

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

MISDEMEANOR DIVISION

CASE NO. 09-011811MM10A

JUDGE FRY

STATE OF FLORIDA,)
Plaintiff,)
vs.)
GRETCHEN CALABRESE,)
Defendant.)
_____)

COPY

Broward County Courthouse, Room 345
201 Southeast 6th Street
Fort Lauderdale, Florida
December 13, 2011

Excerpts of proceedings in the above-entitled cause
which came on for hearing before the Honorable JOHN D. FRY,
Presiding Judge.

APPEARANCES:

MICHAEL J. SATZ, State Attorney, by
CHRISTOPHER KILLORAN

-and-

TARLIKA NUNEZ-NAVARRO,
Assistant State Attorneys,
Appearing on behalf of the State.

EDWARD A. LOPEZ, ESQ.,
Appearing on behalf of the Defendant.

I N D E X

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1 WHEREUPON:

2 The following proceedings were had:

3 * * * * *

4 THE COURT: The State's rested its case-in-
5 chief. At this point, the defense has the option
6 of calling witnesses, should they choose to do so.

7 Mr. Lopez, good morning, sir.

8 MR. LOPEZ: Good morning, Your Honor.

9 THE COURT: What would you like to do?

10 MR. LOPEZ: Your Honor, at this time, the
11 defense would like to call witness Jay Zager.

12 THE COURT: Mr. Zager, please.

13 (Witness enters.)

14 THE COURT: Mr. Zager, good morning, sir.
15 Would you raise your right hand?

16 WHEREUPON:

17 JAY ZAGER

18 was called as a witness on behalf of the Defendant, and
19 being first duly sworn, was examined and testified on
20 his oath as follows:

21 THE COURT: Please have a seat here, sir.
22 Tell us your name. Spell your name.

23 THE WITNESS: My name is Jay Zager. It's
24 spelt Z-A-G-E-R.

25 THE COURT: Mr. Lopez.

1 MR. LOPEZ: Thank you, Your Honor.

2 DIRECT EXAMINATION

3 BY MR. LOPEZ:

4 Q Mr. Zager, could you please tell the jury how
5 you are employed?

6 A I can. Just give me one second.

7 Q Whenever you're ready.

8 A Okay. Good morning.

9 I'm currently employed -- I'm retired Broward
10 County Sheriff's Deputy, right here in -- in Broward. I
11 currently work as a independent breath alcohol testing
12 consultant, nationwide, as a law enforcement consultant.

13 Q You -- You briefly mentioned you had worked
14 for the Broward Sheriff's Office in the past. Could you
15 describe what is the extent of your work background?

16 A I can. My -- My work background here, I was a
17 deputy sheriff; first worked as a general deputy,
18 working on road patrol for a time. Before that, I
19 worked as a civilian employee. The majority of my time
20 was a sworn police officer here in Broward County. And,
21 at some point, I became the officer who was in charge of
22 the breath alcohol testing program. And, also, part of
23 the DUI task force here in Broward County.

24 And what that meant was, I would testify in
25 courts of law, like we're in today. In this very

1 courtroom, many, many times - with a different judge -
2 as an expert witness concerning breath alcohol testing.
3 And, also, I was a still-sworn police officer, so we
4 still did affect DUI arrests.

5 Q In your past, did you testify as a witness for
6 the police?

7 A Well, I -- I was called as a -- a witness,
8 typically, by the government, the State. And that's in
9 that capacity. But I was still also called by the
10 defense from time to time.

11 Q Okay. And can you explain the familiarity
12 that you have with regards to the -- these breath test
13 machines?

14 A Well, quite a lot. It's been my career to
15 work with the breath alcohol testing, various different
16 types of machines over the years that I've become
17 factory-certified on, including the device here, which
18 is the Intoxilyzer 8000 device.

19 Q And I want to focus on that. The -- The
20 machine that was used in this case is called the
21 Intoxilyzer 8000. What familiarity, or training, have
22 you had with respect to that machine?

23 A Well, I'm -- I traveled to the factory, which
24 is a company by the name of CMI. They're in Owensboro,
25 Kentucky. I spent time at the factory; became certified

1 in its operation, its design, its components;
2 disassembling it; learning calibration techniques on the
3 device by -- by a gentleman by the name of Phil Liteling
4 (phonetic), all the -- some of the engineers who were
5 there and -- and bench technicians at the time. That's
6 while I was still employed with the sheriff's office.

7 I've used the device in various research over
8 the years, including at least one paper that I presented
9 where I used that as part of my findings. I currently
10 own one. I still have use of one that I utilize from
11 time to time in drinking labs, where we dose
12 individuals. So, quite a lot.

13 Q Have you had the opportunity to teach any
14 classes, or give any lectures related to the subject of
15 breath alcohol?

16 A I have. Well, I was one of the instructors
17 for the state. Since that time, I continue to instruct,
18 except privately. So I put on courses around the
19 country. I've -- I've taught at some various -- They've
20 been held at university levels. As well as, I have a
21 course here in Florida, that I have myself, that was
22 approved by the Florida Bar. And that one's an overview
23 of the Intoxilyzer 8000, and also field sobriety
24 testing.

25 Q In the State of Florida, have you served on

1 any committees or State boards with respect to breath
2 alcohol?

3 A I have. Let me think for a moment. Some of
4 the -- Some of the committees have been the
5 instrumentation committee, where ultimately the
6 Intoxilyzer 8000 was selected for the next generation
7 device that we use currently in the state. I served on
8 a committee dealing with the forensic rules, where we
9 met to gather -- We gathered, rather, to discuss the --
10 the rules. They were used for breath alcohol testing
11 and blood testing in fact.

12 I was also a member of the committee dealing
13 with -- with the Interlock. That's the device that's
14 installed on a car to prevent somebody from being -- who
15 has alcohol on their breath from starting the car. I
16 was also a member of a committee where I helped design
17 the curriculum that's used in the State -- or was used
18 at the time, the breath alcohol testing curriculum for
19 both breath alcohol testing operators, the pushbutton
20 operators and, also, some of the -- what's called the
21 agency inspectors. I also helped create that document.

22 MR. LOPEZ: Your Honor, at this time, the
23 defense would tender Mr. Zager as an expert witness
24 in the subject of breath alcohol testing, the
25 Intoxilyzer 8000 machine.

1 MR. KILLORAN: Defer to Your Honor.

2 THE COURT: Let's go side-bar.

3 (Side-bar begins.)

4 THE COURT: In anticipating this being my
5 first case of any substance where somebody wanted
6 to have somebody declared as an expert, I reviewed
7 a whole bunch of case law. And there's a
8 reoccurring trend in that, by me certifying
9 somebody as an expert, I lend credence to the
10 assertions (sic) that he's speaking the gospel.

11 Are you familiar --

12 MR. KILLORAN: Yeah, I am --

13 THE COURT: -- with those cases?

14 MR. KILLORAN: -- familiar with them.

15 THE COURT: So, how do I not make you look
16 bad, as you just tendered him to me as an expert,
17 while allowing him to proceed and give the
18 testimony he feels appropriate without me actually
19 saying he's an expert in the field?

20 MR. LOPEZ: Well --

21 THE COURT: What do you think?

22 MR. LOPEZ: I think that -- Well, perhaps you
23 could just say that, Mr. Lopez, you may continue.
24 And then I can just go directly into my -- my
25 direct.

1 THE COURT: All right. If that's how you want
2 me to handle it --

3 MR. LOPEZ: Remaining silent on the issue,
4 unless the Court has some other suggestions.

5 THE COURT: All right. What's your train of
6 thought?

7 MR. KILLORAN: I mean you're right about the
8 case law.

9 THE COURT: Um-hum (affirmative).

10 MR. KILLORAN: So --

11 THE COURT: Yeah.

12 MR. KILLORAN: However Mr. Lopez wants to --

13 THE COURT: Whatever you want to do, we'll do.
14 I mean, is he qualified to speak? I find the
15 defendant qualified to speak --

16 MR. KILLORAN: Yeah, I --

17 THE COURT: -- on these issues, would be my --
18 Or, excuse me, the witness, qualified to speak on
19 these issues without tendering him as an expert.
20 There are cases getting reversed right now for
21 saying he's an expert.

22 MR. LOPEZ: Okay.

23 THE COURT: At what point --

24 MR. LOPEZ: Then perhaps, if the Court were so
25 inclined just to, on the record, say that - in

1 front of the jury - the defendant (sic) -- We find
2 the defendant (sic) qualified to testify in these
3 issues, without saying he's an expert.

4 I mean, it's -- it's --

5 THE COURT: Which, again --

6 MR. KILLORAN: I mean, this -- But the
7 question's already been proposed --

8 THE COURT: Right.

9 MR. KILLORAN: -- about an expert. So it
10 draws the inference that --

11 THE COURT: Exactly. All right. I know what
12 I'm going to do.

13 (Side-bar ends.)

14 THE COURT: Based upon defense's motion to
15 have him tendered as an expert, that's respectfully
16 denied. Having said that, he is qualified to speak
17 on these issues, based upon his training and
18 experience, and the jury shall give the appropriate
19 amount of thought to it.

20 You may proceed, Mr. Lopez.

21 DIRECT EXAMINATION (CONTINUED)

22 BY MR. LOPEZ:

23 Q Mr. Zager, today you are testifying for the
24 defense. How many times have you testified for the
25 State attorney in the past?

1 A Oh, on cases here in Broward County, where I
2 testified as an expert witness, several hundred times,
3 at a minimum; cases in general - which would include
4 administrative hearings, motions, things of that nature
5 - well over a thousand different proceedings.

6 Q And -- And whether testifying for the defense
7 or the government, are you compensated for your time?

8 A I am. I'm paid for my time to show up, time
9 that I work on cases.

10 Q And let me ask you. Is -- Is the substance of
11 your testimony determined by who's paying you?

12 A No, it's not. It's the same testimony that's
13 been throughout the years.

14 Q Could you explain that in more detail?

15 A Well, my -- my testimony here -- Since
16 everything I say is recorded, for many years. So the
17 testimony must be consistent and -- and the same,
18 throughout the course of time. So, as I testified as an
19 expert witness here for the -- the State Attorney's
20 Office, it's no different now. It's just -- It's the
21 same thing, I'm just being called by somebody different.

22 Q Do you end up testifying in every case that
23 you end up reviewing, or being hired on?

24 A I do not, just a portion of my cases where I
25 actually end up in a courtroom setting like this. A lot

1 of the cases I just review the facts, make
2 recommendations on them. It's a small amount.

3 Q And talk about this case. Besides coming here
4 to testify today in jury trial, have you spent a
5 considerable amount of time reviewing the documents in
6 this case, and materials?

7 A I probably, on this particular case, spent
8 more time than -- This is probably up at the top of any
9 other case I have, timewise. So I've spent a
10 considerable amount of time looking at documents,
11 preparing documents; preparing and then answering
12 questions; so, yes.

13 Q Did you and I have consultations pursuant to
14 this trial?

15 A Oh, yes, many.

16 Q Did you spend any time researching any
17 forensic materials in preparation for this jury trial?

18 A I did.

19 Q Can you explain?

20 A Well, there's a host of documents that are
21 available online from the Florida Department of Law
22 Enforcement that I would review. There are forensic
23 journals dealing with breath alcohol testing, that I
24 update and read. There's time studying the general case
25 notes and the discovery, or the police materials,

1 associated with the case as well.

2 Q And were you compensated in this case?

3 A I was.

4 Q Okay. How much have you been compensated for
5 your services with respect to Ms. Calabrese?

6 A It's broken down to stages. If I'm working as
7 a consultant on a case, I charge a thousand dollars for
8 my time, as I explained. And then if I go to trial,
9 such as today, for my time as well I charge additional
10 thousand dollars. Which also includes the time that we
11 -- we spent preparing for trial. And, also, there was a
12 deposition that was taken. I was paid an additional 500
13 dollars.

14 Q Do you charge by the hour, or do you charge a
15 flat fee?

16 A I charge a -- a flat rate, just for the case
17 as a whole.

18 Q Are you able to approximate how many hours
19 you've spent on this case?

20 A This particular case, as I mentioned, was --
21 is probably one where I spent more time than I could
22 ever imagine, either coming to court; answering
23 questions in the deposition; answering questions in a
24 written format; and researching materials. If -- If I
25 had to estimate, I would say it was -- would be well

1 over 40 hours of professional time that I put into this
2 case.

3 Q Okay. Let's talk about the breath test
4 machine, in this case the Intoxilyzer 8000 machine. Is
5 the Intoxilyzer 8000 machine 100 percent accurate?

6 A No, there -- there's -- there's no breath
7 testing machine that's a hundred percent accurate, as
8 far as accuracy -- accuracy is concerned. They all have
9 -- I call it a biomedical-type device. They all have
10 their tolerances.

11 Q Assuming that the Intoxilyzer 8000 machine in
12 this case were operating properly, does FDLE allow for a
13 acceptable margin of error between both breath samples?

14 A They do. What's acceptable is the agreement,
15 as we call that, between the two samples. And that's a
16 .020 of the sample. So, for instance, in a case such as
17 this - with a level of .087 - if the lower sample is a
18 .067, or as high as a .107, those would be considered
19 still within the parameters. So .040 total. So, yes.

20 Q What you just explained, is -- is that what's
21 commonly termed as the agreement or the differential
22 between both samples?

23 A It is. That's what would be called the
24 acceptable agreement, acceptable agreement between
25 samples.

1 Q Is there also something else known as a -- an
2 acceptable range of error, within the Broward Sheriff's
3 Office?

4 A Well, not -- not per se within the Broward
5 Sheriff's Office. An -- An range of error as relates to
6 breath alcohol testing is more something we would define
7 as -- as the tolerance of the device. You may refer to
8 it as range of error, but it's essentially --

9 Q What -- What is -- What is tolerance of the
10 device? Can you explain that?

11 A The tolerance of device means that the soft
12 tolerance, the precision, the accuracy, means that
13 what's the factory tolerance of the device. In Florida,
14 what the Broward Sheriff's Office uses -- They use a
15 .005. Or if you were thinking about that as a .100, it
16 would be an 095 or 105.

17 Q How do you know that the -- that the sheriff
18 in Florida uses -- the Broward Sheriff's Office, uses
19 that .005 number you mentioned?

20 A Well, it -- it's part of the -- it's part of
21 the curriculum that the breath test operators, that are
22 inspecting the devices monthly, are taught. And, it's
23 what the FDLE, Department of Law Enforcement, uses as
24 part of their testing. It's between the two samples, at
25 those levels.

1 Q Is there something called the expired breath
2 temperature that -- of a person?

3 A There is, yes, sir.

4 Q Okay. Is there a correlation -- Can you
5 explain if the temperature in your mouth has something
6 to do with the reading that comes out of the Intoxilyzer
7 8000 machine?

8 A There does. There is a correlation between
9 that --

10 Q Please explain.

11 A Breath alcohol testing is an indirect
12 measurement of the amount of alcohol that comes off of
13 blood. We can't have one without the other, unless
14 you're just placing some alcohol in your mouth. So,
15 presumably, an individual has all the alcohol in their
16 system. It's now at equilibrium throughout the body.
17 The temperature of the mouth has a direct correlation
18 between the outward overall temperature that you're
19 going to - excuse me - result that you're going to see.

20 For instance, if you were to hold your breath
21 closed -- hold your mouth closed, you could actually
22 raise your temperature. Or - excuse me - raise your end
23 result on the breath test level. If you were to drink
24 something cool or actually even hyperventilate, cooling
25 your mouth, you can lower it. So there's a direct

1 distinction between the temperature of the mouth and the
2 end result.

3 Q Does the Intoxilyzer 8000 machine assume a
4 certain mouth temperature when it spits out its results?

5 A It does.

6 Q What is that temperature?

7 A The temperature that's built into the device
8 is that -- what it believes that everybody blowing into
9 it is -- is 34 degrees centigrade.

10 Q In your experience administering breath tests,
11 does everyone have a mouth alcohol temperature of 34
12 degrees Celsius?

13 A Based upon the literature, no, they don't.

14 Q Okay. What were to happen if Ms. Calabrese
15 did not have a 34 degree Celsius temperature in her
16 mouth the night she gave the samples?

17 A Well, the -- the temperature can range. If
18 she didn't have that, the temperature can range between
19 32 degrees C, and upwards of 36 degrees C. So it's a
20 two-degree centigrade difference, plus or minus. And
21 what that equates to is each one degree of centigrade is
22 equal to about seven percent of the end result.

23 Q And -- And I -- I'll have you depict for this
24 in a moment. But, briefly, let's take Ms. Calabrese's
25 higher sample. If her mouth temperature was not 34

1 degrees Celsius, how could that affect her result?

2 A Well, if -- if you apply the -- the range as I
3 mentioned, the -- which would be two degrees C, which
4 would be equal to 14 percent on the end result, that
5 would equal out to roughly about a .012 difference, plus
6 or minus.

7 Q Is there something called an air blank error?
8 Or, what may otherwise be known as an ambient check?

9 A There is an ambient check. That is when the
10 device is drawing it -- If this were the Intoxilyzer
11 breath tube here - and it was purging itself - what it
12 does is it draws air. It takes a picture, if you will,
13 of the room's air and it analyzes it. And it's looking
14 to see if it has anything that could potentially cause a
15 problem with the test result. That's an ambient
16 detection system.

17 If it sees enough quantity of something -
18 alcohol, some volatile, something that could interfere
19 with the breath test - it should alert the operator.
20 The other thing that it's looking to do is it's
21 establishing its baseline to where the device is going
22 to be operating.

23 So, if you take it into a room that's clean -
24 like this is a clean environment - you would expect the
25 device to operate at zero breath alcohol level.

1 Q Does the air in the room or location where the
2 test is being administered have an effect, perhaps, on
3 the result of the test?

4 A It can.

5 Q How --

6 A It can.

7 Q -- exactly?

8 A Well, if there is sufficient quantity to cause
9 an issue with the device, it can actually move that
10 baseline up, and actually distort the reading itself.
11 It can lower the reading, which could also affect the
12 .02 agreement, as far as making that together. So
13 you've got to get a handle on whether or not the ambient
14 detector is working.

15 MR. LOPEZ: Your Honor, with the Court's
16 permission, may Mr. Zager step down from the
17 witness chair and --

18 THE COURT: Absolutely.

19 MR. LOPEZ: -- continue his testimony?

20 Mr. Zager, I'm just going to have you stand in
21 the middle here.

22 (Witness complies.)

23 MR. LOPEZ: And, Your Honor, if I can make use
24 of the easel.

25 THE COURT: Absolutely, Counsel.

1 (Mr. Lopez begins setting up the easel.)

2 MR. LOPEZ: I think I just broke the easel,
3 Your Honor.

4 THE BAILIFF: No, you didn't.

5 THE COURT: That's all right. That's why we
6 have Susan.

7 (Whereupon there was a brief pause in the proceedings,
8 after which the hearing continued as follows.)

9 DIRECT EXAMINATION (CONTINUED)

10 BY MR. LOPEZ:

11 Q Mr. Zager, did you review Ms. Calabrese's
12 breath samples prior to coming to this courtroom to
13 testify today?

14 A I did.

15 Q Okay. What did Ms. Calabrese blow?

16 A The numbers that were - I don't want to block
17 anybody - that were recorded were --

18 Q I'm going to ask you to take the highest one.

19 A Okay.

20 Q In this case. Is that a .089, you drew it on
21 there?

22 A That -- That is. And that's expressed as
23 grams per 210 liters.

24 Q Okay. What is the legal limit in the State of
25 Florida?

1 A Well, the -- the legal limit --

2 Q If I could just have you write the legal limit
3 on the top of the .089, so the jury can get --

4 A Okay.

5 Q -- get the picture.

6 A That's the -- .080 is the -- is the threshold
7 for -- for everybody that's -- there's a per se.

8 Q Everything that you just described on the
9 witness stand -- Can you explain, on the easel, the
10 different variables or factors that could have affected
11 Ms. Calabrese's .089?

12 A Sure. I -- Just taking notes here.

13 Q I see you write down a .012. What does that
14 account for?

15 A That would be the breath temperature.

16 Q Okay. I'm going to stop you there. The .012
17 for breath temperature, explain what that means and how
18 that could have affected Ms. Calabrese's higher sample.

19 A Certainly. The -- The point -- The breath
20 temperature, again as I mentioned, is directly related
21 to the temperature of the breath. The expired breath
22 temperature is what we call that. And the machine makes
23 no distinction for it, no accounting for it. But it's
24 something that can be looked at.

25 Within the breath-testing community, it's well

1 understood that if an individual, again, holds their
2 breath, you can increase it. It lowers it if they
3 hyperventilate. The average person has a higher breath
4 test result - excuse me - breath temperature than what
5 the machine is actually looking for.

6 Q Is that what you mentioned earlier as the
7 expired breath temperature? I -- I believe you were
8 talking about that.

9 A That is.

10 Q Okay. Can you list another factor, if there
11 is, that could have affected Ms. Calabrese's sample in
12 this case?

13 A Well, you asked me as well about .005, which
14 is the tolerance of the device, as well.

15 Q What -- What do you mean by the tolerance of
16 the device?

17 A As I just mentioned before, the tolerance is
18 the -- If you imagine a scale. Basically, if I jump on
19 a scale and it says a hundred - that would be the day -
20 but -- and if it was to read between ninety-five and a
21 hundred and five, that would be the confidence that we
22 would have in between those samples.

23 Q Is that the -- the level that the Broward
24 Sheriff's Office uses between both samples?

25 A It is, yes. No, this is what's permitted when

1 they're doing the monthly calibration checks on the
2 device.

3 Q Any other factors?

4 A Well, you asked me about the agreement. That
5 would be the breath test agreement.

6 Q Who came up, or developed a theory, of that
7 breath test agreement, .020?

8 A That would be FDLE, which is -- talks about
9 that you must have two breath samples that are within
10 .020 of each other.

11 Q Why, in this case, are you subtracting that
12 from Ms. Calabrese's breath sample?

13 A Well, not knowing -- I'm subtracting -- I'm
14 also saying it could go on top of it as well, so --

15 Q Can you explain that further?

16 A Well, the -- these are -- are plus or minus on
17 here. In fact, all of them are plus or minus. So, in
18 other words, with a first sample of .089, that sample
19 could still be considered okay if you collected at a
20 .069.

21 Q Any other factors that could affect the -- the
22 reading?

23 A You also asked me about the -- the air
24 blanking issue.

25 Q What is the air blanking issue?

1 A That's the baseline for the ambient detection.

2 Q Is that what we were talking about earlier as
3 far as the air surrounding the room where the test is
4 taken?

5 A That -- That is. You can just call it -- It's
6 a dirty-room detector. It's basically looking for
7 contaminants in the air, making sure that the device has
8 a ability to determine whether or not the environment is
9 clean.

10 Q Can you total or subtract the numbers, please?

11 A Okay. Just give me one second here.

12 (Witness complies.)

13 A (Continuing) Okay. Well, the sum total of
14 what you asked me, when expressed as such, is equal to a
15 .056. So, what that means is, if you carry that down --
16 If you carry that down --

17 Q Does that number include the air blank air?

18 A It does. It does.

19 That equals either 033, on the low side; and
20 also a 145, would be the range.

21 Q Can you explain what those numbers mean,
22 please?

23 A Sure. These numbers represent the sum total
24 difference between the breath -- the breath test result
25 and the factors that influence that, owing to the

1 variability associated with breath alcohol testing;
2 expressing these, as you've asked me.

3 MR. LOPEZ: Okay. You can have a seat.

4 (Witness complies.)

5 Q (By Mr. Lopez) Mr. Zager, let me ask you.
6 How -- You just described all the different factors that
7 could have affected the result. How is it possible to
8 have such a wide variation, or different (sic), in the
9 readings?

10 A I'll tell you why. Breath alcohol testing, as
11 I mentioned before, it's taking a sample that's
12 indirectly coming off of the blood in the system.
13 Because of that, there's certain variables associated
14 with that. It's -- It's no different, if I can draw the
15 analogy for a moment.

16 If you would imagine the -- If you'd imagine a
17 turkey in the oven. Thanksgiving, mom is looking at the
18 turkey. And she presses on it and says, "You know what?
19 I think it's done. It's time to eat. Let's go. It's
20 been cooking for a long time." Takes it out there, it's
21 raw.

22 That's indirect testing, is what she's doing.
23 If you want to get a direct sample on it, you stick a
24 big turkey thermometer in there. It reaches, I think a
25 hundred sixty-five, it's dinnertime.

1 It's the same thing, in essence, with breath
2 testing. If you look at it, imagine you have a breath
3 alcohol exam. And then we have a -- versus a blood
4 test. The blood would be the direct form of analysis.
5 We take it and -- from a person's vein and we would
6 analyze that.

7 Q Is breath alcohol testing an exact science?

8 A There --

9 Q Is it even a science at all? Let me ask --

10 A Well, of course. There -- There's a science.
11 But, like all sciences, there's -- there's things that
12 you have to accept that are -- that are tolerances
13 within it, so -- And -- And some of these things I've
14 outlined.

15 MR. LOPEZ: Okay. No further questions.

16 THE COURT: State?

17 MR. KILLORAN: Thank you, Judge.

18 THE COURT: Thank you, sir.

19 CROSS-EXAMINATION

20 BY MR. KILLORAN:

21 Q What have we got here? It's pretty
22 impressive. Where did you get your Ph.D. from?

23 MR. LOPEZ: I'm going to object to the
24 comment.

25 Q (By Mr. Killoran) Where'd you get your Ph.D.

1 from?

2 THE COURT: So noted. Counsel, let's be less
3 argumentative.

4 MR. KILLORAN: Absolutely --

5 THE COURT: You may proceed.

6 MR. KILLORAN: -- Your Honor. I apologize to
7 you.

8 THE COURT: No problem.

9 Q (By Mr. Killoran) Where'd you get your Ph.D.
10 from?

11 A I -- I don't have a -- a Ph.D.. Just like
12 when I --

13 Q Where'd you get --

14 A -- testified --

15 Q -- Master's?

16 MR. LOPEZ: Your Honor, if he can answer the
17 question --

18 MR. KILLORAN: I asked him --

19 MR. LOPEZ: -- if he's going to ask it.

20 THE COURT: He answered the question, Counsel.

21 Q (By Mr. Killoran) Where'd you get your
22 Master's from?

23 A Just like when I testified here, I didn't have
24 one, or need one. But --

25 Q Okay. Where did you get your Bachelor's

1 degree from?

2 A I don't have one.

3 Q You don't have a Bachelor's degree. Okay.

4 And you got twenty-five hundred dollars for this case?

5 A In total.

6 Q In total. Okay. And for all your cases last
7 year, how much money did you get paid for being a
8 defense expert?

9 A I have no idea.

10 Q You have no idea how much money you made?

11 A You're -- You're asking for a -- a sum total?

12 Q Yes.

13 A I think my net - and I'd have to say my net
14 out of my pay - was around forty-thousand dollars.

15 Q Forty-thousand dollars. So you did - a little
16 quick arithmetic - 20-some odd cases?

17 A I'm sure it was more cases.

18 Q More cases. So did you get twenty-five
19 hundred dollars per case?

20 A No. I -- I don't know what the exact numbers
21 are per case.

22 Q You mean to tell this jury that you don't know
23 how much money you made being a -- a defense witness?

24 A Well, first of all, the time that I spend,
25 professionally, doing this is not the only thing that I

1 do.

2 Q It's a simple question.

3 A But it's --

4 Q How much money did you make for testifying in
5 front of jurors?

6 MR. LOPEZ: Your Honor, I believe he's
7 answered it to the best of his ability already.

8 THE COURT: All right. Let's try one more
9 time.

10 Q (By Mr. Killoran) How much money did you
11 make?

12 A I -- I answered that.

13 Q Okay.

14 A It's roughly -- As it relates to my DUI
15 business, the net is approximately forty-thousand
16 dollars.

17 Q Okay. In the last two years, how much
18 percentage of your being a witness was for the defense?

19 A The majority of it, I suppose.

20 Q What percentage --

21 A Percentagewise, I would -- I'd say roughly --

22 Q The last two years.

23 A If we're talking criminal cases, or civil
24 cases --

25 Q Criminal cases.

1 A -- as well? Criminal cases, almost a hundred
2 percent.

3 Q Almost a hundred percent. When is the last
4 time you testified in Broward County as a State witness
5 in a criminal case?

6 A For your office?

7 Q Yes.

8 A Hum, I'd say roughly about six or seven years
9 ago.

10 Q Seven years ago. When is the last time you
11 were employed by Broward Sheriff's Office?

12 A I retired from there in 2003.

13 Q Okay. You said you spent about 40 hours of
14 work on this. I'm going to -- Let's break it down. How
15 much time did you spend at the crime scene?

16 A I never visited there, though I live right
17 down the street there. I drive by it constantly.

18 Q How much time did you spend at the crime scene
19 for this case, for purposes of testimony --

20 A I didn't --

21 Q -- today?

22 A I didn't go there, specifically, for this
23 case. But I know the area.

24 Q How much time did you inspect the Intoxilyzer
25 AE-1047, the Intoxilyzer used in this case?

1 A You're asking how much time --
2 Q For this --
3 A -- did I spend --
4 Q -- purposes of this case --
5 A -- in this particular case --
6 Q Yes, looking at the Intoxilyzer --
7 A -- looking at --
8 Q -- that's involved in this particular case.
9 A You want to know how much time I spent
10 actually looking at that particular --
11 Q Yes.
12 A -- machine? I don't have an opportunity to
13 check that device.
14 Q So -- So the --
15 A It's owned by --
16 Q -- answer is zero?
17 A -- the government.
18 Q Okay. And you -- Being a defense witness, you
19 created a report for this case, correct?
20 A I created a --
21 MR. LOPEZ: Your Honor, I'm going to object.
22 That's kind of delving into work product at this
23 point.
24 THE COURT: Let's go side-bar.
25 (Side-bar begins.)

1 MR. KILLORAN: I didn't ask what was in the
2 report. I asked how much time was spent
3 creating --

4 MR. LOPEZ: I just wanted to make sure.

5 MR. KILLORAN: -- a paper.

6 THE COURT: Yes. And that's why I went side-
7 bar. I didn't want to just out-and-out deny it in
8 front of everybody. All right.

9 (Side-bar ends.)

10 Q (By Mr. Killoran) Mr. Zager, how much time
11 was spent creating a report for this specific case?

12 A For your office, I actually prepared a
13 document. And I'd have to look, but it -- it was
14 probably at least ten-plus hours.

15 Q For this specific case, the facts of this case
16 - not the C.V., not the reports, not things of that -
17 for this particular case, how long did it (sic) spend to
18 make a -- the report? Not including photocopying --

19 A No, no. I'm -- I'm asking. You're -- You're
20 asking me the question --

21 Q Okay.

22 A -- as how much time did I spend?

23 Q Yes.

24 A You're -- You're implying -- You want to know
25 the sum total of those hours.

1 Q Yes, I do.

2 A I'd have to look --

3 Q Okay.

4 A -- because I actually -- I remember creating a
5 document for that.

6 This was at the request of your office,
7 actually, to do research and find materials.

8 Q What were those materials for, actually, now
9 that we're on it? Was -- Was that related specifically
10 to Ms. Calabrese's case?

11 A They're related to breath alcohol testing in
12 general, the types of cases I've asked -- or testified
13 in the past.

14 Q Okay. Now let's just talk about her case.
15 How much time was spent creating a report?

16 A If -- If you're talking about a report in the
17 criminal case --

18 Q Yes.

19 A I don't give a -- a written report.

20 Q So you don't have any --

21 A Typically, only in civil cases.

22 Q So you don't have a written report for this
23 case?

24 A As far as that, just what I did for your
25 office, about ten-plus hours.

1 Q Okay. So let's go back to the 40 hours. What
2 was the 40 hours spent?

3 A Time dealing with Mr. Lopez, in preparing for
4 the case, quite a lot; time doing research, looking for
5 materials; time researching and reviewing forensic
6 literature as it relates to breath alcohol testing in
7 general. It's quite a lot of work.

8 Q So Googling stuff.

9 A Not Googling per se, but reviewing the
10 articles. I have a briefcase full of them.

11 Q Okay. In terms of the 8000, how much real-
12 world experience? How many times did you have someone,
13 when you worked for BSO, have a suspect blow into the
14 machine?

15 A By suspect, if you could explain. Are you
16 talking about somebody --

17 Q DUI suspects, someone arrested for DUI, when
18 you were --

19 A As -- As far as that -- that time, I have
20 access to the device and used it for training purposes.

21 Q Okay. How many real-world --

22 A And also for --

23 Q Real-world --

24 A -- for --

25 Q -- experience.

1 A -- for -- There's nobody --
2 Q How many defendants came in -- in when you
3 were in -- operating the machine?
4 A I could finish my question. You -- You --
5 Q Sure.
6 A The times that I actually spent checking
7 people for DUI --
8 Q Um-hum (affirmative).
9 A -- on Intoxilyzer -- The 8000 was not in use
10 yet.
11 Q So, none.
12 A The -- The answer is none --
13 Q Thank you.
14 A -- as far as the State.
15 Q Right.
16 A But for laboratory testing and for published
17 papers that I've worked on, peer review papers I've
18 presented, the time is yes.
19 Q But for real-world, it is zero.
20 A That is the real world.
21 Q For real-world, with suspects, it is zero.
22 A It's --
23 Q Correct?
24 A It's the same. If a person --
25 Q It's not a new question.

1 A -- drinks alcohol --

2 Q For real-world, with suspects, is it zero?

3 A It is zero.

4 Q Thank you. When is the last time you saw the
5 8000 software?

6 A Well, I own my own device. But, I'm not a
7 software engineer to look at software. I don't look at
8 it.

9 Q You don't look at the -- what --

10 A I --

11 Q -- what runs the machine?

12 A I don't analyze software. It's something that
13 I -- I don't do. I'd have to be a --

14 Q But it's right that the software runs the
15 machine? The machine is an instrument, the hardware if
16 you will. And the software is the programs that runs
17 (sic) the machine.

18 A Right.

19 Q Correct?

20 A We -- We've asked your office to provide us
21 copies of that software, but we've never received it.

22 Q So you never wanted to fly to Owensboro,
23 Kentucky --

24 A I --

25 Q -- to look at CMI's software?

1 A I -- I've actually --

2 Q Have they made it available?

3 A I've been to Owensboro --

4 MR. LOPEZ: Your Honor --

5 A -- Kentucky.

6 MR. LOPEZ: -- I'm going to object at this
7 point. I think it's reached the level where he's
8 speaking over him. I mean, it's --

9 MR. KILLORAN: I'm asking a question.

10 THE COURT: I would agree with you.

11 And, sir, you need to let him finish the
12 questions. And then you need to answer the
13 specific questions. You'll have an opportunity to
14 add stuff if it pertains to your answer.

15 State, by the same token --

16 MR. KILLORAN: I will.

17 THE COURT: -- once you ask the question, let
18 him answer it.

19 MR. KILLORAN: I -- I apologize.

20 THE COURT: You may proceed.

21 MR. KILLORAN: I'm going to move on, actually.

22 Q (By Mr. Killoran) Would you consider the 8000

23 -- The Intoxilyzer 8000, would it be considered

24 reliable?

25 A It can be, yes.

1 Q Would you consider it reliable?

2 A If the proper parameters are followed as far
3 as training an individual, the proper time is spent in
4 the observation of an individual, then you can start
5 looking at the reliability of it.

6 Q Now, I'm looking at all this math up here.
7 But you're saying you would consider it reliable?

8 A Yes, the reliability is there, if the
9 parameters are fit. If the person's a proper candidate
10 for breath testing; if the device's calibration points
11 -- if there's nothing that's unusual that occurred; you
12 can start looking at the reliability of the device.

13 Q So if there were documents - for instance the
14 monthly reports before and after, and the annual
15 inspection, as well as the Intoxilyzer being registered
16 properly - that would lend itself to being considered
17 reliable in disregard to this.

18 A Not in disregarding that, because the -- Only
19 one of the things up there relates to the actual
20 inspection, which would be the tolerance of the device.

21 Q Which is the .005?

22 A That -- That is correct, yes.

23 Q Okay.

24 A The other ones relate to the individual and,
25 also, the device. But there's other documents as well,

1 that I've looked at, that cause me concern with this
2 particular device.

3 Q With this particular device that you never
4 saw?

5 A Well, I -- I have access to the records from
6 the Department of Law Enforcement.

7 MR. KILLORAN: Okay. All right.

8 May I just confer?

9 THE COURT: Absolutely, State.

10 (Mr. Killoran and Ms. Nunez-Navarro briefly confer.)

11 MR. KILLORAN: Nothing further, Your Honor.

12 THE COURT: Mr. Lopez, redirect?

13 MR. LOPEZ: Yes. I'm just going to move this
14 out of the way, if I could.

15 THE COURT: Absolutely.

16 MR. LOPEZ: Thank you.

17 Mr. Zager, just a few follow-up questions.

18 REDIRECT EXAMINATION

19 BY MR. LOPEZ:

20 Q The State was asking you, in your capacity, if
21 you had visited the crime scene in this case. Is it
22 necessary to visit the crime scene?

23 A I do, in many cases, look -- go to the crime
24 scene and actually look at it, take some measurements,
25 look at the topography to make sure something's level.

1 In this case, there's been no field tests that were
2 administered.

3 Q Did you have a chance to view the crime scene
4 through the DUI videotape?

5 A I -- I did see the videotape.

6 MR. KILLORAN: Your Honor, objection. Outside
7 the scope of cross.

8 MR. LOPEZ: The door's been opened.

9 THE COURT: Overruled.

10 Q (By Mr. Lopez) Mr. Zager, did you have access
11 to the -- Were you able to have access to the
12 Intoxilyzer 8000 machine that was used in this case?

13 A No. What the prosecutor was implying is that
14 I -- that I should have looked at it. The answer is no,
15 I can't, because the Intoxilyzer access is very limited.
16 In fact, when we're at the Department, like the -- the
17 individual, Ms. Dicienzo there, we keep the device under
18 lock and key. And even the bosses, if they're not
19 certified to run the device, they can't even have access
20 to it.

21 Q And --

22 A So, it's very well regulated. I -- I couldn't
23 access that device unless I --

24 Q An issue was made by the State attorney
25 regarding the 40 hours you spent in this case. Previous

1 to today, had you come to court to testify in Ms.
2 Calabrese's case, on an unrelated matter?

3 A I was requested by the Court, to assist the
4 Court, in coming here and answering questions concerning
5 issues with the case. I also spent other time --
6 There's quite a lot of time, yes.

7 Q Previous to this case -- I mean to this -- to
8 testifying today and those 40 hours you mentioned, did
9 you give a deposition or a sworn statement to the State
10 attorney?

11 A I did.

12 Q You -- An issue was made with the fact that
13 you have no, as the prosecutor termed it, real-world
14 experience with administering the test to suspects. Let
15 me ask you a question. Are you currently a law
16 enforcement officer?

17 A I currently hold State certification. In
18 fact, I just went and updated that this last January at
19 the academy. But I'm not sworn at this point. So I'm
20 not currently working. I -- I'm still, actually, sworn
21 in with the Broward Sheriff's Office for the purposes
22 of --

23 MR. KILLORAN: Judge, objection. Outside the
24 scope of cross.

25 MR. LOPEZ: That, Your Honor, has all been

1 opened.

2 THE COURT: Let's go side-bar.

3 (Side-bar begins.)

4 THE COURT: I agree with you that it's been
5 opened.

6 MR. LOPEZ: Okay.

7 THE COURT: But I would also agree with the
8 State in that he's now trying to drive a truck
9 through a mouse hole.

10 MR. KILLORAN: Well, and also, the whole thing
11 that he's still sworn to be a cop. That would have
12 been nice to know on the cross.

13 THE COURT: Well --

14 MR. KILLORAN: We've all been, you know --

15 THE COURT: It is what it is.

16 MR. LOPEZ: In that you attacked his
17 credentials and his credibility, I'm allowed to
18 rehabilitate him --

19 MR. KILLORAN: I agree as --

20 MR. LOPEZ: -- information.

21 THE COURT: And I agree with you as well. And
22 that's why we're going side-bar, because I want to
23 discuss the parameters. He's bound to say that
24 he's sworn. He's allowed to say he didn't have
25 access.

1 But he's not really supposed to, basically,
2 come out with everything under the sun. But, gee,
3 he's trying to drive a truck through a mouse hole,
4 which is good advocating. And that's what I would
5 want my expert to do.

6 But the question: Was he allowed access? No.
7 Why? Because he's --

8 MR. KILLORAN: That's one I don't want --

9 THE COURT: -- not a sworn law enforcement
10 officer. Boom. Without going into all these
11 credentials, because none of them has anything to
12 do with the Intoxilyzer.

13 So, I mean, if you want to re-ask those
14 questions, I'll allow you to do so. Just I'd
15 prefer not to have the extensive narrative about
16 everything else to try and tie into it.

17 So your objection's with merit, but I'm going
18 to stay and allow you to re-ask the questions.

19 (Side-bar ends.)

20 REDIRECT EXAMINATION (CONTINUED)

21 BY MR. LOPEZ:

22 Q Mr. Zager, when did you retire from the
23 Broward Sheriff's Office?

24 A In 2003.

25 Q Being that you're not a sworn law enforcement

1 officer - you have your certificate, but you're not
2 sworn - do you have any opportunity to give breath tests
3 to suspects now?

4 A Well, to suspects, to people that have been
5 arrested for DUI --

6 Q That's my question.

7 A No. The answer's no. But I still do it as
8 part of training, in classes that I put on and -- and
9 experimentation that I do.

10 Q Those numbers you put on that easel, is that
11 something that you could have testified to when you were
12 working for the State attorney?

13 A Absolutely.

14 Q Explain that.

15 A Well, it -- it's the same presentation. If --
16 If I'm asked the question, during my time as a police
17 officer, as a deputy sheriff testing -- testifying, it'd
18 be the same type of answers. There's nothing different
19 over the course of time. Otherwise, I -- I would be
20 confronted with it. There's no difference. Breath
21 alcohol testing is indirect measurement. And these are
22 the variabilities associated with it.

23 Q Did you notice Franca Dicienzo in the gallery,
24 Broward Sheriff's Office --

25 A Of course.

1 Q -- breath technician?

2 A I sure do.

3 Q Do you know her?

4 A I do. Many years.

5 Q Okay. Should she be able to explain what
6 those numbers are?

7 MR. KILLORAN: Objection. Speculation, Your
8 Honor.

9 THE COURT: Overruled.

10 A (Continuing) I would hope so.

11 Q (By Mr. Lopez) Should she have knowledge of
12 those numbers that you put on there?

13 A Yes, sir.

14 MR. LOPEZ: Okay. No more questions.

15 THE COURT: State?

16 MR. KILLORAN: Nothing, Your Honor.

17 THE COURT: All right. May I excuse this
18 witness, Mr. Lopez?

19 MR. LOPEZ: Yes, Your Honor.

20 THE COURT: All right, sir. You're excused.

21 Have a good day. Thank you for coming.

22 (Witness exits.)

23 * * * * *

24 (Whereupon the hearing was concluded.)

C E R T I F I C A T E

STATE OF FLORIDA)

COUNTY OF BROWARD)

I, MARCIA MARCUM, hereby certify that the foregoing transcript, pages 1 to and including 45, is a true and accurate transcript of excerpts of the record of the proceedings.

Dated this 2nd day of August, 2012, in the City of Fort Lauderdale, Broward County, Florida.

Marcia Marcum

STATE OF FLORIDA)

COUNTY OF BROWARD)

Sworn to and subscribed before me this 2nd day of August, 2012.

Lisa A. Peart

Notary Public, State of Florida



LISA A. PEART
MY COMMISSION # EE 181198
EXPIRES: May 18, 2016
Bonded Thru Budget Notary Services