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IN THE COUNTY COURT OF THE 17TH JUDICIAL CIRCUIT

IN AND FOR BROWARD COUNTY, FLORIDA

STATE ATTORNEY
17TH JUDICIAL CIRCUIT
RECEPTION

CASE NO.: 12-3464MM10A

STATE OF FLORIDA,

Plaintiff,

vs.

GENNEDY CHIKAUROV,

Defendant.

COPY

DEPOSITION

OF

JAY HAGER

Broward County Courthouse
201 Southeast 6th Street
Fort Lauderdale, Florida 33301

April 26th, 2013

3:39 p.m. - 4:39 p.m.

APPEARANCES:

For the Plaintiff(s):

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For the Defendant(s):

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EXHIBIT INDEX

None

1 THEREUPON:

2 JAY ZAGER

3 a witness named in the notice heretofore filed, having
4 been first duly sworn, deposes and says as follows:

5 DIRECT EXAMINATION

6 BY MR. NATIELLO:

7 Q. Okay. We're on the record. It is now
8 approximately 3:39 p.m. on April 26th, 2013. This is a
9 telephonic deposition taken for Mr. Jay Zager, Z-A-G-E-R
10 by Joe Natiello of the State Attorney's Office.
11 N-A-T-I-E-L-L-O. And present also is Assistant State
12 Attorney, Josh Higgins, H-I-G-G-I-N-S, of the State
13 Attorney's Office. And Mr. Clay Hildum of the Court
14 Reporting Services.

15 This is going to be in reference to two cases.
16 First one will be Lauren Elizabeth Graham is the
17 defendant. G R A-H-A-M. And that's Case Number
18 12-014320MM10A, and the second case is on Mr. Gennady
19 Chikaurov. And that case number is 12-003464MM10A.

20 Mr. Zager, what I'd like to do is just start with
21 some generic information. I have a copy of what I
22 believe to be an old curricula vitae and I just want to
23 get some information on it as far as some updates, if
24 that's okay.

25 A. Sure.

1 Q. And just to give you some perspective on the
2 age of this particular curricula, it shows as your
3 address at the time the 4401 address?

4 A. Right. That's no longer.

5 Q. Okay. Approximately how much time has elapsed
6 since you've used that address on this curricula?

7 A. About three years or so.

8 Q. Okay. All right. Tell me about your training
9 experience, Mr. Zager?

10 A. In which regard?

11 Q. Well, I'm sorry?

12 A. In what regard?

13 Q. In regards to you as an expert in DUI matters?

14 A. Well, I'm a retired Broward County Sherriff's
15 Deputy where I was a member of the DUI task force and
16 also the officer in charge of the BAT video room at the
17 time and I also provided expert testimony concerning
18 correct alcohol testing impairment issues.

19 Q. About how many cases to date, and then just
20 approximate, I'm not going to hold you to anything, but
21 approximately how many cases have you testified to in
22 regards to DUI cases?

23 A. Well, total number of cases, if you include
24 all areas of it, trials, motions, hearings, etc., is
25 well over at this point, it's probably well over 1200

1 times, if not more.

2 Q. How many of those cases have you testified in
3 court as a witness?

4 MR. MALOVE: Let me just ask, because it's not
5 clear. Are you talking about when he was a deputy
6 sheriff or are you talking about --

7 MR. NATIELLO: No, no.

8 MR. MALOVE: Since you've left the BSO?

9 MR. NATIELLO: Yes, I'm not. Save for his
10 experience of what he did as a deputy sheriff
11 specifically relating to DUI investigations, I'm
12 not so much interested in his BSO career. What I'm
13 interested in is his experience in testifying as a
14 DUI expert.

15 THE WITNESS: Well, I testified as a DUI
16 expert for the Sherriff's Office as well.

17 BY MR. NATIELLO:

18 Q. Okay. All right. Well, then include that in
19 those numbers, then?

20 A. These are numbers I don't have that I
21 maintained by -- , but the number of cases that I
22 testified in whether or not there was expert testimony
23 that was requested of me either from state attorneys, at
24 the time, those numbers of cases had to be at least
25 probably trials, maybe 2-, 3-, 400. And once again, I'm

1 using a best estimate.

2 Q. I understand. I understand. So
3 approximately?

4 A. At times where I offered an expert testimony
5 where there was some designation or qualification was
6 really in a great majority of those. For whatever
7 reasons, they were asking me my opinions on something,
8 whatever it may have been.

9 Q. All right. Of those 2-400 or so cases that you
10 testified, can you give me a rough estimate as far as
11 how many of those dealt specifically with your opinion
12 or your information, your experience regarding the
13 breathalyzer, the breath tests?

14 A. I'd say the vast majority of them were dealing
15 with breath testing, if I was being called on it. Every
16 so often there would be some type of blood test, but
17 those were very rare. Or it could have been a refusal
18 case as well, but the vast majority of everything when I
19 was still with the government was concerning breath
20 alcohol testing as far as expert testimony on the stand.

21 Q. What about as a private consultant? As a
22 private witness, private expert?

23 A. You're asking just for a breakdown between the
24 differences of cases that are field test or breath test?

25 Q. What I'm asking for is just to get a ballpark

1 idea of what your experience is as testifying as an
2 expert witness, specifically as a private contracted
3 expert witness. So that is my large scope question; and
4 then I want to narrow it down a little bit further, once
5 you give me a ballpark on that to how many of those
6 cases, as a private expert witness have you testified
7 regarding the breathalyzer or breath issues in DUI
8 investigations?

9 **A.** Again, the big majority of them are breath
10 alcohol cases. The number since I've been private
11 practice, since I've retired, I'd once again be guessing
12 because, but it's probably at this point maybe
13 approaching, it's well over, it's got to be over 100
14 cases, at this point.

15 **Q.** Okay.

16 **A.** But the number I don't know, it may be more.

17 **Q.** That's fine, Mr. Zager. Nobody's going to
18 hold your feet to the fire on exact numbers. I'm just
19 trying to get a ballpark idea here.

20 **A.** And the second part of your questions, as far
21 as a breakdown of breath cases versus field tests, the
22 vast majority of them would generally involve either/or,
23 or both, because it may be a case where there's no
24 chemical test involved. But these are numbers that I
25 just don't track.

1 **Q.** Okay. Can you provide a rough estimate, say
2 of just of breath, of those cases, how many had to deal
3 with just breath? Not roadsides?

4 **A.** Well, there are those cases, you're asking
5 where there's just only a breath and there's no field
6 test associated with it?

7 **Q.** Correct.

8 **A.** Those are generally rarer.

9 **Q.** Okay.

10 **A.** But I'd say a small percentage of those.
11 Because generally there's some type of field test
12 involved, but again it's a number I really can't put my
13 hand on other than saying those are smaller in the
14 number because most people, if they refuse, they refuse
15 across the board.

16 **Q.** All right. Now the, your specialized training,
17 what areas of DUI investigations have you received
18 specialized formal training on which has qualified you
19 to be an expert?

20 **A.** Well, obviously the breath alcohol testing
21 area and various breath testing machines from
22 manufacturers as well as field sobriety testing insofar
23 as being an instructor, teaching others and certifying
24 officers. Those are the areas as well.

25 **Q.** What specific training did you take for the,

1 to become an instructor in field sobriety exercises?

2 **A.** I took the NTSA prescribed course at ITTM at
3 University of North Florida a number of years ago and
4 that's probably going to be on my CV, 96-97, somewhere
5 around there.

6 **Q.** Was that the instructor's course or was that
7 the administerer's course? The ability to administer
8 the exercises?

9 **A.** That would have been the instructor course.

10 **Q.** Okay. I see it. Okay. 1998. I'm looking at
11 it.

12 **A.** '98. Okay.

13 **Q.** All right. How about since then? Have you
14 taken any refresher training, anything like that?

15 **A.** I have put refresher training classes on as
16 instructor. It's on others, most recently as last year,
17 at this point we're, we teach either DUI structured
18 course or the basic course, the 24-hour course.

19 **Q.** Have you, yourself, taken refresher courses as
20 either an instructor or as one licensed to administer
21 the courses?

22 **A.** There is no true refresher course that's
23 necessary. The answer is no. I received the courses as
24 they are released by NTSA and I used those in accordance
25 with their prescribed course materials. So I do get the

1 updates as they come out. There's one coming out
2 shortly as well, and I continue to teach out in the
3 field.

4 Q. On the curricula that I have right now, the
5 most recent training that's listed here is CMI Factory
6 training for Intoxillizer 8000 and that was 2003. Do
7 you have any formal training regarding any matters of
8 DUI investigations since then?

9 A. I have quite a few. Just in what particular
10 area, you're asking concerning field testing? Or --

11 Q. Field sobriety exercises primarily. So let's
12 start with that?

13 A. You say with the field testing?

14 Q. Yeah. With the field sobriety exercises.

15 A. Those trainings would be the courses that I've
16 taught throughout the country related to field sobriety
17 or general impairment issues associated with that or
18 attended seminars put on by others as well.

19 Q. Those seminars related to field sobriety
20 exercises?

21 A. They were. They were. I just --

22 Q. I'll tell you what, Mr. Zager, we can really
23 bypass all this part of the program if you can provide
24 me with your most updated curricula, I'd appreciate it.
25 And we can just --

1 **A.** Sure. That's no problem. I'm surprised you
2 don't have it, because your colleagues seem to always
3 have it on hand.

4 **Q.** The email address that you and I have
5 communicated before would be fine if you would just
6 email me a copy, okay?

7 **A.** No trouble.

8 **Q.** Okay. Very good. Thank you. Can you
9 estimate for me approximately how often you testified as
10 an expert for any defense attorney on the DUI cases?

11 **A.** The number of times where I've testified,
12 where I've been called as an expert for defense
13 attorneys, you're asking the question?

14 **Q.** Correct. Yes.

15 **A.** I'm thinking that it would be the number I
16 used before. It must be approaching or past the hundred
17 different cases since I've gone out on my own. So it's
18 a number I would pretty much stick to, but once again --

19 **Q.** Okay. So since you've been out on your own,
20 sir, is it safe to say that all or nearly all of the
21 cases you've testified as an expert has been for the
22 defense?

23 **A.** Well, if you're asking in the area of DUI,
24 I've been obviously called back to cases related to my
25 employment at BSO.

1 Q. No, Mr. Zager, I'm not talking --

2 A. -- that were litigated or even older cases,
3 homicide cases.

4 Q. Mr. Zager, just so we're clear, my questions,
5 unless I specify otherwise, my questions today are
6 strictly going to be dealing with DUI's. Okay. I'm not
7 interested in cases that you've made arrests in your
8 career as a deputy that were not DUI related. I'm not
9 interested in any numbers related to that. I'm strictly
10 focusing on your experience as a DUI expert, okay?

11 A. I understand. So, a few times, just since
12 I've left, retired BSO, I've had to come back on
13 DUI-related issues. Generally that was just to lay
14 whatever fact was necessary in the investigation. The
15 most recent one was a couple of years ago, concerning a
16 civil case, I believe, from an arrest that was made for
17 DUI.

18 Q. Was it one of your arrests? Or was it somebody
19 else's arrest, you were called as an expert in this
20 civil case.

21 A. I believe it was not my arrest. It was
22 another arrest. I forget which department.

23 Q. So, if you, would it be safe to say that
24 approximately 95% of the time or more of your testimony
25 as an expert witness has been for the defense?

1 **A.** I would agree with that. That's I believe
2 what I've written your office in the past. The majority
3 of the cases have been defense attorneys in criminal
4 cases since I've left. There's been other cases, civil
5 cases, other cases that involve the government where I
6 was acting on their behalf, still the vast majority are
7 for defense attorneys.

8 **Q.** In the civil cases you testified for, were
9 they primarily plaintiff's cases? Defendant's cases? Or
10 both?

11 **A.** They have been been both, both sides.

12 **Q.** Have you ever testified on behalf of the state
13 as an expert witness in a DUI case?

14 **A.** By the state --

15 **Q.** In the criminal prosecution?

16 **A.** You're asking since I have left employment?

17 **Q.** That's correct. Since you've left BSO?

18 **A.** Once again, just for those cases where I was
19 related to my employment, but being retained for the
20 state where I actually made it on the stand, there was
21 those cases where I was retained or worked on that
22 didn't go, didn't proceed to trial. Some of those were
23 military courts of justice, etc., but they never made it
24 to the court, so I never rendered an opinion,
25 officially, so. But if that answers your question.

1 **Q.** It was minimal, then? Is that a correct
2 submission?

3 **A.** That is correct. The number of cases, once
4 again, since I've retired from law enforcement have
5 been, that have been for the government where I was
6 working on the case on their behalf are small.
7 Generally there is somebody inside that handles that
8 those were those situations where it was either -- the
9 government for arrests, false arrest scenario, things of
10 that nature.

11 **Q.** How many cases have you testified for where
12 Mr. Robert Malove was the defense attorney?

13 **A.** I testified at least two times, maybe more.
14 Are you asking since leaving BSO?

15 **Q.** Yes. Sir, unless I specify otherwise, any
16 question I ask regarding your experience is going to be
17 related to since you've left BSO.

18 **A.** Okay. Well, there may be things that impact
19 before, but since I've left BSO with Mr. Malove, I do
20 not believe I've had any cases that have actually made
21 it to trial at this point.

22 **Q.** Let me ask it another way, then. How many
23 cases where Mr. Malove was employed as the defense
24 attorney have you been listed as a defense witness?

25 **A.** I would say without checking my records, at

1 this point it's probably maybe four or five or so, maybe
2 six.

3 Q. Okay. All right. I'm going to turn our
4 attention now to the Lauren Graham case.

5 A. Okay.

6 Q. Do you know Lauren Graham?

7 A. I do not.

8 Q. Have you ever met her?

9 A. No. Just we spoke, or I heard her voice over
10 the phone. I haven't met her in person.

11 Q. How did you become involved in Lauren Graham's
12 case?

13 A. Was contacted by Mr. Malove.

14 Q. And what specifically were you asked to do?

15 A. I was asked to comment on that particular case
16 to review the paperwork concerning it and see if whether
17 or not he would call me on the case would be up to him.
18 But my, what I was asked to do was review the case.

19 Q. Okay. And what paperwork specifically did you
20 review?

21 A. I had the copy of the discovery associated in
22 the case.

23 Q. So that would include the police report?

24 A. The police reports, yes, sir.

25 Q. Would that include any supplemental reports

1 from the police officers?

2 A. If they were available.

3 Q. Do you recall specifically what forms you
4 reviewed to prepare for providing an opinion on the
5 Lauren Graham case?

6 A. Well, I can pull the file out and go through
7 what I have, but essentially whatever documentation I
8 had was the Probable Cause Affidavit, one second. The
9 Probable Cause Affidavit, citations, some property
10 receipts, some refusal forms, a, looks like a receipt
11 from a credit card receipt, intoxilizer forms, police
12 department implied consents, English/Spanish. These
13 types of forms, if you want me to continue.

14 Q. No, no. That's okay.

15 A. Just to tell you what I have in the file.

16 Q. What --

17 A. The written report as well, a DUI test report,
18 looks like a prisoner detention form and the Alpha
19 report, as well.

20 Q. Okay. Let me just ask one question, getting
21 back to training experience. Are you a drug recognition
22 expert certified?

23 A. No.

24 Q. Okay. Going back to the Lauren Graham case,
25 did you formulate an opinion on this case?

1 **A.** On this case I did, yes.

2 **Q.** What opinion did you formulate?

3 **A.** Based upon my review that I have an opinion
4 that she was not an impaired person.

5 **Q.** And what was that opinion based on?

6 **A.** Based on the totality of the circumstances
7 related to it, one of the main things, of course is that
8 she was sleeping behind the wheel, and I guess also my
9 opinion I should add is also related to my conversations
10 with Ms. Graham and, as well, that she was not impaired
11 driver, but a sleepy, drowsy driver.

12 **Q.** Okay. So you were telling me that, was your
13 opinion based on anything other than the fact that she
14 was sleeping behind the wheel and that it was
15 Ms. Graham's opinion that she was sleepy?

16 **A.** Well, the other areas that I have to render my
17 opinion are the fact that she has a pale skin, not
18 consistent with a person who has been alleged to be
19 consuming a great amount of alcohol. We have down there
20 listed as pale skin.

21 **Q.** Where was that specifically listed?

22 **A.** That would have been, let me see, I have to
23 pull the file up. That would have been on the DUI
24 Influence Report, more than likely. One second, sir.
25 Okay. Yeah. The DUI Test Report, Plantation DUI Test

1 Report. Under color of face, we have pale. So there's
2 a disconnect from a generally impaired driver.

3 Q. Do you, now you said earlier that you had not
4 met Ms. Lauren Graham. That you spoke with her over the
5 phone, correct?

6 A. Yes, sir.

7 Q. Do you know Lauren Graham's normal complexion
8 when she is not under the influence?

9 A. I do not.

10 Q. And do you know Lauren Graham's complexion
11 while she's under the influence?

12 A. No, sir. Just on this night in question.

13 Q. And just to clarify something else for me,
14 Mr. Zager. Did you respond out to the scene the date of
15 the arrest? July 12th, 2012?

16 A. Did I respond? No, of course not.

17 Q. Okay. So part of what you base your opinion
18 on was that she was sleeping behind the wheel, you're
19 conversation with Mrs. Graham, and the fact that she was
20 pale. Did you consider anything else in formulating
21 your opinion that she was a sleepy driver and not a
22 driver under the influence?

23 A. I did. Also concerning this, I took into
24 account the interaction she had with the breath test
25 operator and his comments concerning her appearance.

1 Q. What comments would those be, specifically?

2 A. These would be in a form that's entitled
3 Plantation Police Department Adult Detention Form.

4 Q. Okay.

5 A. I don't know if you have that handy.

6 Q. Yes, I do.

7 A. But, in there the contact that she had with
8 the officer, I can't make his name out right now --

9 Q. I see the form that you're referring you.

10 A. Okay. So anyway, looking at that, the, just
11 looking at the physical manifestations there for
12 starting with movement, physical condition, behavior,
13 mental state all checked normal, normal, normal. These
14 as well helped influence my opinion.

15 Q. Okay. What else did you base your opinion on?

16 A. I think that's it. At this point. If I've
17 missed something, but that's what I can recall.

18 Q. So, and just to in the interest of completion,
19 the, your assessment of Ms. Graham as a sleepy driver,
20 you mentioned earlier that you had not met Ms. Graham
21 before in person or at all, for that matter, correct?

22 A. That is correct, in person, that's correct.

23 Q. So, are you familiar with Ms. Graham's normal
24 demeanor when she's sleepy?

25 A. I have not seen her in any state at this

1 point. I can only rely upon what I see here.

2 Q. So sleepy or not, alert or not, you're not
3 personally familiar with her normal behavior whether
4 she's sleepy, drunk, sober or anything like that?

5 A. I have not studied her behavior yet. I
6 haven't met her. No, sir.

7 Q. Did you do any interviews with any of the
8 police officers?

9 A. No, sir.

10 Q. Were you present during the depositions of the
11 officers in this case?

12 A. I was not.

13 Q. Did you review their depositions as part of
14 your preparation or formulation of an opinion in this
15 case?

16 A. I have not received those. No, sir.

17 Q. Are there any other opinions or conclusions
18 you have or that you plan on testifying to regarding the
19 matter of State v Lauren Graham?

20 A. I don't know. That would, the things I've
21 testified to are things that I know about the case.
22 Whether or not there is any future developments or
23 Mr. Malove asked me an opinion related to something else
24 at this point, I don't have knowledge of that.

25 Q. Right. Granted, you don't know what questions

1 are going to be asked of you yet, so I wouldn't hold you
2 to that, but I'm more interested in your opinion as an
3 expert in DUI investigations. Is there anything in this
4 file that you know of at this moment which you feel is
5 relevant in this case?

6 **A.** No. I think we covered it.

7 **Q.** Anything left in here that would, you also
8 factored into it in formulating your opinion in this
9 case?

10 **A.** Not that I can recall at this point. It's
11 just related to the issue of a drowsy driver who appears
12 normal moments later at the police station.

13 **Q.** Is there any video or anything that you
14 reviewed in this case?

15 **A.** No, sir.

16 **Q.** Mr. Higgins, do you have any questions of
17 Mr. Zager regarding Lauren Graham?

18 BY MR. HIGGINS:

19 **Q.** Yeah. A few questions. How are you doing
20 Mr. Zager?

21 **A.** Good afternoon, sir.

22 **Q.** Would you agree that an odor of alcohol is
23 something that typically is considered when formulating
24 an opinion as to whether someone is impaired or not?

25 **A.** Well, not whether or not somebody would be

1 impaired, but --

2 Q. Or that and --

3 A. There's the presence of alcohol would be in
4 the body that the person has alcohol that's being
5 released.

6 Q. But it is a factor of consideration, would
7 that be correct?

8 A. Well, it goes to one of the manifestations
9 consistent with an individual who has consumed alcohol.
10 But we don't use that as a notion that the mere presence
11 of alcohol is a factor that they're impaired. That we
12 can't draw.

13 Q. Not that, necessarily, they're impaired, but
14 it's one of the considerations, when you're formulating
15 an opinion based on the totality of everything, is that
16 correct?

17 A. That is correct.

18 Q. Okay. And the same would be said in regards
19 to what the person's eyes may have looked like, whether
20 they're red, bloodshot, watery and whatnot?

21 A. Same thing. It's again, can be a
22 manifestation that is associated with greater amounts of
23 alcohol. When looking at a DUI investigation, of course
24 we know there is other reasons that can cause that, but
25 it's one of the things that can be considered.

1 **Q.** And would you agree that how a person speaks,
2 whether they slur their words or any of that is also
3 something to be considered but by itself it doesn't
4 necessarily definitively say or mean that they're
5 impaired. Is that correct as well?

6 **A.** That is correct. Their normal speech would be
7 something that would have to be assessed, whether or not
8 they have any speech impediments, but it's another
9 factor which is commonly referred to in DWI
10 investigations as the speech, whether or not it's
11 impaired or slurred at this point.

12 **Q.** Now, you said a few moments ago regarding the
13 pale skin is not consistent with someone that consumed
14 alcohol. Can you tell us why that is?

15 **A.** Well, certainly alcohol when consumed in
16 greater amounts can cause flushing of the skin. That's
17 referred to as purple-basal dilator and can cause
18 redness of the skin and facial areas. It's just
19 something that could be commonly associated with, once
20 again, the consumption of alcohol. There's many other
21 factors which can cause that as well; mainly, sun
22 exposure, embarrassment, and we know the list. But
23 that's something that when missing in a DUI
24 investigation would be a disconnect from the case,
25 generally.

1 Q. I have no further questions.

2 BY MR. NATIELLO

3 Q. Okay. That's all the questions we have on the
4 Lauren Graham case. Let's kind of change hats and go
5 with the Gennady Chikaurov case. If you could,
6 Mr. Zager, pull out your file?

7 A. Yeah. Okay.

8 Q. You got it?

9 A. Yes, sir.

10 Q. Give me one second. Let me get mine out.
11 Okay. Let's start with the generic stuff. Gennady
12 Chikaurov, do you know him personally?

13 A. I do not.

14 Q. Have you ever met Mr. Chikaurov in person?

15 A. No. Same scenario. I have spoken to him.
16 Actually I don't have a note of whether or not I spoke
17 to him on the phone. So I'm unsure. I'd have to rely
18 on Mr. Malove on that one there. I didn't make a note.

19 Q. Okay. Mr. Malove, if you can chime in. To
20 your knowledge, has Mr. Zager met personally with
21 Mr. Chikaurov?

22 MR. MALOVE: I don't think he has.

23 BY MR. NATIELLO:

24 Q. Okay.

25 A. I don't remember meeting him, but I was asked

1 whether or not I even spoke to him on the phone at this
2 point. I have a video in this case.

3 Q. Tell me how you became involved in this case,
4 sir?

5 A. Same scenario. Was contacted by Mr. Malove to
6 review the videotape in this case and seems I did form
7 an opinion based upon that.

8 Q. So in preparing for your opinion on this case,
9 what exactly did you do?

10 A. Well in this case there is a videotape. I
11 reviewed that. I reviewed the other materials in the
12 file, which appears to be a Probable Cause Affidavit, a
13 written alpha report, a series of citations, refusal
14 forms. Let's see what else we have here. I think the
15 crash report as well was attached. That's my file. And
16 a BSO Alcohol Influence Report from the CSA.

17 Q. And that's a form you're well familiar with,
18 correct?

19 A. Yeah. I designed it.

20 Q. I would take that as a yes?

21 A. Okay.

22 Q. Now the, you, on this case, did you go to the
23 scene on the date of the arrest?

24 A. No, sir.

25 Q. And you already covered whether or not, you

1 don't recall ever interviewing Mr. Chikaurov directly?

2 **A.** I don't at this point, whether I spoken to him
3 or not. I don't have any notes down here, so I would
4 probably go with a no, at this point.

5 **Q.** How about any of the police officers? Did you
6 interview any of them?

7 **A.** No, sir.

8 **Q.** Present during any of their depos?

9 **A.** Have I read any depos?

10 **Q.** No. Were you present during their depos?

11 **A.** No, sir.

12 **Q.** Did you review the transcripts of their depos?

13 **A.** I have not.

14 **Q.** What opinions, if any, have you formulated in
15 this case?

16 **A.** In this case, I was asked to look at the
17 videotape and make determinations of whether or not I
18 thought the individual that was on video seemed
19 impaired, and I don't see that in this case here. I see
20 an individual who was, is walking and talking and acting
21 quite normal. He's in pain, so there's impairment as
22 far as some of his mobility as he claims from pain
23 associated with that, but that was where I limited my
24 opinion to or where I was asked to look at the case.

25 **Q.** Did you formulate an opinion as to his

1 performance on the roadside exercises at the BAT, the
2 BSO Alcohol Testing Facility?

3 A. Right, the BAT. Yes, sir. I did.

4 Q. What was your opinion on his performance of
5 the roadsides? Pick any one and start with that one.

6 A. Well, just looking at the roadside performance
7 in there, I looked at the way he performed on the
8 Standing Balance and in that I thought he looked quite
9 well. It was really not much of a noticeable sway. I
10 did detect a very slight sway, but nothing that would be
11 a grossly impaired sway as on the previous
12 investigation. Apparently depicting him as somebody. I
13 also looked at the finger to, did you want me to stop
14 there? If you had questions about that?

15 Q. No, no. Well, do you have any other
16 information or insight as to his performance on the
17 Standing Balance? Other than what --

18 A. No, just, once again, just the way that the
19 videotape depicted him, the way that he performed the
20 test is self-evident.

21 Q. Now, what about the next tests?

22 A. The next test would have been the Walk-And-
23 Turn or the Finger-To-Nose. On that one, I noticed --

24 Q. Which one? The Finger-To-Nose or the Walk-
25 And-Turn?

1 **A.** The Finger-To-Nose I'm talking about right
2 now.

3 **Q.** Okay.

4 **A.** On that one as well, I thought his performance
5 looked quite good. You know, there was some of the
6 movements associated with it, he may have not had those
7 spot on, but his overall performance in it, I thought is
8 quite good. With that one, of course, it's not a
9 standardized field sobriety test, so there is no scoring
10 of it as far as clues are associated with it. But
11 nonetheless I thought his performance looked good.

12 **Q.** What did you think of his balance in that
13 test?

14 **A.** I thought his balance was okay. I think,
15 coupled with an individual whose claiming to have pain
16 associated with his feet, my opinion, my overall opinion
17 on the user are that an individual that claims they have
18 pain should not be subjected. There's things that you
19 can do in an alternative to this and you can discount
20 the pain. So a better scenario would be to place
21 somebody, give them a seat, give them a bench and then
22 have them do Finger-To-Nose. That way you leave the
23 pain.

24 **Q.** But isn't part of the component of the Finger-
25 To-Nose test observing their ability to stand and

1 maintain an erect posture?

2 **A.** There is no, according to NTSA, there is no
3 guidelines as far as the standing, excuse me the Finger-
4 To-Nose test in regards to a standardized DUI
5 investigation. It's not one of the three components of
6 it.

7 **Q.** Okay.

8 **A.** It's an alternative test, so what I'm
9 suggesting is that when an individual has pain, if they
10 have foot pain, knee pain, etc., back issues, you can do
11 this exam but it's best to have them seated. That way
12 you alleviate the issue of the impairment due to the
13 pain factor. And then the next one I did look at.

14 **Q.** Well, if I can, if I can just interrupt you
15 for one second, Mr. Zager, if I could.

16 **A.** Sure.

17 **Q.** You mentioned earlier that you had designed
18 this particular form, the DUI Alcohol Influence Report?

19 **A.** I, the person that, and I have to look at the
20 date of when this one was revised.

21 **Q.** It was revised August of '99.

22 **A.** '99. That sounds about right. That's when I
23 did a revision on it. Albeit that I think they changed
24 the little star up top there, but that appears to be the
25 last revision that I was involved with.

1 Q. So the section under performance tests, that's
2 pre-printed, it lists three: the Balance, the Walk-And-
3 Turn and the Finger-To-Nose.

4 A. Yes, sir.

5 Q. Okay. And you said the Finger-To-Nose is an
6 alternative test?

7 A. Well, it's not a standardized field sobriety
8 test in the sense that there's three standardized tests
9 that are approved by NTSA and those being the Walk-And-
10 Turn, the One-Legged Stand, and the Horizontal Gaze
11 Nystagmus. In this case here at BSO, the roadsides that
12 were done at the BAT and they had just been done, they
13 were done like this before I got there, minus -- back
14 when we had, even when I started we had the BAT trucks,
15 we used to bring the BAT trucks out and do roadsides.
16 They were doing some of these types of tests. They did
17 something to repeat it inside the station house, but
18 they're not standardized as far as the Standing Balance
19 or the Finger-To-Nose.

20 Q. Mr. Zager, obviously, you're NTSA certified
21 and so you're familiar with what they feel are the
22 standardized roadside sobriety exercises, but is there
23 any case law that you are aware of or is there anything
24 that you are aware of that says that the three approved
25 NTSA exercises are the only valid roadside exercises to

1 administer?

2 **A.** As far as case law, that I'm without knowledge
3 because I, you know, I don't know what could be out
4 there or what may not be. I can only recite the NTSA
5 materials as far as the ones that are considered the
6 standardized field sobriety tests that we teach as far
7 as the DWI investigative course.

8 **Q.** Are there other organizations out there
9 besides NTSA which train on roadside exercises?

10 **A.** Not as far as roadside is concerned. NTSA is
11 the one who issues the materials on that, as far as
12 roadside performance tests.

13 **Q.** I guess what I'm getting at is, is there
14 anything that says that any other tests besides the
15 three that NTSA suggests are completely invalid?

16 **A.** As far as being invalid, there is, I guess
17 that's open to interpretation. The issue with it is
18 concerning false positive results and standardization
19 concerning whether or not an individual has a certain
20 blood alcohol concentration. That's something we
21 generally don't get into. There's no alcohol test
22 involved.

23 **Q.** Because, would you agree, sir, that roadside
24 exercises are, and I'm not talking Horizontal Gaze
25 Nystagmus, which is a completely separate issue. But

1 would you agree that roadside exercises are psycho-motor
2 exams?

3 **A.** Well that's psycho-physical-motor --

4 **Q.** Psycho-physical-motor exam, right.

5 **A.** Those that involve the movement and divided
6 attention tests. Yes, sir.

7 **Q.** So, there are many ways in which one can judge
8 movement and divided attention besides these NTSA
9 standards?

10 **A.** Yes, sir. There's many other alternative
11 tests. Some of those are listed here are, such as
12 Finger-To-Nose and the Standing Balance, the Romberg
13 test are some of those, finger-touch test, hand-clap
14 test, picking up coins. There's a litany of various
15 tests you can do.

16 **Q.** Very good. So going back to Mr. Chikaurov's
17 performance on these roadside exams performed at the BSO
18 facility. We've talked about the balance and we've
19 talked about the Finger-To-Nose. What's the next test
20 that you observed?

21 **A.** The next one is the Walk-And-Turn test.

22 **Q.** Okay. And tell me about your observations of
23 his performance on that test?

24 **A.** Well, regarding the test in and of itself, I
25 thought he looked very good and since that is one of the

1 standardized tests, I can assess clues associated with
2 that. The clue that I observed him to be positive for
3 was incorrect number of steps. He took eight steps
4 instead of the instructed nine.

5 Q. What else did you see?

6 A. As far as standardized clues, that was the
7 only one. I noted that the CSA wrote him down for
8 touching the wall was something that was notated there
9 and that I observed that as well.

10 Q. You did observe that?

11 A. Yes.

12 Q. How about the, referring to the report, I see
13 a notation from the CSA that there was an improper turn?
14 Is that one of the clues on the test?

15 A. I didn't count him off for the turn being
16 improper. I'd have to look at the video again to see,
17 but that's as far as my notes are concerned, what I put
18 down.

19 Q. So, and refresh my memory, because if you told
20 me, I've forgotten. But what was the conclusion that
21 you reached regarding Mr. Gennady Chikaurov?

22 A. Once again, it was related to his performance
23 on the video that I observed. It's where I was asked to
24 look at the case and form opinions if possible and I
25 don't see an individual who appears impaired at that

1 point, other than impairment from his physical injuries
2 which he's claiming that he has pain.

3 Q. So your ultimate conclusion was that he was
4 not impaired?

5 A. That's correct.

6 Q. And that's based on the video?

7 A. Yes, sir.

8 Q. What else did you base that opinion on?

9 A. That's where I also noticed that his speech
10 did not sound unusual to me, slurred. I noted he did
11 have a very thick accent, a Russian accent as well.

12 Q. Okay. What else did you read or assess or
13 consider in formulating this opinion?

14 A. Well, I'd say that's it. Once again, related
15 to his performance at that point in time on the physical
16 test that he was given and looking at that as totality
17 at that point in time. That's where I was asked to look
18 at the case.

19 Q. Mr. Zager, in your training and experience
20 with DUIs and investigations, and this will include your
21 training experience as a deputy as well as an expert in
22 the private sector, what is the relationship between
23 time elapsed, consumption of alcohol or narcotics and
24 the, how one manifests being impaired?

25 A. I'm not sure I understand the question.

1 **Q.** Is there a connection between the time that
2 one's impairment is measured? The distance in time
3 between one's impairment is measured and one consumes
4 alcohol or narcotics?

5 **A.** Are you asking about, basically a sobering up
6 effect?

7 **Q.** Sobering up or becoming, your level of
8 impairment increasing. I mean, what, describe for me
9 please your knowledge of the relationship between the
10 time elapsed, we'll use an example of somebody drinks
11 alcohol --

12 **A.** I understand. Oh, I'm sorry.

13 **Q.** Go ahead. If you understand my question, go
14 ahead and please explain?

15 **A.** Well, I mean, the example of the answer that
16 there's a potential three answers. Either they were
17 more sober at some point earlier, they were less sober
18 at some point earlier or they were the same as they were
19 when we observed them at a later point. As we well
20 know, once you stop consuming a alcohol or even some
21 drugs, and I don't testify as an expert on drugs, but we
22 know that they will wear off. But people don't sober up
23 so quickly that they look so different in a short amount
24 of time.

25 **Q.** Is there a relationship between, is it

1 possible for one to show manifestations of increasing
2 impairment to a point before they start sobering up, so
3 to speak?

4 **A.** Well, that would be dependent upon whether or
5 not the amount of drug or alcohol was actually
6 increasing. In other words if they had a last dose and
7 it was on its way up, there is a pretty good chance that
8 their impairment would get worse if they were being
9 affected by it.

10 **Q.** What other factors could affect that? In
11 other words, could the consumption of food affect the
12 signs of impairment?

13 **A.** No. The consumption of food would be
14 something that would, could cause a delayed gastric
15 emptying, if we're talking about alcohol and whether
16 that alcohol is done entering into the body from the
17 stomach ultimately. Or if it's mixing in there with
18 high protein or fatty lipids or something of that nature
19 is causing a reaction or delayed reaction. If that
20 answers your question.

21 **Q.** What about, you mentioned to me earlier that
22 you are not qualified to give an opinion on as far as
23 the ingestion of a narcotics, whether prescription or
24 not and its effect on impairment, is that correct?

25 **A.** Yeah. I don't testify in the area as a

1 toxicologist on drugs. So no, I don't.

2 Q. In your review of this file, are you, did you
3 become aware that there were some narcotics or drugs
4 found in Mr. Chikaurov's vehicle?

5 A. Yes, sir.

6 Q. And you are not, then, so what you're saying
7 is you're not able to give an opinion as far as the
8 potential effects of those narcotics that were found in
9 his vehicle and his resulting impairment?

10 A. I don't testify in the area as a drug
11 toxicologist.

12 MR. MALOVE: Let me just interrupt a second. I
13 am leaving my office. I am still on the line, but
14 I might get disconnected. If I do I'll call Mr.
15 Zager back and he can just join me to the call.

16 BY MR. NATIELLO:

17 Q. You got it. It's not going to be much longer,
18 Robert. I can tell you that.

19 All right. So going back to my question. So you're
20 not going to be offering any opinions whatsoever in
21 regards to the narcotics that were found in
22 Mr. Chikaurov's car and those narcotics' potential
23 effect on his impairment to drive?

24 A. Not to my knowledge. I don't testify, again,
25 as a drug toxicologist. So, no.

1 **Q.** And as an extension of that, you are not going
2 to be able to testify or offer an opinion as to the
3 speed, for lack of a better word, of one's sobering up
4 from the effects of narcotics or the slowness of one's
5 sobering up from the effects of narcotics, is that
6 correct?

7 **A.** The so-called half-life associated with that.
8 I don't offer those opinions, just as it relates to
9 alcohol is where I -- in that area. But no. Not, no, I
10 will not be offering any drug toxicology opinions, no
11 sir.

12 **Q.** Of any type? Of any kind?

13 **A.** No, sir.

14 **Q.** Are you familiar with the Widmarks? Explain
15 to me what Widmarks is please.

16 **A.** Widmark, the answer is yes, I am familiar with
17 it. It's an algebraic formula that's used to determine
18 whether the, there's a couple things that can be done
19 with it. Number one is to give the complete amount of
20 alcohol that's found in the body at the time of the
21 chemical test and the number of ounces or drinks. The
22 second portion of it would be to try to go back in time
23 and do a so-called retrograde extrapolation -- that and
24 that's the Widmark formula. It's something that's been
25 around for eighty-plus years at this point.

1 Q. Does that formula have any bearing or any
2 relevance in this case whatsoever?

3 A. Only if there was testimony concerning alcohol
4 consumption would be. At this point I haven't had any
5 information concerning that. At this point, I would say
6 that Widmark related to alcohol is something that I,
7 would not have relevance. But I don't know if that will
8 change.

9 Q. I understand. I'm just talking as of now.
10 For your knowledge of everything right now.

11 A. At this point, no, I would not be offering any
12 opinion related to the Widmark formula.

13 Q. Do you have any other opinions or conclusions
14 or are there any facts that we haven't discussed
15 regarding Mr. Chikaurov's case?

16 A. No, sir. Not that I can recall, no.

17 Q. So, in essence regarding Mr. Chikaurov, your
18 opinion is based on, your opinion that he was not
19 impaired was based on your observation of the video,
20 primarily, but also observation of the accident report
21 and other documents passed along in discovery?

22 A. That's correct, sir.

23 Q. In regards to the alcohol influence report
24 completed by the CSA that we discussed earlier, is there
25 anything on that form that stands out to you as

1 contributing to your opinion?

2 **A.** Just a moment of indulgence. Let me look it
3 over.

4 **Q.** Take your time.

5 **A.** Nothing that I can see at this point here. He
6 appeared to be cooperative. Nothing that I can see.

7 **Q.** Mr. Higgins, you got any questions for
8 Mr. Zager? Okay. That was a no. Mr. Zager, is there
9 anything that I haven't asked you that you'd like to add
10 to this deposition? Anything you'd like to discuss?

11 **A.** Just related to the case, two cases, no. Just
12 I wanted to add for the record, just regard to payment
13 that I did agree to take the case as discussed yesterday
14 at a lower fee because we're doing this deposition over
15 the phone. But the other thing, of course is that I do
16 charge for my time and preparation for the deposition.
17 Just so I'm clear again, once again on that.

18 **Q.** I understand and just also for the record, the
19 one prior communication between you and I, I had
20 forwarded you the name of the woman in Accounts Payable
21 and Administration who you would best speak to directly
22 regarding all matters of payment. It's always best to
23 speak with her and bill her directly rather than the
24 individual assistant state attorneys.

25 **A.** That's fine.

1 **Q.** Okay. Very good. And I have no further
2 questions regarding the Chikaurov or the Graham cases.
3 If there's anything else you'd like to add, please feel
4 free. Otherwise, this concludes our deposition from
5 Mr. Robert Zager at approximately 4:30

6 **A.** Jay. Jay Zager.

7 **Q.** What did I say?

8 **A.** Robert Zager.

9 **Q.** I'm sorry. Jay Zager at approximately
10 4:37 p.m. Mr. Malove, thank you very much and we'll
11 talk to you very much. Do you guys want to read or
12 waive?

13 **A.** Read.

14 (Thereupon, this deposition has been concluded.)

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CERTIFICATE

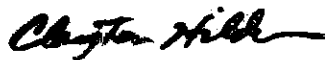
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2
3 THE STATE OF FLORIDA)

4 COUNTY OF BROWARD)

5
6 I, CLAY HILDUM, a Court Reporter, do hereby
7 certify that I was authorized to and did report the
8 deposition of JAY ZAGER, a witness called in the above-
9 styled cause, that the witness was first duly sworn by
10 me; that a review of the transcript was requested; and
11 that the transcript is a true and complete record of my
12 notes.

13 I further certify that I am not an attorney or
14 counsel for any of the parties, nor related to any of
15 the parties, nor financially interested in the action.
16

17 Dated this 20th day of May, 2013

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19 

20 CLAY HILDUM

21 COURT REPORTER

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ERRATA SHEET

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State of Florida vs. Gennedy Chikaurov

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Under penalties of perjury, I declare that I have read my deposition and that it is true and correct subject to any changes in form or substance entered here.

(Date)

JAY ZAGER

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May 20, 2013
Robert Malove, Esquire
Attn: Jay Zager
200 South Andrews Avenue, Suite 901
Fort Lauderdale, Florida 33301

RE: State of Florida vs. Gennedy Chikaurov

Dear Sir or Madam:

You have reserved your right to read and sign the deposition transcript in the above-captioned case to which you were the deponent.

This task may be accomplished by way of your attorney who may provide you with a copy of the transcript. If necessary, you may call us at the number below to schedule an appointment for you to appear at our office to read and sign the deposition transcript. An errata sheet will be provided to you at that time. Our office is open Monday through Friday from 8:00 a.m. to 5:30 p.m.

Respectfully,

CLAY HILDUM

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