used a different time, it  
23 would be a different number, that the time, in  
24 fact, is objective. It's just what number you plug  
25 into that.

1 MR. BERMAN: Well, right. The criteria of  
2 choosing the time of -- of stopping drinking --

3 THE COURT: Right.

4 MR. BERMAN: -- is objective.

5 THE COURT: Right.

6 MR. BERMAN: Him selecting which one to use,  
7 when as an expert he knows that there is another  
8 variable that could be used and summarily decides  
9 not to use it, not give it any consideration, until  
10 I ask him about it, should be concerning.

11 THE COURT: Okay. So, it --

12 Take me to the argument of the Vitiello case,  
13 because that --

14 MR. BERMAN: Um-hum (affirmative).

15 THE COURT: -- that's the most recent --

16 MR. BERMAN: Well --

17 THE COURT: -- case I could find that gives me  
18 any guidance on it. And, so, I go through -- I  
19 have a little flowchart I go through in terms of  
20 Daubert --

21 MR. BERMAN: Um-hum (affirmative).

22 THE COURT: -- that I have right in front of  
23 me, where I get past a little bit of the flowchart  
24 based on the fact that you-all stipulated to the  
25 fact that he's an expert in the field of absorption

1           and elimination. And then he qualifies based on  
2           his -- all of his training and experience. And  
3           then is it relevant to the issue at hand? I think  
4           that's for me easy to say it is relevant to the  
5           issue of whether his breath alcohol was above or  
6           below the legal limit. And -- But is the testimony  
7           based on sufficient facts or data? That testimony  
8           talks -- That finding by me requires me to look --  
9           is the criteria that he used in his reaching his  
10          conclusion, like, as he's --

11                 MR. BERMAN: Um-hum (affirmative).

12                 THE COURT: -- as he referred to them as  
13          objective. Time of stop, time of --

14                 MR. BERMAN: Right.

15                 THE COURT: -- test, time of stop drinking.  
16          Is that based on objective, reliable information?  
17          Has it been tested? He testified to all of that.

18                 So, then we get to the part where you're  
19          arguing that -- Has he -- Has the witness applied  
20          the principle and methods reliably to the facts of  
21          this case?

22                 MR. BERMAN: Um-hum (affirmative).

23                 THE COURT: Is that where you are?

24                 MR. BERMAN: I -- I would probably take a  
25          little bit of a step back, Judge, only because the

1 testimony is the product of reliable principles and  
2 methods only to the extent of the criteria that  
3 he's using, not what he's using as the variables  
4 for the criteria.

5 THE COURT: But you don't disagree that the  
6 underlying principle that he is using to calculate  
7 what the breath reading might be are (sic)  
8 reliable.

9 MR. BERMAN: No. I'm -- I'm not -- I am not  
10 saying that the -- I'm not saying that the  
11 principles, meaning the three criteria that he is  
12 using, is (sic) not reliable. I'm saying the way  
13 that he's using them here because he's not  
14 reasonably -- he's not reliably applying the facts  
15 of the case to those principles makes it  
16 unreliable.

17 THE COURT: Okay. So, tell me why that's not  
18 in -- under the Vitiello case not --

19 MR. BERMAN: Okay.

20 THE COURT: -- going to the weight versus the  
21 admissibility.

22 MR. BERMAN: Sure. Well, first of all, Judge,  
23 in -- in Vitiello - I think it's Vitiello. Yeah.

24 THE COURT: Vitiello.

25 MR. BERMAN: Okay. First of all, Judge, that

1 is Dr. Goldberger. Okay. Dr. Goldberger has a 56-  
2 page curriculum vitae that would clearly outshine  
3 Mr. Malhiot. And I'm sure Mr. Malhiot would even  
4 say that when it comes down to it, Dr. Goldberg  
5 (sic) is the -- probably the end-all, be-all when  
6 it comes to toxicology, retrograde extrapolation,  
7 alcohol -- anything --

8 THE COURT: But --

9 MR. BERMAN: -- like that.

10 THE COURT: But certainly the court didn't  
11 address that issue in that case. They're not  
12 saying --

13 MR. BERMAN: Well --

14 THE COURT: -- "Oh, this doctor is extremely  
15 well qualified." He -- They've just said he's an  
16 expert in the field. And you-all have stipulated  
17 that this witness is an expert in the field.

18 MR. BERMAN: I -- I agree.

19 THE COURT: But whether -- I mean, some  
20 athletes are better than others, but they're all  
21 professional athletes. So, with -- if one runs  
22 faster, that doesn't make him not a professional  
23 athlete because he runs a little slower.

24 MR. BERMAN: No, Judge.

25 THE COURT: Right? So, these are --

1 MR. BERMAN: But --

2 THE COURT: -- both experts.

3 MR. BERMAN: But there -- But there are  
4 definitely certain levels of -- A person can be an  
5 expert, and a person can be an athlete. But still,  
6 within that expertise --

7 THE COURT: But the --

8 MR. BERMAN: -- there are people that are  
9 higher up on the rung and lower up (sic) on the  
10 rung.

11 THE COURT: But this court did not talk about  
12 that. This court --

13 MR. BERMAN: Well --

14 THE COURT: -- talked about --

15 MR. BERMAN: -- because --

16 THE COURT: -- when you --

17 MR. BERMAN: -- that wasn't --

18 THE COURT: -- have --

19 MR. BERMAN: -- the issue.

20 THE COURT: -- an expert and they don't have  
21 certain information, should they be allowed to  
22 render an opinion, all other things being equal  
23 under Daubert? Should that witness be allowed to  
24 come in and give an opinion and be subject to  
25 cross-examination? And should I, as the gatekeeper

1 of that here, allow the evidence to come in and  
2 allow the State to say - just as you did here today  
3 - "Listen, Mr. Malhiot. If the fact is that the  
4 hour is the time that we're dealing with, which is  
5 the hour that he said that night to the police  
6 officer," that goes to your benefit, right? That  
7 witness is going to use those same principles, use  
8 those exact same facts, except for change (sic)  
9 that one fact from one hour to 12 minutes, or  
10 whatever it was, and say, "You know what? You're  
11 right, Mr. Berman. If I used an hour, that would  
12 have -- that would have gone in your favor."

13 MR. BERMAN: Which -- Which he did.

14 THE COURT: Right.

15 MR. BERMAN: He -- He did. That was the --

16 THE COURT: And, so the --

17 MR. BERMAN: -- last thing I ended on.

18 THE COURT: -- question is under the Vitiello  
19 case, it looks like that case is telling me - And I  
20 think you agree I'm bound by it, right? I haven't  
21 found any other case. So, it's as if --

22 MR. BERMAN: Oh, no, this was -- I -- I agree,  
23 Judge. If we were talking about retrograde  
24 extrapolation, absolutely. But that's not what  
25 we're talking about. We're not talking about

1 retrograde extrapolation. And even still, if you  
2 look, the -- the same line that I quoted before we  
3 started the hearing was the exact same line Counsel  
4 ended with from this case.

5 It says, "We believe ... the lack of  
6 information cited by Vitiello ... was presented and  
7 argued to the jury, goes to the weight of Dr.  
8 Goldberger's testimony and not its admissibility,  
9 when, as here, the expert testifies that he or she  
10 considered such additional facts such as the  
11 suspect's performance on the field sobriety tests  
12 and observations of the..." subject's "... behavior  
13 to confirm his or her opinion." And there was no  
14 testimony of that in this case.

15 And, in fact, Counsel didn't -- Because  
16 Counsel knows he can't get that information in  
17 because it subjects the SFSTs to expert testimony.  
18 He could have had him testify that, based on how he  
19 looked, he looked like he would be under the  
20 illegal limit. But he didn't, and that's  
21 additional information that Dr. Goldberger -- Dr.  
22 Goldberger used in coming to a retrograde  
23 calculation. Not just, you know, "I spoke with  
24 somebody." And I believe, Judge, in this case  
25 there wasn't an -- there wasn't a -- a -- there

1           wasn't any testimony or evidence with regards to  
2           when the last drink was had. I don't believe so.  
3           At least not that I remember.

4           THE COURT: Just the 12 minutes.

5           MR. BERMAN: No. In -- In Vitiello.

6           THE COURT: Oh. In --

7           MR. BERMAN: I --

8           THE COURT: -- Vitiello.

9           MR. BERMAN: I don't believe so, Judge. I  
10          think -- I think the issue was in Vitiello whether  
11          or not they could reliably calculate a retrograde  
12          based on the fact that the defendant's BAC was so  
13          low; it was at a .027, I think. And there was an  
14          issue whether or not the toxicologists would do a  
15          retrograde from something that low, because my  
16          understanding is that is kind of low. Some --  
17          Somewhere around a .02 is kind of low. But in this  
18          case, they said that went to the weight because  
19          whereas in that case Dr. Goldberger --

20          THE COURT: That he took into consideration --

21          MR. BERMAN: He took into --

22          THE COURT: -- other fact.

23          MR. BERMAN: -- consideration other things  
24          which they did not hear. And, in fact, Judge,  
25          specifically Mr. Malhiot didn't take into

1 consideration other things. He didn't take into  
2 consideration that, you know, that there was  
3 conflicting evidence, one that he was getting from  
4 the defendant, the other that was clearly on video  
5 that he says he saw. And he never went to -- to  
6 talk to the defendant afterwards to say, "What's up  
7 with this 48-minute, you know, gap? Why? Why'd  
8 you tell him an hour and you're telling me 12  
9 minutes?" And his response was, "Defendant seemed  
10 like he was telling the truth." That's not  
11 reliable.

12 THE COURT: So, what do you say, Mr. Meldon,  
13 to the case law that suggests that it's the -- the  
14 burden is on the Defense to establish the  
15 reliability, and the State -- I mean, that the  
16 Defense has to establish -- make -- I have to make  
17 a pretrial determination as to whether or not this  
18 witness took into consideration certain things to  
19 reach an opinion.

20 MR. MELDON: Your Honor, first of all, I agree  
21 with the Court that the party --

22 THE COURT: (Cannot be clearly heard) --

23 MR. MELDON: -- seeking to admit the testimony  
24 bears the burden of proof by preponderance of the  
25 evidence that the expert possesses -- requisite

1 level of expertise, which has been conceded. And  
2 the testimony's based on reliable method --  
3 methodologies, which is what he had testified to.  
4 I think that's all you have to meet.

5 With regards to what Mr. Berman's saying, I  
6 kept --

7 And, in fact, he testified he reviewed the  
8 documents, he reviewed the video, he spoke to the  
9 client multiple times. That -- I asked him did he  
10 have enough information to --

11 THE COURT: But he --

12 MR. MELDON: -- render an --

13 THE COURT: -- didn't say --

14 MR. MELDON: -- opinion.

15 THE COURT: -- that he considered anything  
16 other than the answer to the question of when he  
17 last stopped drinking to reach his opinion.

18 MR. MELDON: So, he -- What he said is that he  
19 didn't -- he didn't have to, to reach an opinion as  
20 to the absorption of alcohol, that he had enough  
21 information that was given to him -- based upon all  
22 the information, that he would be able to render an  
23 opinion.

24 THE COURT: Because you're making a  
25 distinction between that and retrograde

1           extrapolation.

2           MR. MELDON:  It's the two -- two different  
3           concepts altogether.  In fact, we're not trying to  
4           argue retrograde extrapolation or Widmark's, and --

5           THE COURT:  So, Mr. Berman, what do you say  
6           about that distinction with regard to --

7           The cases that I've read, where the courts  
8           have entered orders or issued rulings indicating  
9           that the defense has failed to meet its burden to  
10          establish either that the person's an expert and/or  
11          that the person or that the information and facts  
12          that they took into consideration were properly  
13          established in the hearing itself --

14          MR. MELDON:  Um-hum (affirmative).

15          THE COURT:  All of those that I read applied  
16          to cases where there was retrograde extrapolation.  
17          And it wasn't just the witness being offered in the  
18          field of absorption and elimination.  And, so, the  
19          testimony from Mr. Malhiot today is that he had all  
20          the information he needed because he wasn't using  
21          retrograde extrapolation, whereas, in - as you  
22          point out -- in the Valetti -- Valetto (sic) case,  
23          that the doctor was doing a retrograde  
24          extrapolation, and so the court pointed out that  
25          the doctor took into account other things.  But in

1           this case they're not offering that as evidence of  
2           retrograde extrapolation but merely as the  
3           absorption of alcohol. And all he's prepared to  
4           say is that "If I know the time of the last drink,  
5           if I know the time of the stop, and I know the time  
6           of the test, I can render an opinion as to what the  
7           readings should be based on -- only on absorption  
8           and elimination."

9           But the -- there was no -- Well, I won't say  
10          "but." Just that that's what their position is, is  
11          that therefore the other information as -- that  
12          you're looking for, like in the Vitiello case, is  
13          not important to offer the testimony because he's  
14          not going to be rendering an opinion based on  
15          retrograde extrapolation.

16          MR. BERMAN: Well, Judge, I -- I don't think,  
17          I mean, if -- when it comes to retrograde, you  
18          know, yes, they're looking for that. But -- But  
19          here's the thing: You're -- you're taking  
20          retrograde and you're working backwards from that  
21          .027 to put him over a .08. And the court said,  
22          "Well, when you're doing that, yes, you should be  
23          looking at all the other observations and  
24          everything else."

25          So, it stands to reason that the opposite is

1           also true.  If you're looking to put somebody below  
2           the illegal limit, that you should be looking at  
3           those considerations as well.  But --

4           THE COURT:  Well, he's not --

5           MR. BERMAN:  -- here's the --

6           THE COURT:  He's not looking to put him below.

7           What he's looking --

8           MR. BERMAN:  Well --

9           THE COURT:  -- to do is to offer an opinion  
10          that if in fact he stopped consuming alcohol 12  
11          minutes before the stop, and he uses that  
12          information with the rate of absorption, that he  
13          could render an opinion as to what it would be at  
14          the time of the test.

15          MR. BERMAN:  Okay.  But --

16          THE COURT:  And he doesn't need those other  
17          factors.

18          MR. BERMAN:  But then --

19          THE COURT:  As opposed to retrograde  
20          extrapolation, where he would need those other  
21          factors.

22          MR. BERMAN:  But -- But then, Judge, my  
23          concern would be how is it relevant?  If he's not  
24          -- If he's going to sit there and say that it's  
25          significantly lower, the time of the -- that the

1 breath test was significantly lower at the time of  
2 the driving --

3 THE COURT: If X, Y, and Z.

4 MR. BERMAN: -- and he doesn't give any sort  
5 of number, how does that aid the jury?  
6 Significantly lower could be .2 -- .025, in which  
7 case that puts him right at an .08. So, how does  
8 that assist the jury? It doesn't.

9 THE COURT: Well --

10 MR. BERMAN: The only way it really assists  
11 the jury is if -- is if not only he can say it's  
12 not -- not only under a .08. Because, remember,  
13 there's that gap between a .05 and a .079 which  
14 you're not either. So, he would have to get him  
15 below a .05 for it to even be relevant to the jury  
16 to say he's not impaired, that breath test result,  
17 it -- it just shows he's not impaired. If he can't  
18 get it below that, it's not relevant.

19 And -- And let me remind the Court, Judge:  
20 Mr. Malhiot's wording wasn't it's -- it is  
21 significantly lower. He qualified that statement,  
22 and I know the Court heard it, because every time I  
23 said those two words, the Court kind of snickered  
24 when I said "Potentially probably?" With every  
25 answer he gave.

1 THE COURT: But doesn't --

2 I'm hearing you, Mr. Berman, but I'm --

3 MR. BERMAN: I mean, honestly, Judge, I'm kind  
4 of in a quandary right now because while -- while I  
5 feel the Court shouldn't allow Mr. Malhiot to  
6 testify, I can't wait for this to go to trial. I'm  
7 ordering this transcript now. I've got the video  
8 from what just happened.

9 MR. MELDON: Does the -- The State withdraws  
10 its -- its objection?

11 THE COURT: I think you --

12 MR. BERMAN: No.

13 THE COURT: -- should --

14 MR. BERMAN: I --

15 THE COURT: I think --

16 MR. BERMAN: I -- I mean --

17 THE COURT: I think you probably should have  
18 advised him that you were -- we were -- you were  
19 videotaping it. I guess he knew that from the  
20 videoconference, but --

21 MR. BERMAN: Why don't --

22 THE COURT: -- that you were taping it.

23 But --

24 MR. BERMAN: I don't think I --

25 THE COURT: -- that's --

1 MR. BERMAN: -- needed to, but --

2 THE COURT: -- neither here nor there.

3 MR. BERMAN: Right.

4 THE COURT: The --

5 MR. BERMAN: But, I mean, I'm in a quandary,  
6 Judge, because --

7 THE COURT: I understand. And what I'm trying  
8 to do is I'm trying to follow the law.

9 MR. BERMAN: I understand.

10 THE COURT: And --

11 MR. BERMAN: Me, too.

12 THE COURT: And my guidance right now is  
13 coming from this Vitiello case, which I -- is the  
14 only case I could find that's recent and that it  
15 takes me down that path of erring on the side of  
16 allowing experts to testify if they're otherwise  
17 qualified. And I find that the -- all of the  
18 criteria has (sic) been met under the Daubert  
19 criteria, and that the issue is clearly that his  
20 opinion clearly is something that the jurors could  
21 consider as to an ultimate issue of fact. And that  
22 is as to what the breath alcohol reading was at the  
23 time of driving, and that it is based on reliable  
24 principles. Everybody agrees. And that the --  
25 The hang-up where I get stuck with you is

1           whether he's applied the principles and methods  
2           reliably to the facts of the case. And, so, the  
3           question then is, as the Court -- Am I to judge  
4           that one set of facts is better than the other?  
5           And in -- And I'm to say, "Well, he should use the  
6           hour, and then I'll let him testify. But if he  
7           uses the 12 minutes, I'm not going to let him  
8           testify"? Or vice versa?

9           I think the -- that that's not what Daubert  
10          intends for me to do. It intends for me to  
11          determine whether or not he should be declared an  
12          expert and able to render an opinion and let the  
13          jury decide whether that opinion is reliable,  
14          valid.

15          And if you cross-examine him and establish  
16          that if he used a different number, and that number  
17          is a number that's on the videotape that the jury's  
18          going to see, that he's going to give them an  
19          entirely different response. Because that doesn't  
20          change the principles. You see? It doesn't change  
21          the methodology that he's relying on to give the  
22          answer.

23          MR. BERMAN: Well --

24          THE COURT: Right? Or not?

25          MR. BERMAN: Not -- Not necessarily, Judge,

1           because -- And I do believe the Court has that  
2           obligation, because under the statute, while not  
3           necessarily under Daubert, under the statute --  
4           under subsection (3) of 97.02 it says that the  
5           witness -- the court has to determine whether the  
6           witness has applied the principles and methods  
7           reliably to the facts of the case.

8           THE COURT: Right, but I --

9           MR. BERMAN: And I --

10          THE COURT: -- don't know --

11          MR. BERMAN: -- can't --

12          THE COURT: -- what the facts of the case are.  
13          I don't know if the facts are 12 minutes or an  
14          hour.

15          MR. BERMAN: But he -- he said they were both.  
16          How can you reliably apply something if you have  
17          two different sets of facts and you only apply it  
18          to the one that you want? Not to the one that  
19          basically puts him over the illegal limit, but only  
20          focuses on the one that doesn't. How is that  
21          reliable?

22          THE COURT: (No verbal response.)

23          MR. BERMAN: And, like I said, I'm in a  
24          quandary because I --

25          THE COURT: No. (Cannot be clearly heard) --

1 MR. BERMAN: -- as much as I would love, I  
2 want him to testify now. But legally, from my  
3 point of view, I think the law would prohibit it.

4 THE COURT: Okay.

5 MR. BERMAN: But --

6 THE COURT: Anything else from you, Mr.

7 Meldon?

8 MR. MELDON: No, Your Honor. I --

9 THE COURT: Okay.

10 MR. MELDON: I had provided you with the other  
11 cases, as well --

12 THE COURT: I --

13 MR. MELDON: -- for your review.

14 THE COURT: I've read all the cases.

15 MR. MELDON: Yeah.

16 THE COURT: And I am going to make the  
17 following findings. Based on the stipulation, I'm  
18 going to let that the witness is an expert in the  
19 field of alcohol absorption and elimination. I'm  
20 going to find that he is qualified to testify with  
21 regard to alcohol absorption and elimination.

22 I'm going to further find that the testimony  
23 and evidence here today established that his  
24 testimony is relevant to an issue at hand in the  
25 case, and that the testimony is based on facts, and

1           that his testimony, if -- is based on a reliable  
2           foundation of scientific principles; that he has  
3           specialized knowledge, and will assist the trier of  
4           fact; and it is -- I do find that the probative  
5           value outweighs any unfair prejudicial value. And  
6           I am going to permit the witness to testify. I --  
7           That means I am denying the State's objection to  
8           the testimony.

9           You want me to do it in a short order, just  
10          like that? Is that okay, Mr. Berman?

11          MR. BERMAN: The -- Like you read it out --

12          THE COURT: Like I --

13          MR. BERMAN: -- or just --

14          THE COURT: -- just said.

15          MR. BERMAN: -- on the record?

16          THE COURT: No. Just like I said it out --

17          MR. BERMAN: It doesn't --

18          THE COURT: -- that I just --

19          MR. BERMAN: It doesn't -- I'm not -- I'm not  
20          going to appeal, Judge.

21          THE COURT: Okay. So, let me just write it so  
22          based on the rulings or the testimony in evidence  
23          on the record, that the Court is going to deny the  
24          State's objection to the witness testifying.

25          MR. BERMAN: Okay.

1 THE COURT: Okay?

2 Do we have a date?

3 MR. MELDON: Your --

4 THE COURT: Or is today the date?

5 MR. BERMAN: That I don't know. Might have  
6 been today, Judge.

7 THE COURT: Today? I usually set --

8 MR. BERMAN: I think it might have been today,  
9 because it was at your calendar --

10 THE COURT: I usually --

11 MR. BERMAN: -- call day.

12 THE COURT: -- set it for a status --

13 MR. BERMAN: Yeah.

14 THE COURT: -- and calendar call.

15 So, where are we on the case in terms of being  
16 ready, in light of my ruling?

17 MR. BERMAN: I need to order a transcript on  
18 this, Judge.

19 THE COURT: Okay.

20 MR. MELDON: And -- And I'll -- And I'll need  
21 time to get my witness to fly down from Georgia, so  
22 he -- I don't --

23 THE COURT: Okay.

24 MR. MELDON: -- have any objection if -- if --

25 MR. BERMAN: You're -- You're going to --

1 THE COURT: So --

2 MR. BERMAN: -- put him on --

3 THE COURT: -- if I --

4 MR. BERMAN: -- after all that?

5 MR. MELDON: Uh-huh (affirmative).

6 THE COURT: If I schedule --

7 MR. BERMAN: Really?

8 THE COURT: -- the case for December the 16th

9 for a --

10 I have a special-set on January 7th, it looks

11 like, already.

12 MS. SEFCHOK: I think we have one all three

13 weeks of December.

14 THE COURT: No, January.

15 MR. MELDON: Don't look --

16 MS. SEFCHOK: Which one's January 7th? Or --

17 MR. MELDON: January 7th I --

18 MS. SEFCHOK: Or --

19 THE COURT: What's January 7th?

20 MS. SEFCHOK: Is that the --

21 THE COURT: I have a special-set on my

22 calendar, it says.

23 MS. SEFCHOK: For January 10 there's (sic) 17.

24 THE COURT: January 7th.

25 So, I'm going to set it for the calendar call

1 on January -- on January 6th. The trial date will  
2 be January 14th. So, you --

3 MR. MELDON: January --

4 THE COURT: -- need to --

5 MR. MELDON: Okay.

6 THE COURT: -- make sure to get his  
7 availability.

8 MR. MELDON: Yes, Your Honor.

9 THE COURT: Because what year is this case?  
10 This case will be one of my older cases. Might be  
11 the oldest case on that day.

12 MR. MELDON: Tuesday, January 14th.

13 THE COURT: Would be the trial week. The 6th  
14 is the calendar call.

15 MR. MELDON: Yes, Your Honor. I will contact  
16 Mr. Malhiot immediately and try to get those --

17 THE COURT: Okay.

18 MR. MELDON: Do you know -- Would it be --

19 THE COURT: You-all -- You-all coordinate,  
20 because you --

21 MR. MELDON: Would it be on the 14th, then?

22 THE COURT: Yes.

23 MR. MELDON: The trial would start?

24 THE COURT: Yes.

25 MR. BERMAN: That's all you.

1                   THE COURT:  The calendar call's going to be at  
2                   9:00 o'clock in the morning, instead of 1:30, and  
3                   the trial will be the 14th.  
4                   (Whereupon the hearing was concluded.)

C E R T I F I C A T E

STATE OF FLORIDA )

COUNTY OF BROWARD )

I, JESSE M. SAVAGE, hereby certify that the foregoing transcript, pages 1 to and including 97, is a true and accurate transcript of the record of the proceedings.

Dated this 12<sup>th</sup> day of February, 2020, in the City of Fort Lauderdale, Broward County, Florida.

Jesse M. Savage

STATE OF FLORIDA )

COUNTY OF BROWARD )

Sworn to and subscribed before me this 12<sup>th</sup> day of February, 2020.

Janice M. Vaughn  
Notary Public, State of Florida



JANICE M. VAUGHN  
Commission # GG 161522  
Expires January 18, 2022  
Bonded Thru Budget Notary Services