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IN THE COUNTY COURT OF THE THIRTEENTH JUDICIAL CIRCUIT
IN AND FOR HILLSBOROUGH COUNTY, STATE OF FLORIDA
CRIMINAL DIVISION

STATE OF FLORIDA,

Plaintiff.

CASE NO: CT-4774-XEP

vs.

DIVISION: B

ASHOK BADGY,

Defendant.

_____ /

VOLUME I OF II
TRANSCRIPT OF PROCEEDINGS

BEFORE: **HONORABLE ERIC R. MYERS**
HONORABLE JOHN CONRAD

TAKEN AT: Courtroom 12
Courthouse Annex
Tampa, Florida

DATE AND TIME: June 15, 2012
9:00 a.m. docket

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REPRESENTING THE STATE:

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P R O C E E D I N G S

1
2 JUDGE MYERS: We're here this morning, State of Florida
3 versus Ashok, A-s-h-o-k, Bagdy, B-a-g-d-y, Case Number 4774-
4 XET, et al. There are multiple defendants and case numbers I
5 guess filed with regard to the defendant's motion to suppress
6 breath results and breath test results.

7 Who is here for the defense?

8 MR. ISSAK: Judge, on behalf of my clients, Mr. Bagdy,
9 Ms. Beckem, Mr. Faircloth, Mr. Forth, Ms. Pankau from your
10 division, and Mr. Devars, Mr. Marshall, and Mr. Manougiain
11 from Judge Conrad's division, Eilam Isaak.

12 JUDGE MYERS: Okay. And for the State of Florida?

13 MS. SANGHVI: Sheila Sangvhi, Judge.

14 JUDGE MYERS: Okay. And we've got a couple of
15 housekeeping matters that we probably need to take up. I was
16 approached by the Officer of the Public Defender. And I hope
17 the gentleman back there is not recording these matters yet
18 because we have not made a determination as to whether or
19 not --

20 MR. ISAAK: Is he listening or not? Is it not on?

21 UNIDENTIFIED SPEAKER: It's not on.

22 JUDGE MYERS: Okay. A determination had not been made
23 as to whether or not these proceedings would be recorded.
24 What says the defense?

25 MR. ISAAK: I don't have an opinion one way or the

1 other. It's probably not a bad training tool for the Public
2 Defender's Office. I think that was the essence of the
3 conversation that I was having with Mr. Goforth.

4 JUDGE MYERS: Okay. And the State?

5 MS. SANGHVI: There's no objection from the State,
6 Judge.

7 JUDGE MYERS: Okay. Representative from the Public
8 Defender's Office?

9 MS. RUSS: Yes, Your Honor.

10 JUDGE MYERS: Okay. May I hear your rationale and/or
11 reason for wanting to record these proceedings?

12 MS. RUSS: Yes. Jessica Russ, once again, with the
13 Public Defender's Office. Like Mr. Isaak said, we do like to
14 record things so that we can use them for training purposes.
15 That's why we'd like to record it.

16 JUDGE MYERS: Within your office?

17 MS. RUSS: Yes, Your Honor.

18 JUDGE MYERS: Okay. Judge Conrad, any --

19 JUDGE CONRAD: No, if nobody objects.

20 JUDGE MYERS: Okay. Without --

21 MS. SANGHVI: Judge, I'd just like to know. Are they
22 tape recording just the defense side or recording the
23 entirety? If it's just the defense side, I don't see any
24 objection for training purposes. However, for the State
25 side, I don't see a purpose.

1 MR. PEACOCK: Mike Peacock on behalf of the Office of
2 the Public Defender. The training purpose is so that -- this
3 is obviously an unusual situation whenever we have two judges
4 sitting to hear a significant motion. And certainly the
5 legal issue that is being presented is novel and not
6 something that the lawyers or office would have an
7 opportunity to see on a normal basis. The reason for
8 recording is so that we have the opportunity for training
9 purposes. The record speaks for itself. And there's
10 obviously a separate audio record that is being maintained
11 for the purposes of the proceeding. The intent of having it
12 available for training purposes would include the
13 presentation of evidence and testimony, and certainly in
14 addition to that, objections as they may arise and be dealt
15 with by the Court as things occur. And we're certainly
16 willing to do it with whatever limitations that the Court
17 intends to impose upon the filming. It would be our request
18 that we have the opportunity to record it from a non-
19 intrusive location so that we're not being intrusive in any
20 way. And it's an open proceeding. The entire world can come
21 in here and watch obviously. There is no secret to what is
22 occurring. It is just the desire of our office to be able to
23 have it available for training purposes. It's very common
24 for us to film in other courtrooms for training purposes. It
25 gives us the opportunity both to share with other lawyers in

1 a way because we can't all be here to see what's occurring
2 this morning, and also to have it available in the future for
3 training purposes.

4 JUDGE MYERS: Okay. All right. Without objection from
5 defense and/or the State and with an explanation by the
6 public defender that these recordings are to be used for
7 training purposes for their office and --

8 MR. PEACOCK: The only remaining question I guess then
9 would be where would the Court prefer that the camera be
10 located. It would certainly be our desire to have it where
11 we can see the people who are speaking from the podium and
12 also the Court. But wherever the Court would prefer that the
13 camera be placed is fine with us.

14 JUDGE MYERS: Wherever you folks can set it up in such a
15 way that you can duly establish your recording and it won't
16 be in any obstructive way. So here, there, or wherever.

17 MR. PEACOCK: Thank you, Your Honor.

18 JUDGE MYERS: We will allow it.

19 MR. PEACOCK: Thank you, Your Honor.

20 JUDGE MYERS: All right. I believe that there is
21 another issue that we need to address. Late yesterday
22 afternoon, and I do stress the word late, I received and I
23 believe Judge Conrad also received the State's motion to
24 strike defendant's motion to suppress breath test and breath
25 results. Mr. Isaak, did you receive a copy of the State's

1 motion?

2 MR. ISAAK: Yes. Ms. Sanghvi actually came by my office
3 about 4:15, 4:30, late in the afternoon and dropped off a
4 copy of the motion and case law supporting the motion.

5 JUDGE MYERS: Okay. Ms. Sanghvi, would you dare to
6 explain to this Court your reasons for doing what you did and
7 the lateness of the manner in which you did what you did?

8 MS. SANGHVI: Yes, Judge. And for the record, I did
9 call Mr. Isaak and inform him that day that that's what I was
10 planning on doing. And I asked permission if I could drop it
11 off to the judges first. However, although these motions
12 have been around for approximately two months, I have more
13 recently been designated as the person that would be
14 responsible for them. And I apologize. I underestimated the
15 amount of time it would take me to peruse through all of
16 Mr. Isaak's materials and the materials I obtained last week
17 and fashion a sufficient response on the State's behalf for
18 it. And I do realize that it is late. However, I do feel
19 like there are issues in there that need to be addressed
20 prior to the motion starting.

21 JUDGE MYERS: Okay. Well, part of my concern, and Judge
22 Conrad can speak for himself if he'd like, is if it was your
23 intention to file your motion, I would believe that you would
24 have to research some matters and look into some matters to
25 fashion a proper motion. Then prudently if you would have

1 notified the Court ahead of time that it is my intention to
2 file a motion to strike or motion to do anything that the
3 State wanted to do in opposition to the defense motion, it
4 would have put us on a little better footing in terms of
5 logistics to try to -- to address this matter.

6 I don't know whether at this late time there's an
7 argument to be made. And, Mr. Isaak, I'm going to let you
8 speak, whether or not the lateness of the filing of the
9 motion renders it to the position where you waived any right
10 to be heard on this matter or whether or not it's such a
11 motion that needs to be addressed, because quite frankly I
12 perused the motion from the State's perspective but really
13 have not read it in depth to know whether or not your
14 argument is such that it needs to be addressed on whatever
15 issue or whatever attack that you're trying to make with
16 regard to the defense's motion.

17 This matter has been set for quite some time. I know
18 the defense probably has gone through a lot of hoops if you
19 will in getting themselves ready, their potential witnesses
20 ready. And they need to be heard, just as the State needs to
21 be heard. But in all fairness to both sides, you put this
22 Court in my opinion in a box in terms of how we address this
23 matter.

24 Mr. Isaak?

25 MR. ISAAC: Good morning, Judge.

1 JUDGE CONRAD: I'm sorry. Madam Court Reporter, are you
2 able to hear him or --

3 COURT REPORTER: Yes.

4 JUDGE CONRAD: You can actually if you want -- I don't
5 know why they're -- you want to turn those? That will make
6 it easier to --

7 MR. ISAAK: I'm fine, Judge. Thank you.

8 JUDGE CONRAD: Yeah. But I think if we have you at the
9 microphone, both sides, and the same thing, Ms. Sanghvi, be
10 at the microphone so everyone can hear the argument and
11 what's being said because it gets a little remote the further
12 away you are.

13 MR. ISAAK: First of all, I have taken the position that
14 there is something disingenuous about the filing of the
15 motion at the time that it was filed, given the length of
16 time that these motions, the defense motions, have been
17 pending. So I agree with the Court that the filing, the
18 lateness is certainly an issue.

19 In reading the motion, I am about a hundred percent
20 certain that Ms. Sanghvi will concede that she is not the
21 creator of this response, that this is probably coming from
22 another State Attorney's Office. And it's been borrowed and
23 filed in these particular cases. Probably I imagine it
24 either came from the 12th circuit or the 17th circuit
25 since -- and I say 17th because most of the cases that

1 support are coming from the 17th. I suspect she's not the
2 one who wrote this.

3 But even if we were to hear the merits of it, I've
4 already given you the Risner case cited 584 So.2d 1141. And
5 I am also giving Your Honors both Burger from the Second DCA,
6 605 So.2d 488, and Veilleux cited at 635 So.2d 977. So the
7 Florida Supreme Court, the Second DCA, and the Fifth DCA have
8 all already said this Court has subject matter jurisdiction
9 to hear these defendants because of the issues of speedy
10 trial and so forth and relief for resolution of criminal
11 cases in a more expeditious manner than what occurs in the
12 administrative context. These sorts of motions should be
13 heard in the criminal case by the county judges.

14 So whatever cases she supported her motion with are from
15 the 17th circuit. This issue has been litigated because
16 these sorts of motions aren't new. They're not novel. These
17 attacks have been happening for decades and decades. And
18 this argument that the State has put forth in the eleventh
19 hour has routinely been shut down by the higher appellate
20 courts.

21 JUDGE CONRAD: Can I ask you -- well, I'm not sure what
22 you're really saying. Are you saying that you are not
23 prejudiced by receiving the motion at 4:30 yesterday
24 afternoon and you're not objecting to us considering the
25 motion this morning and then you want a ruling on that?

1 Because I think the issue is that if it's a motion to strike,
2 then the merits of that motion should most likely have to be
3 resolved before we even get into the issue of whether we
4 should hear your motion to suppress. Would you agree with
5 that?

6 MR. ISAAK: Yes.

7 JUDGE CONRAD: Okay.

8 MR. ISAAK: Except for the fact I am saying that I am
9 prejudiced because I've spent two months preparing for this.
10 I have two witnesses that came from out of town. Mr. Swope
11 is here from Miami. And Mr. Workman has flown in from
12 Boston, Massachusetts. SO we've incurred substantial
13 expense. I made it very clear to everyone that from my
14 perspective, I needed to present these witnesses on the same
15 day at the same time because it's cost prohibitive. So I've
16 gone to great expense to be ready to go forward today. No.
17 I'm absolutely prejudiced should the Court consider the
18 motion to strike and grant it. I'm merely giving you the
19 case law saying these motions should be denied when they are
20 heard.

21 JUDGE CONRAD: And I think what Judge Myers was saying,
22 that -- and this is the problem with the State's filing of
23 the motion, is that whether we would agree or not agree with
24 the State, the issue is, is that there is legal argument that
25 would have to be considered. There's case law that would

1 need to be reviewed and analyzed in order to make a proper
2 decision with respect to your motion. And we're here at 9:30
3 for a hearing that was scheduled two months ago. And I'm not
4 sure whether we could adequately do the research and come up
5 with a proper decision with even the time that's allotted
6 today, because as simplistic as everyone maybe wants to
7 represent these motions to be, they are not simplistic. They
8 are very complicated.

9 Your motion, Ms. Sanghvi, suggests that there may be
10 actually dual jurisdiction and that the case law really
11 suggests that we defer to an administrative process in terms
12 of jurisdiction rather than resolve rules issues in county
13 court or circuit court. So these are significant issues.
14 But at 4:30 the day before, it's problematic.

15 So can you address two things for me, please? Number
16 one, why the lateness? And number two, Mr. Isaak is
17 suggesting this is not your motion and that you probably got
18 this motion from somewhere else. And I think you would
19 probably say you had the motion before yesterday. And so
20 explain the history and why the lateness of the motion.

21 MS. SANGHVI: And, Judge, we're discussing the lateness
22 of this motion when I have been receiving cases that are
23 adopting this motion up until this week. So --

24 JUDGE CONRAD: Yeah. But they're not adopting new
25 issues. All they're adopting is a motion that was filed

1 according to the certificate of service here back on March --
2 was it March 1st? So in other words, the issues raised in
3 the motion are not new issues. None of the parties that I'm
4 aware of that may have added on to Mr. Isaak's motions added
5 anything at all that changed the substance of his motion.
6 But March 1st -- and now we're at June 15th. So April,
7 May, June, two and a half months later and the night before
8 you filed the motion, so.

9 MS. SANGHVI: And, Judge, by the same argument, many of
10 the motions that -- the cases where the motions have been
11 adopted, those cases had offense dates from a year or so
12 prior. And so for them to say, oh, now this is an issue and
13 now this week we're going to join this motion --

14 JUDGE CONRAD: You're missing the point. I mean, you
15 could add motions on until 8:55 this morning. The motion
16 itself has not changed. So let's say no other motions were
17 added and it was just Mr. Isaak and you and his motions that
18 were filed two and a half months ago. Why wouldn't you have
19 been prepared on his motions, regardless of who filed on?
20 That's my point. It doesn't matter how many people added on.
21 It's the same motion. You knew about it two and a half
22 months ago. Why did you wait until the day before?

23 MS. SANGHVI: And, Judge, that was something that was
24 discussed at the office where there was individual cases that
25 was coming up and they were going to be handled by the

1 individual Assistant State Attorneys themselves. And then as
2 more cases started coming in and they were identical motions
3 and that was identified, then it was determined that there
4 needed to be one single person that was going to be
5 responsible for arguing these. And as more and more arrived,
6 that person became me. And so, again, I apologize. I know I
7 should have probably determined that this was going to be an
8 issue a month ago. And that wasn't the case.

9 As far as the other motion goes, I did receive some
10 guidance from Garrett Berman, who is a senior lead DUI
11 Assistant State Attorney. And he provided me with a motion
12 that is similar to this one. However, I have changed a
13 significant portion of it and taken quite a bit out and
14 fashioned it to be towards this case. And that's -- I
15 believe after -- I believe at least four of the subjects are
16 mine and mine alone.

17 JUDGE MYERS: Question. Who is this person, Garrett --

18 MS. SANGHVI: Berman.

19 JUDGE MYERS: And where is he from?

20 MS. SANGHVI: He is from I believe the 17th Judicial
21 Circuit.

22 JUDGE MYERS: 17th Circuit. Okay.

23 MS. SANGHVI: Yes.

24 JUDGE MYERS: Let's go back to Judge Conrad. When did
25 you find out that you were going to be the designated

1 Assistant State Attorney to handle this matter?

2 MS. SANGHVI: Judge, if memory serves me correctly,
3 approximately a month ago.

4 JUDGE MYERS: Approximately a month ago. So prior to
5 that, there were at least, let's say in my example, five
6 other Assistant State Attorneys, just for an example, who
7 were handling I guess their own individual matters, but they
8 were on this same issue? Would it be fair to say that even
9 at that point -- this includes you in that five for example,
10 each state attorney probably should have been at least
11 looking into addressing whatever issues that came up with
12 regard to their motion? Is that fair?

13 MS. SANGHVI: Yes, Judge.

14 JUDGE MYERS: And as the case progressed and you folks
15 looked at it and massaged it and researched it and did
16 whatever you needed to do, when it came down to the fact that
17 a decision was made that you would be the lead person if you
18 will, and then now you tell me that that happened about a
19 month ago, and at that point you probably could have or
20 should have started to make some decisions as to whether or
21 not you wanted to or needed to file the motion that you did
22 or something similar to attack the defense's motion?

23 MS. SANGHVI: Yes, Judge.

24 JUDGE MYERS: Even if you were contemplating and you
25 were still in the process of putting this together, I believe

1 it would have been prudent for at least the State through you
2 to at least have notified Mr. Isaak and the courts that, hey,
3 it is the State's intention to file something in opposition
4 and we'd like to have it heard presumptively prior to today's
5 hearing, or at best put folks on notice and give us the
6 information so we could have had adequate time to review it
7 and then the Court to make a determination whether or not,
8 one, it was timely filed, and two, whether or not it was
9 something that could have been heard prior to Mr. Isaak's
10 motion and determining whether or not it would be
11 dispositive. And that's the problem that I'm having.

12 MS. SANGHVI: And, Judge, I am in 100 percent agreement
13 that this should have been filed earlier. However, the
14 majority of the motion is based on, you know, rule 3.190.
15 And that's something that the State would be entitled to have
16 a hearing on, attention given prior to any motion regardless.
17 So you must determine any time there's a motion filed whether
18 or not the motion is facially sufficient. And whether we
19 filed a motion or not, that's something that both of you
20 would be required to do. So just because it's written and
21 it's filed, doesn't mean it doesn't -- you know, it's now all
22 of the sudden excluded from that attention.

23 JUDGE CONRAD: Yeah. But three-fourths of the motion
24 have nothing to do with that.

25 MS. SANGHVI: Well, the other part of the motion

1 involves --

2 JUDGE CONRAD: Correct?

3 MS. SANGHVI: Yes, Judge.

4 JUDGE CONRAD: Okay.

5 MS. SANGHVI: Involves jurisdiction, which --

6 JUDGE CONRAD: Well, now you're saying, well, that's a
7 motion that everybody knew about. I mean, you know, 3.190,
8 you're citing the rule. Everybody should know that that's
9 part of it. So that could have been filed a month, two
10 months ago, right, a motion to strike for being insufficient?

11 MS. SANGHVI: Yes, Judge.

12 JUDGE CONRAD: And you're saying that -- you make it
13 seem like it's so fundamental that anybody would have known
14 that instantly and that motion could have been filed and then
15 you could have done a second motion to strike or an amended,
16 right?

17 MS. SANGHVI: Yes, Judge.

18 JUDGE CONRAD: Okay. So that one really missed by two
19 and a half month.

20 MS. SANGHVI: But, Judge, by that same token, there
21 would not even need to be a motion filed. I could have
22 presented this argument today without having filed anything.

23 JUDGE CONRAD: Okay. But that still doesn't get back to
24 the other part of your motion.

25 JUDGE MYERS: You could have asked, right?

1 MS. SANGHVI: Yes, Judge. I'm not denying --

2 JUDGE CONRAD: So when were we supposed to address that,
3 the legally sufficiency of the motion? When were w going to
4 address that? Because today is an evidentiary hearing.
5 People are here. People have flown in. The purpose was to
6 have evidence, not a legal argument regarding the sufficiency
7 of the motion. That's why it's an evidentiary hearing. So
8 when were we supposed to hear that part of the motion, given
9 the fact that today was clearly from everyone's understanding
10 to be an evidentiary hearing?

11 MS. SANGHVI: And, Judge, I apologize. I don't have an
12 answer for you. All I can do is cite to the statute,
13 3.190(h), subsection 3, that says before hearing evidence,
14 the Court shall determine if the motion is legally
15 sufficient. And if not, the motion shall be denied before
16 the presentation of any evidence. The Second DCA has been
17 very clear on what the word "shall" means.

18 JUDGE MYERS: But even with that mandate, do we forget
19 about due process considerations and notice considerations?

20 MS. SANGHVI: Judge, it's the State's position that
21 notice doesn't need to be required for this. This is just
22 simply inherent in any motion. It must be legally sufficient
23 before it is heard. That's something that's just -- that's
24 assumed to be done, and it must be done by the trial Court.

25 JUDGE MYERS: I hear what you're saying, but I have an

1 issue with that. First of all, I don't like to assume
2 things.

3 Secondly, if it's the State's position that Mr. Isaak's
4 motion is legally insufficient or whatever argument would be
5 and you would like to make that presentation to the Court, I
6 would believe that due process considerations, notice
7 considerations to Mr. Isaak because he's already filed his
8 motion and he's taken a position on his motion -- if the
9 State takes an opposite position and you have documents to
10 file, cases to present, argument to be made that would be
11 contrary to Mr. Isaak's positions, at a bare minimum he
12 should have notice in order to be able to make a presentation
13 and defend his position, okay, because for all intents and
14 purposes, I would believe, and you can correct me if I'm
15 wrong, that he feels that his motion is legally sufficient
16 and he would go about the business of making his argument on
17 his motion. And that's not to say that he's right or wrong,
18 but that would be potentially the position that he would
19 take. But the State is saying, no, Judge, we read the
20 defense's motion and it is legally insufficient for the
21 following reasons. Well, maybe then he needs to go back and
22 take a second look.

23 And he can either agree or disagree or take whatever
24 position that he needs to take. And that's where the
25 loggerhead comes in, because what I believe you are

1 suggesting is before we get to the merits of an evidentiary
2 hearing of Mr. Isaak's motion that this Court must address
3 the issue of whether or not the motion is facially
4 sufficient, because if we find that it is not facially
5 sufficient or that we don't have jurisdiction to hear this
6 matter, if that would be part of your argument, then we don't
7 even get to Mr. Isaak's motion. Is that fair?

8 MS. SANGHVI: That's correct, Judge. But the State is
9 not arguing that this Court does not have jurisdiction.

10 JUDGE MYERS: Okay.

11 MS. SANGHVI: It's the State's position that there is
12 dual jurisdiction and the Court should defer the jurisdiction
13 to the administrative courts. However, there is no point in
14 the State saying that this Court does not have jurisdiction
15 to address this matter.

16 JUDGE CONRAD: Let's go to Mr. Isaak.

17 Regardless of the administrative hearing argument in the
18 motion to strike, then the State is suggesting that they can
19 raise the issue of the sufficiency of the motion prior to
20 hearing any evidence under 3.190. So regardless of whether
21 they did or didn't tell you about that, and I'm assuming they
22 didn't until yesterday, but I don't know that to be true,
23 then wouldn't we have to listen to argument first on that
24 issue before we may consider evidence?

25 MR. ISAAK: No, sir.

1 JUDGE CONRAD: Okay.

2 MR. ISAAK: Because, again, when you take into
3 consideration the difference between a motion to suppress
4 where the witness comes in here locally versus a motion
5 dealing with the breath test where the experts are coming in
6 from all over the country. It's a very different situation.
7 So, in essence, just as Judge Myers indicated, I think the
8 State by coming in in the 11th hour, 11.9th hour, effectively
9 waived any objection they had to the sufficiency of the
10 motion.

11 JUDGE CONRAD: Because it says before hearing evidence,
12 the Court on the same day shall determine if the motion is
13 legally sufficient. And she raises that argument in her
14 motion to strike. But your position then, on 4:30 the day
15 before, that that specific argument to your motion to
16 suppress has been waived?

17 MR. ISAAK: Waived.

18 JUDGE CONRAD: Okay. You want to address that briefly
19 or not, Ms. Sanghvi?

20 MS. SANGHVI: Judge, I --

21 JUDGE CONRAD: You waived it, too late, you waived it.

22 MS. SANGHVI: Judge, I don't believe there is anywhere
23 in the statute where it says the State can waive that right.
24 I believe that word is shall, no matter what, at any point,
25 at any time. Before that hearing, the trial court must make

1 a determination. And, Judge, also I don't think flying in
2 experts from Timbuktu would add anything to the argument that
3 this motion is insufficient or give any sufficiency to this
4 motion. That should be excluded from consideration when
5 looking at the --

6 JUDGE CONRAD: Let me ask another question. And either
7 side can answer the question. If we were to decide that we
8 should consider the motion to strike, which includes your
9 administrative hearing argument, and if we decide that given
10 the issue and the lateness of the motion and the case law
11 that went into researching and reviewing in order to make a
12 proper decision and that not be accomplished within today's
13 timeframe, is there any legal authority given that that would
14 allow the cost that had been incurred in bringing these
15 witnesses here by the defense -- is there any legal authority
16 that would allow those costs to be taxed and paid for by the
17 State? Do you know?

18 MS. SANGHVI: I do not know, Judge.

19 JUDGE CONRAD: Mr. Isaak, do you know?

20 MR. ISAAK: Judge, it's a fiasco to get money from the
21 State.

22 JUDGE CONRAD: Okay. Well, I'm not sure that's --

23 MR. ISAAK: It's --

24 JUDGE CONRAD: I understand the statement.

25 MR. ISAAK: I mean, I've talked to Mr. Swope, who has

1 been hired incases where defense has been found indigent for
2 cost. And so his fee has come from State funds. And it's
3 taken a year, year and a half for -- three years to get paid.

4 So that's --

5 JUDGE CONRAD: So even if there was legally authority,
6 the practical effect is you'll probably either never see a
7 dollar or a dollar is not going to come for three, four, five
8 years. Okay.

9 MS. SANGHVI: Judge, if I may, I have --

10 JUDGE MYERS: Yes, ma'am.

11 MS. SANGHVI: It is the burden of the defense to present
12 a facially sufficient motion. So how is this being taxed to
13 the State?

14 MR. ISAAK: The motion is sufficient. It's absolutely
15 sufficient. There is nothing insufficient about it.

16 JUDGE CONRAD: Let's say we may agree with your position
17 potentially on that level. But there's also the whole issue
18 of considering whether we should accept jurisdiction to begin
19 with, which may be the first issue to resolve since if we
20 decide there's not jurisdiction, then we wouldn't even
21 entertain the motion, okay? That's the problem. And that's
22 the issue. At least your argument is we need to address that
23 first. And I'm not sure that we could address that issue
24 adequately, given the grammars of your late filing and the
25 fact that it would force us to make a ruling today that we

1 may or may not have the ability to do sufficiently. That's
2 the problem. And if we don't go forward with the hearing
3 today, that means people have flown in at their expense.
4 Then who should pay for that, them? Because you filed the
5 motion at 4:30 yesterday afternoon. Does that answer your
6 question at all?

7 MS. SANGHVI: Yes, Judge.

8 JUDGE CONRAD: Okay.

9 JUDGE MYERS: Two things for me. One, I believe the
10 State conceded, and correct me if I'm wrong, that the county
11 court does have jurisdiction. I believe you made that
12 statement. You indicate that there is dual jurisdiction
13 between the county court and the administrative courts on
14 this issue, but that you are asking that this Court defer to
15 the administrative process, number one.

16 Secondly, both State and defense hit the nail right on
17 the head when, Ms. Sanghvi, you said that the motion is
18 insufficient, and Mr. Isaak said the motion is sufficient.
19 And that's the heart of the matter right there, because a
20 determination has to be made before we even get to the
21 substantive issue of whether or not we can even consider the
22 defense's motion. All right. Therein lies the quandary.

23 We're going to take about 10 minutes, folks, and we'll
24 get right back to you.

25 (Recess.)

1 JUDGE MYERS: All right. The State is present. The
2 defense is present. Judge Conrad and I have conferred.

3 I think the first issue we need to deal with is whether
4 or not this Court has a subject matter jurisdiction to hear
5 this. The State does otherwise concede that we do have, and
6 we will so find -- even though that the State is asking that
7 the Court defer to an administrative action on this mater, we
8 will find that this Court does have the subject matter
9 jurisdiction to hear it. And we will hear it, so in part
10 your motion is denied with regard to that issue. So we will
11 hear it.

12 The State has filed its motion to strike the defendant's
13 motion and has argued that the Court with regard to rule
14 3.190(h) of the Florida Rules of Criminal Procedure, which
15 says that before hearing evidence, the Court shall determine
16 if the motion is legally sufficient. If it is not, the
17 motion shall be denied. And I believe that it's the State's
18 position that prior to hearing any argument to hearing any
19 argument on the merits of the defendant's motion to suppress,
20 that the Court must make the first and threshold
21 determination as to whether or not that motion is legally
22 sufficient based upon the dictates of the rule and that the
23 word "shall" is mandatory language that the Court must
24 consider.

25 Notwithstanding the fact that the motion filed by the

1 State was at the 11th hour, I understand Mr. Isaak's position
2 that he received it at 11, 11.9 hour as he stated. And it
3 puts him in somewhat of a prejudicial vain. However, this is
4 a legal argument as to the sufficiency of the motion.

5 Mr. Isaak has stated this morning that he believes that his
6 motion is sufficient. And I'm sure that he's able to make
7 whatever argument legally as to making that determination.
8 So in that regard, I do not find that Mr. Isaak will be
9 overly prejudiced in order to at least defend his position.
10 He probably pursuant to the rules should not file something
11 that he feels that is not legally sufficient.

12 Looking at the case law, I believe it's the State's
13 burden to go forward on this issue if you're arguing that the
14 defendant's motion is legally insufficient.

15 MR. ISAAK: Judge, and if I may?

16 JUDGE MYERS: Yes. Yes.

17 MR. ISAAK: I don't believe this provision applies.

18 JUDGE MYERS: Okay.

19 MR. ISAAK: I didn't cite to this provision in my
20 motion.

21 JUDGE MYERS: All right.

22 MR. ISAAK: And I didn't cite a warrantless search.
23 That provision is specific to a warrantless search.

24 JUDGE MYERS: 3.190(h)?

25 MR. ISAAK: Yes, sir. I didn't allege a warrantless

1 search. So that -- and if you look, that provision doesn't
2 apply to any of the other motions. So the problem -- when
3 you take other people's -- other work from other
4 jurisdictions without seeing the motion that was filed in
5 that jurisdiction, a lot of the response that they give is
6 based upon the motion filed on the case.

7 If you look at my motions, none of them allege 3.190(h).

8 JUDGE CONRAD: Yeah. But we still have a legal
9 responsibility to determine the legal sufficiency, correct?

10 MR. ISAAK: But she is saying because of the rule, it's
11 in the rule. So you --

12 JUDGE CONRAD: No, no. Regardless of the rule, I mean,
13 isn't that a threshold question anyway, whether your motion
14 is legally sufficient under whatever --

15 MR. ISAAK: But that's --

16 JUDGE CONRAD: -- parameters you want to evaluate that
17 issue, then we have to --

18 MR. ISAAK: But that's a separate issue -- then
19 respectively, that's a separately issue. Then what she
20 cites --

21 JUDGE CONRAD: She might not cite the right rule. Let's
22 say we agree that it's not that rule. But she's saying that
23 the motion is not legally sufficient. Don't we have a duty
24 to resolve that issue before we get to any evidentiary issues
25 or any evidence you want to present on the --

1 JUDGE MYERS: Let me see your book, please.

2 MR. ISAAK: I -- actually, no. I disagree, Judge. I
3 think that based upon length of the filing, I think that she
4 waived that challenge.

5 JUDGE CONRAD: Well, that's a different argument.

6 MR. ISAAK: I think she --

7 JUDGE CONRAD: You say it's waived. But then let's say,
8 again, from a fundamental standpoint, if the motion is
9 legally -- and her argument is it's legally insufficient,
10 wouldn't we want to rule on that issue before we would
11 entertain considering evidence on the merits of the motion.
12 If it's not legally sufficient, then what are we ruling on?

13 MR. ISAAK: I see the point that you're making, except
14 for the fact that if she wants to challenge the sufficiency
15 of it, notwithstanding the fact that whatever rule she's
16 citing doesn't apply to the motion in particular, but you're
17 talking theoretically every motion should be legally
18 sufficient. Since she's talking about the inherent nature
19 of, we're talking about the inherent nature of the filing of
20 the motion and the response, by coming in at 4:30 yesterday
21 afternoon when there's no rule supporting her position, she's
22 waived it. She's given up the right to challenge it. And I
23 submit -- we've already lost an hour and a half.

24 JUDGE MYERS: Ms. Sanghvi?

25 MS. SANGHVI: Judge, I believe that is a typo. It's

1 supposed to be 3.190(g), subsection 3. And I did cite to
2 subsection 3, although I did say (h). It's not (h),
3 subsection 3. It is (g), subsection 3, and that is motion to
4 suppress evidence and unlawful search, period.

5 JUDGE CONRAD: I mean, if you look at (g), again, I know
6 it says motion to suppress evidence and unlawful search. But
7 if you look at subsection 2, contents of motion, it says
8 every motion to suppress evidence, whatever that means, every
9 motion to suppress evidence should -- it seems to say every
10 motion, shall state clearly the particular evidence sought to
11 be suppressed, the reasons for suppression, and a general
12 statement of the facts on which the motion was based. So is
13 it your position that that subsection doesn't apply to your
14 motion?

15 MR. ISAAK: I don't think that -- yes, I don't think it
16 does. But even if you find that it does, my motion contains
17 general facts. It gives --

18 JUDGE CONRAD: Well, that's a different issue. I mean,
19 the threshold is should we make a determination up front
20 whether it's legally sufficient or not.

21 MR. ISAAK: I don't believe --

22 JUDGE CONRAD: Or are we required to do that because she
23 has raised it, albeit through a motion last night or
24 yesterday? But the question of whether we shouldn't, whether
25 you're prejudiced or not, whether it was timely or not is a

1 different issue. From what I'm saying, is there a legal
2 basis that says that you can raise the objection and that we
3 should rule on it?

4 MR. ISAAK: I don't believe the rule applies in this.

5 JUDGE CONRAD: Okay.

6 JUDGE MYERS: And why?

7 MR. ISAAK: Because the motion in subsection (g), that's
8 dealing with warrantless searches. And if you look at -- it
9 specifically lists under (a) through (e) the areas or the
10 topics that can be covered under that motion. This is not
11 one of those motions. This motion is not being brought under
12 subsection (g). It's not a (g) motion. It's not. It's a
13 motion to suppress. It's a pretrial motion, but it's not a
14 (g) motion. And that specific provision that she's relying
15 on is related to that ruling. It doesn't apply.

16 JUDGE CONRAD: So you're saying there are no legal
17 standards for the motion?

18 MR. ISAAK: No. No. I'm not saying that at all. I'm
19 saying what she's saying -- obviously a motion has to be
20 legally sufficient.

21 JUDGE CONRAD: Okay.

22 MR. ISAAK: Every motion that's filed has to be filing
23 of faith that it has to be legally sufficient. But she's
24 relying upon the fact that that rule is what's governing.
25 This is not a (g) motion. It's not. I don't even believe

1 that this particular motion is governed under any of the
2 rules under 3.190.

3 JUDGE CONRAD: But you agree that it has to be legally
4 sufficient?

5 MR. ISAAK: Sure. Of course.

6 JUDGE CONRAD: Would that be a threshold determination
7 then?

8 MR. ISAAK: No.

9 JUDGE CONRAD: So if at the end of the day we listen to
10 eight hours of testimony and then when we decide for whatever
11 reason we agree with the State and say it's not legally
12 sufficient, does that make -- it doesn't make much sense to
13 me that we would do that.

14 MR. ISAAK: But, again, because there's no rule
15 governing this particular motion -- it's just the inherent
16 nature of a motion. Every motion has to be filed in good
17 faith and it has to be legally sufficient. But if she's
18 sitting back and she's hiding in the weeds and waiting to
19 challenge it, at some point you have to say you've given up
20 your right to challenge it. It's not a (g) motion. This
21 motion comes under Robertson.

22 JUDGE CONRAD: Even if I look under 3.190, because that
23 does generically cover every pretrial motion, not just the
24 ones under subsection (g), it says that each motion or other
25 pleading shall state the ground or grounds in which it was

1 based. Okay. That would for me be both legally adequate
2 grounds and factually sufficient grounds within the nature of
3 the motion. And it doesn't as their argument seem to suggest
4 it doesn't, then the motion would not be sufficient under
5 3.190. And then, again, wouldn't be appropriate to determine
6 and evaluate that issue before hearing eight hours or ten
7 hours or twelve hours of evidence? That's the question. And
8 you're suggesting it doesn't fall within subsection (g). You
9 agree that it does have to be legally sufficient. And so I'm
10 just a little bit -- I'm not sure what the -- your argument
11 is I am prejudiced and it was untimely. I understand that.
12 But if you're saying we can't consider that issue for some
13 legal reason, I'm not hearing that legal reason. I'm not
14 there.

15 MR. ISAAK: That's exactly why I think you shouldn't
16 consider it. She filed it at 4:30 in the afternoon.

17 JUDGE CONRAD: Okay.

18 MR. ISAAK: And quite honestly, it's ridiculous because
19 the motion is clearly sufficient.

20 JUDGE CONRAD: Well, again --

21 JUDGE MYERS: We may or may not get there. And that's
22 why we're at this juncture now. And I understand your
23 position that this is not a, quote, unquote, (g) argument,
24 really a (g) -- well, a (g) argument. But are we exalting
25 form over substance here? Even though your argument,

1 Mr. Isaak, and please correct me if I'm wrong, that she cites
2 the wrong provision if you will, okay, but her argument in
3 total is that your motion is facially insufficient. Would
4 you agree that's her argument?

5 MR. ISAAK: That's her position.

6 JUDGE MYERS: That's what I said. That's her argument,
7 not yours.

8 MR. ISAAK: Okay.

9 JUDGE MYERS: Okay.

10 MR. ISAAK: That's her position.

11 JUDGE MYERS: And if that's the State's position, the
12 State's further position I would suggest, and correct me if
13 I'm wrong, is that the Court must make a determination
14 whether or not there's facial sufficiency before we get to
15 any argument on the merits.

16 MR. ISAAK: I don't know that you do. Why?

17 JUDGE MYERS: Why?

18 MR. ISAAK: I don't know that you have to decide that.
19 For a (g) motion, it says. But for any other motion, there
20 is no rule that says you have to make that determination in
21 advance. No. There's no rule. 3.190 says that every motion
22 has to be filed and signed and --

23 JUDGE MYERS: Okay. Ms. Sanghvi?

24 MS. SANGHVI: Judge, the State would like clarification
25 on -- then if it's just filed as generic 3.190, pretrial

1 motion, because that right there goes to show the
2 insufficiency of this motion. We don't even know what
3 statute it's filed under. If you look under -- on page 30 of
4 the State's motion to strike, roman numeral -- subsection
5 roman numeral 11, first line right there, it states although
6 the defendant's motion is titled motion to suppress the
7 breath test and breath results, it does not fall under either
8 of the enumerated grounds for a motion to suppress under rule
9 3.190(g) through (h). That is the State's position.

10 JUDGE CONRAD: Well, Mr. Isaak is suggesting that the
11 authority for the motion is found in case law and that it
12 doesn't necessarily have to fall within 3.190(g) through (h),
13 that he can file a pretrial motion based on the legal
14 authority under I'm assuming State v. Miles or one of the
15 other cases. And therefore it's a valid motion to file.
16 Whether it be as legally sufficient is a different issue. So
17 you're saying he has no legal authority to file the motion to
18 suppress the breath results at all?

19 MS. SANGHVI: No, Judge. I'm saying that it is not.
20 It's more than likely not even a motion to suppress. It's
21 not filed correctly as a motion to suppress because there
22 is --

23 JUDGE CONRAD: What would you characterize it with
24 regards to?

25 MS. SANGHVI: A motion in limine.

1 JUDGE CONRAD: A motion in limine, why? Not to allow
2 you to present the breath results?

3 MS. SANGHVI: Yes.

4 JUDGE CONRAD: For whatever reason?

5 MS. SANGHVI: Well, Judge, because this is not a
6 constitutional issue.

7 JUDGE CONRAD: Isn't that the effect of a motion in
8 limine, to suppress the evidence? Because you have the
9 evidence, right? I'm assuming everyone --

10 MS. SANGHVI: Yes.

11 JUDGE CONRAD: I'm assuming for purposes of where we
12 are, everyone submitted a breath test, correct? And there's
13 results of those breath tests that the State will try to
14 introduce into evidence, right?

15 MS. SANGHVI: Right.

16 JUDGE CONRAD: All right. So you can call it a motion
17 in limine, but isn't the effect of that if we granted a
18 motion in limine suppressing that evidence?

19 MS. SANGHVI: Yes, Judge.

20 JUDGE CONRAD: Okay. So it's potatoes, potato,
21 whatever. It's the same thing, different words. That effect
22 is the evidence won't come in under whatever theory, right?
23 If we agree with you.

24 MS. SANGHVI: Yes, Judge. It's a legally -- it's an
25 insufficient motion to suppress. It cannot be a motion to

1 suppress.

2 JUDGE CONRAD: Okay. Well, then let's say, well, that's
3 true. Let's say we treat it then as a motion in limine.

4 MS. SANGHVI: Uh-huh.

5 JUDGE CONRAD: Then we don't have to consider the legal
6 sufficiency of a motion in limine?

7 MS. SANGHVI: No, Judge. That's not what I'm saying at
8 all. I'm saying that under 3.190, you must consider the
9 legal sufficiency of the motion. That's --

10 JUDGE CONRAD: Are you hearing your arguments right now?
11 You're saying it's not a motion to suppress. 3.190 doesn't
12 apply. It's really a motion in limine. And then you say but
13 under 3.190, then we have to determine the legal sufficiency.
14 But you've just said it's not a 3.190 motion. That's not
15 consistent to me. So if it's a motion in limine from your
16 argument, then what's the legal standard? Do we have to
17 determine legal sufficiency or not under motion in limine?

18 MS. SANGHVI: Yes, Judge. You have to determine the
19 legal sufficiency of any motion in limine --

20 JUDGE CONRAD: But not under --

21 MS. SANGHVI: -- I'm sorry, any pretrial motion.

22 JUDGE CONRAD: -- the rule though. You're not referring
23 to the rule then because that doesn't apply.

24 MS. SANGHVI: Judge, if I may look over what the
25 authority is under -- is it Miles or Robinson that's --

1 MR. ISAAK: Under Robinson, Florida Supreme Court. You
2 have a copy of it. 604 So.2d 783. The Court says if the
3 State -- and I'm reading under headnotes five and six. If
4 the State follows the HRS checklist, now it's FDLE, and the
5 trial court's determination that the predicate has been
6 established is clothed with the presumption of correctness,
7 citing to footnote six. Of course, the defense still has the
8 opportunity to rebut the presumption created by the statutes
9 cited in State v. Bender. For example, the defense might
10 challenge the HRS regulations themselves as being
11 scientifically unsound, but the burden would rest on the
12 defense to prove this point.

13 So initially the burden rest with them. Once they meet
14 the checklist, then the burden shifts to me on this type of
15 challenge. And they specifically talk about an unsound
16 regulation. Scientifically unsound issue.

17 JUDGE CONRAD: Anything else from the State?

18 MS. SANGHVI: Judge, I'm not -- I'm sorry. I'm not
19 understanding how that relates to this pretrial motion issue.

20 JUDGE MYERS: I'm sorry? Go ahead.

21 MS. SANGHVI: I'm not understanding how that subsection
22 in Robertson relates to this motion issue or what authority
23 the defense has in filing this motion. I'm still unclear on
24 that.

25 JUDGE MYERS: So by arguing Robertson, are you saying

1 that we're moving off of the rule requirement, that the rule
2 requirement does not apply?

3 MR. ISAAK: I'm not sure I understand the question.

4 JUDGE MYERS: Well, initially we were dealing with
5 whether or not the Court had to follow the mandates in 3.190.

6 MR. ISAAK: Yeah. I don't think that rule --

7 JUDGE MYERS: Right. That's where I'm --

8 MR. ISAAK: I don't think it applies. No. And I think
9 the Miles case also talks about -- I didn't read from Miles,
10 but both Miles and Robertson both talk about challenging
11 sufficiency of the motion.

12 JUDGE CONRAD: Have you read Miles and Robertson,
13 Ms. Sanghvi?

14 MS. SANGHVI: Yes, Judge.

15 JUDGE CONRAD: According to -- Miles starts out DUI
16 manslaughter case. Miles filed a motion to suppress, or in
17 the alternative a motion in limine to exclude the breath
18 alcohol test results based on the alleged insufficiency of
19 the Florida Department of Law Enforcement regulations
20 governed in testing his blood sample. Is that what happened
21 there?

22 MS. SANGHVI: Judge, I'm sorry. Where are you reading
23 from?

24 JUDGE CONRAD: The first paragraph, where it says
25 proceedings to date.

1 MS. SANGHVI: On Miles?

2 JUDGE CONRAD: Yeah. Didn't they file a motion to
3 suppress or in the alternative motion in limine to suppress
4 the breath results because there was insufficient regulations
5 by the FDLE governing the testing of -- a blood test? That's
6 what that case stands for. Did the Court in that case say
7 that you can't file a motion to suppress based on the
8 insufficiency of the administrative rules?

9 JUDGE MYERS: Did you find it?

10 MS. SANGHVI: No, Judge.

11 JUDGE MYERS: Here you go. I'll help you out right
12 here. Highlighted line right there.

13 MS. SANGHVI: Oh, okay. Your question is --

14 JUDGE CONRAD: Isn't that the procedural posture of that
15 case, on the motion to suppress or in the alternative motion
16 in limine, basis of the motion is challenging the sufficiency
17 of the administrative rules regarding blood testing? Isn't
18 that the facts in Miles? And did they rule in that case that
19 the motion was legally deficient because it was a motion to
20 suppress?

21 MS. SANGHVI: No, Judge. And that is not -- that's not
22 the basis of the State's argument, that because it's titled
23 incorrectly, that that becomes a facially insufficient
24 motion. Does that --

25 JUDGE CONRAD: Okay.

1 JUDGE MYERS: Mr. Isaak?

2 MR. ISAAK: I don't have anything further, Judge.

3 MS. SANGHVI: I have no idea if the defendant's motion
4 in State v. Miles was facially sufficient or not. I just --
5 all I have from this is what it was titled. And Bender is
6 right on point. And it says this is not a constitutional
7 issue. And that's why the State's position is that it's not
8 properly designated as a motion to suppress. However, that's
9 what Mr. Isaak has represented this motion to be by entitling
10 it a motion to suppress. However, he has not cited a statute
11 under which he filed this motion under.

12 MR. ISAAK: The cases are riddled -- the motion is
13 riddled with case law. All the cases, Miles, Robertson, it's
14 everywhere in my motion.

15 JUDGE MYERS: I guess that was going to be my question,
16 is, Ms. Sanghvi, if you're saying that Mr. Isaak's motion
17 does not cite a statute by which he wishes to make his
18 argument, is he otherwise precluded from making that argument
19 if he says that he has case law that would potentially
20 support his position?

21 MS. SANGHVI: No, Judge.

22 JUDGE MYERS: Okay.

23 MS. SANGHVI: That's not the State's position at all.
24 The State's position is that the motion as it is is facially
25 insufficient. It doesn't allege anything that a motion under

1 3.190 should. And, Judge, if you look at McCray, it's a
2 second DCA case --

3 MR. ISAAK: Not a DUI.

4 MS. SANGHVI: Not a DUI. That is correct. However, it
5 does discuss the determination that a trial court must make
6 prior to hearing any evidence.

7 MR. ISAAK: Right, on a warrantless search, 3.190,
8 subsection (g).

9 JUDGE MYERS: Which is not your position.

10 MR. ISAAK: Which is not my position. I mean, I don't
11 know what else I have to do. Two supreme court cases that
12 say that I can do this. I don't think anybody is not on
13 notice of what the issues are here. The motion is riddled
14 with facts. Everybody knows what the issue is here, what the
15 problem I'm alleging is. So I don't think that her argument
16 is genuine at all.

17 And now I'm really starting to get upset over the fact
18 that we've got \$7,000 invested in these two gentlemen sitting
19 here. And this was supposed to start two hours ago. So if
20 I'm noticeably getting upset, I apologize for that. But
21 we've come to a point this is not affecting my ability to
22 adequately make the presentation. And now we're talking
23 about it affecting my client's rights.

24 JUDGE MYERS: Yes, ma'am?

25 MS. SANGHVI: Judge, the cases that defense is citing

1 are simply stating that you can file a motion that discusses
2 breath test results. And that's not what the issue is here.
3 The issue is in this case the defendant's motion is facially
4 insufficient. It's not about whether or not the Miles motion
5 was facially insufficient or the Robertson motion was
6 facially insufficient. It's whether or not this Court must
7 determine whether under the rules Mr. Isaak's motion is
8 facially insufficient. I'm not saying that he cannot address
9 this topic. However, I'm saying that his motion did not
10 sufficiently lay out the specific facts he needs to, to meet
11 this threshold burden. It's not the question of the topic.
12 It's the question of the manner.

13 JUDGE MYERS: Okay. So if that's your position, that
14 Mr. Isaak did not lay out sufficient facts to sustain his
15 motion, could you not make that argument still and Mr. Isaak
16 make his argument as to why he believes he did make a
17 sufficient showing and the Court can hear his argument, hear
18 his presentation? And then if we so find after hearing all
19 of this, giving everybody equal opportunity to make their
20 presentations, if the Court finds that we read his motions,
21 we listened to his arguments, we find that the motions were
22 not factually sufficient and is deficient in some way and
23 then we can make a ruling, or if we find that what he did
24 present in his argument, coupled with what he wrote in his
25 pleadings are sufficient and we still can make a ruling.

1 Because I think the bottom line is Mr. Isaak wants to get to
2 his presentation.

3 MR. ISAAK: Yes, sir. Thank you.

4 MS. SANGHVI: Well, Judge, the issue is that then you
5 start factoring in this evidence that he's going to start
6 bringing in into the legal sufficiency of the motion. And
7 you need to make a determination prior to any evidence that
8 whether or not the motion is sufficient before you can go on.
9 I mean, you can make a determination that he didn't present
10 enough evidence after he determined that the motion is
11 facially sufficient to deny the motion. However, before you
12 can even get to that point, you need to make a determination
13 whether or not the motion on its face is sufficient.

14 JUDGE MYERS: Okay.

15 MS. SANGHVI: And the statute is clear on that, prior to
16 any evidence.

17 JUDGE CONRAD: I mean, I've done the before. Okay. And
18 there's multiple cases. That's the reason for the
19 consolidation. But I hope that you all understand that doing
20 this on bank, given the nature of the issues and all of that,
21 make the process more difficult and make the process longer
22 than otherwise that it would normally take. This was the
23 choice of whoever made it. And I'm just going to tell you
24 from my perspective, is that we're going to do this
25 systematically. And unfortunately if it takes more time than

1 has been allocated today, then it takes more time than has
2 been allocated today. You know, but I'm not going to not
3 issue a legal ruling because witnesses may be here from
4 somewhere else and someone is paying the tab. So that's not
5 going to be a reason not to rule on the State's motion. And
6 I think in order to do that, we need an opportunity to
7 discuss the issue and then come back and let you know how
8 we're going to proceed. So I think that's what we're going
9 to do. And that's just the way the system works. I've done
10 this three times. I know Judge Myers has had the opportunity
11 to do it. It doesn't work like an express train. And so
12 we're not going to operate that way either.

13 So all right. We'll stand in temporary recess.

14 (Recess.)

15 JUDGE CONRAD: You want me to -- all right. We've
16 already addressed the first part of the State's motion to
17 strike based on the request to defer jurisdiction to the
18 administrative hearing process. And we've ruled on that.

19 The last element of the State's motion to strike has to
20 do with the legal sufficiency of the motion. Whether the
21 State has conceded or not, I'm not sure, but it seems to be
22 that at least in their argument 3.190, subsection (g) or (h),
23 whatever one they're referring to, I think it was originally
24 subsection (g), the State suggests that prior to making a
25 ruling on the motion to suppress, it requires the Court to

1 determine legal sufficiency of the motion. That specific
2 section is a motion to suppress evidence and an unlawful
3 search. So the Court finds there is no specific provision
4 that would govern what the Court is required necessarily to
5 do from a rule standpoint on the defendant's motion to
6 suppress in this case.

7 And additionally, with respect to the issue of
8 timeliness, this is one of those issues that the Court has to
9 balance the relative interest of the parties and render a
10 ruling that is consistent with fairness. And under these
11 circumstances, and we're going back to a motion that was
12 filed on March the 1st, the State would have had possession
13 of that motion. The State, whether you were involved or not,
14 Ms. Sanghvi, from the beginning in all of these cases, you
15 were involved with your cases from the beginning. And there
16 should have been a timely motion to strike based on that
17 argument that the motion was legally insufficient so that the
18 Court would have addressed that issue before today, made a
19 ruling, and would have given the parties the benefit of that
20 ruling before occupying almost two hours of today's hearing
21 with that issue.

22 And so the Court is finding that your motion to strike
23 was untimely, that it does result in prejudice to the
24 defendant, and therefore we're denying the motion to strike
25 with respect to the argument of legal sufficiency.

1 So we will hear the motion and rule on the motion based
2 on the merits and the evidence presented, okay? So --

3 MS. SANGHVI: Judge, may I please respond?

4 JUDGE CONRAD: There's no response. I made a ruling.
5 So that's it. I think we've already spent two hours getting
6 to where we should have been at 9:00. And I don't believe
7 there is an adequate response to be honest with you that you
8 could make for filing a motion at 4:30 the day before,
9 addressing issues that go to the essence of the motion. I
10 don't understand that point.

11 But I've ruled. And you've explained it. And we're
12 moving forward, okay?

13 MR. ISAAK: Thank you, Judge.

14 When we had one of our previous meetings, I indicated to
15 the Court that I was going to try to make things very easy
16 for appellate record purposes. This is the original, Judge.
17 And I have one for each one of Your Honors. These are the
18 exhibits I intend to offer into evidence. And this way
19 they're tabbed.

20 JUDGE MYERS: That's for the clerk?

21 MR. ISAAK: That's for the clerk. It says original on
22 it. One of these is for you. It says Judge Myers. Yes.
23 This is yours.

24 You've already seen a lot of this stuff. So there are
25 11 exhibits. They're listed specifically as to what each

1 exhibit is so that there's not going to be any issues. I did
2 this for convenience's sake. And so Your Honors, I'm
3 actually going to ask that these be accepted into evidence.
4 I don't think the State has an objection to the exhibits.

5 JUDGE MYERS: Any objection by the State to defendant's
6 list of exhibits?

7 MS. SANGHVI: Judge, may I have a moment?

8 JUDGE MYERS: Yes.

9 MR. ISAAK: Does it matter which one I --

10 JUDGE MYERS: Sir?

11 MR. ISAAK: Are they all on? They all working? Does it
12 matter?

13 COURT REPORTER: Yes.

14 MR. ISAAK: Oh, okay.

15 MS. SANGHVI: The State has no objection.

16 JUDGE MYERS: All right. It has been marked as Defense
17 Exhibit 1, Composite.

18 MR. ISAAK: Well, I'm going to ask that each exhibit, 1,
19 2, and 3 come in as Defense's 1 through 11, as they're listed
20 because I've listed all of them.

21 JUDGE CONRAD: Have they been marked for identification
22 on the actual exhibits?

23 MR. ISAAK: No, they have not. But if the clerk would
24 just mark each one as tabbed. So each exhibit should be
25 found at the appropriate number.

1 JUDGE MYERS: All right.

2 (Defense Exhibits 1 through 11 received into evidence.)

3 MR. ISAAK: The only other thing, our first witness is
4 going to be Mr. Swope. Your Honors, I am going to invoke the
5 rule. I'm going to ask that my two experts be allowed to
6 remain. But we're only going to end up calling Ms. Barfield
7 as a fact witness, so I'm going to ask that she be excused
8 under the rule of sequestration.

9 JUDGE CONRAD: All right. Why wouldn't we exclude all
10 witnesses?

11 MR. ISAAK: Because I intend to offer those two
12 gentlemen as experts. And under the rules, experts can
13 remain and listen to the other testimony of expert witnesses
14 if they --

15 JUDGE CONRAD: Are they going to hear something they
16 haven't heard before?

17 MR. ISAAK: They might.

18 JUDGE CONRAD: They might.

19 MR. ISAAK: They might. Yes.

20 JUDGE CONRAD: Okay.

21 MR. ISAAK: They might. They both work independently of
22 one another. And they may hear something different.

23 JUDGE CONRAD: Do you have an objection to the witnesses
24 staying or the defense witnesses and then Ms. Barfield being
25 excluded?

1 MS. SANGHVI: Judge, I don't see the purpose in having
2 Ms. Barfield excluded. She's a defense witness. And she has
3 been categorized as an expert far more times than both of
4 these experts combined.

5 JUDGE CONRAD: She's been previously qualified in any
6 court in the State of Florida as an expert in the issue we're
7 discussing today?

8 MR. ISAAK: I'm sure she probably has been declared an
9 expert in multiple issues, but I have no intention of calling
10 her as an expert. She's being called as a fact witness.

11 JUDGE CONRAD: But can the State call her as a witness?

12 MR. ISAAK: I don't know. They didn't list her, but --

13 JUDGE CONRAD: Well, I don't know if they listed anyone.
14 Did they file a list of witnesses?

15 MR. ISAAK: They have their generic list of witnesses.
16 I filed a list of witnesses.

17 JUDGE CONRAD: Okay.

18 MR. ISAAK: But they did not.

19 JUDGE CONRAD: If they don't call her, as you going to
20 call her as a witness, Ms. Barfield?

21 MS. SANGHVI: Yes.

22 JUDGE CONRAD: Okay. So why can't she stay? Wouldn't
23 the same requirements apply? If she's an expert and she may
24 listen to things she hadn't heard before and she's going to
25 present testimony, then she may benefit from hearing everyone

1 else testify.

2 MR. ISAAK: True, except I don't know what expert
3 witness testimony -- because I have no intention of calling
4 her as an expert. I'd ask that the prosecutor proffer to you
5 what expert testimony she's going to give that.

6 JUDGE CONRAD: We could do that with your witnesses as
7 well. I have no idea who they are. I've never met them
8 before. I've never had them in my courtroom before. I don't
9 know if they are experts in anything. So we're going to
10 proffer everyone before we begin. Is that where we're going?

11 MR. ISAAK: Well, if she's intending on calling her as
12 an expert -- because she's a fact witness.

13 JUDGE CONRAD: For you.

14 MR. ISAAK: For me. Right.

15 JUDGE MYERS: Here's my question. Does any rule, law,
16 statute, whatever require that expert witnesses be allowed?

17 MR. ISAAK: No. It's permissible.

18 JUDGE MYERS: It's permissible.

19 MR. ISAAK: It's discretion of the Court. It's
20 permissible.

21 JUDGE MYERS: Thank you.

22 MR. ISAAK: Absolutely.

23 JUDGE MYERS: All right. Not a problem.

24 Anybody who is going to testify in this matter, raise
25 your right hands for me, please. Do each of you swear or

1 affirm that any testimony that you give in this cause will be
2 the truth?

3 (The witnesses respond in unison.)

4 JUDGE MYERS: Put your hands down, please.

5 Call your first witness. Everybody else, outside.

6 MR. ISAAK: I'm going to call Mr. Swope.

7 JUDGE MYERS: Okay. Where would you like this
8 gentleman? Right here?

9 Sir, if you come up, take the stand, please.

10 MS. SANGHVI: Judge, the State would like to inquire as
11 to the purpose of Mr. Daniels being present in the courtroom
12 in this case.

13 JUDGE MYERS: I have no idea who Mr. Daniels is.

14 MR. ISAAK: It's a courtroom in the United States.
15 Anybody can come watch.

16 MS. SANGHVI: So he has no intention of testifying in
17 these matters at all?

18 MR. ISAAK: I'm not calling him as a witness, no.

19 JUDGE MYERS: He didn't stand and raise his right hand.
20 You can have a seat, sir.

21 So he's allowed to stay. It's an open courtroom.

22 You may inquire.

23 MR. ISAAK: Thank you.

24 One other thing. I believe the State will stipulate
25 there are eight machines in question. Their serial numbers

1 are -- all of the begin with 80. And they'll be followed by
2 000808, 000829, 0080, 000833, 00171, 003387, 003388, and
3 00513. I believe the State will stipulate those are all the
4 breath machines here in Hillsborough County and they're all
5 in question.

6 JUDGE MYERS: What says the State?

7 MS. SANGHVI: Judge, that sounded correct. I wasn't
8 able to quite catch all of those numbers. So as long as
9 we're discussing the Intoxilyzers in Hillsborough County
10 and --

11 MR. ISAAK: They are. They're Hillsborough County
12 machines.

13 MS. SANGHVI: I just don't know if that was actually
14 specifically mentioned in the defendant's motion.

15 JUDGE MYERS: Excuse me?

16 MS. SANGHVI: Judge, if I can have a moment?

17 JUDGE CONRAD: Let's do this while we're -- we have
18 multiple defendants that you are not personally retained to
19 represent; is that correct, Mr. Isaak?

20 MR. ISAAK: Correct.

21 JUDGE CONRAD: I have -- and I'm just going to go off
22 your list of exhibits for motion hearing. We started out
23 with Brian Debars, Ashok Bagdy, Brittney Beckem, and then you
24 go down the list and you have et al. But I think all of the
25 defendants that were notified for today are defendants that

1 are collectively represented by you, attorney Barry Tarracks,
2 attorney Jason Samis or Leslie Samis, and the Office of the
3 Public Defender. Is that correct?

4 MR. ISAAC: Yes, sir.

5 JUDGE CONRAD: And in prior conversations regarding
6 these motions, it's my understanding, and since all of the
7 attorneys are present, they can let me know if this is not
8 correct, that the parties have either adopted the motion or
9 have -- are willing to allow you to argue the motion on
10 behalf of their clients, and whatever evidence is presented
11 and whatever ruling that is made as to these cases will in
12 fact be binding as well on their clients. Is that your
13 understanding?

14 MR. ISAAC: Yes.

15 JUDGE CONRAD: All right. Let's do this.

16 Mr. Tarracks, is that your understanding that -- what
17 we're going to do here?

18 MR. TARRACKS: Yes, Your Honor.

19 JUDGE CONRAD: Mr. Samis?

20 MR. SAMIS: Yes, Your Honor.

21 JUDGE CONRAD: And who with the Office of the Public
22 Defender? Ms. Morris?

23 MS. MORRIS: Yes, Your Honor.

24 JUDGE CONRAD: All right. Great. All right.

25 Now I guess we're going back to the issue of the

1 Intoxilyzer. The specific serial numbers of the machines
2 that were used to administer breath tests in these cases; is
3 that correct?

4 MS. SANGHVI: Yes, Judge.

5 JUDGE CONRAD: Okay. So then the record is fine --

6 MR. ISAAK: The record is fine.

7 JUDGE CONRAD: -- that those are the specific
8 Intoxilyzers that cover all of the cases that are before us.

9 MR. ISAAK: Yes, sir.

10 JUDGE CONRAD: Okay. Great. Go ahead.

11 **RICK SWOPE,**

12 having been duly sworn, was examined and testified as follows:

13 **DIRECT EXAMINATION**

14 BY MR. ISAAK:

15 Q Would you please state your name for the record, sir?

16 A My name is Rick Anthony Swope, S-w-o-p-e.

17 MR. ISAAK: Okay. Your Honors, can I have the original
18 exhibits so that Mr. Swope can look at them?

19 BY MR. ISAAK:

20 Q All right. Mr. Swope, where do you work, sir?

21 A I have a copy, Swope Reconstruction Corporation.

22 Q Okay. And I'm directing your attention to Exhibit
23 Number 10. Is that your curriculum vitae that's been admitted
24 through stipulation?

25 A Yes.

1 Q Okay. And if you would, please, detail your educational
2 background for the Court.

3 A I have a bachelor's degree from St. Thomas University in
4 Miami. I have a Master of Science degree in technology and
5 engineering from the University of Miami. I just finished the PhD
6 program in engineering management. I haven't completed my paper,
7 but I've done all my courses.

8 As far as education, I'm certified. I teach for the National
9 Highway Traffic Safety Administration, Department of
10 Transportation, State of Florida. I've taught breath testing,
11 field sobriety testing around the country.

12 MS. SANGHVI: I'm sorry, Judge. I can't hear very well

13 JUDGE MYERS: Okay.

14 THE WITNESS: Sorry, ma'am.

15 MS. SANGHVI: And that was a master's degree from where?

16 THE WITNESS: University of Miami.

17 BY MR. ISAAK:

18 Q Now what is your work experience?

19 A Initially I was a police officer starting in 1974. I
20 was involved with breath testing starting in 1974. I'm still
21 working with it up to this date. Obviously the machines have
22 changed over the years, so I've been instructing in breath
23 testing. I have done work all around the country, testing
24 different types of devices. I do quite a bit in the State of
25 Florida, but I've done many other states. I've done work in New

1 York, Colorado, Washington, Virginia, Pennsylvania, Wyoming,
2 Montana, Michigan, Ohio. I've done work with all of those states
3 as far as breath testing goes, either for the government or for
4 defense purposes or doing review of machines, writing articles,
5 doing research, those kind of things.

6 Q And what training have you received in breath testing
7 through the course of your --

8 A Well, during the course of the time, obviously machines
9 changed. But over the years I've probably had, you know, 1,500
10 hours or so specifically with breath testing. But I'll kind of
11 stick with the Intoxilyzer, which the Court is probably more
12 familiar with. I initially was certified on the Intoxilyzer
13 series, starting with the 5000 series in 1984. And during that
14 time, I also took various courses from the factory. At that time
15 they were in Colorado before they moved to Kentucky, so I took the
16 factory courses. I took all the 5000 courses as that machine
17 progressed. I then took various courses up through and to the
18 8000. So I've done, you know, research, all the courses that were
19 available by the factory.

20 I was a police officer through 1990, which was prior to the
21 8000 coming in, but I did a lot of research at Florida
22 International University with a team of individuals involving the
23 8000 and the 5000, correlating those two machines.

24 Q And how many Intoxilyzer 8000s do you work with
25 currently --

1 A Well --

2 Q -- or have you worked with in your experience?

3 A Well, I have 10 that's available. In other words,
4 sometimes we only have two. But we have 10 that's available to
5 us, either through private individuals who own that and that could
6 be -- it could be I believe Coca-Cola or one of those companies
7 own a couple, Department of Transportation from other states.
8 There's owners of machines throughout the country that allow us to
9 use the machines for purposes as long as we maintain it, fix
10 whatever we do, and send it back to them. So we have access to
11 10.

12 Q And you mentioned earlier FIU University?

13 A Yes.

14 Q You maintain machines for FIU?

15 A Well, I maintain machines initially for Broward
16 Community College, at the breath testing program for probably 12
17 years. But FIU, they have none themselves. In other words, all
18 of our machines are rented or brought in to use. We work them in
19 the lab. And individual students are told what to do with the
20 machines. In other words, electrical people work it, mechanical
21 people, software people. And I direct basically what happens to
22 those machines, make sure that they're maintained properly, and
23 then ship them off back.

24 Q Now have you ever testified as an expert witness?

25 A Yes.

1 Q On the Intoxilyzer 5000?

2 A Yes.

3 Q On the Intoxilyzer 8000?

4 A Yes.

5 Q How many times -- how many counties in Florida have you
6 testified as an expert in breath testing?

7 A I think all of them. I can't recall any I haven't,
8 but --

9 Q How many states in the United States have you traveled
10 to and testified as an expert witness on breath testing?

11 A Twenty-six states, but I think about fifteen of those
12 were Intoxilyzer states. The rest of them had other machines.

13 Q Okay. And how many times have you ever been invited to
14 lecture in breath testing?

15 A Yes.

16 Q How many times?

17 A Well, I've been invited to lecture three or four hundred
18 times a year. I don't really do any anymore, but I'm asked every
19 day

20 Q Okay. How many different states have you gone to and
21 testified to as -- on topics of breath testing?

22 A Probably 30 maybe.

23 Q And now the copy of your curriculum vitae at number -- I
24 think it's number 10, that's not the one you gave me this morning.
25 There's actually a more recent one?

1 Q Good morning, Mr. Swope.

2 A Good morning.

3 Q What's the majority of your consulting business?

4 A Accident reconstruction, engineering activities.

5 Q Okay. And how much of your consulting business involves
6 DUIs?

7 A Maybe one percent or less.

8 Q Okay. And then of that less than one percent, how much
9 of that involves the Intoxilyzer?

10 A Well, it depends on -- you know, most of the cases I get
11 are breath cases, so that one percent would be probably somewhere
12 in there. I don't know. Most of them are breath cases that I get
13 though out of the one percent.

14 Q Okay. And that's current?

15 A Yes. I mean, those are the cases I take.

16 Q Okay. And specifically as to the flow sensor, how many
17 times have you been qualified as an expert to discuss the flow
18 sensor?

19 A Well, I don't think I've ever been asked specifically
20 about the flow sensor. I've talked about it. Usually they just
21 ask that I be qualified on the machine and then questions are
22 asked from there. But as far as each part, I've never been
23 qualified on a part of the machine.

24 Q Okay.

25 A I mean, that I recall.

1 Q And what specific education or knowledge do you have
2 about the flow sensor as it relates to the Intoxilyzer 8000?

3 A Well, taking the machine apart, doing research on it,
4 reading about it, attempting to figure out how it works versus
5 what happened with the old Intoxilyzer -- I shouldn't say old, but
6 the 5000 series, reviewing probably thousands of documents over
7 the past three or four years involving differences in breath
8 tests, how they relate to problems or possible problems that may
9 exist. I've spoken about it. I've lectured about it. We're
10 doing research on the flow sensor.

11 Q And where are you doing research on that?

12 A Well, I'm doing it either through FIU or through my own
13 company.

14 Q Either?

15 A Both. I mean, it depends on -- when we do machine work,
16 the tests are always on the flow sensor, which really -- I'm sure
17 you know this, but it's really not a flow sensor. Usually for the
18 Court's ease we call it a flow sensor. It's really a pressure
19 transducer. So there really is no flow sensor to speak on the
20 machine. It's really a pressure transducer, because as you're
21 aware, flow sensors only measure liquids.

22 Q Uh-huh. Well, for the consistency with maintaining what
23 Mr. Isaak has referred to in his motion, we'll call it the flow
24 sensor.

25 A Well, that's what the State refers to it as.

1 Q Okay.

2 A That's what's in all the documents with the State.

3 Q And so you alone refer to it as a pressure transducer?

4 A No. I think any engineer that knows what they're doing
5 refers to it as that because it really not a flow sensor. A flow
6 sensor is dealing with liquids.

7 Q And, Mr. Swope, are you in fact an engineer?

8 A Yes, absolutely.

9 Q In what?

10 A Industrial engineering.

11 Q Okay. And does that have anything to do with the flow
12 sensor at all? Is it --

13 A Well, I don't know if there is a degree with the flow
14 sensor. But certainly my degree covers scientific protocol.
15 That's what I do. So I research things and do scientific protocol
16 with the industrial engineering degree and the PhD degree that I
17 have -- or that I'm working on.

18 Q That you're working on.

19 A Right.

20 Q And you said all of your experiments with the flow
21 sensor -- I'm sorry, with the Intoxilyzer 8000 involve the flow
22 sensor?

23 A No. I never said that. What I said is, is that when
24 we're conducting experiments on the Intoxilyzer, several things
25 are looked at during each test phase. It could be radio frequency

1 interference. It could be time. It could be volumes. And
2 obviously that's the one thing that I look at all the time and I
3 direct people to look at things like the flow sensor, radio
4 frequency interference, temperature of the machines, those kind of
5 things, not specific, but trying to find out what's going on with
6 the machine.

7 Q So do you think that in your attempts to try to find out
8 what's going on with the Intoxilyzer, that that qualifies you in
9 any way to discuss the Intoxilyzer as it pertains to the flow
10 sensor?

11 MR. ISAAK: Objection; argumentative.

12 JUDGE MYERS: I'll overrule the objection.

13 You can answer if you can.

14 THE WITNESS: Well, yes, considering the State has no
15 engineers working on it whatsoever. And certainly this
16 machine works on engineering principles. There is no
17 engineers other than high school diploma people working on it
18 for the State, so I would assume I am qualified.

19 BY MS. SANGHVI:

20 Q And what's the basis of your knowledge of saying that
21 there is no engineers in the State of Florida that work on the
22 Intoxilyzer 8000?

23 A Because I've been here for over 25 years. And I've
24 never seen one engineer with FDLE at any time. I've never seen
25 one scientific protocol, even though I recommended it when I was

1 with the Department. I've recommended scientific protocols be set
2 on the machine for the past 15 years. I have made recommendations
3 to the Florida Department of Law Enforcement on how it should be.
4 And I've never spoken with or seen one engineer on the payroll in
5 the past 25 years.

6 Q Okay. So because you have never seen an engineer and
7 because you've made recommendations for there to be an engineer,
8 it's your statement today that there are no engineers in the State
9 of Florida that work on the Intoxilyzer?

10 MR. ISAAK: I'm going to object. It's irrelevant for
11 purposes of voir dire.

12 JUDGE MYERS: I'll sustain that objection.

13 BY MS. SANGHVI:

14 Q Mr. Swope, can you tell me when you've been published on
15 the Intoxilyzer 8000 when it pertains to -- just to the
16 Intoxilyzer 8000.

17 A I haven't been published on. I have provided
18 information for Dr. Rose and others to be published during our
19 studies, and I've gotten credit for that. But I have not
20 published an article myself. I don't do that. I do
21 reconstruction publications, not those.

22 Q And you've testified numerous times as an accident
23 reconstruction expert.

24 A Yes.

25 Q Would you say that the Intoxilyzer 5000 is very similar

1 to the Intoxilyzer 8000?

2 A Yes.

3 Q In what manner?

4 MR. ISAAK: Objection; relevance for voir dire.

5 JUDGE MYERS: Sustained.

6 MS. SANGHVI: Judge, he's going to apparently testify as
7 to the relation between the Intoxilyzer 5000 and 8000. I
8 just want to understand his expertise in the matter. That's
9 what they're intending to qualify him as an expert on, is the
10 relation between the 5000 and the 8000, how it relates to the
11 protocol.

12 JUDGE MYERS: Is that your intention, Mr. Isaak?

13 MR. ISAAK: Well, there is going to be some comparisons
14 about the testing process. But her question is not related
15 to his qualifications on the 5000. Basically the question
16 was irrelevant for purposes of voir dire. She's asking for
17 what the differences are. She's not asking about his
18 qualifications.

19 JUDGE MYERS: Sustain the objection. Ask your next
20 question.

21 BY MS. SANGHVI:

22 Q And what training specifically do you have on the
23 Intoxilyzer 8000?

24 A I was certified by an FDLE instructor named Jada Zager
25 (ph) on the 24 hour course. So that would --

1 Q Okay.

2 A That would be just the initial course, which is what the
3 officers were required to take. I took the same course. And then
4 everything else was done on my own or through the college or
5 through other individuals after that. Obviously no state training
6 because I wouldn't really learn much from it.

7 JUDGE CONRAD: Can I ask you a question? Certified as
8 what?

9 THE WITNESS: Well, as far as the operation. The 24
10 hour course, about eight hours of that encompasses how to
11 plug the machine in.

12 JUDGE CONRAD: As an operator? As an inspector? What
13 is the extent of the certification you're claiming.

14 THE WITNESS: The certification allows -- it follows the
15 24 hour rules and the introduction to the machine, how the
16 machine correlates to the 5000, how to give a breath test,
17 the 8000 versus the 5000.

18 JUDGE CONRAD: Yeah. But what are you certified as?

19 THE WITNESS: Just a technician.

20 JUDGE CONRAD: To administer a breath test --

21 THE WITNESS: Yes.

22 JUDGE CONRAD: -- or to, like, conduct an inspection?
23 That's my question.

24 THE WITNESS: Sorry, Judge. To administer. It's the 24
25 hour --

1 JUDGE CONRAD: Okay. As a breath test operator.

2 JUDGE MYERS: As an operator.

3 THE WITNESS: Yes.

4 JUDGE CONRAD: Okay.

5 THE WITNESS: I'm sorry.

6 BY MS. SANGHVI:

7 Q So you are a certified breath test operator?

8 A No. I was certified by and FDLE instructor, but I
9 cannot hold a permit because I'm not law enforcement. You can
10 only hold a permit if you're law enforcement.

11 Q So are you really certified then?

12 A Yes. I was certified by a Florida Law Enforcement
13 instructor who then retired about a month or two after he
14 certified me. But he couldn't give me a permit because I'm not
15 law enforcement. So I took the course just to find out what the
16 officers were learning during -- going from the 5000 to the 8000.
17 But I cannot have a state permit because I'm not an officer. So I
18 have his class he gave me, but I cannot hold a physical permit.

19 Q Okay. I'm just trying to understand this. You had
20 let's say a tutoring session that encompassed everything that an
21 agency operator, drug test operator would receive in a formal
22 course?

23 A Yes, correct.

24 Q Okay. But instead of going through the formal course,
25 you became certified by the FDLE instructor on your own time?

1 A Yes. I couldn't go through the course. The State would
2 not allow me to go through the course. The only way I could do it
3 was I had to go through the course on my own. They would not
4 allow me to attend the courses.

5 Q And so this is not a certified course?

6 A He's a certified instructor and gave me the certified
7 course. I just cannot hold a state permit because I'm not law
8 enforcement.

9 Q And when did you take this tutoring session?

10 A Probably about three years ago.

11 Q And how long has it been since you've been in law
12 enforcement?

13 A 1990.

14 Q Have you ever had anything that's been peer reviewed on
15 the Intoxilyzer 8000?

16 A No. Well, I haven't, no. FIU has, but not me. In
17 other words, information I give them, but I have not done my own
18 study per say.

19 Q And do you have any documentation that it was you in
20 fact that gave this evidence to them?

21 A You'd have to call them or get the information from FIU
22 or from Dr. Stephan Rose.

23 Q Do you have any specialized knowledge of FDLE rule
24 promulgation?

25 A I'm not really sure how to answer that.

1 Q Have you ever worked with FDLE on promulgating rules for
2 their breath test procedures?

3 A Well, I did with HRS, which actually ran the breath
4 program until 1988. I was involved heavily with the rules. FDLE
5 took it over right about the time I was leaving. So with the
6 breath testing program, yes, but it moved over to FDLE later.
7 They took that over. So specifically with FDLE, no.

8 Q And that's with the Intoxilyzer and the rules that
9 pertain to the Intoxilyzer?

10 A Yes. That was the 5000 though, not the 8000.

11 Q And what did you do there?

12 A Basically worked on moving the rules from the 4011 ASA
13 machine to the 5000 machine. That was in 1984. And I worked with
14 them as far as rules going through 1989. And that would be
15 submitting recommendations for rules, breath testing times,
16 control testing, items used in breath testing, breath tubes, low
17 volume samples, all of those other issues.

18 Q And, Mr. Swope, isn't it correct that anyone can submit
19 their opinions to FDLE as far as rule promulgation goes?

20 A Well, sure.

21 MR. ISAAK: Objection; argumentative.

22 THE WITNESS: Sorry.

23 MR. ISAAK: Not relevant to the issue of his
24 qualifications.

25 JUDGE MYERS: Ms. Sanghvi?

1 MS. SANGHVI: Judge, I'm asking him if he has any
2 specialized experience with rule promulgation, not whether or
3 not he's aware that everyone has an opportunity to initiate a
4 process.

5 JUDGE MYERS: But you answered that question. But your
6 next question was, "Could anyone submit?" So what's the
7 relevance of that with regard to his qualifications?

8 MS. SANGHVI: I can rephrase.

9 JUDGE MYERS: That would be good.

10 BY MS. SANGHVI:

11 Q Is there any involvement that you have with FDLE rule
12 promulgation that is not open to anyone else in the public to do?

13 A Not that I'm aware of, no.

14 Q Okay. And it's your testimony that you have looked at
15 an Intoxilyzer 8000 and that you have inspected it?

16 A Are you talking about your machines or --

17 Q The Intoxilyzer 8000.

18 A The machine itself? Are you saying a specific machine?
19 Which machines are you referring to?

20 Q The Intoxilyzer 8000 in general.

21 A Yes, I have. Up to 10 of them, yes.

22 Q And are any of those the Intoxilyzers that are used in
23 Hillsborough County?

24 A No.

25 Q Have you made any attempts to inspect those?

1 A Yes. Well, I made a request on a couple of previous
2 trials over the past few years, yes.

3 Q Past few years?

4 A Yes.

5 Q But those were for the Intoxilyzer 8000, not 5000?

6 A Yes, correct.

7 Q And you have not been able to inspect those?

8 A I haven't been given permission that I'm aware of, no.

9 Q And you are certified as an agency inspector. And
10 that's not a department inspector?

11 A No. Again, I cannot hold certification from the State.

12 Q Okay. Have you had any tutoring as to that subject?

13 A Again, I'm not sure how to answer that. We basically do
14 our own protocols and set them up for -- I set up the protocols on
15 what the machines -- how they're going to be taken apart and put
16 back together. Have I had specific tutoring to the 8000? No.

17 Q Are any of these protocols that you have come up with
18 been established as reliable in the field?

19 A We haven't published them for the field because we're
20 still trying to find out how the State is using the machines. So
21 we're still trying to -- we're trying to correlate as best as we
22 can what the State's procedures are and trying to correlate those
23 into our own studies to see what the State is doing and how it's
24 affecting the machine, either good or bad. So we're still working
25 on it.

1 Q And that would pertain to the flow sensor itself?

2 A That's one of them, yes.

3 MS. SANGHVI: Nothing further from the State.

4 THE WITNESS: Thank you, ma'am.

5 MS. SANGHVI: Judge --

6 JUDGE MYERS: Hang on.

7 JUDGE CONRAD: Do you have any follow-up?

8 MR. ISAAK: Just briefly.

9 **VOIR DIRE CROSS-EXAMINATION**

10 BY MR. ISAAK:

11 Q How many times have you been accepted as an expert in
12 breath testing?

13 A Probably over 800 times.

14 Q And estimate how many of those times where you were
15 accepted as an expert on the 8000.

16 A Now, probably maybe 75 to 80 just because it just came
17 into effect, you know, a few years ago, but somewhere around there
18 I suppose.

19 Q And how many times have you been accepted as an expert
20 on the 5000? The remainder?

21 A Yeah, 600 at least. Yeah.

22 MR. ISAAK: Nothing further in terms of qualifications.
23 So we're offering him as an expert on the 5000, 8000, and
24 scientific protocol.

25 JUDGE MYERS: Ms. Sangvhi?

1 MS. SANGHVI: The State is going to object to Mr. Swope
2 coming in as an expert. Using the standard, you have to
3 decide first if his testimony is going to actually help an
4 understanding of this scientific principle that's generally
5 alleged in this motion. It's still the State's position that
6 the defense's motion is vague and does not allege specific
7 facts. However, the facts that we do know are that the
8 defense is alleging that there should be rules promulgated by
9 FDLE to encompass the calibration of a flow sensor or the
10 validation of a previous calibration of the flow sensor. And
11 that's something that was stated in the motion. And I don't
12 see how this expert or Mr. Spoke could be helpful in
13 assisting both of you in understanding the calibration of a
14 flow sensor in this matter.

15 Mr. Swope has testified that he has never testified or
16 never been qualified as an expert to discuss the flow sensor.
17 Although he may have been qualified to discuss the
18 Intoxilyzer 8000, he knows nothing about rule promulgation
19 more than anybody else in the general public would. And his
20 knowledge of the Intoxilyzer 8000 consists of being a home
21 certified agency inspector, which sitting through countless
22 DUI trials, even those credentials have been commonly
23 criticized by defense as not being sufficient enough. And
24 here we have someone that wasn't even certified to do that
25 that just has an FDLE inspector give him a home tutoring

1 session and then claims to have some certified knowledge as
2 to being an agency inspector.

3 And as Mr. Swope stated, this is a 24 hour course, but
4 we have no record that he actually took 24 hours or anything.
5 And even as an agency inspector, he would not be sitting here
6 qualified to discuss the calibration of a flow sensor. I
7 would assure you that if I brought in an agency inspector in
8 here to discuss the flow sensor calibration, that there would
9 be no way that he or she would be qualified as an expert.

10 Going on, this is considered then a newer novel of
11 scientific principle to be discussing the Intoxilyzer 8000
12 flow sensors. As Mr. Swope stated, this has been around us
13 for a few years.

14 He has no published work when it pertains to the
15 Intoxilyzer 8000 at all, let alone towards flow sensors or
16 the calibration of flow sensors.

17 He says that he is currently working on studies to
18 understand how it relates to breath testing. And those
19 studies are unfinished. He's still working on them. And
20 although he may have contributed to some research at FIU,
21 this in no way qualifies him to discuss the Intoxilyzer 8000
22 and the flow sensors.

23 And Frye is very clear that the trial judge must
24 determine whether a witness is qualified as an expert to
25 present opinion testimony on this specific issue. And the

1 State concedes that Mr. Swope may be an expert on the
2 Intoxilyzer 5000 in the past and that he may be an expert on
3 accident reconstruction. As he stated, that is 99 percent of
4 his consulting business. However, as to the Intoxilzyer
5 8000, Mr. Swope has not shown, and the burden is on the
6 defense to show, that he is in fact an expert in this
7 specific field. And let alone not only on the Intoxilyzer
8 5000, but as to the flow sensor. And there is nothing that
9 has been published, peer reviewed, or accepted in the
10 scientific community that Mr. Swope has demonstrated that he
11 intends to present.

12 For these reasons, we ask that you exclude Mr. Swope as
13 an expert.

14 MR. ISAAK: Your Honor, he's been doing breath testing
15 for 25 years, starting with the A-something machine, moving
16 on to the 5000, moving on to the 8000. He has a bachelor's
17 degree, master's degree. He's completed the school portion
18 of his Ph.D. This is what he does. He's been accepted in
19 every county in Florida as an expert in breath testing. This
20 is what he does. His whole educational background is about
21 scientific protocol. He experiments and does study on this
22 specific machine. This is what he does. He is absolutely
23 qualified. And he's been accepted as an expert by judges in
24 Hillsborough County. He testified in front of Judge Courtney
25 as an expert on an 8000 machine in October of last year, was

1 the last time I hired him for one of my clients. So he's
2 absolutely an expert.

3 MS. SANGHVI: I was present for this trial. And
4 Mr. Swope in fact testified to retrograde extrapolation,
5 which is not --

6 MR. ISAAK: No. That's not true. He testified --

7 JUDGE CONRAD: Okay. Don't interrupt.

8 MR. ISAAK: -- to more than extrapolation.

9 JUDGE CONRAD: Mr. Isaak, don't interrupt.

10 MR. ISAAK: Sorry.

11 JUDGE MYERS: Go ahead.

12 MS. SANGHVI: Based on Mr. Swope's testimony, he has
13 never testified on the Intoxilyzer 8000 as it pertains to
14 flow sensors. He's never been determined to be an expert in
15 the calibration of such at all. And the State is not denying
16 that he's been qualified as an expert before. But it's this
17 subject, whether or not he can qualify as an expert to this
18 particular subject, whether or not he can aid the trial
19 judges as to this specific topic. And there's a lot of
20 freedom that comes along with being an expert. And at this
21 point, Mr. Swope has not demonstrated that he is entitled to
22 give opinion testimony on an instrument that he has merely
23 taken apart and done instruments on and attempted to figure
24 out. He's demonstrated no knowledge of the calibration, of
25 flow sensors, a reliability of such, how they pertain to the

1 reliability of breath testing samples. He may have testified
2 and have knowledge of breath testing instruments in general.
3 However, this is a very specific matter.

4 JUDGE CONRAD: But didn't he testify that he has
5 qualified as to testimony regarding the Intoxilyzer 8000 and
6 that testimony didn't include -- you asked him, "Are you
7 qualified as an expert on the issue of the flow sensor," and
8 he said, "I wouldn't be qualified as to that issue. I would
9 be qualified as to the operation of the Intoxilyzer 8000,
10 which would include questions relating to that." Did he not
11 say that and has therefore been qualified previously to
12 provide that testimony?

13 MS. SANGHVI: Judge, I don't believe he said he
14 specifically was -- at one of the times he was qualified
15 where he was -- in the Intoxilyzer 5000 where he did discuss
16 the flow sensor. He said he wouldn't be qualified as an
17 expert to that specific matter. But it's the State's
18 position that he's never stated that he's been qualified on
19 the Intoxilyzer 8000 where he was allowed to testify about
20 the flow sensor. He may have been qualified to talk about
21 the Intoxilyzer 8000, but this is a very specific matter.
22 This is the calibration of the flow sensor and whether or not
23 these calibrations were linked to the scientific reliability
24 of the instrument.

25 MR. ISAAK: And if I may respond? Since Ms. Sanghvi

1 said she was present for his testimony in front of Judge
2 Courtney, he absolutely testified on the flow sensor because
3 there was flow sensor issues. And evidence came in about a
4 problem with the flow sensor. So she's been present for his
5 testimony on flow sensor and being permitted to give expert
6 witness testimony on the flow sensor. So her representations
7 to this Court are disingenuous. We were both there. He
8 absolutely testified. And those documents are in the record.

9 MS. SANGHVI: Judge, if my memory serves me correctly,
10 it was regarding mouth alcohol, which I do understand that
11 Mr. Swope has been qualified to discuss the mouth alcohol.

12 JUDGE CONRAD: Why don't we do this? Why don't you --
13 let's just clear that up. You want to ask him about prior
14 testimony on the flow sensor, Mr. Isaak?

15 BY MR. ISAAK:

16 Q Mr. Swope, you testified in --

17 JUDGE CONRAD: In general. It doesn't have to be
18 specific, but whatever he did.

19 BY MR. ISAAK:

20 Q Have you testified in the past on breath volume?

21 A Yes. Since it became an issue, we found it as an issue
22 beginning in the middle of 2010. So from that time on, that's why
23 we started looking -- or I started looking at it, because of the
24 variances in the readings. I realized there had to be something,
25 which I spoke with you about a long time ago, about the flow

1 rates, because we were getting flows that were in the fives. And
2 the human body sometimes doesn't even have five liters of air. So
3 we were getting fives and sixes. And we were getting valid
4 readings at, you know, .00 flow. I mean, we were actually getting
5 a numerical value. So that's when I first starting looking into
6 it, because I realized if you're not blowing into the machine, how
7 is it giving you a reading. So that's how --

8 Q And relating flow back to the 5000, while flow was not
9 an issue on the 5000, but pressure was an issue on the 5000. Does
10 that not include breath volume as well?

11 A Yes. There was a -- right. It's the same thing. It's
12 just a different -- we're using different terminology.

13 Q And with the 5000 did you ever look at pressure issues?

14 A Well, we did, but we were able to time those because we
15 knew what the reference points were. We don't know what the
16 reference points is with the 8000.

17 Q But have you been doing some sort of flow related issue
18 or breath related issue for 20 years?

19 A Yeah. In certain manners, yes.

20 Q Thank you.

21 JUDGE MYERS: Follow up?

22 MS. SANGHVI: Mr. Swope just stated that we don't know
23 how this pressure relates to the Intoxilyzer 8000 because it
24 has not been granted access to this information. So is that
25 what he just said, that he doesn't know how it relates?

1 JUDGE MYERS: That's what you said he just said. I
2 don't necessarily believe that's what he said.

3 MS. SANGHVI: If he could just please clarify that then.

4 JUDGE MYERS: Ask him a question.

5 **FURTHER VOIR DIRE EXAMINATION**

6 BY MS. SANGHVI:

7 Q What is your knowledge of the Intoxilyzer 8000 flow
8 sensor as it relates to the breath volume?

9 A Well, that's a good question. I'm trying to figure that
10 out, along with everybody else because the State has not provided
11 any reference point. So they have no reference point to come up
12 with their flow sensor study or whatever they're doing when
13 they're attempting to say they're calibrating the flow sensor
14 because they have no reference points. They have no volume
15 samples. They have no start and end points. So there is
16 nothing -- I know how to test the flow sensor. I'm trying to
17 figure out how the State is testing the flow sensor and coming up
18 with a numerical value when they have no basis for it. They are
19 just picking numbers out of the air. That's what I'm trying to
20 say. So I can't measure a reference unless I am given a number.
21 I know what my number is and I know how I do references. But the
22 State has not provided the information in any of their studies or
23 tests as to figure where they got that number. So do I study the
24 flow sensor? Yes. But I can't give you a numerical value with
25 the State because nobody from the State has been able to provide

1 that information.

2 Q So -- and let me clarify that I heard you correctly.
3 You're saying that because the State has no reference points, then
4 you have no reference points?

5 A I always have reference points.

6 Q Okay.

7 A All of my tests have reference points. I am trying to
8 figure out where the State comes up with their number for the
9 reference point. They have none. They have no test that allows
10 me to know where they're starting the flow from, where they're
11 ending the flow, and what their reference point is as to the
12 amount of volume going into the 1.1 liters. That's what I'm
13 saying.

14 Q And what knowledge do you have that the State doesn't
15 have a test?

16 A Because I've searched for it. I've asked for it. I've
17 looked for it. It's not in their schematics. CMI has not
18 provided that information to anybody. I've seen various court
19 orders around the state looking for that. The State refuses to
20 show those documents. That information has not been provided.
21 The software information hasn't been provided. No test studies
22 have been provided through FDLE, through CMI, through any
23 manufacturer that I'm able to find or locate any test results.
24 And no one has yet testified from the State because no one knows
25 what it is. I've seen transcripts. I've sat in on testimony from

1 Ms. Barfield and Skipper. And everybody is like, "Well, there's a
2 number." "What's the number?" "We don't know what it is." It's
3 a secret number in some secret society somewhere, but nobody knows
4 what it is. So I can't give you a number because the State hasn't
5 provided the number.

6 Q Were you referring to the source code?

7 A No. That's another issue.

8 Q Okay.

9 A But I'm referring to how they look for the flow in this
10 particular machine. You have to -- I'm sure you would agree there
11 has to be a start point and there has to be an end point.

12 Q And so you're saying you don't know what that start
13 point and end point is?

14 MR. ISAAK: I'm going to object. This is not relevant
15 to his voir dire.

16 JUDGE MYERS: Sustained.

17 MS. SANGHVI: Again, the State still has objections to
18 Mr. Swope being qualified as an expert. He says that he has
19 no knowledge of any reference points the State uses,
20 specifically in promulgating its role in determining whether
21 or not the flow sensor is in fact calibrated correctly or
22 reliable or anything to do with this at all. He's stating he
23 has absolutely no knowledge of this information. He's made
24 attempts to obtain this knowledge, but he doesn't have it.
25 He's admitting himself that he doesn't have this, the

1 expertise necessary to discuss this matter. And then the
2 burden is on the defense to show this. If there is
3 calculations, the burden is on the defense to provide those
4 calculations.

5 JUDGE MYERS: I've heard enough. All right. Based upon
6 the witness's testimony in regards to his experience, his
7 qualifications, his education, training, I will find that he
8 is qualified to render an opinion with regard to specific
9 issues of the Intoxilyzer 5000, 8000, and the scientific
10 protocols. I'll note the State's objection. But I will find
11 that his expert testimony, that his opinion testimony would
12 be helpful to the Court in understanding the present issues.
13 He is so qualified.

14 MR. ISAAK: Thank you.

15 JUDGE MYERS: I'll note the State's objection.

16 JUDGE CONRAD: And just for the record, and I concur in
17 Judge Myers' ruling. If I didn't for some reason, I would
18 note that independently. So I just want the record to
19 reflect that. If I don't make a statement, I'm concurring
20 with his ruling as far as my cases are concerned as well.
21 Okay?

22 MR. ISAAK: Thank you, Judge.

23 **DIRECT EXAMINATION CONTINUED**

24 BY MR. ISAAK:

25 Q Mr. Swope, would you educate us a little bit about

1 the -- I'd like to focus initially on scientific protocol.

2 A Okay.

3 Q Okay. Would you educate us a little bit about the
4 differences between validation testing and calibration testing?
5 What's the differences?

6 A Well, calibration testing obviously is basically where a
7 known sample or a known numerical value is entered into the
8 machine. And the machine basically reads that to see if the
9 sample introduced in the machine is correct or not.

10 JUDGE CONRAD: And you're saying that's calibration?

11 THE WITNESS: That's calibration.

12 JUDGE CONRAD: Okay. Go ahead.

13 THE WITNESS: Validation is a little bit different.

14 Validation is basically -- even though they're kind of
15 scientifically tied in, validation would be taking -- doing a
16 specific study on a known sample, validating that sample, and
17 validating the results of that sample to be used at a later
18 time. So in other words, you have already validated the
19 sample. In other words, most of the state uses calibration.
20 So they say we're calibrating the machine, which they're
21 really not doing. So I think everybody uses that term wrong.
22 We're really not calibrating the machine. Calibrating is
23 actually adjusting it, trying to bring the machine into
24 compliance with whatever it is. So if the machine is off --
25 like, when the machine goes to a factory, they calibrate it.

1 BY MR. ISAAK:

2 Q Right.

3 A We always use that term. I used it as an officer of
4 course, calibrating. We really don't calibrate it. We kind of
5 check the calibration.

6 JUDGE CONRAD: May I ask questions as you go along?

7 THE WITNESS: Absolutely, Judge.

8 JUDGE CONRAD: The calibration, you're saying there's a
9 known volume --

10 THE WITNESS: Right.

11 JUDGE CONRAD: -- that's introduced into the machine.

12 THE WITNESS: Right.

13 JUDGE CONRAD: And then the machine would register a
14 reading of that volume.

15 THE WITNESS: Right, like an .08 or something.

16 JUDGE CONRAD: Like a sample of a breath, of an
17 alcohol -- known alcohol sample.

18 THE WITNESS: Yes. Right.

19 JUDGE CONRAD: And then the calibration would mean that
20 the known volume is being read correctly by the machine so
21 that apparently you can draw the conclusion it's working.

22 THE WITNESS: Yes.

23 JUDGE CONRAD: Okay. I understand that. Explain the
24 validation a little bit more.

25 THE WITNESS: Validation would be where the machine is

1 fully checked from A to B. In other words, everything is
2 working correctly. The parts are working. The displays are
3 working. You've created samples which the way I do it to
4 validate it is I take samples which are unknown to me. So I
5 get those samples. I let the machine read those samples.
6 And then I validate them.

7 JUDGE CONRAD: How?

8 THE WITNESS: Well, I validate them by -- once the
9 machine reads them, I then go back and find out what the
10 sample actually is.

11 JUDGE CONRAD: How?

12 THE WITNESS: I get that from the manufacturer, where I
13 purchase it, or from the lab at FIU. So my students may
14 make -- in other words, to give you an example would be let's
15 say they give me three different samples. I don't know
16 what's in sample A, B, or C. So I take sample A, I put it I
17 the machine, and I get a reading. And B and C is the same
18 way. So what I'm doing at that point then, I get the
19 numerical values. Now students or the engineers know what's
20 in A, B, and C. I don't to this point. I tell them, okay,
21 the machine read .08, .09, and .10. They at that point
22 validate that. Either the samples are correct, or if I am
23 off, then either I know something is off with the machine or
24 something is off with the sample. But these samples are
25 correct because they've been validated by the --

1 JUDGE CONRAD: What does that have to do with breath
2 volume? Can you do the same means with breath volume?

3 THE WITNESS: Yes.

4 JUDGE CONRAD: You have a known sample but you don't
5 know?

6 THE WITNESS: That's correct.

7 JUDGE CONRAD: And where do you get that, from the
8 manufacturer?

9 THE WITNESS: I get that -- well, I can get that, A,
10 from a manufacturer, from a secondary source, or from a lab.

11 JUDGE CONRAD: So the same process by which you would
12 test alcohol, you can test breath volume?

13 THE WITNESS: That's right.

14 JUDGE CONRAD: And then after the results, the machine
15 prints out the results. And then you correlate that with the
16 known value for the sample?

17 THE WITNESS: That's correct.

18 JUDGE CONRAD: Okay. Go ahead.

19 BY MR. ISAAK:

20 Q So what I put on the display board are exhibits that can
21 be found at Exhibit 3 and Exhibit 4. This is form 40. This is a
22 generic looking reporting form, the 8000 form 41, a generic
23 reporting form for a department inspection.

24 A Right.

25 Q Now essentially what happens on a monthly basis, this is

1 validation testing?

2 A Yeah. Right.

3 Q Right. Because as you said, the machine before it goes
4 online --

5 A Right.

6 Q -- would be calibrated by the manufacturer if it's first
7 going online or by a repair facility if it's coming back from the
8 repair. They'll calibrate it.

9 A Right.

10 Q So what happens on a monthly basis, they take known
11 samples, whether it's an .05, an .08, a .20, and they put a known
12 sample into the machine to validate a preexisting calibration?

13 A Yes. That comes from the State. So they provide each
14 agency with the samples, which they then validate the machines
15 based on what they -- the State knows it to be.

16 Q Right. And the alcohol reference solutions are
17 previously tested through gas chromatograph according to a rule --

18 A Right.

19 Q -- to validate the alcoholic content of the alcohol
20 reference solution. So they take a known sample and they put it
21 into the machine to validate the preexisting calibration?

22 A That's right.

23 Q Okay. And in order to do that, they have parameters
24 where the results have to fall into whether -- at the .05, the
25 .08, or the .20 level?

1 A Right, within, you know, 10 percent I think it is.

2 Q So everything about the monthly inspection or the
3 department inspection, what we're talking about, alcohol content
4 analysis --

5 A Right.

6 Q -- is validation testing or is a form of validation
7 testing?

8 A Right. That's the State's form or what I call their
9 form of validation.

10 Q Okay. Now let's go back a little bit so that we can
11 show the differences between what used to happen with the 5000 and
12 what's going on now in terms of scientific protocol.

13 A Okay.

14 Q The 5000 -- while this is the reporting form, the 5000
15 used to test at the .00, alcohol free --

16 A Right. Right.

17 Q -- .05, .08, .20. They had one more, zero, alcohol free
18 with acetone.

19 A Acetone, right.

20 Q But that's not included in here. They didn't do an
21 acetone test up in different locations. But the 5000 ran similar
22 tests?

23 A Yes, similar, right.

24 Q Okay. And the 5000 only did alcohol reference
25 solutions. This last one here is the dry gas scanner.

1 A Yeah. The dry gas is new with the 8000. The 5000 had
2 the capability to do it, but they didn't do it.

3 Q They didn't?

4 A Right.

5 Q The 5000 only used alcohol reference solutions?

6 A Yes, right.

7 Q Now compared against the 8000, they used alcohol
8 reference solutions and dry gas?

9 A Right.

10 Q Dry gas is different than alcohol reference solutions?

11 A Yes.

12 Q It's a different form of what they call --
13 scientifically, it's a different type of control?

14 A It's a different control. It's easy. It screws onto
15 the back of the machines, the cylinder. It's easy to use. Right.

16 Q But essentially from scientific terms, what I'm getting
17 at is the 5000 used alcohol reference solution, the 8000 uses
18 alcohol reference solution and dry gas?

19 A And gas, correct.

20 Q So there is -- from purely scientific protocol, is the
21 8000 a better protocol than the 5000 since they're using two
22 controls versus one?

23 A Yes. They're using two different types of controls to
24 check it out. Right.

25 Q What is controlled testing?

1 A Controlled testing would be basically the machine
2 checking itself against another sample during an actual what I
3 call a breath run. So it checks itself while it's going, kind of
4 like your car so to speak. Your car checks itself all the time.
5 The machine now tests itself during a breath run.

6 Q Right. Part of the 8000, it does controlled testing.
7 But let's go back to the 5000.

8 A Right.

9 Q Did the 5000 control test?

10 A It did, but the State didn't do it.

11 Q It had the capability?

12 A It had the capability, right.

13 Q But the State didn't do it?

14 A Right. We did it all the time, I mean, at the college,
15 but it -- so the State did not choose to do controlled testing.

16 Q And from your perspective as a defense witness, did you
17 criticize the State's failure to control test?

18 A Yes.

19 Q Did you think that was poor scientific protocol?

20 A Yes.

21 Q And even control testing, would that be characterized as
22 validation testing or calibration testing?

23 A Well, technically it could be either. I mean, you know,
24 technically it's validation really.

25 Q For the purposes of what -- the way it's being used now

1 with the 8000, is it a validation test?

2 A Yes, absolutely.

3 Q Now are you familiar with a gentleman by the name of of
4 Dr. Kurt Dubowski?

5 A Yes.

6 Q Is Dr. Dubowski considered to be one of the foremost, if
7 not the foremost expert in the world on breath testing?

8 A Yes, he is.

9 Q He's out of Oklahoma?

10 A Yes.

11 Q Are you aware of whether he was critical of the failure
12 to control test in Florida back on the 5000?

13 MS. SANGHVI: Judge, I'm going to object to this expert
14 testifying to this knowledge of another expert's objection.

15 MR. ISAAK: I think he's allowed to rely upon anything
16 that would be ordinary within the field of testimony. I
17 think under Ehrhardt, experts can rely upon hearsay. It's
18 something that they normally rely upon, statements from
19 experts or certainly things that one expert relies upon from
20 one expert to the next.

21 MS. SANGHVI: Judge, the State would disagree that's
22 what's happening here. The State would simply state that the
23 defense is trying to bolster an expert's testimony by
24 bringing in another expert's concurrent -- potential
25 concurrent belief.

1 JUDGE MYERS: I guess was the question whether or not
2 your witness --

3 MR. ISAAK: Is aware of whether Dr. Dubowski was
4 critical --

5 JUDGE MYERS: -- is aware of if it was critical.

6 MR. ISAAK: Same as he was. Critical of Florida under
7 the 5000 not control testing. Correct. And he may say no.
8 I hope he'll say yes, but he may say no.

9 JUDGE MYERS: And the problem with the question is what?

10 MS. SANGHVI: This is improper bolstering by an expert.

11 JUDGE MYERS: By him saying that he is aware or not
12 aware?

13 MS. SANGHVI: After he's already stated his opinion
14 about it, whether or not -- he's stating whether or not
15 another expert who is qualified in this same field agrees
16 with him.

17 JUDGE MYERS: We haven't gotten that far yet as to
18 whether or not they have any agreeance. I'll overrule the
19 objection.

20 BY MR. ISAAK:

21 Q Are you aware of whether Dr. Dubowski was critical of
22 Florida under the 5000?

23 A Yes.

24 Q And your recollection, did he suggest the same thing
25 that you suggest, that control testing is a necessary part of

1 scientific protocol?

2 MS. SANGHVI: Objection; improper bolstering.

3 MR. ISAAK: I don't believe it's bolstering.

4 JUDGE MYERS: I'll overrule it.

5 THE WITNESS: Yes.

6 BY MR. ISAAK:

7 Q Now after years -- how many years was the 5000 used?

8 A It started in some effect in Florida in 1984. And I
9 believe in 1987 -- and I could be off a year or two, Judge. It
10 goes back a ways. But I think in 1987 it became the sole testing
11 machine in the state of Florida and that it was the sole testimony
12 machine from 1987 until I guess 2006 or -5 or something like that.

13 Q So about 20 years, two decades?

14 A Yeah, right.

15 Q Did Florida ever -- as far as you know, did the alcohol
16 testing program, whether it's HRS or FDLE, ever concede to control
17 test on the 5000?

18 A Never.

19 Q Okay. When the 8000 comes out, after 20 years of
20 controlled test opinions that the should control test, what does
21 FDLE do with the 5000 -- or with the 8000?

22 A They add a control test to the software.

23 Q Okay. And so now there's controlled testing during the
24 actual administration of a breath test?

25 A Correct.

1 Q And that's a dry gas standard?

2 A It's a dry gas standard. Yes.

3 Q And they control test before the breath test and after?

4 A Yes.

5 Q Okay. And from a purely scientific perspective, is the
6 reason that would be appropriate scientific protocol to ensure
7 that nothing happened during the administration of a breath test
8 that would take out or somehow mess up the previous established
9 calibration?

10 A Yes. It's a safeguard basically.

11 Q It's a safeguard?

12 A Yeah. It's a safeguard.

13 Q To ensure that nothing happened during the breath test
14 that would somehow impair the calibration of the machine?

15 A Right.

16 Q Okay. Now would it be -- would you agree that in
17 comparing the 5000 to the 8000, FDLE has actually employed better
18 scientific protocol?

19 A Yes. Well, yeah. I mean, they were on the way, yes.

20 Q Well, I mean, before there was no controlled testing.
21 Now there's controlled testing. Before it was one type of
22 control. Now it's two types of control. I mean it seems to me
23 just common sense says that's better protocol.

24 A It is better, yes.

25 Q And from a purely scientific protocol perspective, the

1 purpose -- and I'm not going to concede that whatever tests the
2 deployed is scientifically reliable. But from a purely scientific
3 protocol perspective, is the reason they validate to theoretically
4 show that the machine is accurately analyzing for alcohol content?

5 A Well, that's the point of it. I mean, that's the
6 attempt obviously, is to show that you have, you know, at the
7 start, before the test is given it's working, and after the test
8 is given it is working, so that they can obviously come in and
9 show that the machine was operational at that time.

10 Q Now let's shift the focus then to flow sensor. Are you
11 familiar with -- and if you would look at Exhibit Number 1. And
12 I'm going to direct your attention to page seven of Exhibit Number
13 1. Do you have that there?

14 A Yes.

15 Q That talks about the minimum requirements of a valid
16 breath test, correct?

17 A Correct, for the 8000. Correct.

18 Q For the 8000. And it talks about what's necessary to
19 have for a valid breath tests. What are the three components?

20 A Time, pressure, and slope.

21 Q For the 8000 in terms of pressure, it uses volume?

22 A Well, right. In other words, it's correlated to the old
23 machine, so it's like that's how close they are related.

24 Q And what are the requirements for a valid breath test
25 according to the agency inspector curriculum?

1 A Time, volume, and slope.

2 Q What is the time requirement?

3 A The time requirement is obviously one second, which
4 that's a-whole-nother subject. Time requirement is one second.
5 Right.

6 Q Okay.

7 A And of course you've got to have sufficient volume,
8 which is 1.1.

9 Q 1.1 liters.

10 A Right.

11 Q And what is slope?

12 A Well, slope is analyzing the sample during the course of
13 the flow into the machine to make sure that there is no mouth
14 alcohol or to try to ensure that there is no contaminant in the
15 sample.

16 Q Okay. So in other words, a slope is rising as a person
17 is expelling air. The concentration of alcohol is rising until
18 they get to deep lung air. And then it levels off or almost
19 levels off?

20 A Well, I mean, you're talking theoretically.

21 Q Okay.

22 A I mean, that's really theoretically the purpose of the
23 slope, is that the more air that goes from your lungs into the
24 machine, through the tube into the machine, that it analyzes that
25 and it looks for a leveling off of your breath sample. In other

1 words, you start off with a lower number, assuming you have
2 alcohol, and it rises to a peak number, whatever that may be, and
3 then it levels off. And then the machine analyzes that I believe
4 every 20 milliseconds. And there's a thousand milliseconds in a
5 second. So every 20 milliseconds it looks at that.

6 Q Okay. Now can you have a valid breath test if one or
7 more of the three requirements are not satisfied?

8 A No. Well, not under the rules, no.

9 Q Okay. And now is there a rule, a specific rule that
10 you're aware of under chapter 11(d) that defines what is contained
11 in the agency inspector curriculum? Because I can't. I haven't
12 seen a rule.

13 JUDGE CONRAD: Okay. Mr. Isaak, okay. You've already
14 done it a couple times. Don't testify.

15 MR. ISAAK: Okay.

16 JUDGE CONRAD: Ask him a question. And then if he has
17 an answer, he'll answer it. Okay, please?

18 BY MR. ISAAK:

19 Q Are you aware of any specific rule that outlines these
20 requirements?

21 A No.

22 Q As from your perspective then, do these requirements
23 involve somehow the operation of the machine written into the
24 software? How would it use the requirements?

25 A Well, I mean, obviously the software is what triggers

1 the device.

2 Q Okay.

3 A So the software allows a timing issue, it allows a
4 volume issue, and it allows a slope issue.

5 Q Okay.

6 A So, you know, it analyzes those independently. And this
7 is kind of a roundabout answer, but the curriculum that the
8 students take, the officers, identifies what those are and what
9 the machine is looking for. But there's no way to independently
10 verify what's going on other than attempting to read the cards and
11 figuring out what happened.

12 Q I understand that.

13 A Right.

14 Q But what I'm getting at is these requirements are
15 somehow designed and developed into the operation of the machine
16 as opposed to by formal rule.

17 A Yes. They're a software designation. Yes.

18 Q Okay. And if one or more of these minimums are not met,
19 is this machine designed to somehow flag the results as being not
20 valid?

21 A It can, yes.

22 Q If it's operating correctly?

23 A If it's operating correctly, it will flag it under
24 certain circumstances. Absolutely.

25 Q So if a person doesn't meet the time requirement, the

1 machine would flag it?

2 A That's right.

3 Q If a person doesn't meet the 1.1 liter requirement, the
4 machine would flag it?

5 A Yes.

6 Q If a person doesn't meet the slope requirement, the
7 machine would flag it?

8 A Yes.

9 Q And is there any rule that you're aware of that says if
10 time isn't met, the breath test is invalid? Is there a
11 promulgated rule that says that?

12 A No.

13 Q That's simply -- what we're talking about is the
14 operation of the machine?

15 A Operation, yes.

16 Q Okay. Now if you would turn to page 10 of the
17 curriculum.

18 JUDGE MYERS: Still Exhibit 1, correct?

19 MR. ISAAK: Yes, sir. Exhibit 1, page 10.

20 BY MR. ISAAK:

21 Q Do you see there under scenario for the first question
22 about volume not met?

23 A Right.

24 Q Okay. If a person -- if this machine flags the result
25 as being less than 1.1 or a breath alcohol content result as

1 coming from less than 1.1 liters of breath volume, what notation
2 is the machine going to give?

3 A Volume not met.

4 Q And how will it designate it in writing?

5 A It will --

6 Q Or how is it supposed to?

7 A It will show it on the screen and on the card.

8 Q Okay. And it will -- right out as we see there, is that
9 what would be written out on the card?

10 A Yes.

11 Q The first result would be a VNM, the second result would
12 be a numerical value?

13 MS. SANGHVI: Objection; counsel is testifying.

14 JUDGE MYERS: Sustained.

15 BY MR. ISAAK:

16 Q What exactly will be written? If you would read it into
17 the record, please?

18 A Well, just in other words, it would be volume not met,
19 which would be initials, VNM.

20 Q Okay.

21 A And it would give a sample two and sample three, because
22 obviously you have to automatically go into another sample.

23 MS. SANGHVI: I'm going to object to this expert witness
24 reading into -- an agency curriculum that he is not certified
25 in, has not ever taken a course in, from reading it into the

1 record.

2 MR. ISAAK: It's in evidence.

3 JUDGE MYERS: Overruled. You didn't have to take a
4 course in order to be able to read.

5 BY MR. ISAAK:

6 Q And in those circumstances when the volume is not met,
7 what other information will the card actually print out?

8 A Well, it will automatically go into a third test mode.
9 So in other words, if the first one is not met, the machine
10 automatically knows that. So now it needs two valid tests. So
11 it'll automatically go into a second and a third mode. And that
12 will -- if everything is okay at that point, it will print it on
13 the card and spit it out and tell you that's what happened.

14 Q And then what other information about the volume not met
15 will appear on the print card?

16 A Well, there are two types of print cards. One is --
17 there's the one that you get from the FDLE website, which is a log
18 of the machine. And that will print out the liters of air that
19 were submitted or the asterisk that was submitted at that time. So
20 that will come out. On the breath card itself, what I just read
21 to you would be on the initial card the officer gets. But in the
22 breath log, it will have that other information as far as the --
23 as I indicated, as far as the sample volume and those types of
24 things.

25 Q Will the breath card though also provide what the sample

1 was and the language contained there about the sample not reliable
2 for quantitative breath alcohol level?

3 MS. SANGHVI: Objection; testifying.

4 MR. ISAAK: I'm asking whether that will appear there.

5 MS. SANGHVI: Objection; leading.

6 JUDGE MYERS: Overruled. Go ahead.

7 THE WITNESS: Yes.

8 JUDGE CONRAD: Can I ask a question?

9 MR. ISAAK: Yes, sir.

10 JUDGE CONRAD: When the suspect or subject gives a
11 sample and it has a result of volume not met --

12 THE WITNESS: Right.

13 JUDGE CONRAD: -- is the actual volume measured by the
14 machine recorded?

15 THE WITNESS: Yes.

16 JUDGE CONRAD: Okay.

17 THE WITNESS: But not -- but -- I'm sorry.

18 JUDGE CONRAD: Okay. So the answer is yes?

19 THE WITNESS: Yes.

20 JUDGE CONRAD: And it's recorded. And where is that
21 information? If it is stored, is that stored and then
22 available in some database?

23 THE WITNESS: Yes.

24 JUDGE CONRAD: And give me the specifics.

25 THE WITNESS: When the machine is downloaded to the FDLE

1 website, to their server -- some departments do it every two
2 weeks. Some do it every month. You have to go to the
3 server, pull up this particular case or whatever case it is,
4 and print out the card which lists the volumes, the liters of
5 air and the time card which you'll have to then print off of
6 the website itself. The officer doesn't get it unless he
7 asks for it himself.

8 JUDGE CONRAD: So hypothetically if it was one liter and
9 it came up VNM --

10 THE WITNESS: Right.

11 JUDGE CONRAD: -- volume not met --

12 THE WITNESS: Right.

13 JUDGE CONRAD: -- there's a record that it was one liter
14 somewhere?

15 THE WITNESS: Yes.

16 JUDGE CONRAD: Okay. Go ahead.

17 BY MR. ISAAK:

18 Q Now if you would turn to page 35? This is a section
19 apparently that discusses all the different display messages. And
20 I think it starts on page 33. But I'll ask you to turn to 35. Do
21 you see where the volume not met display is?

22 A Yeah. The top one on the left, right.

23 Q Okay. And if you look in the middle section, is that
24 the language that will appear in those circumstances where a
25 person provides less than 1.1 according to the machine's analysis?

1 A Yes.

2 Q Okay. What does it mean breath sample not reliable for
3 quantitative breath alcohol level? What does that mean?

4 A It means that the machine did not get the required
5 amount of air, which is 1.1 liters. That's what it meant.

6 Q Okay. And if you would turn to -- let me see, under
7 Number 2, that's the breath test operator course exhibit.

8 A Okay.

9 Q Defendant's 2. Turn to page 16. No. That's not the
10 page I meant. Let me see. I wanted page 13. I'm sorry.

11 A Page 13?

12 Q Page 13.

13 A Okay. Sorry.

14 Q I'm sorry.

15 A Okay.

16 Q What are we looking at in 3.7? Is that the same thing
17 that we were looking at from the agency inspector curriculum?

18 A Yes.

19 Q Okay.

20 A Yeah. It's the same thing. It's a breath operator
21 course paper.

22 Q Okay. So Exhibit 1 is agency inspector curriculum.
23 Exhibit 2 is breath test operator curriculum?

24 A Right.

25 Q All right. Now if you would also turn to Exhibit 6.

1 A Okay.

2 Q Have you seen this correspondence before? Have you seen
3 this letter?

4 A Yes.

5 Q Okay. Have you read it?

6 A Yes. You mean from Bruce Colton, that one?

7 Q Yes, sir.

8 A Yes. Sure.

9 Q Okay. Could you discuss the scientific principles that
10 we're talking about, that he's talking about in this letter?

11 MS. SANGHVI: I'm sorry. Which Exhibit are we on?

12 MR. ISAAK: Number 6. It's dated July 29, 2005.

13 THE WITNESS: Right.

14 BY MR. ISAAK:

15 Q What are they talking about in this letter?

16 A What they're talking about was that initially the 8000
17 was not printing out items that were considered as insufficient
18 samples, that the software was not actually notifying the operator
19 or operators that the sample was not proper into the machine and
20 was not letting them know when there was an insufficient sample.
21 So they were putting out readings, but there was no way of the
22 operator actually knowing it.

23 Q Now this letter discusses -- and I realize you're not an
24 attorney. It discusses the case law, Brady v. Maryland. From a
25 legal perspective, that means disclosure of exculpatory evidence

1 that defendants are entitled to. In your opinion, is the
2 notification that the machine gives that the breath result is
3 quantitatively not reliable, is that exculpatory evidence from a
4 scientific perspective?

5 MS. SANGHVI: Objection. This witness has no basis to
6 discuss what is exculpatory evidence on a legal basis. There
7 is no scientific basis for exculpatory evidence.

8 MR. ISAAK: I'll rephrase that question.

9 JUDGE MYERS: I'll sustain the objection.

10 MR. ISAAK: I'll rephrase that question.

11 JUDGE MYERS: You can rephrase it.

12 BY MR. ISAAK:

13 Q Would the notification generated by the machine that the
14 result is quantitatively not reliable -- from a scientific
15 perspective, would that be consistent with scientifically
16 unreliable notification?

17 \ A Yes.

18 Q Okay. So the machine is essentially telling the person
19 this result is scientifically unreliable?

20 A Right.

21 Q Okay. Now if you would turn to Number 7. Have you seen
22 that letter that was sent in response?

23 A Yes. Is that the one by Tunnel (ph) I think or --

24 Q Yes.

25 A Yeah, right.

1 Q Well, it's signed by Mr. Tunnel.

2 A Right.

3 Q If you look at page two, from a scientific perspective,
4 do you agree with his -- with the statement there, volume is a key
5 component in establishing reliability? Do you agree with that?

6 A Yes.

7 Q Okay. And do you agree with the next sentence from a
8 scientific perspective that says -- well, would you please read
9 that into the record?

10 A "Where a breath sample does not meet minimum volume
11 requirements, the instrument cannot determine if there are
12 interference or mouth alcohol present and cannot ensure that a
13 deep lung breath sample has been obtained."

14 Q Do you agree with that scientifically?

15 A Yes.

16 Q Okay. Now let's talk about --

17 JUDGE MYERS: Let me interrupt before you ask your next
18 question.

19 MR. ISAAK: Sure.

20 JUDGE MYERS: We're going to take our mid-day break
21 right now.

22 MR. ISAAK: Okay.

23 JUDGE MYERS: I know we got a late start. Originally we
24 were going to break at noon, but I can give you some
25 latitude.

1 MR. ISAAK: That's fine.

2 JUDGE MYERS: It's 12:30 by the courtroom clock. We'll
3 resume at 1:30.

4 MR. ISAAK: Okay.

5 JUDGE MYERS: Okay.

6 THE WITNESS: Thank you, Your Honor

7 JUDGE MYERS: Thank you, folks.

8 Deputy, secure that door.

9 THE BAILIFF: Yes, sir.

10 JUDGE MYERS: All right. Thank you, sir.

11 Mr. Isaak?

12 MR. ISAAK: Yes.

13 JUDGE MYERS: I'm going to take the original and give
14 this back to the clerk.

15 Madam Clerk, will you secure the original exhibit,
16 please?

17 We'll stand in recess.

18 (Recess.)

19 JUDGE MYERS: Okay. You ready to retake the stand, sir?

20 MR. ISAAK: Judge, can I give him the exhibits?

21 JUDGE MYERS: Absolutely.

22 The State is present. The defense is present.

23 MR. ISAAK: Yes, sir.

24 JUDGE MYERS: The witness has now retaken the stand.

25 Continuation from this earlier morning's hearing.

1 Mr. Isaak, you may continue your examination.

2 MR. ISAAK: Thank you, Judge.

3 BY MR. ISAAK:

4 Q All right. I was just about to ask you before we broke
5 for lunch -- I want to focus now on the flow sensor.

6 A Right.

7 Q Which actually it's not a flow sensor. What is the true
8 name of the component?

9 A A pressure transducer.

10 Q Pressure transducer.

11 A Right.

12 Q What is the difference between a pressure transducer, a
13 flow sensor, and a flow meter?

14 A Well, a flow sensor and a flow meter, they're designed
15 to check the flow and the rates of fluids. Basically it checks
16 the pressure of the fluids, the dynamics of the fluids. That's
17 what that's for. So it's kind of the same thing.

18 A pressure transducer checks airflow. And it measures
19 airflow. And of course to get to that, there's certain procedures
20 to do reference points, things like that. In other words, so
21 that's the difference between the two. So really for ease of
22 reading I guess or for ease, the State has called it a flow
23 sensor.

24 Q And I'm calling it a flow sensor.

25 A Right.

1 Q In my motion it's called the flow sensor.

2 A Right.

3 Q But we're really talking about a pressure transducer?

4 A Yes, that's correct.

5 Q And so -- and is every Intoxilyzer 8000 from a hardware
6 perspective, is it supposed to be the same from one to the next?

7 A Every one is the same. Well, it's supposed to be.
8 Every one is supposed to be.

9 Q It's supposed to be?

10 A Yes.

11 Q So one pressure transducer should be the same from each
12 machine to each machine?

13 A Yes.

14 Q In theory?

15 A In theory.

16 Q Okay. Now what component in an Intoxilyzer 8000
17 analyzes breath volume?

18 A Well, I'm not sure what you mean by what component. I
19 mean, in other words, it's infrared light absorption. And
20 actually a sample chamber is where the filters are, which actually
21 measure the difference between the ethanol and the chamber and
22 air. So that really gives us the numerical value.

23 Q Of the alcohol content?

24 A Of alcohol, sure.

25 Q I'm talking about what component analyzes the breath

1 volume. Is that the --

2 A The flow sensor.

3 Q The flow sensor or the pressure transducer?

4 A I'm going to call it the flow sensor --

5 Q Okay.

6 A -- so the Court doesn't get confused because that's in
7 the FDLE documents as flow sensor.

8 Q Does machine's -- does the infrared light absorption
9 theory of alcohol content analysis assist the flow sensor in its
10 function in analyzing breath volume?

11 A No.

12 Q So this particular requirement of 1.1 liters, that is
13 satisfied 100 percent by the flow sensor?

14 A Yes.

15 Q The analysis of that component or that substance is done
16 strictly by the flow sensor?

17 A Yes.

18 Q Okay. Now, is there any testing that you've seen during
19 the monthly inspection -- and I guess if you would look at -- if
20 you will look at Exhibit 3?

21 A Yes.

22 Q Form 39. Do you see the first page, form 39?

23 A Yes.

24 Q That is the monthly inspection? It's called agency --
25 that's the monthly inspection form?

1 A Yes. It's -- yes, revised form, yes.

2 Q Is there any procedure in that monthly inspection that
3 does any testing whatsoever of the flow sensor?

4 A No.

5 Q If you would look at Exhibit Number 4, first page? What
6 is that?

7 A That's a department inspection for the --

8 Q And that's --

9 A -- Intoxilyzer 8000.

10 Q And that is which form?

11 A Form 36.

12 Q Form 36. And this form outlines the testing that has to
13 be done by the department inspectors?

14 A That's right.

15 Q And department inspections are supposed to be done how
16 often?

17 A They do those every -- well, department inspections are
18 done once per calendar year.

19 Q Okay. Agency inspections are done how frequently?

20 A Once per calendar month.

21 Q Okay. And anywhere in this form 36, is there any of
22 these procedures designed to test the flow sensor?

23 A No.

24 Q Is the flow sensor ever tested by form or rule during
25 any monthly inspection?

1 A No.

2 Q Is it ever inspected by any form or rule during a
3 department inspection?

4 A No.

5 Q Okay. If you would now turn to Exhibit 8? Are you
6 familiar with some of the forms that are produced when the FDLE
7 inspectors inspect the machines?

8 A Yes.

9 Q Have you ever seen a document similar to these called
10 field notes?

11 A Yes, quite frequently.

12 Q Okay. What is your understanding as to what these field
13 notes represent?

14 A Well, primarily it's sort of up to the inspector,
15 because I've seen all kinds of different references on them. But
16 basically if there is some issue or the machine has a problem such
17 as maybe the machine has some kind of issue with it during the
18 month or during the test, it's written on this form and explains
19 what it is. It also explains any correction procedures. It also
20 can be used as a transmittal form, indicating that the machine was
21 taken offline and sent into a repair facility. So it has a
22 variety of things that an officer may write down during the month
23 or week or whatever.

24 Q And whatever machine they're working on, do they
25 indicate on this form by serial number which machine?

1 MS. SANGHVI: Objection; calls for speculation.

2 MR. ISAAK: It's on the form.

3 JUDGE MYERS: Overruled.

4 THE WITNESS: Yes. It's always identified by agency and
5 number -- and machine number.

6 BY MR. ISAAK:

7 Q And where is that serial number? Where can we find it?

8 A It should be in the upper right hand corner I believe.

9 Q Under instrument serial number?

10 A Yes.

11 Q So the first page we're looking at, do you a form dated
12 March 10, 2010?

13 A Yes.

14 Q So that will tell you the date that somebody, whoever
15 this person was, was filling out this form and working on this
16 machine?

17 A Yes. And there's always a received date as to when FDLE
18 received the form.

19 Q Okay.

20 A Or documented it.

21 Q And we can tell what machine the person was working
22 on --

23 A Yes.

24 Q -- because of the serial number in the upper right hand
25 corner?

1 A Yes.

2 Q If you would turn to the next page, please? And you see
3 the date, February 4, 2010?

4 A Yes.

5 Q Based upon the information contained on this document,
6 we know we're dealing with 808?

7 A Yes.

8 Q And what was the person doing on that day?

9 A An annual inspection after repair.

10 Q So this is a department inspection?

11 A Yes.

12 Q Is there anything in here that says that they did any
13 testing on the flow sensor or any other components?

14 A No. There was no testing on any components, just that
15 it was replaced from an -- after an annual inspection.

16 Q Okay. If you turn to the next page, please? Now what
17 machine are we talking about?

18 A 829.

19 Q And the date on your form is?

20 A 4/8 of '10.

21 Q And you said this was an inspection after repair. Is
22 there anything on this day that this person tested the flow
23 sensor?

24 A Nothing to indicate it, no.

25 Q Okay. If you would turn -- let me see, two pages to a

1 form dated March 4, 2010?

2 A Okay. That's the one the 4 looks like it's wrote over.

3 Is that the one?

4 Q Yes.

5 A Okay. Got it.

6 Q And what machine are you looking at?

7 A 829.

8 Q And what was the purpose of this test?

9 A An annual and inspection after repair.

10 Q Is there any indication on this form that there was any
11 testing done on the flow sensor?

12 A No.

13 Q If you would look through the remainder of each page in
14 Exhibit 8? Because I don't want to go through page after page.
15 Do you see any notations on any document for any machine in
16 Hillsborough County in that calendar year, in that exhibit,
17 showing any testing of the flow sensor?

18 A No. I didn't see any.

19 Q Now you said --- earlier in your testimony you said you
20 became aware of flow sensor issues in 2010.

21 A Yes.

22 Q How did you become aware that there was an issue with
23 flow sensors?

24 A Well, I had looked at a bunch of documents from the FDLE
25 website involving the test. I was trying to come up with a

1 reference point or a standard for the flow sensor since I couldn't
2 find it, as I explained to the State earlier. I was having
3 difficulty finding that. So I was trying to come up with a
4 reference. So I decided the next best thing would be -- first of
5 all, my first question to myself was where did the 1.1 liter
6 standard come from. That was a standard I couldn't find anywhere,
7 in any scientific article, paper, research, project, whatever. So
8 I wanted to find out where the 1.1 came from.

9 So then I decided to pull probably 5- or 600 tests from all
10 around the State to find out what the liters of air versus the
11 readings were.

12 Q Okay.

13 A So that's how I got involved in that.

14 Q Now if we're talking about purely scientific protocol,
15 is it good protocol or bad protocol to not test the flow sensor?

16 A Well, it would be bad protocol then obviously not to
17 test it.

18 Q How do you ensure -- I mean, obviously there's a
19 requirement of 1.1 liters.

20 A Right.

21 Q How do you ensure that the flow sensor is accurately
22 analyzing breath volume to comply with that requirement?

23 A You don't, I mean, the way it's set up now. I mean,
24 there's no way to validate what is -- in other words, there is no
25 way of me knowing or people I work with knowing what the flow

1 sensor is -- the amount of air going in because obviously the
2 amount of air going into the chamber represents what the infrared
3 light is going to read in the chamber. We know that the software
4 calls for certain things; the time, volume, and slope. We don't
5 know how that's achieved if the flow sensor is not getting us the
6 proper information. So the flow sensor is kind of the start of the
7 domino effect, so to speak.

8 Q In order to come forward with scientific protocol,
9 should the flow sensor be tested?

10 A Well, yes. You have to because everything comes off the
11 flow sensor. In other words, if it was, like -- I guess the best
12 way to describe it -- I know the Court is very intelligent, but as
13 far as mathematics goes, if I have 10 steps and I make an error in
14 step 8, it may not effect 9 and 10 that much. But if I make an
15 error in step 1, by the time I get to 10, it's going to be
16 magnified 10 times. So the flow sensor is what starts everything.
17 In other words, we are relying on the flow sensor to tell us that,
18 yes, there's 1.1 liters of air or greater. So that triggers the
19 slope. And then that triggers the time. But it's kind of a
20 circle because the time, volume, and slope in this machine doesn't
21 comport with what the rules say -- or I'm sorry, the procedures
22 say for an officer taking a breath sample. So if I'm wrong at
23 step 1, I've already blew my reading and I'm not even to the other
24 two steps yet.

25 Q Okay.

1 A That's what I'm saying.

2 Q Let me ask you this. In terms of scientific protocol to
3 appropriately test the flow sensor, should it be calibrated?

4 A Yes. Well, there has to be standards.

5 Q Okay. And should it be validated through testing?

6 A Yes.

7 Q Same as the other testing that we talked about before,
8 initial calibration and that calibration is satisfied through
9 validation testing?

10 A Through validation, right.

11 Q Should that concept also apply to the flow sensor?

12 A Sure. Of course.

13 Q If you would now look at Exhibit 9?

14 A Okay.

15 Q The first document is for which machine?

16 A 808.

17 Q And it's dated when?

18 A It's dated 1/13 of '11.

19 Q And this was for what purpose?

20 A This is a purpose for an annual inspection after repair,
21 calibration and recalibration.

22 Q Okay. Now the notes there, if you would look at that
23 note indicating -- or the comments, high but within standard
24 calibration points --

25 A Right.

1 Q Would you please turn to the next page?

2 A Right.

3 Q Do you know what that document is?

4 A That's a flow rate calibration chart, which comes off of
5 the software. In other words, there's a procedure in this machine
6 where you would set, you know, the switches into a certain
7 position and give you this card basically. It would check the
8 rate of flow.

9 Q Okay. So now for the first time we can see that
10 somebody is doing some sort of work, some sort of calibration?

11 A Right.

12 Q On the flow sensor?

13 A Right. They're attempting to do something with -- the
14 software, you know, most likely in my opinion gives them this
15 analogy. So the software has something built in to check this
16 particular flow sensor.

17 Q Would you please turn to the next page? And we're still
18 talking about the same machine, correct?

19 A 808, right.

20 Q Okay. And this is dated what day?

21 A 3/8 of '11.

22 Q Now what was the reason for this work, according to this
23 document?

24 A Well, the initial, if you recall, on 1/13 of '11, that
25 didn't meet standards, so it was returned back to the facility.

1 Q Okay.

2 A So now this is back to the agency.

3 Q Back to FDLE?

4 A Back to FDLE.

5 Q Okay.

6 A Well, I call it the agency. Sorry. And they are now
7 doing another inspection after the repair. So it's been repaired
8 apparently, and now it's coming back.

9 Q Under the comments, we see flow calibrated.

10 A Right.

11 Q So now they've done a flow calibration?

12 A They've done a flow calibration, correct. And they had
13 replaced the o-rings of the machine.

14 Q If you look to the next page, what is that?

15 A That's the flow rate calibration that they, again, got
16 off the software.

17 Q Now you said before there is no promulgated rule --

18 A Right.

19 Q -- for flow calibration. So essentially whatever
20 procedure has now been done on this machine, 808, on March 8th of
21 2011, do you know where it came from?

22 A No. I mean, I know the individual who did it by his
23 writing. But where the procedure came from, I have no idea.

24 Q Well, we have some idea. But in terms of promulgation.

25 A As far as promulgation, no, I don't know.

1 Q Okay. Turn to the next machine, please, 829.

2 A Okay.

3 Q The next page. That's for machine 829. Do you see
4 that?

5 A Yes.

6 Q And the date you have is April 6th?

7 A April 6th of '11.

8 Q And if you look in the comments --

9 A Right.

10 Q -- what does flow verified mean to you?

11 A It means that he did another flow check. He did it on
12 this machine. It met whatever requirements he had. And it was
13 fine.

14 Q Okay. If you look at the next page, any of those
15 tickets show any sort of flow testing?

16 A No.

17 Q Okay. Please turn to the next page for Intoxilyzer 830.

18 A Okay.

19 Q And it should be dated 6/16.

20 A 6/16 of '11, yes, sir.

21 Q Do you see that?

22 A Yes.

23 Q Under the comments, did they do any work on the flow
24 sensor?

25 A Again, the flow was calibrated.

1 Q Okay. And on the next page, do you see a ticket showing
2 testing of calibration?

3 A Yes.

4 Q Okay. Turn to the next page for 833, please.

5 A Okay.

6 Q That should be dated March 24th. Do you see that?

7 A March 24th of '11, yes, sir.

8 Q And did they do any -- based upon what you see in the
9 comments, did they do any testing on the flow sensor?

10 A Yes.

11 Q What did they do?

12 A It says flow accuracy verified.

13 Q So that's a validation test, not a calibration?

14 A That's right.

15 Q If you turn to the next page, do you see out of those
16 test tickets or printout tickets, is there any of them related to
17 flow sensor?

18 A No.

19 Q Okay. Turn to the next page, please.

20 A 8/25 of '11.

21 Q For machine 1731?

22 A Yes.

23 Q Do you see whether or not in the comment section did
24 they do any work on the flow sensor?

25 A Yes.

1 Q What did they do?

2 A Again, it says flow was verified.

3 Q And if you turn to the next page from the printed
4 tickets, do any of those reflect any work on the flow sensor?

5 A They don't.

6 Q Turn to the next page, please. It should be for 3387.

7 A Yes.

8 Q Dated 6/16?

9 A Yes.

10 Q Based on information in the comments, did they do any
11 work on the flow sensor?

12 A Yes.

13 Q What did they do?

14 A They actually took the machine out of service.

15 Q Okay.

16 A It said the flow pressure transducer requires
17 replacement.

18 Q Okay. And if you would then turn -- let me see. Go up
19 a few pages to document dated July 21, 2011.

20 A Got it.

21 Q Do you have that?

22 A Yes.

23 Q And this is still for 3387 based upon the serial number
24 identified?

25 A Yes.

1 Q Based on information in the comment section, after they
2 replaced the pressure transducer, what did they do?

3 A Well, they calibrated the flow again. It says flow
4 calibrated.

5 Q And on the next page, is one of those test tickets
6 indicative of a calibration procedure?

7 A It is, yes.

8 Q Okay. Turn to the next page, please. It should be
9 dated November 2, 2011.

10 A Yes.

11 Q And for 3388?

12 A Yes. It says flow calibrated.

13 Q Okay. And if you turn to the next page or the two
14 pages, is there a document showing a flow calibration?

15 A Yes.

16 Q Okay. Turn to the next page after that, please. It
17 should be dated June 1, 2011.

18 A Yes.

19 Q For 5113. Based on information in the comments section,
20 did they work on the flow sensor?

21 A Yes.

22 Q What did they do?

23 A Flow calibrated again.

24 Q And on the next page, is there a document showing that
25 the flow was calibrated?

1 A There is.

2 Q Okay. Is there -- from the documents, if you compare
3 2010 to 2011, is there a pattern here?

4 A Well, they're obviously starting to check the flow
5 sensors at some point in '11.

6 Q Okay. I guess the point I'm trying to get to is, did
7 you see any information in the documents from 2010 showing any
8 work whatsoever?

9 A None.

10 Q From what you saw in 2011, is there any machine that
11 didn't either get a validation or a calibration test?

12 A No, not that I saw. I mean, I didn't see the cards for
13 each one, but we certainly saw it was written on the forms.

14 JUDGE CONRAD: Can I ask a question?

15 MR. ISAAK: Yes, sir.

16 JUDGE CONRAD: Do you know from any sources how the FDLE
17 is conducting flow sensor calibration tests?

18 THE WITNESS: There is forms, Judge, that they follow.
19 I'm assuming those are --

20 JUDGE CONRAD: No. I'm asking you. Do you have
21 personal knowledge of the specific procedure that at least is
22 suggested, following some procedure to determine whether the
23 sensor is calibrated? Do you know what that specific
24 procedure is, what they do?

25 THE WITNESS: Yes. Only -- well, only rating their --

1 JUDGE CONRAD: But what do they do? How do they --

2 THE WITNESS: They have a form in here that you can look
3 at.

4 MR. ISAAK: That's my next question, Judge.

5 JUDGE CONRAD: Okay. Then I'm sorry.

6 MR. ISAAK: Oh, no, no, no. I didn't want to interrupt
7 the Court, but that's exactly where I'm going.

8 JUDGE CONRAD: Okay. Go ahead. I'm sorry.

9 MR. ISAAK: I think -- my next line of questioning.

10 BY MR. ISAAK:

11 Q Will you turn to Exhibit 5, please?

12 A Yes. That's tabbed here I think. Right.

13 Q Do you see that -- what does it say on the top?

14 A It says FDLE alcohol testing program procedures manual.

15 Q Okay. Now, Mr. Swope, are you aware of any -- in your
16 20-plus years of experience, have you ever seen a manual of this
17 sort go through a promulgation process?

18 A Like this? No.

19 Q Any of the procedures in here would be unpromulgated?

20 A Right. Well, yeah. There's nothing promulgated at this
21 time in here, no.

22 Q Okay. Now if you would turn to -- it's going to be on
23 page nine. 7.5. Do you see that?

24 A No. Hang on. I'm getting there. Got it.

25 MR. ISAAK: Okay. Judge, I think this is where you were

1 going.

2 BY MR. ISAAK:

3 Q Okay. What is 7.5? Have you reviewed this?

4 A Yes.

5 Q Okay. What is 7.5 from what you can tell?

6 A It's really the way for the officer to check the flow
7 sensor. This is the procedure that -- I don't know who came up
8 with it, but this is the procedure they use to check, calibrate,
9 whatever word you want to use. They call it calibrating the flow
10 sensor during a certain particular procedure that they use.

11 Q Now if you would turn to page 28? It's about two pages
12 over.

13 A Right.

14 Q Under 2.19, what is that procedure there?

15 A This is another procedure for checking the flow rates.
16 It's kind of similar, but just another procedure. It gives a
17 chart. It lets the officers know where they're supposed to be
18 within a certain range. And I believe this is the one if it's --
19 if they can't make this work correctly, they go back to the
20 previous page.

21 Q So put into perspective for us what we're seeing flow
22 verified.

23 A Right.

24 Q Is it your understanding that they've done 2.19
25 procedure?

1 A I would think so. I mean, if you follow that procedure,
2 my understanding would be, yes, they've done it. Now they move
3 onto this procedure. And if this doesn't work, they go back to
4 the initial --

5 Q To 7.5?

6 A Correct.

7 Q Okay. So in those documents where there was flow
8 verified, apparently the person did the 2.19 procedure for those
9 documents in 2011 that say calibrated, it would be your opinion
10 that they did the 7.5 procedure?

11 A Yes.

12 Q Okay.

13 A That's what it looks like because they reference -- I
14 mean, this one, the 2.19 references the initial one, which is 7.5.

15 Q Okay.

16 A In fact -- I'm sorry.

17 Q No, no, no, no. I don't want to --

18 A I was going to say in fact, item 12 of that procedure
19 tells them if they can't get it going correctly, they go back to
20 7.5.

21 Q Okay. All right.

22 A So whatever that means.

23 Q Now have you reviewed these procedures from a
24 perspective of validity from scientific protocol?

25 A Right. Yes.

1 Q What's your opinion?

2 A Well, my opinion is I don't know what their reference
3 standard is. I don't know what their reference point is. I don't
4 know where they come up with the 1.1. I don't know what kind of
5 equipment -- because in other words, they're referencing different
6 types of equipment for flow sensors. But in other words, the
7 calibration procedure has to be based on something. In other
8 words, obviously what we do, a monthly test with ethanol, that's
9 based on -- you know, in other words they can check that with the
10 gas chromatograph. And when FDLE sends the sample of alcohol to
11 an agency, that's already been tested. In other words, they make
12 the alcohol. they get the solution. They test it. They
13 reference it. And it's sent to an agency. And they can say, yes,
14 this is what it is. But on the flow sensor, I don't know what
15 that procedure is. There's nothing in the documents to tell me
16 what their reference point is, what their accuracy point is, what
17 their error rate is. And they have a chart in here, but it
18 doesn't tell me where it came from, just like the 1.1 liters. I
19 don't know where that came from. And I don't know what the
20 reference is.

21 Q Are you familiar with an R value?

22 A Well, I am familiar with that as a reference point of
23 rate of flow.

24 Q Okay. Do these procedures, either 2.19 or 7.5, take
25 into consideration the R value?

1 A No, they don't.

2 Q And when you say rate of flow, what is the R value?
3 What's the rate of flow?

4 A What's the rate of flow? It's how much flow is going
5 into the machine, what is the machine accepting.

6 Q Okay.

7 A Is the flow meter even capable of handing that type of
8 breath?

9 Q Okay.

10 A Are they putting too much in? Are they putting too
11 little in?

12 Q Okay.

13 A You know, and I know from readings I've seen that
14 obviously there's some issue somewhere.

15 Q All right. So is it your opinion that 2.19 isn't a
16 scientific procedure or is there something deficient about it?

17 A It's deficient because I don't have the R values, I
18 don't have the accuracy, and I don't have the reference points.

19 Q What about 7.5?

20 A Same thing.

21 Q Okay.

22 A I mean, they talk -- it addresses -- which is really
23 weird, because it kind of addresses each other. It says here is
24 the procedure we're going to do. Then we move to the second
25 procedure. Well, if the second procedure doesn't give us what we

1 want, well, let's just go back to the first procedure and hope
2 that one of them works. But it doesn't address what happens if
3 there's an error. I mean, how do you know, especially an officer,
4 because really they're the ones doing the maintenance. I mean,
5 the officer is kind of in a bind because he doesn't really know
6 what he's looking for. That's the problem. I mean, the officer
7 should know what he's looking for. When he sees an erratic reading
8 come up during the month, which happens I've seen hundreds and
9 hundreds of times, he should have the ability to say -- or to know
10 what's happening, why is the flow giving me different numbers
11 numerically on lower volume readings than higher volumes or vice
12 versa.

13 Q If we look at or if we consider the monthly inspection,
14 is it scientific or unscientific to -- the failure to test the
15 flow sensor?

16 A Unscientific.

17 Q Why?

18 A Because that's our first safeguard for the machine.

19 Q Okay.

20 A If it was the third one, it may not be as important.
21 And I would just tell the Court, well, maybe it's off a little
22 bit, but it might not be that big a deal. But because obviously
23 the air is what you're looking and you're looking for deep lung
24 air, that's your first line that really -- it's the first thing a
25 person puts into the machine. So the machine takes your air. And

1 then the machine has to think to itself, okay, I need a certain
2 amount of time, I need a certain slope, it has to go into the
3 chamber, and then I have to analyze it. And then I'll provide the
4 officer a reading. And that -- if the machine could talk, so
5 that's what it's doing. But because your volume is the first
6 thing that goes in, that has to be right. That has to be right.
7 And we don't know if it is right.

8 Q Based on only testing the machine apparently one time a
9 year during some sort of additional testing during the department
10 inspection, is there any way to know from any of the other
11 procedures in place whether the calibration of the flow sensor
12 would go out of tolerance? Is there any way to know?

13 A Not without testing it often, no. There is no way of
14 knowing. I mean, we don't know what the machine will accept.

15 Q In the absence of testing the flow sensor on a monthly
16 basis, is there any way to know whether or not it is accurately
17 analyzing the volume to meet the requirement of 1.1 liters? And
18 I'm talking scientifically.

19 A Well, no and yes. Scientifically, I mean, the way I
20 would say you know there is an issue is when you get erratic
21 readings. So if you want to just go to a simple lay explanation,
22 when the officer gets a reading, and let's just use a number of
23 say, .20 and you have a DUI come in and he blows 2.9 liters at
24 say, a .20. Now he blows 1.1 liters and he's a .30. Well, right
25 there that's a warning. That tells you something is wrong with

1 the rate of flow that goes into the machine. If you have twice
2 the volume of air in the machine and you have -- and the reading
3 is higher, then you get -- you know, or vice versa where it's, you
4 know, much lower than it is on a 1.1. So from just a quick lay
5 standpoint, that's the way you'd look at that. But it's
6 unscientific.

7 MR. ISAAK: I'm going to tender the witness, Judge.

8 JUDGE CONRAD: Cross?

9 THE WITNESS: Thank you, sir.

10 **CROSS-EXAMINATION**

11 BY MS. SANGHVI:

12 Q Hello again, Mr. Swope.

13 A Good afternoon, ma'am.

14 Q Mr. Swope, you stated earlier that the majority of your
15 consulting is on accident recon?

16 A Yes.

17 Q Can you tell me, does your hourly rate vary between the
18 accident recon and the DUI breath testing?

19 A It can, yes.

20 Q Okay. And what is your average hourly rate?

21 A 225 per hour. Court is 300 per hour. And work for
22 governmental agencies is generally less, whatever the State pays.

23 Q Have you been paid by a governmental agency?

24 A U.S. Attorney's Office mostly. I refuse to work for
25 Florida anymore. It takes too long to get paid.

1 Q Okay. How much did you make last year?

2 A I don't know that that's --

3 Q As an expert?

4 A -- something I give out. I don't know that I'm required
5 to give that out.

6 Q Your average -- the amount you make as an expert
7 witness?

8 A I don't really know without looking at my books. I'm
9 not sure.

10 Q How do you mostly work for?

11 A Usually insurance companies and plaintiff lawyers.
12 That's probably 99 percent of my work. The other one percent is I
13 do work for the U.S. Attorney's Office. And I might only have one
14 or two criminal cases for the State now. The rest of them will be
15 defense, the ones that I have.

16 Q And if I told you that you've previously stated that you
17 made a million dollars a year as an expert, would that be correct
18 to your or familiar to you?

19 A My company probably has.

20 Q And that is -- what's the name of your company?

21 A Swope Reconstruction Corporation.

22 Q And you previously worked as a sheriff?

23 A Yes.

24 Q And when did you stop working as a sheriff?

25 A August of -- I'm sorry, July of 1990. But I kept my

1 certification for four years. And I taught at the police academy
2 through 1997.

3 Q And did you have to do anything to maintain that
4 certification or did it just --

5 A I didn't keep it maintained. I just -- when I left -- I
6 think at the time when I left, you were allowed to keep it for
7 four years without any kind of requirements.

8 Q And when did you begin consulting?

9 A Well, I began consulting immediately on reconstruction
10 when I left in 1990. I didn't do any criminal work other than for
11 the State until probably 1994 or '95. So I didn't do any defense
12 work until '94 or '95. That was the first time.

13 Q So you didn't start your own private consulting firm in
14 1987?

15 A I'm not sure what you -- I mean, I had a firm in '87,
16 but I was still with the sheriff's office. I was with another
17 individual. It was a jointly owned company. And so I was just an
18 employee of that company as well.

19 Q And at that company you were testifying as to breath
20 testing?

21 A No. No.

22 Q What were you testifying to?

23 A Civil cases outside of the county.

24 Q As a sheriff?

25 A Yes. I was allowed to at that time.

1 Q Is that why you left the sheriff's office?

2 A Well, eventually. I mean, business was doing pretty
3 well. Yeah.

4 Q The side business; is that correct?

5 A Yes. That's correct. It was doing pretty well and --

6 Q How much did you make as a sheriff?

7 MR. ISAAK: Judge, objection to relevance.

8 JUDGE MYERS: I'll sustain it.

9 BY MS. SANGHVI:

10 Q You've stated that you've studied the flow sensor
11 calibration before?

12 A Yes. It was one of the things I looked at. Yes.

13 Q Do you have any of those studies with you today?

14 A No.

15 Q And you've never been published in that?

16 A Specifically, no. Not on the flow sensor, no.

17 Q Have you ever been published on the Intoxilyzer 8000?

18 A No. I have not. I've provided -- as I said before, I
19 provide my studies. There's about 11 of us that go into one
20 individual. And he puts it together for a paper. I don't do any
21 papers myself on breath testing anymore.

22 Q Do you have any of those papers here with you today?

23 A No.

24 Q Do you have any way of proving that you in fact
25 contributed to these papers?

1 A Sure. Just pull them offline. I think Dr. Rose has
2 articles on that. Dr. Dick Jensen. I believe there is Wayne
3 Morris. There is probably several individuals that we've all
4 contributed to, studies from Florida International University.
5 You can pull those up. I'm sure there's several different
6 websites that has those papers.

7 Q That are attributed to you?

8 A No. But my name will most likely be on there because I
9 was a contributor of the studies. And it usually indicates FIU or
10 personnel at FIU. And usually our names are on it.

11 Q So you're saying that your name would be on there, but
12 you don't know?

13 A No. I know my name is on it. I'm assuming that it show
14 on the paper, so.

15 Q And, again, you don't have those here?

16 A No. But you can certainly get them or I'm sure I can
17 send them to Mr. Isaak, whatever you wish.

18 Q And you stated that you don't have any specific
19 knowledge of the flow sensor procedure for calibration?

20 A Well, there is none other than what's on these documents
21 which I just went through. There is no -- obviously as you're
22 aware of, no state mandated procedure. So I'm going off of what
23 these forms say.

24 Q And there forms were provided to you by Mr. Isaak?

25 A Well, I certainly got copies from him, but I think I had

1 them before in either other cases or some other attorneys provided
2 them to me. I can't tell you exactly where I got them, but I have
3 seen them though.

4 Q And you stated that you're reviewed this procedure for
5 scientific validity?

6 A Yes. I've attempted to do what they show on these
7 documents.

8 Q And based on that, you came up with some results?

9 A Well, sure. Well, you can always come up with a result.
10 The question is, is the result accurate and how did you get to
11 it. As I indicated, without a reference point, I can't really
12 tell you that exactly if they're right or not. I don't know. I
13 need reference points. I need to know how the software is set up.
14 That's what I really need to know. The alcohol ones I can tell
15 you because we can do independent testing. But without knowing
16 the software codes and working on some of these other things with
17 the flow sensor, I can't tell you.

18 Q So the alcohol ones you can tell us whether or not
19 they're valid or they're not?

20 A Well, sure because ethanol has been tested so many
21 times. It's fairly easy to come up with that.

22 Q But not when it pertains to an individual's breath test,
23 the validity of that, compares to a calibrated instrument?

24 A Well, no, because I don't know the parameters to get to
25 that other than what I've testified to now. We know that

1 there's -- I know, I should say. I shouldn't say we. I know that
2 there's a lot of errors in the breath readings because I've seen
3 them. And I'm trying to figure out if those readings are accurate
4 or not. When you come in here, you're assuming the reading is
5 accurate. I'm assuming that. But I can't assume that. I have to
6 assume there's other things that go into play to arrive at that
7 reading and how the machine analyzes that reading.

8 Q And what's the basis for that?

9 A Seeing the 600-and-some-odd readings that I think were
10 out of compliance or what I would consider not correct from all
11 around the state.

12 Q And you're saying you would consider them not correct?

13 A No. Anyone that has scientific background that looks at
14 that would have the same question. At least colleagues I've
15 worked with have had that question. I didn't make them say that.
16 I just said, "What do you think of this read?"

17 MS. SANGHVI: I'm going to object to him talking about
18 conferring with other experts. Again, that's bolstering.

19 JUDGE MYERS: Ask your next question.

20 BY MS. SANGHVI:

21 Q And you stated that -- is it procedure 2.19 is
22 deficient?

23 A Yes.

24 Q For the record, I'm referring to Defense Exhibit 8.

25 JUDGE CONRAD: Did you say sufficient or deficient?

1 MS. SANGHVI: Deficient.

2 JUDGE CONRAD: Sufficient?

3 MS. SANGHVI: Deficient.

4 JUDGE CONRAD: Deficient. Okay.

5 MS. SANGHVI: That's what he testified to earlier.

6 THE WITNESS: I don't think it's 8. It's another tab,
7 right?

8 MS. SANGHVI: Right. I could be mistaken.

9 THE WITNESS: Okay. I just want --

10 MS. SANGHVI: I apologize. Defense Exhibit 5.

11 THE WITNESS: I just wanted to make sure I didn't look
12 at the wrong document when you were talking to me.

13 MS. SANGHVI: I appreciate that.

14 JUDGE MYERS: Well, actually, it would be Defense
15 Exhibit 1, tab 5.

16 MS. SANGHVI: Yes.

17 BY MS. SANGHVI:

18 Q For the record, we're looking at Defense Exhibit 1, tab
19 5. And it's listed as page -- let's start with --

20 A 20-28?

21 Q Yes. 20-28.

22 A That's 2.19. Right.

23 Q 2.19.

24 A Right. Got it.

25 Q And you stated that this is a deficient procedure?

1 A Right.

2 Q Can you tell me why?

3 A Well, I don't know what the reference point is. I don't
4 know where they came up with those numbers. In other words, when
5 you ask me, like, an ethanol number, I can tell you where that
6 came up because there's plenty of studies indicating what the
7 reference points are for alcohol and -- or for ethanol. Generally
8 that comes from blood, so that's an easy reference point. I can
9 give you an answer. This one, I don't know where it came from. I
10 don't know what they're using as an accuracy of reliability. So I
11 can't tell you that.

12 Q So you haven't connect any studies regarding this?

13 A There are no studies. I have been able to find none
14 that come up with these numbers or this procedure.

15 Q And you personally have not conducted any studies to
16 determine whether or not this procedure is accurate or not?

17 A Well, I really don't know how to answer that. The
18 procedure I use for fluid studies and breath studies are different
19 because I know what my reference points are. This one, I can't
20 conduct a study and tell you if it's right or not until I know the
21 reference points. So it's hard to give you an answer, ma'am. I'm
22 not trying to avoid your question. It's just I can't -- yes, I've
23 tried, but I can't come up with a number because I don't know
24 where to start.

25 Q So because you don't know where to start, you're saying

1 that this procedure is deficient?

2 A Right. I don't know where they came up with it and
3 where they came up with these numbers. I don't even know if
4 they're applicable to this type of machine. I don't know that. In
5 other words, Drager has numbers. That's a different machine. I
6 know we don't use them. But the Drager machines have a flow
7 sensor similar to this, but they provided numbers that we can go
8 back and test where they're getting their rates of flows and where
9 they're getting their liters of air and how they're measuring
10 them. So they do have a procedure. I'm assuming CMI has one, but
11 I don't know what it is.

12 Q And would the same go for 7.5, which is page nine of tab
13 5?

14 A Yes, correct.

15 Q And that's why it's deficient, because you are unaware
16 of the reference points?

17 A Right. Where they came to them, right.

18 Q Okay. Can you tell me, have you done any studies that
19 relate to the scientific accuracy as it compares to the flow rate,
20 the breath results?

21 A Well, again, our own studies, yes. And it does --
22 certainly would verify that the readings would be accurate because
23 I know what the reference points are when I do my own. I can tell
24 you where to start, what the flow rates are, and what the error
25 rates are. I can give you the numbers of the ones that I do, but

1 I can't verify yours because I don't know if it's actually
2 analyzing the ethanol sample correctly.

3 Q And can you tell me why?

4 A Again, because I don't have a reference point. I don't
5 know if your sample -- and I'm saying yours just for the ease of
6 the Court. But I don't know if the amount of flow going in is
7 more than 1.1 liters or less. And we don't know that. I don't
8 know if the flow meter is -- let's say the flow meter is allowing
9 one liter of air in, not 1.1. And the flow meter is saying -- and
10 the machine is saying, okay, I've got the right amount of air.
11 But according to the rule, that's not enough. It needs 1.1. So
12 if it's giving us a reading at 1.0, that's not right. It's not an
13 accurate representation of what you as a prosecutor want. You
14 want the 1.1 or greater. I don't know that. Or you could have
15 somebody putting in 1.2 or 1.3 liters, but the machine is reading
16 less than that and you're getting volume not met and the officer
17 might think, well, the guy is screwing around, so I'm going to
18 give him a refusal. So that's the difference between knowing or
19 not knowing.

20 Q So e saying that this is step 1. The volume coming in
21 is step 1?

22 A No. The State is saying that.

23 Q Okay.

24 A I am agreeing with the state, that the State says that's
25 the first step. But obviously you have to blow into the machine.

1 Q Right.

2 A So I think you'd agree that that's step number one.

3 Q And you stated, correct me if I'm wrong, that step one
4 has to be right, otherwise how are you going to get to step 89.

5 A Right. Exactly. Agreed.

6 Q So explain to me why step one has to be right and how it
7 affects eight and nine.

8 A Well, because step number one, the amount of air going
9 in, has to reach a certain amount of air. And during that certain
10 amount of air, which is the 1.1 r greater, that's where the
11 machine says, okay, is there a mouth alcohol in the sample.
12 that's number one. I think you would want to know if there is
13 mouth alcohol or not because that would affect the reading. So if
14 you have less volume than 1.1 and the machine does not recognize
15 because of time that you have mouth alcohol, you're going to get a
16 reading which you would consider to be valid. And you're going to
17 say, well, geez, this guy didn't have mouth alcohol because the
18 machine didn't trigger. Well, it's not going to trigger if you
19 don't have over 1.1 liters and you don't meet your time
20 requirement. So that would be the first error in the case.

21 The second one would be is if you have an individual, as I
22 indicated before, that blows more than the 1.1. And the
23 machine -- I'm sorry, he blows less than 1.1. But the machine
24 accepts the sample anyway and says, well, it's okay, there's
25 nothing wrong. Well, your slope is not going to work because you

1 have to have, as you're aware, the minimum of one second according
2 to the software, which is in the operator's manual. So it's not
3 going to analyze for that. So that's what I mean. You keep
4 competing and having different errors. In other words, what if
5 the reading is less than 1.1 again and it's less than a second and
6 there's radio frequency interference? That's not going to trigger
7 either because it's less than a second. So you're going to get a
8 numerical reading. And you're going to think it's correct.

9 Q Correct me if I'm wrong, but the instrument will not
10 even start if there is not one second; is that correct?

11 A That's --

12 Q I mean, all three of these have to be in place. So
13 we're just talking about the flow sensor. We're not talking about
14 the time and we're not talking about the slope.

15 A Well, no, we're talking about -- because the one second
16 is almost instantaneous. As soon as you start blowing, I mean, a
17 second is -- I don't even know how to demonstrate how quick it is.
18 The Court knows. So as soon as you start blowing in there and the
19 machine accepts anything, that's a second. So that kind of comes
20 around into another circle of, well, how can it really analyze the
21 sample in one second for slope, which it really can't. But that's
22 a-whole-nother issue.

23 But the point is that you need the first requirement to go
24 in, to make sure that the time and the slope can analyze a proper
25 sample that's more than 1.1 liter. And we don't know that.

1 Q And you're saying you don't know where 1.1 comes from?

2 A No. To me it's a target, but I don't know the
3 scientific, why they chose 1.1. Some of the other machines are
4 different in other states. And I'm not trying to throw in other
5 states, but they're different than the 1.1. So I don't know where
6 Florida picked that up.

7 Q So can you tell me how you know that if you don't have
8 1.1 liters of breath, how you're obtaining an accurate sample.

9 A I can tell you because I've seen hundreds of samples
10 with the State that have had 0.5 liters, 0.9 liters, and come up
11 with a valid number. Obviously -- in other words, less say you
12 have less -- the machine is going to show me that I have less than
13 1.1 liters of air, but it's going to give me a valid number. And
14 it's going to be on the printout card. But for it to be on the
15 printout card as you indicated, it's got to be more than a second.
16 So the machine says, okay, the reading is correct. But you will
17 never know unless you pull the card from the FDLE website that
18 shows you what the volume is going into the machine. So it's
19 giving you -- the officer is going to come in here and hand you a
20 card. And he's going to say here's the two readings I got from
21 this subject. And you're going to say, okay, it's a .10 and a
22 .10. And you're going to prosecute. But when we look at the
23 website and we pull off the document, it's going to show less than
24 1.1 liters. You're not going to know that unless you pull it.
25 That's the problem with this whole procedure now. You don't know.

1 You might want to know that.

2 Q And are you stating that in that case it should have
3 been a volume not met?

4 A Right, exactly.

5 Q Okay. So you're saying when there's a less than
6 acceptable -- less than 1.1 --

7 A Right.

8 Q -- that that sample is inaccurate?

9 A It would be based on the rules that you have, correct.
10 I'm not saying that it's inaccurate myself. I'm saying your rules
11 say that. Your rules require that.

12 Q And I'm going to ask you again. Can you tell me why the
13 sample is inaccurate according to you?

14 A No.

15 MR. ISAAK: I'm going to object. I think this has been
16 asked and answered.

17 JUDGE MYERS: Sustained. Asked and answered.

18 BY MS. SANGHVI:

19 Q Is a less than a 1.1 sample of breath not scientifically
20 reliable?

21 A Yes.

22 Q And why?

23 A Because --

24 MR. ISAAK: Objection; asked and answered.

25 JUDGE MYERS: I'll overrule. Go ahead.

1 THE WITNESS: Because it could be less than a second,
2 number one, which means a slope detector does not check for
3 mouth alcohol. And number two is it's less than the
4 requirement that the rules indicate.

5 BY MS. SANGHVI:

6 Q I'm not talking about the rules here. I'm talking about
7 scientific accuracy. There's a rules argument. And the rules
8 argument is that they don't ensure scientific reliability. I want
9 you tell me why this is not scientifically reliable.

10 MR. ISAAK: Objection; asked and answered.

11 JUDGE MYERS: Sustained.

12 BY MS. SANGHVI:

13 Q Do you have the data with you today that led you to this
14 conclusion?

15 A No, but I had it in the last trial. I believe it was it
16 was all marked on Mr. Isaak's trial. I know we marked probably,
17 what, 50 documents? I didn't bring them with me today, but I'm
18 sure it's in there. If the Court wishes those documents, I can
19 get them or you can get them I'm sure.

20 Q Have you analyzed any of the individuals in this case,
21 their breath samples, their breath readings?

22 A No. I haven't spent much time looking at them. No,
23 ma'am.

24 Q So you don't know if there's any volume not mets?

25 A No, ma'am. I didn't look.

1 Q Or any of the ones that should have been volume not
2 mets?

3 A That's correct. I didn't look at these individuals.

4 Q And you stated that one of the clues to knowing about
5 calibration in between inspections is erratic readings?

6 A Yes. That's a clue for me, yes.

7 Q And do you know if there's any erratic readings in the
8 cases present?

9 A I didn't look at each individual reading.

10 Q And you stated that scientific protocol, it's bad
11 protocol to not have these calibrated?

12 A Yes.

13 Q Can you explain why?

14 A Well, I think it's only fair that you have an accurate
15 and reliable reading, regardless of what it is. And I think you
16 have to have an accurate kind of reliable reading when it's a
17 criminal issue especially. That's my opinion.

18 Q And the same for validation?

19 A Yes.

20 Q I'm going to refer you to State's Exhibit 1.

21 JUDGE MYERS: Defense?

22 MS. SANGHVI: I'm sorry. Defense Exhibit 1.

23 THE WITNESS: Yes, ma'am.

24 BY MS. SANGHVI:

25 Q And that is tab 4.

1 A Yes, ma'am.

2 Q Form 36.

3 A Yes, ma'am.

4 Q I'm looking at the fifth paragraph.

5 A Right.

6 Q Underneath verify date. Can you explain to me what that
7 is underneath there?

8 A I must be on a different -- I'm on form 36.

9 Q Form 36.

10 A Okay. Which one?

11 Q Paragraph five.

12 A Paragraph five, yes.

13 Q I'm looking down here. It's minimum sample volume
14 check.

15 A Right.

16 Q Can you explain -- can you read that out loud, please?

17 A Minimum sample volume check. Press enter. When
18 "provide sample now" is displayed, provide a breath sample volume
19 of less than 1.1 liter as shown on the display. The instrument
20 must again display "provide sample now". Provide a breath sample
21 volume of greater than 1.1 as shown on the display. The result
22 must be 0.000. Enter yes or no at the okay prompt.

23 Q Can you explain to us what that means?

24 A That's just a sample check, when you provide sample now.
25 I'm not really sure how because there's nothing that they have to

1 hook up to the machine that they provide any more than 1.1 unless
2 they're blowing less. I mean, what I do for that is I blow very
3 little, just a quick puff of air to get that number -- or to get
4 that reading. And then I blow longer for the second one. That's
5 what I do.

6 Q You don't know what the department does?

7 A Well, I know that they have nothing to hook up to it
8 because it doesn't say to hook anything up to it. So it tells the
9 individual to provide the sample, but it doesn't have any
10 equipment to hook up to it like the other parts do.

11 Q And I'm going to refer you to Defense 1, tab 9.

12 A Yes, ma'am.

13 Q And it's one, two, three, four, five, six, seven pages,
14 and dated June 16, 2011 on the bottom.

15 A Yes, ma'am.

16 Q And it says breath tube screen cleared.

17 A Right.

18 Q Can you tell me where the rule is that discussed the
19 breath tube?

20 A No. Not off the top of my head, no.

21 Q Do you know if there is a rule?

22 A I don't think so. I mean, I don't recall seeing that,
23 but no.

24 Q Have you done any studies on that?

25 A No.

1 Q Do you think that there should be a rule promulgated to
2 discuss the cleaning of a breath tube?

3 A I haven't thought about it.

4 Q You haven't been called in to testify in any cases
5 regarding cleaning of a breath tube?

6 MR. ISAAK: Objection; argumentative.

7 JUDGE MYERS: Overruled.

8 THE WITNESS: No, ma'am.

9 MS. SANGHVI: Judge, at this time the State requests
10 under 90.704 and 90.705 --

11 JUDGE MYERS: Evidence code?

12 MS. SANGHVI: Yes, Judge. Cross-examination. An expert
13 witness is required to provide the data that they rely upon.
14 And if they do not, their testimony is to be stricken.

15 JUDGE MYERS: Give me the cite again.

16 MS. SANGHVI: 90.704 and 90.705.

17 JUDGE MYERS: 704?

18 MS. SANGHVI: I'm sorry, Judge. 90.705.

19 JUDGE MYERS: Which is it, four or five?

20 MS. SANGHVI: Five, Judge. Subsection one. It says on
21 cross-examination, the expert shall be required to specify
22 the facts or data.

23 JUDGE MYERS: That's what it says.

24 MS. SANGHVI: And then reading in subsection two, it
25 says if the party establishes a prima facie evidence that the

1 expert does not have a sufficient basis for the opinion, the
2 opinions, inferences of the expert are inadmissible unless
3 the party offering the testimony establishes the underlying
4 facts or data.

5 MR. ISAAK: We'll give her whatever she wants. She can
6 specify whatever underlying data she wants the witness to
7 produce it, go back, and he'll produce it for her. Whatever
8 she wants.

9 JUDGE MYERS: Please correct me if I'm wrong. Because
10 of certain information, you asked the witness whether he
11 brought it with him today. And his answer was no to certain
12 things that you asked whether he brought it with him. Is
13 your argument that because he didn't bring the particular
14 document with him even though he had testified to his opinion
15 or testified to facts within his personal knowledge, that I
16 should otherwise discredit his testimony just because he
17 didn't bring the document?

18 MS. SANGHVI: Judge, I think the rule is pretty
19 straightforward when it says on cross-examination the expert
20 shall be required to specify the facts or data.

21 JUDGE MYERS: All right. Stop right there. I have no
22 problem with shall be required to specify the facts or data,
23 period. It does not say specific the facts or data by
24 providing the written information. His testimony could
25 potentially satisfy that requirement. Now if it goes on and

1 further says he must provide the written documentation or the
2 treatises or other bound volumes and information, so be it.

3 MS. SANGHVI: Judge, I understand what you're saying.
4 However, I don't believe that this witness has testified
5 sufficiently about the facts for data that he basis his
6 opinion on. Had he testified to that, and I believe -- I
7 asked him about the facts and data and asked him if he had
8 studies, and he said yes. I asked him to tell me about
9 those, and he couldn't. And then I asked him if he had
10 brought documentation of that.

11 JUDGE CONRAD: Let me ask you this because obviously you
12 thought about this before today, correct?

13 MS. SANGHVI: No, Judge.

14 JUDGE CONRAD: It just came to you?

15 MS. SANGHVI: Yes.

16 JUDGE CONRAD: The objection on cross-examination to the
17 lack of data just came to you in the middle of the hearing?

18 MS. SANGHVI: Judge, truthfully?

19 JUDGE MYERS: That would be good. Truthfully is good.

20 JUDGE CONRAD: Yeah. Because I'll be honest with you. I
21 mean, I've been doing this 31 years. And you either thought
22 about that ahead of time or someone told you that ahead of
23 time, unless you, you know, have a photographic memory of the
24 rules or the evidence rules. And the point being is if
25 you're going to make an argument based on the application of

1 90.705, at a minimum I would expect that you would have legal
2 authority, case law authority that says if the request is
3 made on cross-examination for the underlying data, that the
4 witness thereby must produce in court the specific sources or
5 documents that he is relying on instead of making a "this is
6 what I think it says" argument. So you don't have any legal
7 authority that says what you're asking the Court to do. Is
8 that fair to say?

9 MS. SANGHVI: Judge, that's not fair to say. May I have
10 a moment just to collect my argument?

11 JUDGE CONRAD: You either have legal authority, Ms.
12 Sanghvi, or you don't. If you're going to rely on that
13 statute of evidence, the rule of evidence in the statute to
14 present an argument, then obviously it may be subject to
15 interpretation. Mr. Isaak may not agree with you. We may
16 not agree with you. But there could be appellate authority
17 that specifically outlines how this rule is to be applied or
18 this particular statute. And I would assume that if you were
19 going to make the objection and request that information,
20 that you would have done the research necessary to supply us
21 with the legal authority. So I'm a little bit uncertain as
22 to why you're not arguing something other than this is what
23 you think it says.

24 MS. SANGHVI: Judge, my legal basis is simply from --
25 I'd be happy to provide that to the Court.

1 JUDGE CONRAD: You have Ehrhardt on evidence? Do you
2 have that or no?

3 MS. SANGHVI: I just have my printouts from Westlaw
4 regarding the expert testimony. If I could just have a
5 moment?

6 JUDGE CONRAD: Okay.

7 MS. SANGHVI: Judge, I have Ehrhardt. Would you like me
8 to --

9 JUDGE CONRAD: No. I'm simply asking you if you have
10 any case authority that says that outside of the witness's
11 testimony, which he has testified to the facts underlying his
12 opinion at this point, if part of that is data or written
13 documents, does he have to provide those on cross under
14 90.705.

15 MS. SANGHVI: Judge, I don't have anything specific to
16 documents. However, it just says that they must provide the
17 sufficient basis for his opinion.

18 JUDGE MYERS: Make a reference to sub one or sub two?

19 MS. SANGHVI: Well, I have sub one up. And then sub
20 two --

21 JUDGE MYERS: Okay. Let's take a look at 90.705,
22 disclosure of facts or data underlying expert opinion. Sub
23 one, unless otherwise required by the Court, an expert may
24 testify in terms of opinion or inferences and give reasons
25 without prior disclosure of the underlying facts or data.

1 Cross-examination. An expert shall be required to
2 specify the facts or data, period. So in terms of your
3 questioning, were you questioning such that you asked the
4 witness to give a specific opinion on an issue of your
5 question or you asked -- but you asked him general questions.
6 You did not ask him to render a specific opinion. For
7 example, sir, assume the following sets of facts; one, two,
8 three, four, whatever. And based upon those facts, can you
9 render a scientific opinion based upon the facts as
10 presented? And in my question -- you didn't question him in
11 that manner. That's not to say that's the only manner in
12 which it could be done. But this rule appears to direct it
13 based upon if it's testifying and rendering an opinion or
14 giving some type of an inference.

15 The questioning was basically fact related questions in
16 terms of what he did, how he did it, what he knew, and how he
17 knew, and his experiences with regard to these machines.
18 Now, you asked him certain things. And he indicated I guess
19 with regard to certain documents, he said that he didn't have
20 them with him at this particular time. But are those
21 documents such that you're saying that he's relying on them
22 to render his opinion?

23 MS. SANGHVI: Judge, I believe the questions that he
24 could not back up with some sort of sufficient facts or data
25 that were asked on direct, those must be excluded. And

1 that's -- I think that's what the meaning of the statute
2 states, is that these questions that were then asked on
3 direct, okay, well, is this scientifically reliable as this,
4 is this bad protocol, whatever. Do you have -- on cross, you
5 must be able to back that up. And that's what I was trying
6 to do in saying, "Okay, well, tell me why then you came up
7 with this."

8 JUDGE MYERS: All right. Well, let me ask this
9 question. Since you indicated that those questions were
10 posed on direct and he did not have a scientific basis or
11 analysis to back them up with any data, did you then object
12 when the question was being asked?

13 MS. SANGHVI: Judge, I didn't believe that was an
14 objection at that point. I believe under the statute it was
15 then my opportunity under cross to obtain those facts and
16 data. It's not an objectionable -- a question when he's
17 asking him something and he doesn't back it up with facts and
18 data immediately on direct. However, on cross is my
19 opportunity to elicit that kind of information. And that's
20 what I've -- I'm reading the statute. That's what it seems
21 to read to me.

22 JUDGE MYERS: Well, read it to me.

23 MS. SANGHVI: Okay. Unless otherwise required by the
24 Court, an expert may testify in term of opinion or inferences
25 and give reasons without prior disclosure of the underlying

1 facts or data. So there we have direct. I can't object
2 because he doesn't cite to underlying facts or data there.

3 JUDGE MYERS: Stop right there.

4 MR. ISAAK: She's not allowed to object?

5 JUDGE MYERS: Well, that's where I'm going.

6 MS. SANGHVI: No, no.

7 JUDGE MYERS: So are you telling me you can't object? If
8 you believe on direct examination that the witness is
9 answering a question and in answering that question he's
10 basing it upon some opinion that he has, okay, and does not
11 otherwise I guess have the documentation if you will to back
12 it up? Okay.

13 MS. SANGHVI: Judge, that's not -- that was not belief,
14 that I didn't go into this, go into direct assuming that he
15 didn't have any information to back it up. I just attempted
16 to elicit the facts and data on cross.

17 JUDGE MYERS: Okay.

18 MS. SANGHVI: I didn't ask questions I assumed that he
19 wouldn't be prepared to answer.

20 JUDGE MYERS: Okay.

21 MS. SANGHVI: That's certainly not my intention.

22 JUDGE MYERS: Okay.

23 MR. ISAAK: Respectfully, can I chime in?

24 JUDGE MYERS: Sure.

25 MR. ISAAK: He did answer the questions. When she said,

1 "Why is it unscientific," he gave her a reason. And just
2 because she doesn't like the reason, now she comes and she
3 says, "Well, where is the data?" There wasn't data because
4 his answer, "Why isn't it unscientific," was he doesn't have
5 the reference points. That and whatever data she's looking
6 for, whatever articles or anything that she was asking him
7 that he didn't have here, that had nothing to do with those
8 questions. So she's mixing one question with one answer and
9 a different question with a different answer. The questions
10 about why the procedure was unscientific had nothing to do
11 with the underlying data.

12 JUDGE MYERS: If I recall the testimony --

13 MR. ISAAK: He didn't have the reference points. He
14 didn't know where the computers came from. He didn't know
15 what their reference points were. I think she's confusing
16 -- he didn't have the articles that were written. She wants
17 the articles where his name is? Those are easy. I'm sure we
18 can find those. I think it's kind of silly, but --

19 JUDGE MYERS: No reference point. If that's his
20 testimony as to why he believes that this testing does not
21 follow sufficient scientific protocol because he says in
22 regard to the State of Florida there is not reference point.

23 I think in the questioning he also said that as far as him
24 being able to give an answer to the work that he does, he has
25 a reference point or some established standard baseline by

1 which he can tell you what he does.

2 MS. SANGHVI: And, Judge, he also stated that he knows
3 these to be inaccurate because he has studied 500 or so
4 tests. And they've demonstrated erratic showing of results
5 and that's how he knows this. That's why he knows that
6 they're not accurate. That he's reviewed the procedure for
7 scientific validity. And he said that about 2.19. He said
8 that about 7.5. I just want to know where the facts are that
9 this is based off of. Where is this coming from? If he's
10 reviewed all of these instruments and all of these tests and
11 all of these calibrations, then there's some basis for this,
12 but he can't tell me what the basis is. There's no facts and
13 there's no data provided.

14 JUDGE CONRAD: In Ehrhardt it cites Jackson v. State,
15 648 SO.2d 85, page 91, Florida Supreme Court case, 1994. It
16 says -- and this is the quote from the case. "Although the
17 proponent of an expert opinion may choose to disclose the
18 basis for the opinion, such disclosure is not required prior
19 to eliciting the opinion. If the cross-examiner inquires
20 about the basis of the opinion, the expert must disclose the
21 facts or data upon which the opinion is based. And the Court
22 in its discretion may require such disclosure. However,
23 there is no requirement that the facts or data underlying an
24 expert opinion be admitted into evidence in order to
25 establish the basis for the opinion.

1 So in other words, it seems like you've asked them or
2 him about the specific facts he relied on. He told you what
3 those facts were. He explained to you what the data was that
4 he relied upon. And that case seems to suggest that those
5 documents don't otherwise have to be admitted into evidence
6 in order for that opinion to be valid. Is there something
7 different than that that you're suggesting or --

8 MS. SANGHVI: Judge, I'm not asking for all of it to be
9 admitted into evidence. I'm certainly asking for a factual
10 basis behind it. And I think simply stating I have done
11 research and I have found this is not facts and data as
12 sufficient to base your opinion on.

13 JUDGE MYERS: Maybe I misunderstood. I thought you were
14 asking us to exclude his testimony because he had not
15 provided the written basis.

16 MS. SANGHVI: Well, let me clarify. I'm saying I gave
17 him an opportunity to provide an answer orally. If he can
18 give me sufficient facts and data on which he's based his
19 opinion of off, then I would not require anything additional.
20 There would be no need for written documentation. And that
21 was the attempt to elicit the facts and data on cross, but he
22 was unable to provide that to me. And he said based on these
23 studies, but he can't tell me any of the facts or data in
24 those. So then I asked for the written. If I can't have
25 either one, then yes. If he can satisfy this orally, then

1 there is no need for anything written.

2 MR. ISAAK: Judge, I believe the witness gave good
3 answers.

4 JUDGE MYERS: I would believe that whether or not the
5 witness has satisfied his obligation to testify and any
6 weight be given to that testimony would fall upon the Court.
7 He gave you an answer. That's his answer. Whether you like
8 it or not, whether you believe he satisfied what you required
9 or you believe he should require, that's your prerogative.
10 If he didn't answer the question, then so be it. You believe
11 that he didn't answer the question.

12 The next step then goes to whether or not -- and your
13 argument is because you believe he didn't answer the
14 question, then he should then provide some written
15 documentation or the basis for his answer.

16 Judge Conrad just read to you what Ehrhardt says on that
17 particular issue, that the Court has some discretion with
18 that and that the document need not be provided. I think
19 ultimately you're trying to get us to exclude his testimony.

20 MS. SANGHVI: Judge, if I may? I'm reading out of --

21 JUDGE MYERS: Yes, you may.

22 MS. SANGHVI: I'm reading footnote six. After the
23 section, it says, "However, section 705, subsection 2, makes
24 it clear that the opinion is admissible if the party offering
25 the opinion cannot establish the adequacy of the underlying

1 facts." And then I'm reading from subsection six. And about
2 halfway down there is a Second DCA case. It says Martin v.
3 Story, 97 So.2d 343. It's a Second DCA opinion of public
4 safety department expert that towed car was a dangerous
5 instrumentality, inadmissible. Her basis for opinion was
6 admittedly incomplete statistics. The expert had no
7 knowledge of the vehicle under discussion.

8 This expert has testified he has no knowledge of
9 anything to do with the flow sensors, the instruments in
10 question here, and he has stated that his studies are
11 incomplete, that he's trying to figure all of this out. And
12 he has not provided us with any sort of facts or data to base
13 these conclusions off of.

14 JUDGE MYERS: Mr. Isaak?

15 MR. ISAAK: Well, respectfully, Judge. She's wrong.
16 Mr. Swope testified he's been an expert for 20 years. And
17 he's been working on the Intoxilyzer 5000, the Intoxilyzer
18 8000. He's been looking at the flow sensors since 2010. So
19 there is certainly a very strong basis. He has a very strong
20 history with the machine. He's been spending -- he's spent
21 probably close to two years now investigating flow sensors.
22 So I think he's satisfied the fact that he has a sufficient
23 knowledge of flow sensors and what they're used for and
24 scientific protocol for testing the components of the
25 machines in order to ensure reliability and accuracy of

1 whatever analysis that component is conducting.

2 MS. SANGHVI: Judge, it's not a question here of whether
3 or not he's been going to be admitted as an expert. He's
4 already been admitted as such. So that standard does not
5 apply.

6 It's not whether or not he has sufficient knowledge to
7 base his opinion. It's whether or not he has sufficient
8 facts or data to back his opinions up here today.

9 JUDGE MYERS: So your request, if any, is what,
10 Ms. Sanghvi?

11 MS. SANGHVI: To exclude the expert opinion that could
12 not be -- that there could not be established a sufficient
13 basis for that opinion. So it states -- under the rule, it
14 states that this is inadmissible unless they can establish
15 the underlying facts or data.

16 JUDGE MYERS: And which opinion would you ask me to
17 exclude?

18 MS. SANGHVI: Well, Judge, I would ask to exclude any
19 information regarding the flow sensor that has -- that's not
20 backed up by any facts or data.

21 JUDGE MYERS: But that would not necessarily be an
22 opinion. You said exclude any information.

23 MS. SANGHVI: Let me clarify. Whether or not the
24 scientific protocol is bad protocol, whether or not -- if he
25 has an opinion on whether or not it should be calibrated to

1 ensure scientific reliability, whether or not he is of the
2 opinion that it should be validated to ensure scientific
3 reliability.

4 JUDGE MYERS: Did you ask him all of that in the form of
5 him to render an opinion to answer your question?

6 MS. SANGHVI: Judge, are you speaking to me?

7 JUDGE MYERS: Yes, ma'am.

8 MS. SANGHVI: No, Judge. I asked him for the facts or
9 data to back up the questions that Mr. Isaak asked him on
10 direct.

11 JUDGE MYERS: But before we get to the facts and/or
12 data, this rule talks about rendering an opinion. One is
13 contingent from the other. There's the rendering of an opinion
14 and then the data or lack of the data to back up that
15 opinion. You can't get to step two unless you deal with step
16 one. And that's why I asked you specifically what opinion is
17 the State saying that the witness testified to that you wish
18 me to exclude predicated upon the fact that he rendered that
19 opinion without some basis of any documentation to back that
20 up.

21 MS. SANGHVI: Judge, that opinion was rendered during
22 his direct. He was asked those questions. And I believe Mr.
23 Isaak stated that this is a scientific protocol question or
24 something to that effect. Is it necessary to calibrate the
25 instrument? And is it necessary or good scientific protocol

1 to validate the flow sensor? And these are questions that
2 Mr. Swope provided his opinion for. And on cross, then I am
3 allowed to question about that opinion. I don't see it
4 necessary that I re-ask all the same questions. And I
5 believe in many instances I did. I said, "You stated." That
6 was an opinion. Now let's back it up.

7 JUDGE MYERS: Well, see that there now is the problem.
8 Whether his statements was given in statements of fact based
9 upon his personal knowledge and observations and works or was
10 it a statement given on the basis of an opinion based upon
11 the question that was being asked. Therein lies the problem
12 because in terms of trying to have a fine line, okay, in
13 terms of dealing with the witness's testimony. So are you
14 saying now that I should exclude his entire testimony or are
15 there certain parts of the testimony that you believe are
16 deficient based upon his lack of having, as you claim, the
17 required documentation? I don't believe that the witness's
18 entire testimony was opinion. Would you --

19 MS. SANGHVI: I would agree with that, Judge.

20 JUDGE MYERS: You think that's a fair statement? All
21 right.

22 MS. SANGHVI: Yes.

23 JUDGE MYERS: So since the witness's entire testimony
24 was not opinion, there we go to the next step. Deal with
25 what parts and specific parts of the witness's testimony is

1 the State saying is or was opinion that was not substantiated
2 by, as you say, this necessary documentation.

3 MS. SANGHVI: Uh-huh.

4 JUDGE MYERS: You want me to exclude it.

5 MS. SANGHVI: Uh-huh.

6 JUDGE MYERS: I need specifics.

7 MS. SANGHVI: Yes, Judge. The State would seek to
8 exclude any opinion testimony given regarding the reliability
9 of the flow sensor and its calibration or validation and
10 anything regarding his opinion about the reliability of any
11 of the protocol that was discussed that I asked about on
12 cross. I gave the witness an opportunity to clarify. And
13 that was --

14 JUDGE CONRAD: What didn't you get? I mean, what are
15 you saying that he didn't -- first, part of it is based on
16 his personal experience. He's going to testify, "This is my
17 experience. This is what I've done. These are the studies.
18 These are the tests. This is what I've done." What
19 information factually -- and this is what Judge Myers was
20 trying to get to. You're saying, "Well, I want his opinion
21 struck and declared inadmissible," but you're not saying what
22 specific portions of that opinion. And you're not
23 articulating what facts you are now alleging were not
24 provided or disclosed in support of whatever the specific
25 opinion you want excluded. You're just saying, "He didn't

1 give me what I wanted or didn't answer my questions with
2 specific data, so I want everything excluded." But what if
3 the question you asked had nothing to do with anything in
4 terms of his opinion? Why would we exclude it based on an
5 unrelated question? It has to be specific.

6 MS. SANGHVI: Based on questions regarding Defense 1,
7 tab 5, regarding the Intoxilyzer 8000, the calibration and
8 procedures. Mr. Swope stated that he's of the opinion that
9 2.5, which is on page seven -- I'm sorry, not 2.5 -- 7.5 on
10 page nine is deficient, as well as 2.19, which is on page 28
11 of tab 5.

12 JUDGE CONRAD: Right. And you asked him why he had that
13 opinion. And what did he tell you?

14 MS. SANGHVI: He told me that there was not sufficient
15 information here for him to have --

16 JUDGE CONRAD: So what didn't you get? What facts
17 didn't you get from him that you believe he somehow has
18 somewhere else other than the exhibit that was introduced,
19 the questions related to the exhibit in your cross-
20 examination as to 2.1? What facts are you alluding to that
21 you have not been given in response to your questions and
22 therefore his testimony should be inadmissible? That's what
23 I'm not getting. You may not agree with his opinion, but if
24 your argument is I didn't get -- Judge, he never disclosed
25 the underlying facts to support the opinions so now you have

1 to declare it inadmissible, what facts are you now stating
2 were not provided to you with respect to that opinion that
3 you asked for? That's what I need to know. I think that's
4 what Judge Myers wants to know. And that's as to what
5 elements -- whatever elements of the opinion you're objecting
6 to. What facts didn't you get that you think you should have
7 gotten in response to your question?

8 MS. SANGHVI: Judge, I asked him specifically about why
9 the volume, the 1.1, how that volume would affect the
10 scientific reliability of those breath tests. I went through
11 the whole -- going back to what Mr. Isaak asked and Mr. Swope
12 stated on direct, about how this was step one, step one to
13 obtaining a reliable result and how without step one you
14 could not obtain a valid step eight, step nine.

15 JUDGE CONRAD: I understand the argument. What facts
16 did you not get that you're claiming he relied on facts that
17 he did not testify to in giving the opinion provided? Because
18 the purpose of the rule is to allow him to give the opinion
19 without disclosing the facts initially. And then if you want
20 to cross-examine him on the facts, you can do that. And then
21 he has to disclose his facts.

22 MS. SANGHVI: He stated that the facts and data were
23 conducted by studying over 500 Intoxilyzer breath results,
24 studying the calibration and such.

25 JUDGE CONRAD: Okay. So what didn't you get?

1 MS. SANGHVI: I didn't get the results of that.

2 JUDGE CONRAD: Of what?

3 MS. SANGHVI: Of his studies. I don't have any specific
4 facts or data that he can base his opinion off of other than
5 he has -- he's stating that he did conduct this. But we have
6 no way to verify that.

7 JUDGE MYERS: Let me jump in here. In answering Judge
8 Conrad's initial question, Ms. Sanghvi, you made reference to
9 tab 5.

10 MS. SANGHVI: Yes, Judge.

11 JUDGE MYERS: Okay. And in part of your explanation,
12 then you kind of slid off and started talking about 1.1
13 liters of breath. And therein lies part of the problem that
14 I'm having. Because the witness's testimony with regard to
15 tab 5 -- and I believe it was the Court that said Defense
16 Exhibit 1, tab 5, so we could be specific. And it makes
17 reference to 2.19. And also in tab 5 it makes reference to
18 7.5. The witness's testimony per the Court's notes says he
19 believes that those procedures are deficient because they
20 have no reference point. That's his testimony. That's why
21 he believes that they are deficient. Whether he's rendering
22 that opinion based upon his position there with regard to
23 those procedures as outlined, he read them, he says he
24 understand what they say, but he didn't know whether they're
25 accurate or not. And they are subsequently in his opinion

1 deficient because of no reference point. Okay. I don't
2 necessarily know that there would be any other underlying
3 documents or treatises or other written materials to verify
4 that. That's his opinion based upon his reading because he
5 said, look, I don't have a starting point. I don't know how
6 they came up with these procedures. So therefore I believe
7 they are deficient because there's no reference point.

8 He further went on to testify in terms of his individual
9 action, his individual testing of the 8000 and what he does.

10 He can give you a reference point and verify, you know,
11 justify the basis of any testimony that he gives. Okay.

12 Now there may be some other things that he testified to,
13 but I don't necessarily know that they equate to an opinion
14 that needs to have some type of written verification and
15 documentation. You're asking me to exclude the testimony
16 based upon opinion of 90.705. I'll deny the State's request.

17 I believe that the witness's testimony was sufficient and
18 previously been certified as an expert in these particular
19 areas. He can testify to that. It will be up to the Court
20 to make a determination as to any weight to give that
21 testimony, but that testimony is otherwise admissible. Your
22 request is denied.

23 MR. ISAAK: I just have a couple brief questions.

24 JUDGE CONRAD: Well, let me -- I'm assuming you were
25 done?

1 MS. SANGHVI: Yes, Judge.

2 **REDIRECT EXAMINATION**

3 BY MR. ISAAK:

4 Q Going back to tab 4, the department inspection
5 procedures --

6 A Yes.

7 Q -- when you were questioned about the minimum sample
8 volume check --

9 A Right.

10 Q -- I think -- would it be your opinion the flaw in
11 the -- the inherent flaw in her questioning, is there anything
12 about that procedure that validates whatever number is being
13 displayed while that procedure is going on as valid?

14 A No.

15 Q Do you see the point of my question?

16 A Yeah.

17 Q Okay. In other words, is that procedure in any way
18 validating the operation of the flow sensor?

19 A No, it's not.

20 Q The fact that a number comes up above or below 1.1, does
21 that mean that it's accurate?

22 A No, it doesn't.

23 Q Okay. This is not the type of procedure that we're
24 talking about in terms of validating or calibrating a flow sensor?

25 A That's correct.

1 MR. ISAAK: Okay. That's all I have.

2 THE WITNESS: Thank you.

3 JUDGE MYERS: You may stand down.

4 MR. ISAAK: Yes.

5 THE WITNESS: Thank you, Your Honor.

6 JUDGE MYERS: Let me have counsel approach, please.

7 (A sidebar conference was held on the record.)

8 MR. ISAAK: Yes, sir?

9 JUDGE MYERS: I believe Judge Conrad had some other
10 matters that he needs to take up probably in about another
11 hour or so from now.

12 MR. ISAAK: Right. I know. He has to leave at 4:30.
13 So let me call Tom Morton and go as far as I can go.

14 JUDGE MYERS: Okay.

15 JUDGE CONRAD: Just so you know, it's not --

16 MR. ISAAK: I know. I know. I know. You said it's
17 your --

18 JUDGE CONRAD: I have a domestic violence petitions that
19 have to be signed.

20 MR. ISAAK: Right.

21 JUDGE CONRAD: I can go to a quarter of.

22 MR. ISAAK: Okay.

23 JUDGE CONRAD: And then I got get down there to --

24 MR. ISAAK: He's here and he's ready to go.

25 JUDGE MYERS: Just be mindful of your time, okay?

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JUDGE CONRAD: Okay.

JUDGE MYERS: Thank you, folks.

(The proceedings are continued in Volume II of II.)