

IN THE COUNTY COURT OF THE TWENTIETH JUDICIAL CIRCUIT IN  
AND FOR CHARLOTTE COUNTY, FLORIDA. CRIMINAL ACTION

STATE OF FLORIDA,

PLAINTIFF,

VS.

CASE NO. 92-2042 T

FREDERICK BUDDY HERSEY,

DEFENDANT.

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TRANSCRIPT OF PROCEEDINGS

BEFORE THE HONORABLE KENTON H. HAYMANS, JUDGE  
OF SAID COURT, AT THE HEARING IN THE ABOVE-  
STYLED ACTION, HELD IN THE CHARLOTTE COUNTY  
COURTHOUSE, PUNTA GORDA, FLORIDA, ON  
OCTOBER 1, 1993.

APPEARANCES:

BRIAN KOBEL, ASSISTANT STATE ATTORNEY  
201 W. MARION AVENUE, SUITE 101  
PUNTA GORDA, FLORIDA 33950  
ON BEHALF OF PLAINTIFF.

DAVID MIGNEAULT, ATTORNEY AT LAW  
1500 COLONIAL BOULEVARD, SUITE 217  
FORT MYERS, FLORIDA 33907  
ON BEHALF OF DEFENDANT.

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COPY

1 THE COURT: GENTLEMEN, I BELIEVE WE'RE HERE  
2 ON A MOTION TO SUPPRESS. THIS IS THE CASE OF  
3 THE STATE OF FLORIDA VERSUS FREDERICK BUDDY HERSEY,  
4 CASE 93-2042 T.

5 STATE READY?

6 MR. KOBEL: STATE READY.

7 THE COURT: CALL YOUR FIRST WITNESS.

8 MR. KOBEL: I BELIEVE THE DEFENSE HAS THE  
9 BURDEN OF GOING FORWARD WITH THEIR MOTION TO  
10 SUPPRESS.

11 MR. MIGNEAULT: I BELIEVE OUR MOTION TO  
12 SUPPRESS --

13 THE COURT: NOT A SEARCH WARRANT, IS IT?

14 MR. KOBEL: NO, SIR. IN A MOTION TO SUPPRESS,  
15 EVIDENCE IS TO BE OBTAINED AS A RESULT OF -- WITHOUT  
16 A SEARCH WARRANT. THAT IS THE ONLY MOTION THE  
17 STATE IS AWARE OF THAT WE HAVE TO GO FORWARD WITH,  
18 IF THEY CAN SHOW THERE WASN'T A SEARCH WARRANT.

19 THE COURT: ALL YOU HAVE TO DO IS PUT THE  
20 WITNESS ON AND TELL HIM HE'S UNDER OATH, THAT THEY  
21 DIDN'T TAKE HIS OR THEIR FALSE TEETH OUT AND THE  
22 BURDEN IS GOING TO SHIFT.

23 MR. KOBEL: I BELIEVE THERE IS MORE GROUNDS  
24 TO THE MOTION NOW, ALSO THAT HE WASN'T AWARE OF --

25 THE COURT: I JUST READ THE MOTION. I DON'T

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KNOW WHAT ELSE --

MR. MIGNEAULT: I DON'T MIND GOING FORWARD.  
YOUR HONOR, I WILL CALL DEPUTY JAMES MELO.

THEREUPON,

JAMES MELO,

A WITNESS DULY SWORN BY THE CLERK, WAS EXAMINED AND  
TESTIFIED AS FOLLOWS:

DIRECT EXAMINATION

BY MR. MIGNEAULT:

Q DEPUTY, PLEASE STATE YOUR NAME FOR THE  
RECORD.

A JAMES L. MELO.

Q AND WHO ARE YOU EMPLOYED BY?

A CHARLOTTE COUNTY SHERIFF'S OFFICE.

Q AND HOW LONG HAVE YOU BEEN EMPLOYED BY THEM?

A ALMOST THREE YEARS.

Q AND WHAT IS YOUR RESPONSIBILITY WITH THE  
CHARLOTTE COUNTY SHERIFF'S OFFICE?

A I AM A CORRECTIONAL OFFICER.

Q AND DO YOU HAVE ANY SPECIFIC DUTIES REGARDING  
THE BREATHALYZER MACHINE?

A YES, SIR. I AM A STATE CERTIFIED OPERATOR.

Q AND WHEN DID YOU OBTAIN THIS CERTIFICATION?

A JULY OF '91.

Q THANK YOU. SIR, ON AUGUST 11TH, 1993, DID

1 YOU COME IN CONTACT WITH A FREDERICK BUDDY HERSEY?

2 A YES, SIR, I DID.

3 Q AND WERE YOU ON DUTY THAT EVENING?

4 A YES, I WAS.

5 Q AND COULD YOU PLEASE STATE HOW YOU CAME  
6 IN CONTACT WITH MR. HERSEY?

7 A YES, SIR. MR. HERSEY WAS BROUGHT IN AT 1350  
8 FOR DRIVING UNDER THE INFLUENCE.

9 Q AND WHAT WAS YOUR RESPONSIBILITY AT THAT TIME  
10 WHEN HE WAS BROUGHT INTO THE JAIL?

11 A I WAS THE INTOXOLYZER OPERATOR ON DUTY  
12 AND IT WAS MY DUTY TO OBSERVE HIM FOR TWENTY MINUTES PRIOR  
13 TO TESTING HIM.

14 Q OKAY. AND DID YOU OBSERVE HIM THE ENTIRE  
15 TIME HE WAS IN THE JAIL UNTIL THE TIME HE BLEW INTO THE  
16 BREATHALIZER MACHINE?

17 A YES, SIR.

18 Q PRIOR TO HIM BLOWING INTO THE BREATHALIZER  
19 MACHINE, DID YOU FIND ANYTHING ON HIS PERSON?

20 A YES, SIR. I HAD TO INDIVIDUALLY REMOVE  
21 HIS PROPERTY FROM HIS POCKETS.

22 Q AND DID SOME OF THAT PROPERTY CONSIST OF  
23 SOME FALSE TEETH IN A PAPER TOWELL?

24 A YES, SIR, IT DID.

25 Q AND WHERE WERE THEY LOCATED?

1 A THEY WERE IN HIS TOP POCKET.

2 Q AND WHAT DID YOU DO IN REGARD TO THOSE FALSE  
3 TEETH THAT WERE ENCLOSED IN A PAPER TOWEL?

4 A HE WANTED TO GIVE THEM TO ME AND I WOULDN'T  
5 ACCEPT THEM. HE ASKED IF HE COULD PUT THEM BACK IN HIS  
6 MOUTH. HE UNWRAPPED THEM OUT OF THE PAPER TOWEL, STARTED  
7 CLEANING THEM OFF AND PLACED THEM IN HIS MOUTH. AT THAT  
8 TIME I STARTED THE TWENTY MINUTE OBSERVATION PERIOD.

9 Q HOW DID HE START TO CLEAN OFF THE PAPER TOWEL  
10 (SIC)?

11 A IT WAS STUCK TO IT, SIR. HE WAS PICKING THE  
12 PIECES OF PAPER TOWEL OFF HIS TEETH.

13 Q WAS THE PAPER TOWEL OR THE FALSE TEETH WET  
14 AT THAT TIME?

15 A DIDN'T APPEAR TO BE WET.

16 Q WOULD IT BE FAIR TO ASSUME, BASED ON YOUR  
17 COMMON KNOWLEDGE, THAT AT SOME POINT TIME EITHER THE  
18 FALSE TEETH OR THE PAPER TOWEL WERE WET WITH SOME SUBSTANCE?

19 A I WOULD BELIEVE SO, SIR.

20 Q AFTER HE PICKED OFF PIECES OF PAPER TOWEL  
21 FROM HIS FALSE TEETH, WHAT DID YOU HAVE HIM DO AT THAT  
22 TIME?

23 A I ALLOWED HIM TO PLACE THEM IN HIS MOUTH.

24 Q AND WHAT HAPPENED AFTER THAT, SIR?

25 A I BEGAN MY TWENTY MINUTE OBSERVATION PERIOD

1 AND I CONTINUED ON WITH THE BOOKING PROCESS TO MAINTAIN  
2 COMPLETE CONTROL.

3 Q DID THERE COME A TIME WHEN MR. HERSEY BLEW  
4 INTO THE BREATHALIZER MACHINE?

5 A YES, SIR.

6 MR. MIGNEAULT: YOUR HONOR, I WOULD ASK THIS  
7 BE MARKED AS DEFENSE EXHIBIT 1 FOR IDENTIFICATION.

8 THE COURT: THE CLERK WILL MARK IT.

9 (SHORT DELAY HAD.)

10 MR. MIGNEAULT: YOUR HONOR, MAY I APPROACH  
11 THE WITNESS?

12 THE COURT: YOU MAY.

13 MR. MIGNEAULT: THANK YOU, SIR.

14 Q SIR, I AM GOING TO SHOW YOU WHAT HAS BEEN  
15 MARKED AS DEFENSE EXHIBIT 1 FOR IDENTIFICATION. DO YOU  
16 RECOGNIZE THAT, SIR?

17 A YES, SIR.

18 Q AND WHAT IS THAT?

19 A THIS APPEARS TO BE THE PRINTOUT CARD FROM  
20 THE BREATHALIZER MACHINE THAT WAS DONE ON MR. HERSEY.

21 Q AND IS THERE WRITING ON THAT CARD?

22 A YES, SIR, THERE IS.

23 Q AND WHOSE WRITING IS THAT?

24 A THAT'S MY WRITING.

25 Q AND DOES THAT APPEAR TO BE AN ACCURATE COPY

1 OF THE BREATHALIZER CARD THAT WAS DONE ON AUGUST 11TH, 1993,  
2 FOR MR. HERSEY?

3 A YES, IT DOES.

4 MR. MIGNEAULT: YOUR HONOR, AT THIS TIME I  
5 WOULD MOVE DEFENSE EXHIBIT 1 FOR IDENTIFICATION  
6 INTO EVIDENCE.

7 MR. KOBAL: NO OBJECTION.

8 THE COURT: ADMITTED.

9 Q (BY MR. MIGNEAULT CONTINUING) OFFICER, TAKE  
10 A LOOK AT EXHIBIT 1. CAN YOU PLEASE TESTIFY AS TO WHEN  
11 THE FIRST -- WHEN MR. HERSEY FIRST BLEW INTO THE MACHINE  
12 AND THERE WAS A READING?

13 A YES, SIR. 1423.

14 Q AND CAN YOU PLEASE TESTIFY AS TO WHEN -- DID  
15 MR. HERSEY BLOW A SECOND TIME?

16 A YES, HE DID.

17 Q WHAT TIME WAS THAT?

18 A 1423.

19 Q DEPUTY, ARE YOU CERTIFIED TO BE A  
20 BREATHALIZER INSTRUCTOR?

21 A NO, SIR, I AM NOT.

22 Q ARE YOU A BREATHALIZER MAINTANENCE PERSON?

23 A NO, SIR, I AM NOT.

24 Q WHAT EXACTLY ARE YOUR DUTIES THEN IN REGARD  
25 TO THE BREATHALIZER MACHINE?

1 A I AM AN OPERATOR.

2 Q ARE YOU FAMILIAR WITH THE GENERAL WORKINGS  
3 OF THE BREATHALIZER? ARE YOU COMPETENT TO TAKE IT APART  
4 AND TO EXAMINE IT?

5 A No, SIR, I AM NOT.

6 Q COULD YOU PLEASE EXPLAIN TO THIS COURT THE  
7 PROCESS IN TAKING A BREATHALIZER FROM AN INDIVIDUAL?  
8 WHAT HAPPENS WHEN YOU ARE SETTING UP THE BREATHALIZER TEST  
9 FOR SOMEBODY TO BLOW INTO THE MACHINE?

10 A FIRST THING I DO IS FILL OUT MY PAPER WORK  
11 AS THE TIME ALLOWS AND THEN WE HAVE A CHECKLIST WE GO ON,  
12 YOU PUSH THE START BUTTON.

13 Q WHAT HAPPENS WHEN YOU PUSH THE START BUTTON?

14 A SAYS "INSERT CARD."

15 Q THEN WHAT HAPPENS?

16 A YOU INSERT THE CARD. THERE IS AN AIR BLANK,  
17 AFTER IT DOES THE AIR BLANK IT WILL SAY "BLOW."

18 Q HOW LONG DOES THE AIR BLANK TAKE?

19 A I COULDN'T TELL YOU EXACTLY, SIR.

20 Q SIR, WHEN YOU WERE TRAINED -- STRIKE THAT.  
21 MR. MIGNEAULT: I HAVE NOTHING FURTHER FROM  
22 THIS WITNESS.

23 THE COURT: CROSS.

24 CROSS EXAMINATION

25 BY MR. KOBAL:



1 Q OFFICER, IS THERE ANY RULE OR ANY REGULATION  
2 IN YOUR TRAINING THAT REQUIRES YOU TO HAVE PEOPLE REMOVE  
3 FALST TEETH?

4 A NOT TO MY KNOWLEDGE.

5 Q DO YOU RECALL THE NIGHT IN QUESTION?

6 A YES, SIR, I DO.

7 Q DO YOU RECALL WHETHER THE TIMES REFLECTED  
8 ON THE PRINTOUT SEEM TO BE AN ACCURATE ACCOUNT OF WHAT  
9 TIMES THE SUBJECT TESTS WERE ACTUALLY RECEIVED INTO THAT  
10 MACHINE?

11 A YES, SIR, IT DOES.

12 Q FROM THE PRINTOUT AS A RESULT OF THE FIRST  
13 TEST TO THE END OF THE SECOND TEST, COULD THAT HAVE BEEN  
14 COMPLETED IN MINUTES, OR WAS THAT COMPLETED IN A MINUTE  
15 ON THAT NIGHT?

16 A SIR, I COULDN'T GIVE YOU A REAL EDUCATED  
17 TIME. I DIDN'T TIME IT WITH A WATCH. I GO BY WHAT THE  
18 CARD SAYS.

19 Q DOES IT SEEM TO BE CONSISTENT WITH WHAT --  
20 DOES WHAT THE CARD SAYS SEEM TO BE CONSISTENT WITH YOUR  
21 MEMORY OF WHAT HAPPENED THAT NIGHT?

22 MR. MIGNEAULT: OBJECTION, YOUR HONOR, CALLS  
23 FOR SPECULATION. HE ALREADY TESTIFIED HE DOESN'T  
24 RECALL.

25 THE COURT: SUSTAINED.

1 MR. KOBEL: HE CAN GIVE AN APPROXIMATION,  
2 YOUR HONOR.

3 THE COURT: IF HE KNOWS.

4 Q (BY MR. KOBAL CONTINUING) DID YOU FOLLOW THE  
5 CHECKLIST IN ALL THE PROCEDURES THAT YOU ARE SUPPOSED TO  
6 DO?

7 A YES, SIR, I DID.

8 MR. KOBAL: I HAVE NO FURTHER QUESTIONS.

9 REDIRECT EXAMINATION

10 BY MR. MIGNEAULT:

11 Q DEPUTY, DO YOU HAVE SPECIFIC KNOWLEDGE THAT  
12 YOU WERE IN FACT NOT TRAINED TO HAVE PEOPLE REMOVE THEIR  
13 FALSE TEETH OR DO YOU NOT REMEMBER WHETHER OR NOT YOU WERE  
14 TRAINED REGARDING FALSE TEETH? SO WE CAN CLARIFY THE  
15 RECORD.

16 MR. KOBAL: OBJECTION, YOUR HONOR, AS TO  
17 RELEVANCE OF WHAT HE WAS TRAINED TO DO AS OPPOSED  
18 TO WHAT IS IN THE RULES.

19 MR. MIGNEAULT: YOUR HONOR, HE PREVIOUSLY  
20 TESTIFIED ON CROSS THAT HE BELIEVED -- REGARDING  
21 THE FALSE TEETH, HE WAS ASKED, "DID YOU RECEIVE  
22 ANY TRAINING REGARDING FALSE TEETH?" I WAS  
23 INQUIRING IF HE DID RECEIVE IT OR JUST CAN'T  
24 REMEMBER WHETHER OR NOT HE RECEIVED IT.

25 THE COURT: OBJECTION OVERRULED.

1 Q (BY MR. MIGNEAULT CONTINUING) YOU MAY  
2 ANSWER THE QUESTION.

3 A COULD YOU REPEAT THE QUESTION?

4 Q SURE. DO YOU SPECIFICALLY REMEMBER NOT  
5 BEING TAUGHT REGARDING FALSE TEETH AND WHAT TO DO WITH  
6 THEM OR DO YOU NOT REMEMBER WHETHER OR NOT YOU WERE TAUGHT  
7 ANYTHING ABOUT FALSE TEETH?

8 A TO THE BEST OF MY KNOWLEDGE, I WAS NOT  
9 TAUGHT ANYTHING TO DO WITH FALSE TEETH.

10 MR. MIGNEAULT: I HAVE NOTHING FURTHER FROM  
11 THIS WITNESS.

12 THE COURT: STEP DOWN, PLEASE.

13 (WITNESS EXCUSED.)

14 THE COURT: CALL YOUR NEXT WITNESS.

15 MR. MIGNEAULT: I WOULD CALL DEPUTY JOHNSON  
16 TO THE STAND.

17 TEHEREUPON,

18 STEVEN JOHNSON,

19 A WITNESS DULY SWORN BY THE CLERK, WAS EXAMINED AND  
20 TESTIFIED AS FOLLOWS:

21 DIRECT EXAMINATION

22 BY MR. MIGNEAULT:

23 Q DEPUTY JOHNSON, PLEASE STATE YOUR NAME FOR  
24 THE RECORD.

25 A DEPUTY STEVEN JOHNSON.

1 Q AND WHO ARE YOU EMPLOYED BY?

2 A I AM EMPLOYED BY THE CHARLOTTE COUNTY  
3 SHERIFF'S OFFICE.

4 Q HOW LONG HAVE YOU BEEN EMPLOYED BY THEM?

5 A I'VE BEEN EMPLOYED BY THEM NEARLY FOUR YEARS.

6 Q AND IN WHAT CAPACITY DO YOU WORK FOR THE  
7 CHARLOTTE COUNTY SHERIFF'S DEPARTMENT?

8 A I AM CURRENTLY THE DEPUTY IN CHARGE OF THE  
9 THE INTOXOLYZER MAINTENANCE AND JAIL CLASSIFICATION.

10 Q WHAT DO YOUR DUTIES ENTAIL IN REGARD TO  
11 BREATHALIZER MAINTENANCE?

12 A IN REGARD TO BREAHTALIZER MAINTENANCE, WE  
13 PERFORM THE MONTHLY CHECK TO MAKE SURE THAT THE INSTRUMENT  
14 IS WORKING PROPERLY AND GIVING OUT PROPER READINGS.

15 Q ARE YOU A CERTIFIED BREATHALIZER INSTRUCTOR?

16 A No, SIR, I AM NOT.

17 Q ARE YOU CERTIFIED TO TAKE APART A BREATHALIZER  
18 AND TO REPAIR ANY OF THE COMPONENTS?

19 A Yes, SIR, I AM.

20 Q IS THAT ONE OF YOUR FUNCTIONS AT THE CHARLOTTE  
21 COUNTY SHERIFF'S OFFICE?

22 A No, SIR, IT IS NOT.

23 Q HAVE YOU EVER DONE THAT SERVICE AT THE  
24 CHARLOTTE COUNTY SHERIFF'S DEPARTMENT?

25 A No, SIR, I HAVE NOT PERFORMED THAT SERVICE

1 ON OUR DEPARTMENT'S MACHINES.

2 Q WHEN WAS THE LAST TIME -- STRIKE THAT.

3 WHEN DID YOU RECEIVE YOUR TRAINING REGARDING  
4 BREATHALIZER MAINTENANCE?

5 A 1992.

6 Q WOULD YOU PLEASE SPEAK TO THIS COURT WHAT  
7 THE PROCEDURE IS WHEN AN INDIVIDUAL IS GOING TO TAKE A  
8 BREATHALIZER TEST, THE PROCEDURE FOR THE MACHINE TO RUN?

9 A AGAIN, FOR THE MACHINE TO RUN IT IS GOING  
10 TO BE TURNED ON, WARMED UP. ONCE IT IS WARMED UP, THE  
11 OPERATOR IS GOING TO PUSH THE BUTTON, FIRST THING THAT  
12 COMES IS "INSERT CARD." THE OPERATOR THEN INSERTS THE  
13 CARD, WAITS A SPECIFIC TIME THAT THE MACHINE IS GEARING  
14 ITSELF FOR IT, THE AIR BLANK, TELLS THE SUBJECT TO THEN  
15 PLEASE BLOW, AND THAT'S ALL THE OPERATOR HAS TO DO. HE  
16 IS STRICTLY FOLLOWING THE INTERNAL PROGRAM SHOWING HIM  
17 WHAT TO DO.

18 Q HOW LONG DOES THE INITIAL AIR BLANK TAKE  
19 WHEN YOU TURN ON THE MACHINE?

20 A JUST SECONDS. THERE IS NOT ANY LENGTH OF  
21 TIME AT ALL.

22 Q IS IT TRUE THAT THE HIGHER THE BREATHALIZER  
23 READING IS ON THE FIRST BLOW, THE LONGER IT WILL TAKE FOR  
24 THE AIR BLANK TO -- FOR THE MACHINE TO PURGE ITSELF?

25 A No, SIR.

1 Q IT IS NOT TRUE?

2 A No, SIR.

3 Q OKAY. AND WHAT DO YOU BASE THAT TESTIMONY ON?

4 A THE AIR BLANK RUNS A SPECIFIC AMOUNT OF TIME  
5 TO CLEAR ITSELF OUT. IT IS A ONE-SIDED CHAMBER. IT TAKES  
6 JUST SO LONG TO CLEAR THE CHAMBER OUT. WHATEVER IS IN  
7 THERE CLEARS OUT WITHIN THE SAME AMOUNT OF TIME WHATEVER  
8 IS BLOWN INTO IT.

9 Q HAVE YOU HAD ANY BLOWS OR BREATHALIZER -- DO  
10 YOU RUN THE MACHINE? DO YOU GIVE TESTS?

11 A YES, SIR, I DO.

12 Q HAVE YOU HAD ANY TESTS IN YOUR CAREER WHERE  
13 TWO BLOWS, WITH TWO BREATHALIZER READINGS ARE WITHIN A  
14 ONE MINUTE TIME PERIOD?

15 A NOT TO MY KNOWLEDGE, SIR. OF COURSE, I DON'T  
16 LOOK AT THEM THAT CLOSELY.

17 Q WOULD YOU BE SURPRISED IF-- DOES IT STRIKE  
18 YOU AS ODD THE FACT THAT TWO BREATH READINGS ARE GOING TO  
19 BE TAKING PLACE IN ONE TIME PERIOD, MEANING THAT A PERSON  
20 WOULD BLOW, THE MACHINE WOULD READ, IT WOULD PURGE ITSELF,  
21 IT WOULD THEN DO THE INTERNAL CALIBRATION, THEN RESET  
22 ITSELF, THE PERSON WOULD BLOW AGAIN LONG ENOUGH TO GET AN  
23 AIR SAMPLE, AND THEN ANOTHER READING WITHIN A MINUTE  
24 TIMEFRAME? WOULD THAT SURPRISE YOU?

25 A No, SIR, NOT ON THAT PARTICULAR MACHINE.

1 Q BUT THEN YOU HAVE NEVER HAD IT HAPPEN IN  
2 YOUR ENTIRE CAREER?

3 A NO, I HAVE NOT HAD IT HAPPEN.

4 Q SIR, HAVE YOU DONE ANY INDEPENDENT TESTING  
5 REGARDING THE INTOXOLTZER 5000?

6 A MY TESTING IS DONE AS A MAINTENANCE OPERATOR.  
7 I TEST IT WITH A SPECIFIC AMOUNT OF ALCOHOL ON A MONTHLY  
8 BASIS.

9 Q I'M TALKING ABOUT HAVE YOU DONE ANY INDEPEND-  
10 ENT TESTING IN REGARD TO THE COMPONENTS TO SEE IF THEY WORK  
11 VERSUS IF THEY DON'T WORK?

12 A YES, SIR. THAT'S PART OF MY MONTHLY  
13 MAINTENANCE PROCEDURE.

14 Q HAVE YOU DONE ANY TESTING IN REGARD TO FALSE  
15 TEETH AND THE BREATHALIZER MACHINE?

16 A NO, SIR.

17 Q OKAY. SIR, THIS PARTICULAR BREATHALIZER  
18 MACHINE, HAS IT BEEN DOWN FOR ANY TYPE OF MAINTENANCE OR  
19 REPAIRS PRIOR TO MR. HERSEY BLOWING INTO IT?

20 A YES, SIR.

21 Q CAN YOU PLEASE STATE WHAT REPAIRS THEY WERE  
22 FOR?

23 A I BELIEVE AT THAT POINT IT WAS TO TIGHTEN UP  
24 A LOSE VALVE ON ONE END OF THE BREATH SAMPLE CHAMBER. IT  
25 WAS SENT OUT FOR REPAIR AND RECALIBRATED AND SENT BACK TO US.

1 Q WITHIN THE YEAR PRIOR TO THE BREATH SAMPLE  
2 GIVEN BY MR. HERSEY, APPROXIMATELY HOW MANY TIMES THAT  
3 MACHINE HAS BEEN OUT FOR REPAIR AND MAINTENANCE?

4 A THE ONE TIME.

5 Q WHEN IT GOES OUT FOR MAINTENANCE, DOES THE  
6 COMPANY USUALLY REPLACE OR REPAIR A PORTION OF THAT  
7 MACHINE?

8 A AGAIN, SIR, I HAVE NO IDEA. YOU ARE ASKING  
9 ME WHAT THEY DO. I DO NOT KNOW WHAT THEY PERFORM.

10 Q WELL, DO YOU HAVE ANY KNOWLEDGE AT ALL  
11 WHETHER OR NOT THEY DO REPLACE COMPONENTS OR FIX ANYTHING  
12 WHEN YOU DO SEND THE MACHINE OUT?

13 A AGAIN, YOU ARE ASKING FOR AN ASSUMPTION ON  
14 MY PART. I CAN'T ANSWER THAT QUESTION, SIR.

15 Q WHEN YOU SEND OUT THE MACHINE AND IT COMES  
16 BACK TO YOU, ISN'T THERE ANY TYPE OF DOCUMENTATION TELLING  
17 YOU WHAT THEY'VE DONE TO THAT MACHINE?

18 A MANY TIMES, YES, THEY WILL ALSO PUT A LABOR  
19 FEE IN IT AND EXPLAIN THAT THEY HAVE DONE SOMETHING, BUT  
20 NOT NECESSARILY PARTS HAVE BEEN CHANGED OR WHAT'S UP. IT  
21 IS JUST INFORMING US THAT, YOU KNOW, THIS IS WHAT WE DO  
22 SO WHEN YOU PAY THE BILL WHICH GOES TO OUR FINANCE DEPART-  
23 MENT -- MANY TIMES I DON'T SEE THOSE BILLS.

24 Q WHERE DID YOU RECEIVE YOUR TRAINING REGARDING  
25 THE BREATHALIZER MAINTENANCE?



1           A       THE MAINTENANCE WAS GIVEN TO ME FROM THE  
2 ST. PETERSBURG JUNIOR COLLEGE AND CMI, WHICH WAS THE  
3 MANUFACTURER OF THE MACHINE.

4           Q       IS THAT PURSUANT TO HRS AND FLORIDA DEPARTMENT  
5 OF LAW ENFORCEMENT GUIDELINES?

6           A       YES, SIR, AT THE TIME IT WAS.

7           Q       OKAY. HAS THE MACHINE BEEN OUT FOR ANY  
8 MAINTENANCE OR REPAIRS SINCE MR. HERSEY'S TAKING OF THE  
9 BREATHALIZER?

10          A       NO, SIR.

11                   MR. MIGNEAULT: I HAVE NOTHING FURTHER,  
12 YOUR HONOR.

13                                   CROSS EXAMINATION

14 BY MR. KOBAL:

15          Q       DEPUTY JOHNSON, IS THERE ANY RULE OF HRS  
16 THAT YOU ARE FAMILIAR WITH WHICH REQUIRES THE BREATHALIZER  
17 OPERATORS TO HAVE SUBJECTS REMOVE FALSE TEETH PRIOR TO  
18 BLOWING INTO THE MACHINE?

19          A       NO, SIR, THERE IS NO RULING IN HRS 10D42.

20          Q       DO YOU ALSO, WHEN YOU DO MONTHLY MAINTENANCE,  
21 CHECK AND SEE IF THE 5000 SERIES WILL DETECT MOUTH ALCOHOL?

22          A       YES, SIR, WE DO. IT IS ON THE MONTHLY  
23 MAINTENANCE FORM THAT I BROUGHT WITH ME TODAY.

24          Q       THE MACHINE WE ARE SPEAKING OF IS SERIAL  
25 NUMBER 64-002775?

1 A YES, SIR.

2 Q DO YOU RECALL WHETHER THAT MACHINE RECORDS  
3 MOUTH ALCOHOL?

4 A THAT MACHINE, IF YOU ARE DEALING WITH MOUTH  
5 ALCOHOL, READS INVALID SAMPLES. IT WILL NOT TAKE A BREATH.

6 Q HAS THAT MACHINE EVER FAILED THAT TEST WHICH  
7 YOU GIVE IT MONTHLY?

8 A NO, SIR, IT HAS NOT. WE'VE HAD THAT MACHINE  
9 SINCE '88.

10 Q APPROXIMATELY HOW MANY TIMES HAVE YOU FED  
11 SAMPLES INTO THAT MACHINE AND OBSERVE IT BLOW AIR BLANKS.

12 A I DON'T UNDERSTAND THE QUESTION.

13 Q HOW MANY TIMES HAVE YOU PERFORMED MAINTENANCE  
14 ON THAT MACHINE?

15 A MAINTENANCE HAS BEEN DONE MONTHLY SINCE  
16 WE'VE HAD THE MACHINE AS PART OF THE GUIDELINES.

17 Q HOW MANY SAMPLES DO YOU PUT THROUGH EACH TIME  
18 MAINTENANCE IS DONE?

19 A WE PUT THROUGH, THE 50, THE 10, THE ACETONE,  
20 SO FOUR SAMPLES SENT THROUGH IT, A PERIOD OF SIX, SEVEN  
21 TIMES -- FIVE TIMES EACH MONTH, I MEAN EACH SIDE IT IS  
22 TESTED AND IT AIR BLANKS FIVE TIMES THROUGH AND THREE ARE  
23 RECORDED.

24 Q DO YOU HAVE ANY IDEA APPROXIMATELY HOW MANY  
25 AIR BLANKS YOU'VE OBSERVED?

1           A       I WOULD -- IT WOULD HAVE TO BE HUNDREDS.

2           Q       IS IT POSSIBLE THEN FOR THE END OF THE FIRST  
3 SUBJECT TEST FOR THE MACHINE TO RECORD THE TIME AND THEN  
4 RUN THROUGH AN AIR BLANK AND THE SECOND SUBJECT TESTING  
5 GIVEN AND RECORD THE SECOND TIME AND HAVE THAT FALL WITHIN  
6 ONE MINUTE?

7                   MR. MIGNEAULT: OBJECTION, YOUR HONOR,  
8 SPECULATION, IMPROPER PREDICATE. ALSO HE HAS NOT  
9 BEEN QUALIFIED AS AN EXPERT. IN REGARD TO THAT MATTER.

10                   THE COURT: SUSTAINED.

11           Q       (BY MR. KOBAL CONTINUING) APPROXIMATELY HOW  
12 LONG DOES AN AIR BLANK TAKE?

13           A       AGAIN, I HAVE NO WAY OF KNOWING. BE MILLI-  
14 SECONDS, JUST BE SECONDS TO CLEAR IT.

15           Q       OKAY. AND APPROXIMATELY HOW LONG -- HAVE YOU  
16 GIVEN SUBJECT TESTS BEFORE?

17           A       YES, SIR, I HAVE.

18           Q       ARE YOU A CERTIFIED OPERATOR ALSO?

19           A       YES, SIR, I AM.

20           Q       APPROXIMATELY HOW LONG IS THE RANGE OF TIME  
21 WITHIN WHICH THE SUBJECT TESTS CAN BE TAKEN.

22                   MR. MIGNEAULT: OBJECTION, YOUR HONOR,  
23 IMPROPER PREDICATE.

24                   MR. KOBAL: YOUR HONOR, HE OBSERVED IT  
25 HIMSELF. HE'S GIVEN THE BREATH TEST. HE'S HAD

1 AN OPPORTUNITY --

2 MR. MIGNEAULT: YOUR HONOR, HE TESTIFIED TO  
3 THE FACT THAT HE DOES NOT KNOW LONG IT TAKES AND  
4 HE HAS NO IDEA. HE TESTIFIED THAT--IN HIS CAREER  
5 HE'S NEVER HAD SAMPLES WITHIN ONE MINUTE. HOW CAN  
6 HE TESTIFY TO IT?

7 MR. KOBAL: HE ALSO TESTIFIED -- WELL --

8 THE COURT: SUSTAINED.

9 Q (BY MR. KOBAL CONTINUING) WOULD YOU, THROUGH  
10 YOUR TRAINING AND EXPERIENCE, SUSPECT THAT A SUBJECT TEST  
11 IS INVALID IF IT IS GIVEN IN THE SAME TIME PERIOD?

12 MR. MIGNEAULT: OBJECTION, YOUR HONOR,  
13 IMPROPER PREDICATE.

14 THE COURT: SUSTAINED.

15 MR. KOBAL: I HAVE NO FURTHER QUESTIONS AT  
16 THIS TIME.

17 REDIRECT EXAMINATION

18 BY MR. MIGNEAULT:

19 Q DEPUTY, WHEN YOU DID RECEIVE YOUR INSTRUCTIONS  
20 THOUGH REGARDING THE BREATHALIZER OPERATIONS, MAINTENANCE  
21 AND TO GIVE THE BREATHALIZER TEST, DID YOU RECEIVE ANY  
22 INSTRUCTIONS REGARDING FALSE TEETH IN HAVING DEFENDANTS  
23 REMOVE THEM PRIOR TO BLOWING INTO THE MACHINE?

24 A AGAIN, TO ANSWER YOUR QUESTION, SIR, ONE  
25 INSTRUCTOR I RECEIVED THAT INSTRUCTION. WHEN I REQUALIFIED,

1 THE NEXT INSTRUCTOR DID NOT ADDRESS IT. IT WAS NOT  
2 NECESSARY FOR IT AND HE WAS A DISTRICT SUPERINTENDENT  
3 FOR HRS.

4 MR. MIGNEAULT: YOUR HONOR, I ASK THIS BE  
5 MARKED AS DEFENSE EXHIBIT 2 FOR IDENTIFICATION.

6 THE COURT: IT WILL BE MARKED.

7 (SHORT DELAY HAD.)

8 MR. MIGNEAULT: YOUR HONOR, MAY I APPROACH  
9 THE WITNESS?

10 THE COURT: YOU MAY.

11 Q SIR, DO YOU RECOGNIZE THIS?

12 A NOT REALLY, SIR. IT LOOKS LIKE A BACK PAGE  
13 OF AN AIR REPORT.

14 Q I'M NOT ASKING YOU TO RECOGNIZE THE WRITING.  
15 I'M JUST ASKING IF YOU RECOGNIZE THE FORMAT FOR THAT FORM.

16 A AGAIN, THE FORMAT APPEARS TO ME TO BE THE  
17 BACK SIDE OF AN AIR REPORT FILLED OUT BY AN ARRESTING  
18 OFFICER.

19 Q DOES THAT APPEAR TO BE A FAIR AND ACCURATE  
20 REPRESENTATION OF THE BACK SIDE OF AN ALCOHOL INFLUENCE  
21 REPORT FORM?

22 A AGAIN, THE BEST OF MY KNOWLEDGE, I NOTICE  
23 THAT IT IS ONE SIGNED BY MR. MELO.

24 Q ONE OF THE QUESTIONS ASKED ON THAT FORM IS,  
25 "DO YOU WEAR FALSE TEETH?" I'M GOING TO SHOW YOU RIGHT

1 THERE (POINTING). IS THAT A ROUTINE QUESTION THAT IS  
2 ON THAT FORM THAT IS ASKED OF DEFENDANTS?

3 A AGAIN, SIR, I DO NOT ASK THESE QUESTIONS.  
4 THAT IS ASKED BY THE ARRESTING OFFICER, NOT BY THE OPERATOR,  
5 NOT BY THE TECHNICIAN.

6 Q YOU'VE NEVER BEEN TRAINED TO FILL OUT ONE  
7 OF THOSE FORMS?

8 A NO, SIR, I DO NOT FILL THEM OUT.

9 Q HAVE YOU EVER SEEN ONE OF THOSE FORMS BEFORE?

10 A IN THIS, WE'VE MADE COPIES AND SENT THEM OVER  
11 TO THE COURTHOUSE. AS TO SITTING AND LOOKING AT IT AND  
12 TRYING TO UNDERSTAND IT, NO, SIR. I'VE NEVER BEEN TRAINED  
13 IN IT, NOT SPENT THE TIME TO SEE WHAT IS INVOLVED WITH IT.

14 MR. KOBAL: YOUR HONOR, OBJECTION TO THE  
15 RELEVANCE OF THIS LINE OF QUESTIONING.

16 MR. MIGNEAULT: I'LL GET TO THAT WITH THE  
17 NEXT QUESTION, YOUR HONOR.

18 Q (BY MR. MIGNEAULT CONTINUING) SIR, DO YOU  
19 KNOW WHY THEY WOULD REQUIRE THE OFFICER TO ASK IF A  
20 DEFENDANT HAS FALSE TEETH?

21 A NO, SIR.

22 MR. MIGNEAULT: I HAVE NOTHING FURTHER FROM  
23 THIS WITNESS AT THIS TIME, JUDGE, BUT I DO RESERVE  
24 THE RIGHT TO RECALL HIM.

25 THE COURT: YOU MAY STEP DOWN.

1 (WITNESS EXCUSED).

2 MR. MIGNEAULT: DEFENSE WOULD CALL MR. RICK  
3 SWOPE TO THE STAND.

4 THEREUPON,

5 RICK SWOPE,

6 A WITNESS DULY SWORN BY THE CLERK, WAS EXAMINED AND  
7 TESTIFIED AS FOLLOWS:

8 DIRECT EXAMINATION

9 BY MR. MIGNEAULT:

10 Q MR. SWOPE, PLEASE STATE YOUR NAME FOR THE  
11 RECORD.

12 A RICK SWOPE, S-W-O-P-E.

13 Q AND WHERE DO YOU RESIDE, SIR?

14 A 8014 SOUTHWEST 29TH STREET, DAVIE, FLORIDA.

15 Q AND WHAT IS YOUR OCCUPATION?

16 A I AM SELF-EMPLOYED. I HAVE A COMPANY CALLED  
17 SWOPE RECONSTRUCTION. ACCIDENT RECONSTRUCTION IS THE  
18 PRIMARY BUSINESS THAT I DO AND I ALSO DO SOME DUI CONSULT-  
19 ING FOR THE STATE ATTORNEY OFFICES AND ALSO THE PUBLIC  
20 DEFENDER'S OFFICES AND I DO SOME DEFENSE WORK AROUND THE  
21 STATE.

22 Q CAN YOU PLEASE RELATE TO THIS COURT YOUR  
23 EXPERIENCES IN REGARD TO DUI'S?

24 A YES. I WAS IN CHARGE OF THE DUI TASK FORCE,  
25 ADMINISTRATIVELY IN CHARGE OF THE DUI TASK FORCE AND

1 TRAFFIC HOMICIDE BUREAU FOR THE BROWARD SHERIFF'S OFFICE  
2 FOR ABOUT FIVE AND A HALF YEARS. I BECAME INVOLVED IN  
3 BREATH TESTING IN 1974. I WAS CERTIFIED IN THE STATE OF  
4 KANSAS BY THE KANSAS HIGHWAY PATROL AND ALSO BY THE U.S.  
5 ARMY INVOLVING USE OF THE BREATHALIZER 900, 900A. I  
6 WORKED THAT INSTRUMENT FOR SEVERAL YEARS. I ALSO BECAME  
7 CERTIFIED IN THE STATE OF FLORIDA WITH THE 900, THE 900A,  
8 THE 1000, THE 3000, THE 4011, THE 4011ASA AND THE 5000  
9 AND 5000R.

10 I'VE BEEN AN INSTRUCTOR IN THE STATE OF  
11 FLORIDA SINCE 1985 INVOLVING DUI AND BREATH TESTING. I'VE  
12 BEEN TEACHING AT THE BROWARD POLICE ACADEMY SINCE 1985.  
13 I'M ON STAFF WITH THE UNIVERSITY OF NORTH FLORIDA IN  
14 JACKSONVILLE, ICCM, AS AN ADJUNCT INSTRUCTOR AND I ALSO  
15 TRAVEL DOING INJURY AND DEATH INVESTIGATIONS AND ALSO  
16 INTOXOLYZER AND BREATHALIZER INFORMATION FOR THE UNIVERSITY  
17 OF LOUISVILLE SOUTHERN POLICE INSTITUTE OUT OF KENTUCKY.  
18 I TRAVEL FOR THE NATIONAL HIGHWAY TRAFFIC SAFETY  
19 ADMINISTRATION, GIVING CLASSES ON DUI'S AND ON BREATHALIZER  
20 EQUIPMENT AND INSTRUMENTS.

21 AS FAR AS I KNOW, I AM THE ONLY PERSONAL  
22 OWNER OF AN INTOXOLYZER 5000R-66 SERIES WHICH I PURCHASED  
23 FROM CMI ABOUT SIX MONTHS AGO.

24 Q SIR, DO YOU PRESENTLY ALSO WORK FOR THE  
25 STATE ATTORNEY'S OFFICE IN FLORIDA?



1           A        YES, I DO. I CONSULT QUITE FREQUENTLY FOR  
2           THE BROWARD COUNTY STATE ATTORNEY'S OFFICE. I HAVE ABOUT  
3           SIX OR EIGHT CASES PENDING WITH THEM NOW WHERE I AM CALLED  
4           IN TO TESTIFY EITHER ON BREATH CASES, ROAD SOBRIETY TESTS  
5           OR I RECONSTRUCT ACCIDENTS FOR THEM INVOLVING DUI MAN-  
6           SLAUGHTERS AS WELL. ACTUALLY I ASSIST. I DON'T PROSECUTE.  
7           I ASSIST THEM.

8           Q        HAVE YOU EVER BEEN CLASSIFIED AS AN EXPERT  
9           IN ANY COURT OF LAW IN FLORIDA?

10          A        YES.

11          Q        HOW MANY TIMES HAVE YOU TESTIFIED AS AN EXPERT  
12          IN REGARD TO BREATHZLIZER MACHINES?

13          A        HUNDREDS OF TIMES.

14          Q        HAVE YOU EVER BEEN DISQUALIFIED AS AN EXPERT?

15          A        TO MY KNOWLEDGE, NO.

16          Q        SIR, THE INSTRUCTION THAT YOU RECEIVED IN  
17          ORDER TO BECOME AN INSTRUCTOR FOR THE BREATHALIZER OR  
18          THE INTOXOLYZER 5000 MACHINE, WHO GAVE THAT INSTRUCTION,  
19          WHO WAS IT SANCTIONED BY?

20          A        WELL, AT THAT TIME THE INSTRUCTION WAS GIVEN  
21          BY HRS. I BELIEVE IN JULY OF THIS YEAR OR AUGUST IT WAS  
22          TURNED OVER TO FDLE BUT AT THAT TIME EVERYTHING WAS DONE  
23          UNDER HRS. THERE WERE CERTAIN REQUIREMENTS NATURALLY  
24          YOU HAD TO GO THROUGH INSTRUCTORS' SCHOOL AS WELL AND  
25          THAT WAS THROUGH FDLE. I BELIEVE THAT WAS AN EIGHTY HOUR