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IN THE CIRCUIT COURT OF THE 17TH
JUDICIAL CIRCUIT, IN AND FOR
BROWARD COUNTY, FLORIDA

CASE NO.: 05-25454MM10A
JUDGE: FEINER

STATE OF FLORIDA,

Plaintiff,

VS.

BOB HOGAN,

Defendant.

Fort Lauderdale, Florida
August 2nd, 2006

DEPOSITION OF JAY ZAGER

Taken on behalf of the Defendant, before JILL LEWIS,
a Notary Public within and for the County of Broward,
State of Florida, pursuant to Subpoena re Deposition.

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APPEARANCES:

ON BEHALF OF THE PLAINTIFF
BY: TED HOLLANDER, ESQUIRE

ON BEHALF OF THE DEFENDANT
BY: MELISSA STEINBERG, ESQUIRE

ALSO PRESENT:

LANIE BANDELI

1 THEREUPON

2

JAY ZAGER

3 A witness of lawful age, being first duly sworn in accordance
4 with law, was examined and testified as follows:

5

DIRECT EXAMINATION

6 BY MS. STEINBERG:

7 Q Can you please state your name for the record?

8 A Jay Zager.

9 Q And where are you currently employed?

10 A I am employed by myself.

11 Q Since when?

12 A Since sometime in 2003.

13 Q So, you don't have any other employment at this
14 time?

15 A I work from time to time as an investigator, a
16 private investigator.

17 Q For who?

18 A International Detective Bureau.

19 Q And you said you work for yourself. Have you formed
20 a corporation?

21 A I have.

22 Q What's the name of that?

23 A Jay Zager.

24 Q Incorporated?

25 A Yes.

1 Q And are there any other employees of Jay Zager
2 Incorporated?

3 A No.

4 Q And what is the primary function of Jay Zager
5 Incorporated?

6 A Consulting.

7 Q And what type of consulting do you do?

8 A Alcohol related consulting, DUI consulting.

9 Q And as a business do they pay taxes?

10 MR. HOLLANDER: From the get go, anything that is not
11 related or particular to the case or the Intoxilizer
12 (phonetic) 5000 or 8000 I want certified. Because whether he
13 pay taxes, how is that relevant, in my opinion that is not
14 relevant to anything.

15 MS. STEINBERG: Let's just ask the question --

16 MR. HOLLANDER: You can ask the question but let's certify
17 it and let Judge Feiner decide if he should answer it.

18 Q So, certify that to the judge.

19 MR. HOLLANDER: Let's just keep a record of all of those
20 that a certified and we'll go back with a list of them and see
21 which ones he should answer and which ones he shouldn't.

22 Q Do you derive income from testifying in court?

23 A I derive income from my time spent on cases.

24 Q And that's in DUI cases?

25 A DUI and also other cases that stem from investigate

1 work.

2 Q How much of your income is derived from DUI cases,
3 what percent?

4 A Probably eighty or ninety percent of them.

5 Q And what was the income last year that you earned
6 for testifying as a DUI witness?

7 MR. HOLLANDER: Certify that question.

8 MS. STEINBERG: Well, he can answer the question and let
9 Judge Feiner decide --

10 MR. HOLLANDER: Let's let Judge Feiner decide if he should
11 answer that that question. How much money he made, what does
12 that have to do with this case?

13 MS. STEINBERG: That's clearly under the evidence for a
14 permissible question to show bias.

15 MR. HOLLANDER: I'm not denying that he gets paid for this
16 case and eighty percent of his money comes from testifying in
17 DUI related cases. But how much money he makes or if he pays
18 taxes can lead to all kinds of other issues which I don't
19 think are fair game for this deposition.

20 MS. STEINBERG: How much money a witness makes in terms of
21 testifying is definitely fair game in terms of a discovery
22 deposition and is also permissible to trial.

23 MR. HOLLANDER: Well, what you say is permissible at trial
24 --

25 MS. STEINBERG: Well, whether it is permissible at trial

1 is going to be up to the judge.

2 MR. HOLLANDER: I agree.

3 MS. STEINBERG: But in terms of this deposition I'm
4 allowed to inquire.

5 MR. HOLLANDER: The question is how much money does he
6 make in total from testifying in a year?

7 MS. STEINBERG: On DUI cases, yes.

8 MR. HOLLANDER: I'm not sure if that permissible but I
9 rather just certify that.

10 Q Certify that question as well.

11 And how much of your time is devoted to testifying for
12 the defense in DUI cases?

13 A I'd say that the majority of the cases that I
14 testify for have been for being called as a DUI witness.

15 Q Ninety-nine percent of your time is for the
16 defense?

17 MR. HOLLANDER: Your question was how much time he spent
18 testifying for the defense?

19 MS. STEINBERG: Yes.

20 MR. HOLLANDER: Answer that question.

21 A Well, I'm typically called as a defense witness.

22 Q When was the last time you were called as a State
23 witness?

24 A Sometime earlier this year in Broward.

25 Q Okay.

1 A But I don't think I testified in that case because
2 it was a mistrial or something like that.

3 Q So, you haven't testified as a State witness this
4 year of 2006?

5 A Not that I can recall.

6 Q What about 2005, do you recall testifying for the
7 State in 2005?

8 A Yes, on the Pack Water case.

9 Q And were you called as fact witness for -- cases?

10 A I don't recall either way. I way have been asked
11 some expert questions from the defense.

12 Q And were you classified as an expert witness in
13 that?

14 A I don't think that there was any time where anybody
15 qualified anybody. I did at some point levy some type of
16 opinion as best I recall.

17 Q Opinion as to what?

18 A I have to look at the transcript. It's been to long
19 and I don't remember.

20 Q Now, you have been retained in the case of State of
21 Florida versus Bob Hogan.

22 Correct?

23 A I have.

24 Q Who retained you?

25 A I was retained by Mr. Hollander's Office.

1 Q And when were you retained?

2 A I don't recall exactly. Maybe it was a month or so
3 ago.

4 Q Even though you were listed as a witness on that
5 case last week?

6 A I didn't have anything to do with that?

7 Q Did you sign a retainer agreement with Mr.
8 Hollander's Office in this case?

9 A No.

10 Q How was an agree reached?

11 A Verbal.

12 Q And what was the verbal agreement as to this case?

13 A That I would review the case and offer testimony if
14 necessary.

15 Q And how much are you getting paid?

16 A I was paid a thousand dollars.

17 Q And is that all inclusive or is that just for the
18 initial reviewing of the case.

19 A That should be all inclusive.

20 Q Should be or is it?

21 A Well, it should be. It depends on how many hours I
22 actually spend on it.

23 Q What was the agreement reached?

24 Was there the agreement that there was initially a
25 thousand dollars unless you spend more than five hours on the

1 case and if you spend less than five hours than you give back
2 some of the money?

3 A Again, it was a very loose agreement and I don't
4 have anything specific. Typically in cases that I handle with
5 Mr. Hollander's Office I review the case and provide testimony
6 if necessary.

7 Q Well, how many cases have you been involved in with
8 Mr. Hollander's Office?

9 A I really couldn't tell you, maybe half a dozen or a
10 dozen.

11 Q So, you have this loose arrangement in terms of all
12 of these cases with Mr. Hollanders Office?

13 MR. HOLLANDER: -- what's the difference with this case.
14 MS. STEINBERG: Well, I can't get an answer as to this case.
15 It's some sort of ridiculous agreement that depends on the
16 amount of hours. How many hours does that depend on?

17 A Well, it's just a loose agreement where if I'm
18 called than I'm called and if I'm not than I'm not.

19 Q And how do you bill for this?

20 A I have already billed.

21 Q Are you going to ask for additional monies?

22 A It doesn't look that way.

23 Q What does that depend on?

24 A The amount of time that I would spend on it. If it
25 turned into a days worth of testimony or something like that.

1 Q A full day of testifying in court?

2 A Correct.

3 Q So, if you testify for a full day in court than you
4 are going to ask for more money?

5 A I don't know. Technically this is the full payment
6 that I'm going to receive on this case and I'm fully paid on
7 it.

8 Q So, why did you say before that it's a loose
9 agreement and it depends if this is going to be the only --

10 A Well, if it turns into a situation where I keep
11 appearing and keep appearing and going to court then I would
12 address it. But for now it's okay and it's in the realm of
13 what I'm used to.

14 Q So, in other words, for cases where you don't appear
15 do you give back money?

16 A No.

17 Q So, it's a wait and see type of approach and they
18 don't know how much they are going to pay you?

19 A No. I'm paid in full for this case as I said.

20 Q Now, what have you done in terms of reviewing this
21 case?

22 A I have looked at the video and I have looked over
23 some breath test documents, standard discovery.

24 Q Anything else?

25 A I was pertained to --

1 Q So, have you gone to the scene of the incident?

2 A No.

3 Q Do you plan on going to the scene of the incident?

4 A I may or may not.

5 Q When would you decide that?

6 A At some point.

7 Q Well, what point would that be? We are about a
8 month away from the trial date so when would you decide to do
9 all of this?

10 A I'm sorry I can't tell you because I have no idea.

11 Q Mr. Zager, you realize that this case was set for
12 trial this week.

13 Correct?

14 MR. HOLLANDER: I'm going to object. He's hired to
15 evaluate the breath test instrument and that's it.

16 MS. STEINBERG: But he just stated as his answer that he
17 may or may not go to the scene.

18 MR. HOLLANDER: That's fair.

19 Q Mr. Zager, do you realize that it was suppose to go
20 to trial and, in fact, you were schedules to testify today.

21 Correct?

22 A Yes.

23 Q And as of today you have not visited the scene?

24 A I have not.

25 Q So, that would play no role in your opinion to any

1 conclusions that you may come to regarding this defendant?

2 A My opinions on this case are limited to the breath
3 alcohol.

4 Q Okay.

5 A That's what my involvement on this case was.

6 Q So, you have no intentions of going to the scene for
7 any reason because you were not hired to do so.

8 Correct?

9 A At this point I do not.

10 Q Do you foresee a reason that you would have to?

11 A In most cases, no.

12 Q What about this case?

13 A In this case I do not.

14 Q So, you just watched the video in this case?

15 A I did.

16 Q And is there anything in particular about the video
17 that you observed?

18 MR. HOLLANDER: He's hired for the breath test
19 instrument only not about roadside exercises. It's about the
20 instrument itself and that's it.

21 Q So, you don't plan to testify at all about field
22 sobriety exercises?

23 A I do not.

24 Q And you are familiar with Deputy Faccini.

25 Correct?

1 A I am.

2 Q Do you have any reason to challenge anything that he
3 has said?

4 MR. HOLLANDER: Again that's not fair game or relevant to
5 the breath test instrument. Whether Deputy Faccini is a good
6 law officer, how is that related.

7 That's what this is about, his involvement is about the
8 Intoxilizer (phonetic) 5000 and how that reads breath readings
9 and how it can be affected by the particular person. It's not
10 about Deputy Faccini, his report, or roadsides.

11 MS. STEINBERG: Deputy Faccini is the arresting officer in
12 this case and I can ask him about his relationship with him.

13 MR. HOLLANDER: But that wasn't your question. Your
14 question was, do you have any reason to discredit what he said
15 in this case. That's not what he's involved with.

16 MS. STEINBERG: But Deputy Faccini is the arresting
17 officer and I can ask the questions about --

18 MR. HOLLANDER: But he's not testifying about roadsides,
19 about police conduct, about how roadsides should be done, or
20 his performance. He is testifying about the breath test
21 instrument.

22 MS. STEINBERG: It doesn't matter. I can go into it.

23 MR. HOLLANDER: I don't think --

24 Q He's testified about this stuff in the past and it
25 may come up in this trial.

1 MR. HOLLANDER: Well, before I certify can you repeat the
2 question please.

3 MS. STEINBERG: You have worked with Deputy Faccini in the
4 past.

5 Correct?

6 A Yes.

7 MS. STEINBERG: Do you have any reason to doubt his --

8 MR. HOLLANDER: So, you are to bolster Deputy Faccini by
9 an ex-officer saying that he is or isn't a good officer?
10 That's not up to him.

11 MS. STEINBERG: It is up to him. It's his opinion about
12 the arresting officer.

13 MR. HOLLANDER: Let's certify that. We'll ask Judge
14 Feiner if he should answer that question.

15 Q The fact that you're going to have to come back
16 before Judge Feiner and have a hearing is that going to
17 increase your fees?

18 A No.

19 Q Are you -- certified?

20 A No.

21 Q Were you ever -- certified?

22 A No.

23 Q What breath documents did you look at in particular
24 regarding this case?

25 A Just the breath test slip.

1 Q Have you looked at any of the maintenance records
2 for the Intoxilizer (phonetic)?

3 A I have no personally.

4 Q Do you plan on looking at them?

5 A If they are provided to me I will.

6 Q Again, you were supposed to testify in this case
7 today. So, you didn't feel that it was necessary to look at
8 the breath test documents prior to trial?

9 A If they are not provided to me than don't have an
10 opportunity to look at them.

11 Q That wasn't my question. My question was, you
12 didn't think it was necessary to look at the maintenance
13 documents for this particular case before trial?

14 A If they are not provided to me --

15 Q They question is, do you think it's relevant, do you
16 think you need to look at them before preparing for a case?

17 A Absolutely. I would get an opportunity to look at
18 them before.

19 Q When would you have gotten the opportunity if the
20 trial was today?

21 A It would have probably been on the stand if it was
22 handed to me.

23 Q So, just when you were approached in court you could
24 just look at the documents and that's enough preparation for
25 you to form an opinion about the Intoxilizer used in this

1 particular case?

2 A Well, if I'm to believe the breath test documents,
3 that's what I do.

4 Q Do you have any reason to doubt the documents
5 provided by BSO and the maintenance of the Intoxilizer 5000
6 used in this case.

7 MR. HOLLANDER: He hasn't seen a copy of it.

8 Q Well, the last answer was, if I were to believe.
9 That was his answer, if I were to believe the documents. So,
10 my question is, why wouldn't he believe the documents as
11 presented to him.

12 A I would have to see something contrary to that to
13 change my opinion.

14 Q See something contrary to what?

15 A The actual breath test inspection.

16 Q What would you be looking for?

17 A The cards.

18 Q So, if the maintenance records are moved into all
19 the other cards, are you talking about the monthly inspection
20 card?

21 A Yes.

22 Q Is that a yes?

23 A Yes.

24 Q So, you have nothing to doubt the accuracy of the
25 Intoxilizer 5000 used in this case.

1 Correct?

2 A Right.

3 Q Okay.

4 A Unless I saw something different.

5 Q Do you have any reason to believe that the reports
6 would show anything in --

7 MR. HOLLANDER: Hold on one second. Are you asking him
8 that because the breath results say it's a certain number that
9 that means it is that certain number?

10 MS. STEINBERG: Well, he is saying that he has no reason
11 to doubt the veracity of the Intoxilizer unless he sees
12 something different. So, I'm trying to get out what he's
13 looking for or if the maintenance records come in --

14 MR. HOLLANDER: Are you asking about all the inter
15 workings of the machine?

16 MS. STEINBERG: Not yet.

17 MR. HOLLANDER: We're going to get to that later?

18 MS. STEINBERG: Yes.

19 MR. HOLLANDER: Okay. Because I want to make sure that
20 that's clear for the record. He didn't just say that just
21 because it says a number that that's what I really is.

22 MS. STEINBERG: Unless he sees something different, that's
23 what he's saying. The witness had no problem understanding
24 the question.

25 MR. HOLLANDER: Well, I think that --

1 Q Mr. Zager, are you confused as to the terms of my
2 question?

3 A I am now. Your question was, would I have any
4 reason not to believe the results on the actual signed
5 inspection document.

6 Q Correct.

7 A And the answer is, no, unless I saw something
8 printed differently on the breath test strips.

9 Q Now, you are familiar with --

10 A Yes.

11 Q You have worked with her.

12 Correct?

13 A I have.

14 Q Do you have any reason to doubt her proficiency and
15 good maintenance on the Intoxilizer 5000?

16 A No.

17 Q So, if she being the state witness in this case
18 would you have any problems with the maintenance as she will
19 testify to?

20 A No.

21 Q Now, as you said earlier, you have no reviewed any
22 of the cards regarding this particular Intoxilizer? You
23 didn't know anything about this at the time.

24 Correct?

25 A At the time of the dispatch I have not seen it,

1 right.

2 Q And you have seen the breath reading in this
3 particular case?

4 A Yes.

5 Q And the reading was a .129 and a .128.
6 Correct?

7 A Yes.

8 Q Now, what about that reading are you going to be
9 testified to?

10 MR. HOLLANDER: I definitely am going to object to that.
11 You got to ask a specific question. You can't say, what is
12 your opinion about --

13 MS. STEINBERG: Yes I can.

14 MR. HOLLANDER: About what?

15 MS. STEINBERG: As to the breath in this case. What's
16 your opinion as to the breath in this case.

17 MR. HOLLANDER: That's not a question.

18 MS. STEINBERG: Of course it is.

19 MR. HOLLANDER: What's your opinion about it?

20 MS. STEINBERG: Yes.

21 MR. HOLLANDER: I'm sorry to the court reporter because
22 we're all going back and forth. You have to ask some
23 specifics, you can't ask the general question, what do you
24 think about the --

25 MS. STEINBERG: What do you plan on testifying to. I can

1 are you going to be testifying to in terms of the breath
2 alcohol reading in this particular case?

3 MR. HOLLANDER: You don't know what the direct examination
4 is. So, you are asking him to tell you what Mr. Meltor
5 (phonetic) is going to ask him in trial?

6 Q Well, what is your opinion about the breath alcohol
7 reading in this case, the subject that you have been retained
8 to testify about?

9 A My overall opinion of the breath?

10 Q Correct.

11 A My opinion is that the result obtained on the
12 Intoxilizer, if the Intoxilizer proves to be calibrated
13 correctly and which I'm presuming it was, that the results
14 obtained are correct.

15 Q Okay.

16 A However, they are subject to factors that could
17 influence the breath.

18 Q Now, what factors would influence the breath alcohol
19 reading in this case?

20 A Well, there are many factors that could do that such
21 as mouth alcohol, mouth temperature, partition ratios, status
22 of a persons absorbed -- and things of that nature.

23 Q Okay. Well, let's take that one at a time.

24 A Okay.

25 Q Mouth alcohol. If somebody had mouth alcohol

1 wouldn't that be reflected in the breath alcohol testing on
2 the card?

3 A It could be but not every time.

4 Q Well, how many times in your dealings with the
5 Intoxilizer would mouth alcohol not be detected?

6 A Many times.

7 Q How many times?

8 A I couldn't tell you how many times. It's something
9 that is done many times. Even this officer has done
10 experiments with the Intoxilizer showing that you can get a
11 reading from that device doing training here.

12 Q I'm not exactly familiar with that. When were
13 readings obtained with no alcohol being tested?

14 A Well, you're asking about mouth alcohol. I'm saying
15 taking a little alcohol, placing it in the mouth, and having a
16 result still show up on an Intoxilizer.

17 Q It usually shows up as mouth alcohol. A star
18 usually comes up to it and it says mouth alcohol detected.

19 Correct?

20 A It certainly can. That's what it's designed to do,
21 the same as it's always been.

22 Q Okay.

23 A For the most part it can do that but there is time
24 where it can't.

25 Q Well, how many times in your experience has it not

1 come?

2 A I couldn't bring to tell you a number because I have
3 never recorded that.

4 Q Okay.

5 A It's just a known fact that with a breath alcohol
6 testing device the mouth alcohol can slip by.

7 Q Do you have any reason to think that mouth alcohol
8 was a factor in this case?

9 A There is nothing to lead me to believe it was in
10 this case.

11 Q So, you wouldn't be able to testify that mouth
12 alcohol was a factor in this case.

13 A It didn't appear to be.

14 Q Now, you said the mouth temperature. Do you have
15 any information that the defendant's mouth temperature was
16 different than anybody else's mouth temperature than anybody
17 else's mouth temperature at the time of the breath test in
18 this case?

19 A No.

20 Q Have you done any physiological studies on the
21 defendant to determine if he has the mouth of a reptile or
22 anything like that?

23 A No.

24 Q He's a normal person with a normal body temperature.

25 MR. HOLLANDER: He just said he didn't do that study so he

1 wouldn't know.

2 Q So, he can be classified as a normal human being and
3 mouth temperature shouldn't be a factor in this case as well.

4 Correct?

5 A Well, I'm not saying that but it's a possibly.

6 Q Is it a mere possibility, is it a probability, do
7 you have any facts to back up the fact that you think it's a
8 possibility? What are your facts?

9 A Well, based on the literature, the forensic
10 literature of the average breath alcohol temperature, it's
11 been determined that the average individual presents at
12 roughly thirty-five degree centigrade.

13 Q And what did this defendant present at?

14 A Well, as I said, the Intoxilizer is not capable in
15 determining what somebody's mouth alcohol temperature is.

16 Q And why would that be a significant factor in this
17 case?

18 A Well, it's a significant factor because it can give
19 a false high reading if the mouth alcohol temperature is
20 higher than thirty-four degrees.

21 Q Now, why do you think the defendant's temperature
22 was higher than what the Intoxilizer normally detects for?

23 A Well, some of the modern forensic papers show that
24 an average is close to thirty-five degrees.

25 Q And what is the Intoxilizer currently set for?

1 A Thirty-four.

2 Q And how much would that increase a defendant's
3 breath alcohol reading?

4 A Roughly about seven percent.

5 Q One degree would make someone's breath alcohol
6 reading seven percent higher than what is normally being
7 recorded?

8 A Correct.

9 Q What literature are you referring to?

10 A There is a study from a Doctor Carpenter, who is a
11 forensic director for the State of Alabama, where he published
12 a paper.

13 Q When was this published?

14 A Roughly ninety-eight or ninety-nine.

15 Q And when did you become familiar with this paper?

16 A I might have been there when he actually presented
17 this paper but I don't remember. I have spoke to him about it
18 and I became familiar with it as a member of a particular
19 organization.

20 Q What's that organization?

21 A That's the International Association for chemical
22 testers.

23 Q So, you're saying that the defendant's breath
24 alcohol level in this case is seven percent higher than it
25 should have been because you think that his temperature was

1 not at thirty-four degrees Celsius but thirty-five degrees
2 Celsius?

3 A That's what that article certainly suggests.

4 Q And thirty-four degrees Celsius is what temperature
5 in Fahrenheit?

6 A It's roughly around a hundred degrees or so.

7 Q Okay.

8 A it would be closer to a hundred and one.

9 Q And thirty-five degrees Celsius would equate to
10 what?

11 A Thirty-five degrees?

12 Q Yes.

13 A As I said, it's roughly about a hundred degrees.

14 Q Well, my question before was what was thirty-four
15 degrees.

16 A Oh.

17 Q Just for the record, you're using a calculator to
18 determine this?

19 A I would have to.

20 Q Okay.

21 A It's roughly about ninety. I'll just generalize it
22 and say that it's roughly around ninety or ninety-three and we
23 can take it up to about ninety-six degrees more or less.

24 Q And is that thirty-four degrees Celsius?

25 A Fahrenheit.

1 Q But I'm saying that is the thirty-five the ninety-
2 three in the mouth?

3 A No. The thirty-four is the lower obviously.

4 Q So, if someone is to have a mouth alcohol of a 100
5 degrees -- Are you saying that the mouth alcohol is higher in
6 the mouth than their body temperature is?

7 A Lower.

8 Q Okay.

9 A We can blow out.

10 Q So, if someone were to have a mouth alcohol of a
11 hundred degrees Fahrenheit in their mouth then that means
12 their body temperature would be higher than a hundred degrees?

13 A I don't know the answer to that. Their core
14 temperature would certainly be different in most cases than
15 their mouth alcohol temperature.

16 Q And you said that their core temperature is higher
17 than their mouth temperature.

18 Correct?

19 A In most cases, yes.

20 Q And correct me if I'm wrong but 98.7 is what most
21 people are if they are not sick.

22 Correct?

23 A 98.6 is what the average is.

24 Q So, somebody would have to have a fever of some sort
25 to have a mouth alcohol of a hundred degrees?

1 A A hundred degrees in the mouth?

2 Q Yes.

3 A I would imagine that it's possible.

4 Q So, if someone, if their not sick and don't have the
5 flu, and most people you are saying have a normal temperature
6 of 98.6 degrees Fahrenheit, how would they have a mouth
7 temperature of over a 100 degrees?

8 A You're the one who asked that question. I didn't
9 say it was a hundred.

10 Q Okay.

11 A I said that thirty-five was the average which
12 equates out to roughly ninety-five or ninety-six degrees where
13 we're dealing with metric and English conversions.

14 Q I know. That's why I'm trying to keep it in the
15 Fahrenheit realm and not the Celsius realm.

16 A Thirty-five degrees is below a hundred degrees
17 Fahrenheit.

18 Q It's above standard body temperature.

19 Correct?

20 A A 100 degrees is above standard body temperature.

21 Q And you testified earlier that someone's mouth
22 temperature than their core temperature.

23 Correct?

24 A That's correct.

25 Q Do you have any reason to think that this

1 defendant's core temperature was elevated at the time of this
2 case?

3 A I don't have any knowledge of that.

4 Q Do you have any knowledge that his mouth temperature
5 was any higher than the average person's mouth temperature at
6 the time of the arrest?

7 A Other than the individual, no, I do not.

8 Q I'm talking about Mr. Bob Hogan.

9 A Okay.

10 Q So, his mouth temperature is not different than
11 anyone else's?

12 A It's unknown.

13 Q And have you done anything to determine what his
14 mouth temperature is?

15 A For him, no.

16 Q Have you done it for anybody?

17 A No.

18 Q Now, you said that other factors should be
19 considered in determining someone's breath alcohol level like
20 you have to consider a partition ratio.

21 Correct?

22 A Certainly.

23 Q Have you done any studies about this defendant's
24 partition ratio?

25 A No.

1 Q Are you familiar about the accepted norm about what
2 partition ratios are?

3 A Yes.

4 Q What is the accepted norm?

5 A Between 1700 and 2300 on average.

6 Q The average is 2100.

7 Correct?

8 A The average is closer to 2300 but in the U.S. it's
9 usually 2100.

10 Q And you testified in the past that there average
11 accepted norm is 2100 to 1.

12 Correct?

13 A Yes.

14 Q Do you have any evidence to suggest that Mr. Hogan's
15 partition ration is anything different that 2100 to 1?

16 A I do not.

17 Q Were you going to testify as to partition ratios in
18 this case?

19 A I was going to talk to the attorney as to where or
20 not they were going to ask me those questions.

21 Q Well, if you no knowledge about this defendant's
22 partition ratio, what information would you need to know in
23 determining this defendants partition ratio?

24 A Well, the status of their --

25 Q Have you obtained any of that information?

1 A I have not

2 Q Are you planning on obtaining that information?

3 A Whether or not the attorney's release it to me or
4 discuss it with me, that's up to them.

5 Q Again, you were scheduled to testify today in this
6 particular case. Did you have any plans to talk about whether
7 he was rising or falling?

8 A I have no plans.

9 Q Okay.

10 A It's not my call whether or not the attorneys want
11 to do that.

12 Q Well, if you're going to base your testimony on
13 evidence than the State has a right to delve into that and
14 determine that.

15 A That's why we're here.

16 Q So, you have no plans on obtaining any of the
17 information to make a determination about this defendant's
18 partition ratio.

19 Correct?

20 A As an individual I have no idea whether they want me
21 to testify about that.

22 Q Okay.

23 A Again, that's something that only the attorneys
24 involved --

25 Q So, why don't you talk to us a little bit about your

1 knowledge of precision ratios. Do you know what the defendant
2 drank that night?

3 A The report says two drinks.

4 Q Is that consistent of a breath alcohol reading of a
5 .128 and a .129?

6 A No.

7 Q Why not?

8 A Well, if we were to assume that a standard drink
9 contains one ounce of alcohol then it would not be.

10 Q Considering that you used to be in law enforcement,
11 what's the standard response to someone who was pulled over
12 for a DUI, how many drinks do they usually admit to?

13 MR. HOLLANDER: That is not relevant to this case and you
14 can certify that.

15 Q So, two drinks would not be consistent of a .128 and
16 a .129?

17 A Right. It would not be consistent.

18 Q Did you determine what the defendant ate that night?

19 A No.

20 Q Did you determine when he was drinking his drinks?

21 A No.

22 Q Are those factors that need to be determined in
23 someone's absorption and elimination?

24 A Yes.

25 Q And, in fact, if somebody had stopped drinking

1 they are having a bottle of alcohol while they are behind the
2 wheel.

3 A Certainly it could be a dangerous thing but that
4 depends on cases to case.

5 Q There is no indication of that in this case.
6 Correct?

7 A That he had an open bottle while he was behind the
8 wheel?

9 Q Yes.

10 A Not that I remember.

11 Q So, he wasn't drinking while driving?

12 A I don't recall that he was.

13 Q What information do you need to see how fast someone
14 absorbs alcohol?

15 A As I said, no body can put a handle on the
16 individual absorbing as it varies greatly.

17 Q Okay.

18 A There is no way to say how quickly or slowly someone
19 absorbs.

20 Q Okay.

21 A Just the time it may take, thirty or ninety minutes,
22 is what we would typically say.

23 Q Sir do you have any --

24 A Inaccurately?

25 Q Yes.

1 A Not at this point, no.

2 Q So, your testimony is going to be based on
3 presumptions, suppositions, and conclusions?

4 A That's some fancy lawyer talk but my testimony has
5 always been based on facts and limitations based on breath
6 alcohol testing.

7 Q And breath alcohol testing usually gives the benefit
8 of the doubt to the defendant.

9 Correct?

10 A If you are referring to the corresponding blood
11 alcohol level, than yes, you will get a lower result in the
12 blood.

13 Q Now, you have been testifying about the Intoxilizer
14 5000.

15 Correct?

16 A Yes.

17 Q What about the Intoxilizer 5000 used in this
18 particular case that you would find that this breath sample
19 would be inaccurate?

20 A I haven't been shown anything that would show me
21 that the Intoxilizer itself was off in its calibration.

22 Q So, you have nothing to refute that this defendant
23 blew a .129 and a .128 at the time and you're going to say
24 that it's an accurate reading.

25 Correct?

1 A Well, it can certainly be construed as accurate but
2 the liability is always subject to the limitations of the
3 breath alcohol testing.

4 Q And those are the fact that someone's partition
5 ratio could be 1700 instead of 2100?

6 A Those things that I mentioned before that we went
7 over.

8 Q But you have nothing specific to indicate that he is
9 just the average human being.

10 Correct?

11 A I have nothing to say that he is not the same as
12 anyone else.

13 Q Do you have anything?

14 CROSS-EXAMINATION

15 BY MS. BANDELI;

16 Q I have a couple of questions. You read in the
17 report that the defendant has two drinks.

18 Correct?

19 A That's what I recall.

20 Q Okay.

21 A If you want me to look at it again I can but we all
22 agree that that's what that was.

23 Q Did you ever interview the defendant?

24 MR. HOLLANDER: If he did I would object because you can't
25 ask him what my client said to him.

1 MS. BANDELI: That's not my question.

2 MR. HOLLANDER: Okay.

3 Q I would also disagree with that but that's not my
4 question.

5 A Can I take this, my wife never calls three times.

6 Q Sure.

7 A Okay. I don't remember the question.

8 Q Have you ever interviewed the defendant in order to
9 further your investigation into this case?

10 MR. HOLLANDER: I don't have a problem with you asking it
11 here but I don't think it's appropriate for you to ask it in
12 court because not you are shifting the --

13 Q Could you just answer the question?

14 MR. HOLLANDER: You can answer.

15 A I did speak to him. I didn't ask him any questions
16 that would further my investigation.

17 Q So, you were not able to determine the types of
18 drinks that the defendant had?

19 A I didn't get that.

20 Q The volume of drinks?

21 A No.

22 Q Okay.

23 A I presumed that the two drinks were what he took but
24 I didn't ask him that.

25 Q But a drink could be a shot or a bottle depending

1 on someone's perception of a drink.

2 A That's certainly true. Again, I assume them to be
3 two alcoholic beverages, standard drinks.

4 Q Now, how long is it that you worked for Broward
5 Sheriff's Office?

6 A Just a bit over fifteen years.

7 Q And in your capacity with breath testing, what did
8 you do for them and in the later parts of your career there?

9 A I sat around and talked to you guys about cases
10 basically.

11 Q You did maintenance on the Intoxilizer.

12 Correct?

13 A That was part of it.

14 Q And in your capacity as coming in and testifying you
15 were able to do what's called the -- Theory.

16 Correct?

17 A Sure.

18 Q What is that theory?

19 A That is a means to show the total amount of alcohol
20 in the body.

21 Q And correct me if I'm wrong, but you have enough
22 information in this case to perform that and do the formula.

23 Correct?

24 A Sure.

25 Q Did you do it on this case?

1 A No.

2 Q Could you do it now?

3 A I need a calculator.

4 Q Okay.

5 A I need his weight.

6 Q A male that weight 190 at a height of 5' 6".

7 A 7.8 drinks.

8 Q Now, you did that formula on a calculator and you
9 are able to do it without paper or referencing the formula.

10 Correct?

11 A Yes.

12 Q Okay.

13 A I have done it so many times.

14 Q All the factors that you took, would you say it's
15 fair that his breath alcohol reading is not consistent with
16 him having two drinks?

17 A Sure.

18 Q The person who administered the breath test in this
19 case was -- Nadina. Are you familiar with her?

20 A Just by seeing her name on cases before and on this
21 case.

22 Q Do you see anything on the paperwork that she has
23 completed that would raise an eyebrow to you?

24 A Actually, I have never seen the affidavit. I don't
25 remember seeing anything that was unusual.

1 Q I'm going to show you the alcohol influence report
2 that she filled out as well as the checklist.

3 A Okay.

4 Q Have you ever reviewed that document, the alcohol
5 influence report, prior to the deposition here today?

6 A I have.

7 Q What about the checklist?

8 A No.

9 Q Okay.

10 A That's the first time I have seen that.

11 Q Okay.

12 A That looks in order to me.

13 Q So, you have no reason to believe that the twenty
14 minute observation period wasn't done in accordance in
15 accordance with rules.

16 Correct?

17 A Not at this point.

18 Q Now, you used to be employed by BSO.

19 Correct?

20 A Yes.

21 Q And how long were you employed by BSO?

22 A More than fifteen years.

23 Q When did you leave BSO?

24 A In 2003.

25 Q And how did you leave BSO?

1 A What?

2 Q How did you leave with BSO?

3 A How did I leave?

4 Q Yes. Did you resign?

5 A I retired from BSO. I put my retirement papers in.

6 Q And why is it that you retired from BSO in the year

7 2003?

8 A I thought it would be a good time for me to go.

9 Q Why is that?

10 A Well, I thought it would be a good time for me to
11 go. I felt that fifteen years is long enough.

12 Q Were you under an I.A. investigation when you left?

13 A Not when I put in my retirement papers I was not.

14 Q At some point in time before you left BSO were you
15 under an I.A. investigation?

16 MR. HOLLANDER: Unless that you have something that shows
17 that it was sustained than it's not allowed unless you have a
18 document of a sustained I.A. investigation.

19 MS. BANDELI: I can ask whether or not he was under an
20 I.A. investigation.

21 MR. HOLLANDER: Not in court you can't.

22 MS. BANDELI: We are not in court, we're in a
23 deposition.

24 MR. HOLLANDER: Okay. I just wanted to make sure that it
25 didn't come up in court.

1 A At some point after I put my retirement papers in I
2 was advised that there was a then I.A. investigation.

3 Q And who initiated that investigation?

4 A That would have been Captain Chef, I believe is
5 whose name is on that investigation.

6 Q And what was that in regards to? Why was that
7 investigation initiated?

8 A For distraction from duty I believe was what the
9 charge was.

10 Q And was that your only I.A. investigation you were
11 under before leaving BSO?

12 A Do you mean in the past also?

13 Q Yes.

14 A There have been other ones in the past.

15 Q How many times have you been under an I.A.
16 investigation while you have been employed with BSO?

17 A A couple other times. I would have to look at the
18 printouts.

19 Q Did you file for bankruptcy prior to leaving BSO?

20 MR. HOLLANDER: That's not relevant.

21 MS. BANDELI: Yes, it is.

22 MR. HOLLANDER: We'll certify that one.

23 MS. BANDELI: No, he can answer that one.

24 MR. HOLLANDER: I say he doesn't answer that one.

25 MS. BANDELI: Judge Feiner will determine that one.

1 MR. HOLLANDER: Okay.

2 Q Other judges have ordered you to answer this and you
3 know that.

4 A What was that?

5 Q All the judges have ordered that you answer that
6 question, whether or not you have declared bankruptcy, prior
7 to leaving BSO. And you have never shown up for a deposition
8 after being ordered.

9 A Than they said I didn't have to answer questions
10 pertaining to the particulars of it.

11 Q Right. So, we don't have to go into the details.

12 A Okay.

13 Q But the question is, did you file for bankruptcy
14 prior to leaving BSO?

15 A We'll leave that up to Judge Feiner.

16 Q Okay.

17 A If he says I have to answer that than I'll answer
18 that.

19 Q Certify that question. Are you familiar with BSO's
20 policies?

21 A Sure.

22 Q Is it against BSO policies to file for bankruptcy?

23 A I don't know about a policy that prohibits a person
24 from filing from bankruptcy.

25 Q Are you still in bankruptcy proceedings?

1 A Yes.

2 Q When do those conclude?

3 MR. HOLLANDER: These are all along the same lines so
4 let's put these together with the bankruptcy questions.

5 MS. BANDELI: So, let's just certify to Judge Feiner
6 about the witnesses financial status in terms of this
7 proceeding.

8 MR. HOLLANDER: Okay.

9 Q Have you ever testified differently about your
10 reasons for leaving BSO?

11 A Not that I recall.

12 Q Okay.

13 A I left BSO because I thought it was time for me to
14 go.

15 Q Why in particular after fifteen years did you think
16 it was a good time to go?

17 MR. HOLLANDER: Are you asking him as in --

18 MS. BANDELI: Yes.

19 MR. HOLLANDER: Well, maybe that's the answer.

20 MS. BANDELI: I didn't ask that question.

21 MR. HOLLANDER: The answer is that he thought it was time
22 to go.

23 Q Have you ever testified different as to that?

24 A I don't know. I may have given out more information
25 about the --

1 Q Did you ever testify as to you thought you were
2 working too hard?

3 A I was definitely working too hard.

4 Q What made your job different that you figured that
5 now in 2003 it was a good time to go?

6 MR. HOLLANDER: You want me to get into his health issues?
7 Let's certify that too.

8 MS. BANDELI: Well, in the past he has testified about
9 it.

10 MR. HOLLANDER: Well, just say what he said so we know.

11 Q You have testified that you had to wear a uniform
12 and that's one of the reason you left BSO.

13 Correct?

14 A I was a Deputy Sheriff and I wore a uniform.

15 Q But in the past you didn't have to wear a uniform.

16 Correct?

17 A For a great deal of my career I was not wearing a
18 uniform.

19 Q And at some point in your career you were asked to
20 start wearing a uniform again.

21 Correct?

22 A Yes.

23 Q And you were not happy with that.

24 Correct?

25 A It's not as comfortable as a pair of slacks and a

1 shirt that's for sure.

2 Q And do you remember giving a deposition where you
3 said that was one of the reason you left BSO?

4 A I don't know if I actually said that.

5 Q Okay.

6 A I would have to see what was written if you want to
7 draw my attention to it.

8 Q Do you remember giving a deposition in our office on
9 the case of State of Florida versus Manuel Forenas (phonetic)?

10 MR. HOLLANDER: I don't see why this is relevant. I don't
11 get how this relates to this?

12 MS. BANDELI: Are you kidding. It's called impeachment
13 and you know better. Do you want to certify that too?

14 MR. HOLLANDER: I think --

15 Q You testified in the State of Florida versus Manuel
16 Forenas (phonetic) that you thought you had to do excessive
17 amounts of work.

18 Correct?

19 A If I could just refresh my memory to see if I agree
20 or disagree.

21 Q Sure.

22 A You have to point out where it says that here?

23 Q I believe that it's the next page.

24 A Okay.

25 Q So, did you feel that when you left you were being

1 asked to do excessive amounts of work?

2 A I was. I was doing a lot of --

3 Q And what kind of work was that?

4 A I was doing more and more projects like
5 demonstrations that we used to call puppet shows at school.

6 Q Okay.

7 A I had to go to more and more schools and every bit
8 of time I had I was given new projects of writing grants and
9 things of that nature.

10 Q Did you at one point volunteer to do those things?

11 A Nothing was voluntarily but I certainly used to do
12 those and they were part of my job but I never had them
13 expanded out where they were occupying a great deal of my work
14 schedule.

15 Q But you had volunteered to demonstrate at schools.

16 Correct?

17 A Yes and I still do that.

18 Q But you are saying that BSO was requiring that as
19 part of your job description to go to school and give
20 lectures?

21 A It was always a requirement but it was just the
22 frequency of it.

23 Q What changed?

24 A The frequency.

25 Q Okay.

1 A The total amount that I was doing had changed.

2 Q What did it change to? Had you started doing it and
3 what did you think was an excessive amount?

4 A I would pretty much have to look over my old
5 schedule but I was primarily only handling high school in
6 Broward County and kids that were within the drinking age.

7 Q Okay.

8 A And then it went out to middle schools and
9 elementary schools and it became a means to give more and more
10 or my time.

11 Q Were you being asked to do these things after hours?

12 A In some of these cases I did presentations after
13 hours.

14 Q Okay.

15 A I did citizen academies and things of that nature.

16 Q When you worked for BSO how many hours a week did
17 you have to work?

18 A Same as any government job, forty hours a week.

19 Q And how many hours extra would you have to put in?

20 A I don't know.

21 Q Okay.

22 A It wasn't the total number of hours that were
23 getting excessive but the work within that compound.

24 Q So, the fact that they were giving you more duties
25 to do within your four hours work week were becoming excessive

1 to you?

2 A Yes.

3 Q Did you find that you couldn't complete your job
4 duties during your forty hours or that you didn't have enough
5 time to sit around at the breath alcohol testing facility?

6 A It was probably a little bit of both.

7 Q Okay.

8 A There were certainly situations where I couldn't
9 handle two presentations with court ongoing, with independent
10 studies, with projects and motions that came up.

11 Q Okay.

12 A It certainly became more difficult to do my job.

13 Q And did you ever express that to anyone?

14 A Not within the command but just to others.

15 Q So, you never told any of your superiors that you
16 were being required to do too much during your forty hour work
17 week?

18 A No. You don't do that in BSO, that's suicide.

19 Q And what had you been doing besides giving lectures
20 to the students?

21 A Everything I just said, my job.

22 Q Just for the record I want to show you where you
23 said you were asked to do more work and ask to change from
24 plain clothes into uniform on page 21 lines nine through
25 eleven.

1 A Okay.

2 Q Were you also asked to go onto road patrol?

3 A I agree with this. As I said I did go from plain
4 clothes to uniform.

5 Q And you weren't happy with that?

6 A It's not as comfortable.

7 Q You were also asked to do road patrol duties?

8 A I did do some road patrol.

9 Q And you weren't happy with that?

10 A That meant going on until midnight and that wasn't
11 something I wasn't used to.

12 Q Okay.

13 A That certainly wasn't good for my being awake and
14 then coming in and handling court cases.

15 Q But that changed back to you just working 9:00 to
16 5:00.

17 Correct?

18 A At some point, yes.

19 Q You talked about your knowledge of forensic
20 literature.

21 Correct?

22 A My answer is about the mouth temperature.

23 Q Are you familiar with literature regarding breath
24 alcohol testing and the forensic validity of stuff?

25 A Sure.

1 Q Are you familiar that studies have shown that ninety
2 percent of driver's breath alcohol level is going down when
3 they are tested and not up?

4 A Yes.

5 Q So, you would agree with that statement?

6 A Yes.

7 Q And do you have any reason to believe that MR. Hogan
8 is part of that ten percent that was going up when he was
9 tested and not down?

10 A It's an unknown.

11 Q So, you have no concrete evidence to testify about
12 whether or not he was going up or down?

13 MR. HOLLANDER: Let me just --

14 Q My question was, do you have any evidence to show
15 that Mr. Hogan was part of the ten percent that may have been
16 going up when tested and not down?

17 A I do not at this time.

18 Q Do you plan on getting such evidence?

19 A I don't know whether or not something like that
20 would be released to me.

21 Q What evidence would you need?

22 A I would need to have evidence told to me about
23 recent consumption.

24 Q And since you were about to testify in this case and
25 weren't provided it, do you plan on getting that evidence?

1 A In most cases it is typically released to me on the
2 day of trial.

3 Q The day of trial you get this type of information
4 provided to you?

5 A It's been my experience.

6 Q Well, if you were to get that information provided
7 to you on the day of trial than I guess we have to depose you
8 again.

9 A This is one of the only states where I take
10 depositions.

11 Q Did you prepare any graphs, charts, or any other
12 demonstrative aides that you would use during this trial?

13 A No.

14 Q Do you plan on making such diagrams or charts up?

15 A No.

16 Q I don't have anything else.

17 RE-DIRECT EXAMINATION

18 BY MS. STEINBERG:

19 MS. STEINBERG: The only thing I have for the record is,
20 Mr. Hollander do you plan on providing any additional reports,
21 evidence, or documents to Mr. Zager?

22 MR. HOLLANDER: Nothing that --

23 MS. STEINBERG: Well, he testified today that there were
24 certain things that he did not see in discovery.

25 MR. HOLLANDER: As far as the cards?

1 MS. STEINBERG: Yes.

2 MR. HOLLANDER: If we get a hold of the cards I'll hand
3 them over.

4 MS. STEINBERG: And you understand that you have a right
5 to re-depose him at that time because that's new evidence that
6 we will be taking into account.

7 MR. HOLLANDER: I think you guys have possession of the
8 cards.

9 MS. STEINBERG: We do not.

10 MR. HOLLANDER: Okay.

11 MS. STEINBERG: Those have to be obtained through the
12 Broward Sheriff's Office.

13 MR. HOLLANDER: Well, I'll make an effort to try and
14 obtain the cards. And you are saying that if I get the cards
15 I should give them to you and you will re-depose him?

16 MS. STEINBERG: You should give them to him.

17 MR. HOLLANDER: And then you want to re-depose him?

18 MS. STEINBERG: We'll have to.

19 MR. HOLLANDER: I'm going to make my best effort to get
20 the cards.

21 MS. STEINBERG: But he's going to have to testify as to
22 the information --

23 MR. HOLLANDER: Okay.

24 MS. STEINBERG: So I would suggest that you do that.

25 MR. HOLLANDER: Okay.

1 MS. STEINBERG: Read or waive?

2 MR. HOLLANDER: Read.

3 (Thereupon, the deposition was concluded.)

4 STATE OF FLORIDA

5 COUNTY OF BROWARD

6 I, JILL LEWIS, certify that I was authorized to and did report
7 the foregoing proceedings and that the transcript is a true
8 record.

9

10 Dated this 14th day of August, 2006.

11

12



JILL LEWIS

13

CASE NUMBER: 05-25454MM10A

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