



**54-B District Court**  
101 Linden Street  
East Lansing, Michigan 48823-4311  
(517) 351-7000

Hon. Richard D. Ball  
District Court Judge

Hon. Andrea A. Larkin  
District Court Judge

Nicole Evans  
Court Administrator

To: Mr. Nichols

Re: *People of the State of Michigan v*

I have received your formal request for the transcripts below.  
Preparation of the transcript held before Judge Andrea Andrews Larkin on:

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**Excerpt of Motion Testimony of Witness**

**W. Mark Fondren**

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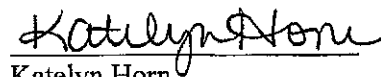
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Dated: October 20, 2019

  
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STATE OF MICHIGAN

By: KSK

Deputy Clerk

IN THE 54B DISTRICT COURT COUNTY OF INGHAM

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff,

V

Case No:

Defendant.

EXCERPT OF MOTION  
TESTIMONY OF WITNESS W. MARK FONDREN  
CALLED BY THE PEOPLE

BEFORE THE HONORABLE ANDREA ANDREWS LARKIN, District Court Judge

Tuesday, July 16, 2019 - East Lansing, Michigan

APPEARANCES:

For the People:

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1 East Lansing, Michigan.  
2 Tuesday, July 16, 2019 at 9:52 a.m.  
3 (Exhibits marked prior to motion)  
4 MS. TRIPI: Your Honor, the first witness that the  
5 People would like to call is W. Mark Fondren.  
6 THE COURT: Mr. Fondren, come on right up here. This  
7 is a hard courtroom to walk around unfortunately.  
8 MR. FONDREN: That's fine. I move slowly.  
9 THE COURT: Sorry about that. Before you take a  
10 seat, will you raise your right hand?  
11 MR. FONDREN: Yeah.  
12 THE COURT: Do you swear or promise that the  
13 testimony you're about to give in this matter will be the  
14 truth, the whole truth, and nothing but the truth?  
15 MR. FONDREN: I do.  
16 THE COURT: All right. Have a seat, get that  
17 microphone up to your mouth level, state your first and last  
18 name for the record and then spell it if you would?  
19 THE WITNESS: Mark Fondren, F-O-N-D-R-E-N.  
20 W. MARK FONDREN  
21 (At 9:53 a.m., witness called by Ms. Tripi, sworn by  
22 the Court, testified as follows)  
23 DIRECT EXAMINATION  
24 BY MS. TRIPI:  
25 Q Good morning, Mr. Fondren. Can you please tell me what your

1 occupation is?

2 A I'm employed as the Blood Alcohol Technical Leader for the  
3 Michigan State Police.

4 Q And, what does that mean specifically regarding to your role?

5 A This is a newly created position, primarily I'm to oversee the  
6 functions of the Breath Alcohol Testing Program, writing  
7 procedures, developing new procedures, looking at quality  
8 control, how does this program compare to other states, and  
9 ultimately working toward ANAB or what's called ISO  
10 accreditation.

11 Q And, can you please tell me what your collegiate background is  
12 in?

13 A In summary, I have a bachelor of science from Baylor  
14 University, master of science also from Baylor. I completed  
15 my post-graduate work at the Ohio State University. And, I am  
16 board certified by the American Board of Forensic Toxicology  
17 specializing in the area of alcohol.

18 Q And, what prior experience do you have with breath testing or  
19 DataMaster machines?

20 A In regards to breath testing, for 23-years I was the senior  
21 forensic chemist where I ran the breath testing program for  
22 Tarrant County Medical Examiner's Office--

23 THE COURT: How many years?

24 THE WITNESS: --in Texas.

25 THE COURT: How many years, sorry?

1 THE WITNESS: About 23.

2 THE COURT: Okay.

3 THE WITNESS: I retired from there in about 2017 and  
4 then took a position as the Forensic Laboratory  
5 Direction/Quality Manager for the State of Maine. It was one  
6 of the programs that I supervised. I did not physically on a  
7 day-to-day basis run the program. As I said, I was the  
8 laboratory director at that point. And then, recently came  
9 here to do the same thing for the State of Michigan.

10 BY MS. TRIPI:

11 Q And, do you have any particular certifications that would make  
12 you qualified as--in the field of breath testing?

13 A Aside from doing it for probably 25 years now. As I said, I  
14 am board certified through the American Board of Forensic  
15 Toxicology. I have numerous certifications with regards to  
16 manufactures; Guth, CMI, the Intoximeter now manufacturer of  
17 DataMaster.

18 Q Okay. And--

19 THE COURT: Who is now the manufacturer of the  
20 DataMaster?

21 THE WITNESS: It's now Intoximeter out of St. Louis.  
22 Originally it was manufactured by NPAS, a company called  
23 National Patent out of Ohio. A number of years ago they got  
24 out of the breath testing business and sold that to  
25 Intoximeter.

1 THE COURT: Okay.

2 BY MS. TRIPI:

3 Q And, I know you have not--Have you ever been before this  
4 Court?

5 A Not here.

6 Q And--

7 A I have not.

8 Q --have you ever testified as a witness before?

9 A Several thousand times.

10 Q In what capacity would you evaluate data?

11 A Both in the area of toxicology, trace analysis, and I did some  
12 (inaudible) chemistry when I was a young forensic scientist.  
13 But, now primarily I do toxicology, breath alcohol being one  
14 of the areas.

15 Q And, I see that there are several certificates that you  
16 provided to me regarding certificates of completion or  
17 different accreditations that you've received. Let me see, if  
18 I may read a few. Did you attend the Northwestern University  
19 Traffic Institute regarding the Nineteenth Vehicular Homicide-  
20 DWI Conference on July 14 through 18, 1996?

21 A I did. I believe that was in Chicago.

22 Q And, did you attend the ADCLD/LAB Calibration Technical  
23 Assessor Refresher Training in 2014?

24 A ASCLD Laboratories, yes I did.

25 Q And, if I may just to save the Court some time list off the



1 titles of the certificates which would be; the Certificate of  
2 Completion of Measurement Traceability from ASCLD/LAB Assessor  
3 Training back in 2014, the American Society of Crime  
4 Laboratory Directors Laboratory Accreditation Board in 2012,  
5 The Forensic ISO/IEC Internal Auditor Training Course in Maine  
6 in 2017, and likewise for the Guth Laboratories in August 2005  
7 and Guth Laboratories for December 2014 regarding Basic  
8 Operation, Technical Aspects, Basic Maintenance and  
9 Calibration, and the--his accreditations can go on and on, I  
10 would like to submit his curriculum vitae as an expert.

11 MR. NICHOLS: I'm waiting for a question.

12 THE COURT: I think she read the--

13 MS. TRIPI: Yes.

14 THE COURT: --all of the certificates that she read  
15 are those actual programs that you attended?

16 THE WITNESS: They are.

17 THE COURT: And did you receive certifications in  
18 each one of those or?

19 THE WITNESS: I did.

20 THE COURT: All right.

21 THE WITNESS: There probably are numerous more that--

22 THE COURT: That you don't--

23 THE WITNESS: After 25-years I don't keep all of the  
24 certificates.

25 THE COURT: --keep all the certificates. Okay.

1 THE WITNESS: Particularly after moving these days,  
2 you know, all of those that you did mention and that I have  
3 provided to the Court or to you and to you as well I assume, I  
4 did all of those.

5 THE COURT: Did you want to see the copy of his CV  
6 and his--

7 MS. TRIPI: Your Honor?

8 THE COURT: --certifications, Mr. Nichols?

9 MR. NICHOLS: Your Honor, I got the CV a couple of  
10 days ago. I got the certifications at about 9:45--

11 THE COURT: This morning. Okay.

12 MR. NICHOLS: --this morning, yeah.

13 THE COURT: Are you asking to have him certified as  
14 an--or recognized by the Court as an expert in Breath Alcohol  
15 Analysis and/or traceability?

16 MS. TRIPI: Yes, Your Honor.

17 THE COURT: Okay. Tell me about the traceability  
18 certificate that she read about. How many--

19 THE WITNESS: Let me--

20 THE COURT: --how much experience have you had in  
21 that area?

22 THE WITNESS: As part of a--I'm a laboratory assessor  
23 for ASCLD/LABS was the original name of the organization.  
24 They have now merged with ANAB. When a laboratory because or  
25 wishes to become accredited traceability is one of the things

1 that is required, it is required through the ISO 17025  
2 document. Initially I would go through training in essence to  
3 build--training in traceability as part of your assessor  
4 course and then every two years or when you are ready to do  
5 another assessment there is always a refresher.

6 THE COURT: All right. And, have you worked on any  
7 traceability issues with the breathalyzer machine that is at  
8 issue in Mr. Finnerty's case?

9 THE WITNESS: I've reviewed all the documents, yes.

10 THE COURT: Reviewed the documents. All right. All  
11 right. Mr. Nichols, would you like to voir dire before the  
12 Court entertains a motion to recognize him as an expert in  
13 this field?

14 MR. NICHOLS: Oh yes.

15 THE COURT: Okay.

16 VOIR DIRE

17 BY MR. NICHOLS:

18 Q Good morning, sir.

19 A Good morning.

20 Q I will allow you to answer a question and will let you develop  
21 your answer completely, just please let me finish the question  
22 first. And, if you don't understand just let me know and I'll  
23 try to clarify it for you, okay?

24 A Not a problem. This is not my first rodeo, counselor. I'm  
25 more than happy to.

1 THE COURT: Texas talk.

2 BY MR. NICHOLS:

3 Q I appreciate it.

4 THE COURT: Rodeos.

5 BY MR. NICHOLS:

6 Q Texas talk, I was going to say. Tell me about Tarrant County.

7 A Tarrant County is one of the counties in Texas of which there

8 are 254, if I remember right. Major cities would be Fort

9 Worth, Arlington.

10 Q Okay.

11 A Population if I had to take a guess 1.5 million.

12 Q A lot of lawyers in Fort Worth.

13 A There are, sure.

14 Q And you've been cross-examined by them, I'm sure.

15 A Not only there but in other states as well, sure.

16 Q Okay. You said you retired from the position at Tarrant

17 County, is that correct?

18 A I did.

19 Q Was there a hearing shortly before you left during which some

20 --And, I think they're called ACA checks were in question?

21 A I'm sure there were lots of hearings about everything that was

22 going on. Not to my knowledge, I mean, there was nothing,

23 there was no event that was going on.

24 Q Okay. What's an ACA check?

25 A ACA in the world of breath alcohol is a short or an acronym

1 for airblank. calibration check, airblank.

2 THE COURT: What's a--Wait. Can you say that again?

3 THE WITNESS: It's when an instrument runs an  
4 airblank, a calibration check, and an airblank.

5 THE COURT: Airblank, calibration check, airblank.

6 Okay.

7 THE WITNESS: Typically, we refer to them as ACA.

8 THE COURT: Okay.

9 BY MR. NICHOLS:

10 Q In other words, for example in this case, we would expect to  
11 see a subject sample, blank test, subject sample. And, the  
12 blank test is supposed to come up as triple zeros, right?

13 A You would expect that. ACA would refer typically to a  
14 diagnostic evaluation that's being done where you are running  
15 calibration checks. Either here, we'd use either dry gas or  
16 you'd use a wet bath single air.

17 Q The ACA checks in Tarrant County, if I understand correctly,  
18 were there some instruments that weren't checked correctly?

19 A No.

20 Q They were all checked correctly?

21 A They were.

22 Q Okay.

23 THE COURT: At least when you were there? I mean--

24 THE WITNESS: At least when I was there.

25 THE COURT: --you don't know what's happened since--

1 THE WITNESS: I can't tell you what's happened since  
2 then.

3 THE COURT: You went to Maine after Texas, right?

4 THE WITNESS: I did.

5 THE COURT: Okay.

6 BY MR. NICHOLS:

7 Q Your testimony is you left Tarrant County of your own  
8 volition?

9 A I did--

10 Q Nobody--

11 A --after--Correct. After almost 23-years being around the  
12 medical examiner's office seeing a lot of my friends come  
13 through the morgue, I had enough.

14 Q And, you went to Maine?

15 A I did. I had vacationed in Maine and have a residence up  
16 there for the last 10-years or so.

17 Q You were in Maine employed in the position that you've  
18 testified to for two years?

19 A I was.

20 Q Why did you leave Maine?

21 A Just didn't really care for the way they run their forensic  
22 programs and about that time Michigan had talked to me and  
23 said hey we're looking for someone to run the breath alcohol  
24 program here. Would you be of interest? So, we chitchatted a  
25 little bit then, so I left.

1 Q And, I am really curious about that because you testified it's  
2 a new position, correct?

3 A It is.

4 Q You got my subpoena last week, right?

5 A I did.

6 Q Okay. And, I asked you to bring your job description.

7 A I do not have my job description.

8 Q Okay.

9 A You'd probably have to--I think if I would have to venture to  
10 guess I would contact HR.

11 Q Well, I did.

12 A And, you also asked me for my application, which I don't have  
13 either.

14 Q Okay. And, I'm really curious because this is a new position  
15 in the State of Michigan, that's what you've testified to,  
16 right?

17 A It's my understanding it is. Whether it was existed previous  
18 years and has been unfilled for a period of time. But, to my  
19 knowledge, my history with breath testing, there has always  
20 been just a couple of sworn individuals who ran the program.

21 Q Sworn as in sworn police officers?

22 A Troopers, so yeah.

23 Q Perry Curtis, your--sort of your predecessor was a sworn  
24 trooper?

25 A I guess. I don't know him.

1 Q Never talked to him?

2 A No, I couldn't pick him out of a lineup of two people.

3 Q This position is responsible for managing the technical  
4 operations of the breath alcohol discipline within the  
5 forensic science division on a statewide basis, that's the  
6 basic job description, correct?

7 A I'd say so. I wouldn't have a problem with that.

8 Q For the breath alcohol discipline the position ensures  
9 compliance with accreditation standards, distributes and  
10 reviews proficiency tests, ensures appropriate audits are  
11 conducted, maintains the current procedure and training  
12 manuals, designs directs and conducts developmental research,  
13 coordinates training, oversees the quality assurance measures  
14 of the discipline, testifies in court as needed, and assists  
15 with special projects, is that correct?

16 A Again, I haven't seen the document you're reading from but I  
17 have no problem with that. Those would all be things that I'm  
18 planning on doing.

19 Q Okay. I mean, you're a scientist?

20 A I am.

21 Q You would certainly have read the job description for the job  
22 for which you ultimately applied, right?

23 A As I said, there was a job announcement that was posted. I  
24 believe it was on the IACT website, a link from the IACT to  
25 something else. There was a short description, whether or not



1       that's what you are reading from, I don't know? It's been,  
2       you know, what eight months/nine months since I saw that.

3   Q     What is IACT?

4   A     But again, I have no problem with that.

5   Q     What is IACT?

6   A     IACT is one of the professional organizations that most  
7       technical supervisors or technical leaders, state program  
8       managers, would belong to. International Association of  
9       Chemical Testers.

10  Q     One of the special projects it sounds like to me, and I kind  
11       of know this from talking to the former Sergeant Curtis, is to  
12       get the breath test program in the State of Michigan  
13       accredited, agree?

14  A     That is one of the items that I am exploring. What it would  
15       take, what changes would the program have to make to be  
16       eligible for accreditation.

17  Q     The program therefore is currently is not eligible for  
18       accreditation, agree?

19  A     Correct. I would agree.

20  Q     Okay. So, one of the special projects is to make improvements  
21       in the current breath test program in the state of Michigan?

22  A     Sure.

23  Q     And certainly, you would agree that following the  
24       administrative rules is a conditioned precedent of a valid  
25       breath test?

1 A It is. It has nothing to do with the accreditation.  
2 Accreditation deals simply with the calibration of instruments  
3 and along those lines. The administrative rules are going to  
4 govern the actual breath testing of any given subject.  
5 Q I did kind of jump around on you a little bit there. But I'm  
6 talking about the way the instruments calibration is checked,  
7 there are certain set of not only scientific standards, but  
8 the state has developed administrative rules, correct?  
9 A The state has developed administrative rules and how you check  
10 your instrument for calibration would be separate of  
11 calibration. There's a (inaudible) dividing line in an  
12 accreditation world between the calibration laboratory and  
13 then in the actual use of that instrument to generate results,  
14 in this case, the only thing the instrument does do is gives  
15 results of suspected individuals for DWI.  
16 Q Okay. You testified you reviewed the documents in this case,  
17 correct?  
18 A It would have been questions around traceability. So, yes. I  
19 went back and looked back at the solutions that were utilized  
20 for the 120-day checks. The calibration values, if it was  
21 calibrated. You know, I looked over several different  
22 instruments and I'm trying to keep your two separate here.  
23 And then, the dry gas, as well.  
24 Q Well, we're just talking about one instrument. It's  
25 instrument number 300330.

1 A Correct. I've also been looking at other instruments as well  
2 during the same last four or five days--  
3 Q Okay.  
4 A --for other individuals.  
5 Q By the way, is this the first time you've testified in  
6 Michigan as an expert?  
7 A It is.  
8 Q Proposed expert. Okay. And, you know because you said you  
9 looked at them, you would have looked at them because it's  
10 important to look at them. Do you know what an OD-84 is?  
11 A Still learning all the different numbers the State of Michigan  
12 uses but I believe the OD-84 is typically referred to as a  
13 Subject Record.  
14 Q The log that the tech is supposed to prepare when he or she  
15 performs service or the 120-day maintenance that's required by  
16 the administrative rules, right?  
17 A I believe that's the OD-33. Correct me if I'm wrong. Again,  
18 I'm learning the numbers.  
19 Q I would be hastened to add, I hope this is not the first time  
20 I correct you when you're wrong.  
21 A You are more than welcome to counselor and I will do--  
22 Q The OD-84 is the 120-day.  
23 A --the same for you as well.  
24 Q Thank you. I mean, the science is the science, right?  
25 A It is what it is.

1 Q Okay. One of the things that I asked for because it was very  
2 important for my experts to see. The OD-84 log and the  
3 subject tickets that were printed during the OD-84 logs  
4 preparation, the certificates of analysis for the thermometers  
5 that were used, all of those things I asked for.

6 A You did. And, replied back to the prosecutor. I said we need  
7 some dates, that MSP had those in their possession and we're  
8 more than happy to provide those.

9 Q Okay.

10 A And, I haven't heard anything back from either party.

11 Q I have not been advised that you were happy to provide them  
12 but how about October 25, 2018? Can we do that one?

13 A That's fine.

14 Q Okay.

15 A As long as we make a note of it or allow me to make some notes  
16 here, I have no problem with that. We are the custodian of  
17 records. I don't have a problem with you getting it. But you  
18 said that was--

19 Q October 25, 2018.

20 A Hang on. And that's the 120-day check at that location,  
21 correct?

22 Q Well, if it was 120-day, we're not quite sure what it was?

23 A Okay.

24 Q For instrument number 300330. You reviewed the OD-33s then,  
25 is that correct?

1 A I did.

2 Q The weekly accuracy check logs?

3 A I did.

4 Q Okay. Did you review the simulator test tickets that were  
5 produced during the weekly simulator checks?

6 A I'll have to correct you on that, counselor. There are no  
7 weekly simulator tests. The weekly check is done with dry gas  
8 and yes, I do have that. And again, you are more than welcome  
9 to have those as well, if you'd like.

10 Q I have them. I have weekly simulator check with dry gas.

11 A Well, you're comparing apples and oranges. There is a weekly  
12 check that's done with dry gas. There is no simulator  
13 involved. Simulator is used exclusively with the wet bath.

14 Q Happy to use your vernacular. You are aware that there was a  
15 manual dry gas check that was performed on September 27, 2018,  
16 that produced a filter wheel error?

17 A I don't have that in front of me but that's fine if it did.

18 Q Okay. And, you are aware that the instrument 300330 was taken  
19 out of service after October 1<sup>st</sup> when it produced a filter  
20 wheel error?

21 A If it was a filter wheel error than the instrument would go  
22 out of service automatically.

23 Q Who is Andrew Clark?

24 A He is the technician on the eastern side of the state.

25 Q And that would include Michigan State University?

1 A It would.

2 Q The document that was provided to me about a hour ago, I see

3 that you were given the training that the 120-day service reps

4 were provided by Intoximeters--

5 A I did. I did--

6 Q --in April of 2017.

7 A April of 2019.

8 Q I'm sorry. April of 2019. April 17, 2019, is the date you

9 were given the certificate?

10 A That's fine.

11 Q Okay. I've taken something similar to this at National Patent

12 Analytical Systems, there's no test at the end.

13 A I'm sorry, there's no what?

14 Q There's no test at the end.

15 A I had a test.

16 Q You had a proficiency test?

17 A I had a written test, yes.

18 Q Okay. Intoximeters administered that proficiency test?

19 A They did.

20 Q Do you have the record of that test?

21 A It's a part of the condition of passing the class. So, by

22 passing the test that's one of the requirements to get a

23 certificate. If I failed the examinations, the final exam,

24 then you don't get the certificate. Kind of like a university

25 works.

1 Q I appreciate the answer, but my question is do you have the  
2 record of that test?

3 A I have the record that I completed the class. If you would  
4 like to contact Intoximeter they may have it, they may not, I  
5 have no idea.

6 Q Okay. Because, you know, like you over 20-years I've gone  
7 through a lot of courses too and sometimes you get a lot of  
8 chances to take and pass the test.

9 A I only needed one.

10 Q Okay. Do you remember what the score was?

11 A I do not.

12 Q Okay. So, this was a three-day course?

13 A I think it was.

14 Q Okay. And, they trained you on how to identify errors with  
15 the instrument?

16 A We looked at the software and see what the errors mean, what  
17 the possibilities are in a typical error messages. We looked  
18 at the internal components of the instrument, how it's put  
19 together, how the functionality works, what would cause a  
20 filter wheel error, using that as one of your examples, how  
21 they are remedied, that kind of thing.

22 Q And I'm sure you talked about current ongoing concerns with  
23 the DataMaster DMT, correct?

24 A I'm familiar with a lot of it, sure.

25 Q Like the voltage regulator?

1 A Voltage regulator are a part on a specific board, yeah. It  
2 can go out.

3 Q Sure.

4 A That's fine.

5 Q And, that's an important component of that instrument's  
6 ability to detect a volatile or damning substance like  
7 ethanol, right?

8 A Not necessarily. It depends on what's going on with each  
9 individual component. A voltage regulator, if it failed and  
10 allows too much voltage to go through on a board it may fry  
11 all the parts down stream of that, or it may not. It depends  
12 on what that voltage is and where it is within the scheme.  
13 There are a number of voltage regulators within any circuit  
14 board.

15 Q Okay. Probably discussed issued with the power board in the  
16 DataMaster DMT?

17 A Didn't discuss it per se but I would suspect that they're  
18 going to fail on an annual basis or somewhat of a regular  
19 basis just like all the breath testers will.

20 Q Did you discuss the expected shelf life of the filter wheel on  
21 the instrument?

22 A We did not. We discussed the overall shelf life and life  
23 expectancy of the DMT.

24 Q Okay. The filter wheel is also an important component of the  
25 infrared spectroscopy device, would you agree with that?



1 A That's fine.

2 Q Yes?

3 A Sure.

4 Q Okay. Other than the three-day course and was this in--It  
5 doesn't say. Was this course in Missouri, Ohio, Michigan?  
6 Where was it?

7 A St. Louis.

8 Q St. Louis, Missouri? That's where Intoximeters is based,  
9 correct?

10 A It is.

11 Q And they don't actually manufacture the DMT, right? They  
12 bought the technology.

13 A They bought the technology. I believe that there was to be  
14 production run and would probably still go back to the NPAS  
15 production facility and then they would ship it manufactured  
16 to Intoximeter for final check, calibration, that kind of  
17 thing.

18 Q That's your understanding of the agreement between the two  
19 companies?

20 A That's my basic understanding. I haven't really asked per se  
21 because I'm not in the market to purchase any new instruments.

22 Q Okay. I am. If you've got one for sale, let me know.

23 A Sure.

24 Q Have you ever been to NPAS' facility?

25 A I have not. They were out of the breath testing world before

1 I moved up here and in Texas we used a different manufacturer.  
2 Q You used the Intox5000?  
3 A That was one of them. We started off with the 5066 and then  
4 68 then the EN then the 9000.  
5 Q Okay. Basic same principle just different features on each  
6 instrument, is that correct?  
7 A Fair enough. In fact, all breath test instruments are  
8 basically the same.  
9 Q Okay. Dan Dunsworth was your instructor?  
10 A He was.  
11 Q Did--I would have thought that Gina Gettl who is the Sergeant  
12 at the Michigan State Police would have trained you, is that  
13 true?  
14 A She did the Mobile Breath Test Operator school when I went to  
15 become--to take the training--the same training that a trooper  
16 or any other law enforcement officer would take to run the  
17 DataMaster. I sat through all of those classes. She normally  
18 teaches those, I do not.  
19 Q Let's pause and spell that name for the benefit of the court  
20 recorder.  
21 A Oh, I would have to look it up. I believe it's G-E, I believe  
22 there are two Ts, L-E.  
23 Q It's I think G-E-T-T-L.  
24 THE COURT: That's what I thought.  
25 THE WITNESS: Okay.

1 BY MR. NICHOLS:

2 Q I know because I've got an email from her from yesterday.

3 A That's fine.

4 Q Okay. So, you've done the breath test operator school, when  
5 did you do that because I don't see that in your stack of  
6 certificates here?

7 A Probably, February sometime, but I can look up the exact date.  
8 I have actually gone through all of the classes, the PBTs,  
9 everything that an individual could take in the state of  
10 Michigan.

11 Q When you say an individual, an individual working for law  
12 enforcement because I've signed up for those classes many  
13 times. Did you know that I can't take them?

14 A I did not know that.

15 Q Is that something that maybe you could take a look at  
16 changing?

17 MS. TRIPI: Objection, Your Honor, relevance. He's  
18 asking--

19 THE COURT: Sustained.

20 MS. TRIPI: --for personal favors of our witness in  
21 order to get--

22 THE COURT: Well, this is voir dire. So, let's move  
23 on. Sustained.

24 MR. NICHOLS: I will move on. I just want to say,  
25 it's not a personal favor. I think they should allow it for

1 every single citizen including attorneys.

2 THE COURT: Again--

3 MS. TRIPI: Objection, relevance.

4 THE COURT: Yeah. Sustained.

5 BY MR. NICHOLS:

6 Q You get my point?

7 A Point made.

8 Q Okay. The Dan Dunsworth person, who trained him, if you know?

9 A You'd have to ask him.

10 Q He works for Intoximeters?

11 A He does.

12 Q Okay.

13 THE COURT: I've been liberal. We're just doing a  
14 voir dire as to whether or not he should be qualified for  
15 purposes of this motion as an expert in the area of breath  
16 test analysis and traceability on the breathalyzer that was  
17 used here in Mr. Finnerty's case. So, I would like to sort of  
18 tighten this up since we only have until noon.

19 MR. NICHOLS: I do want to ask him for his definition  
20 of traceability to see what his understanding is of that  
21 scientific term.

22 THE COURT: Okay.

23 BY MR. NICHOLS:

24 Q Go. Did you understand my question?

25 A Fine. Traceability is an aspect when we look at typically an

1 unknown standard and that can be traced back through a series  
2 of unbroken calibrations to a NIST standard.

3 Q National Institutes of Standards and Technology.

4 A Yes. You then purchase a standard it's going to come with or  
5 generally when you purchase standards it's going to come with  
6 a COA, what's called a Certificate of Analysis. It's going to  
7 have a number of bits of information and will identify any  
8 accreditation information from the manufacturer or the  
9 laboratory. It will also include a statement if it is a NIST  
10 traceable standard then it is NIST traceable, it may include  
11 other information as well.

12 Q The certificate of authentication would be important, for  
13 example, with the thermometer that's used in the wet bath  
14 simulator that's preformed every 120-days?

15 A Yes and no. Typically, in the world with simulators you don't  
16 calibrate the actual simulator itself. What you do is you  
17 compare that with a NIST thermometer that is, for example,  
18 Guth (inaudible) 500s have a calibration port. You simply  
19 open that. The simulator itself is going to give you a  
20 digital read out, 34.00. You can insert your digital  
21 traceable thermometer and compare the two. If there's a  
22 difference than--and if you are so trained, there is a  
23 mechanism where you can go into the simulator and adjust that  
24 simulator, so it matches the calibration of your NIST  
25 traceable thermometer. An individual can do that, if properly

1       trained and certified. Or, you can send it back to the  
2       factory and they'll do the same thing.

3   Q       Would you agree that without traceability being established  
4       you don't have a valid measurement?

5   A       Not all. You can certainly have a measurement that doesn't  
6       have to be traceable. In fact--

7   Q       Excuse me.

8   A       Oh.

9   Q       Valid measurement.

10   A       That's fine. I'm answering your question. We have a lot of  
11       measurements that are valid without traceability, we use those  
12       to make very important decisions on those on a day to day  
13       basis. For example, we get medical tests done. We have our  
14       cholesterol checked. We make life decisions based upon the  
15       results of that. That measurement from the laboratory is not  
16       traceable. Now, depending on what you define as a valid  
17       measurement. Valid can be in the world of breath testing, do  
18       we have an accurate measurement of breath alcohol  
19       concentration of this individual. Traceability really has no  
20       effort or direct relationship there. We can have  
21       traceability. Does traceability add benefit to a program?  
22       Yes. If you want to gain accreditation through ISO and then  
23       traceability and uncertainty of measurement and other things  
24       that you have mentioned in whatever you were reading from,  
25       procedures, proficiency tests, things like that, those would

1 all be required items.

2 Q Let's hone in on that definition. When I say valid, I mean  
3 forensically reliable as defined by ASLCD, ANAB, page 185 of  
4 the National Accredited--Academies of Science Report on  
5 Forensics in the United States of America. Let's say those  
6 are the definitions of a valid measurement, for that you need  
7 traceability, agree?

8 A Traceability certainly could help and if you're around a  
9 particular cutoff point then, yes traceability is going to be  
10 a valid and as I said in regards to accreditation, is going to  
11 be required.

12 Q Without traceability you won't have accreditation, that's your  
13 testimony?

14 A That's true. You can have--To have accreditation you must  
15 have traceability. You can certainly have traceability  
16 without having accreditation.

17 Q Okay.

18 MR. NICHOLS: At this point, I don't have any further  
19 voir dire. It sounds like the gentleman has a master's degree  
20 and he has training from at least the current provider of the  
21 DataMaster DMT. I think he can give testimony as an expert in  
22 how the DataMaster DMT works and what he knows so far about  
23 the machine and program.

24 THE COURT: All right. The Court will recognize you  
25 as an expert witness in those areas.

1 (At 10:23 a.m., witness recognized as an expert  
2 witness)

3 MS. TRIPI: Your Honor, at this time, People move to  
4 have admitted People's Exhibit #1, which is the curriculum  
5 vitae for Mark Fondren and multiple, multiple certificates  
6 that have already previously been discussed on the record of  
7 certificates of completion that have been reviewed by defense  
8 counsel.

9 THE COURT: Any objection, Mr. Nichols?

10 MR. NICHOLS: First as to the curriculum vitae, I did  
11 receive a copy of this. I asked and sent a subpoena to the  
12 witness for the publications he's referenced on page two as  
13 well as to identify as the speaking that he's identified on  
14 page two. We have one, two, three, four, five, six, seven,  
15 eight--I'm sorry, seven, eight, nine, 10, 11, 12, 13, 14, 15  
16 different certificates some of which are simply  
17 representations that he completed a particular program. They  
18 appear to be in no particular order. But I would rather have  
19 a specific number if we're going to admit this as an exhibit  
20 instead of saying--

21 THE COURT: All right. And, I didn't get copies of--

22 MS. TRIPI: Sure. And, I apologize, Your Honor--

23 THE COURT: --the certificates.

24 MS. TRIPI: --the fifteen certificates.

25 THE COURT: All right. Exhibit 1 will be admitted.



1 (At 10:24 a.m., People's Exhibit 1, admitted)

2 MS. TRIPI: And, Your Honor, to continue now that he  
3 has been established for the points of this testimony  
4 regarding the administration of the DataMaster. Can--I'm  
5 going to resume the questioning with, can you describe what  
6 you believe is necessary according to Michigan rules that have  
7 so far promulgated, what's required to have the valid and  
8 legally recognized DataMaster maintenance? Like, what is  
9 required for the maintenance of the DataMaster regarding  
10 traceability?

11 THE WITNESS: I don't believe there's any requirement  
12 in traceability or I don't believe the words traceability  
13 appear in the administrative rules. There are references in  
14 the administrative rules that the DataMaster be checked on a  
15 120-day basis for accuracy at the 40, 80, 200 level. I  
16 believe there's a reference in there to acetone and RFI, as  
17 well. There may be a diagnostic requirement within the  
18 administration. It's normally done when they're there.  
19 There's also a weekly check that's done with dry gas, that's  
20 automatically generated Monday mornings at 4:00 a.m.  
21 Custodian of records would collect that data and then add--the  
22 weekly check that is, he'd collect that data and then add it  
23 to a basically a log book that's there.

24 DIRECT EXAMINATION (CONTINUED)

25 BY MS. TRIPI:

1 Q And, who is the person that usually is the collector of the  
2 records for dry gas calibration checks? Like what is their  
3 general title?

4 A I assume--I have no idea.

5 Q Okay.

6 A It's going to be different at each location. There's what's  
7 defined as a custodian of record over that instrument at each  
8 location. What their exact title or job reference is, I don't  
9 know? I can say it's not me.

10 Q And, can you tell me more about the stability and accuracy  
11 from simulated breath samples?

12 A One of the things that we'll look at or the technicians will  
13 perform on a review would be the accuracy checks of an  
14 instrument over a period of time. They're going to be doing  
15 that every 120-days or if there's a service for instance, then  
16 they go back to the instrument sooner to put it back into  
17 service, they are going to complete those tasks as well. To  
18 get some idea of an instrument's performance one can easily  
19 pull that data and then graph it over an extended period of  
20 time by plotting each of those .04 results over an extended  
21 period of time, likewise for the 08 and the 200. You get some  
22 idea as to the accuracy and stability of that instrument over  
23 a long period of time.

24 Q And, how would you be able to obtain the data regarding the  
25 stability and accuracy from the simulated breath samples?

1 THE COURT: Are you talking about for the machine  
2 that the instrument that was used for Mr. Finnerty's--

3 MS. TRIPI: Yes. Yes--

4 THE COURT: --3--

5 MS. TRIPI: --Your Honor, from the specific machine  
6 DMT 300330--

7 THE COURT: 330, okay.

8 MS. TRIPI: --from Michigan State University Police  
9 Department.

10 BY MS. TRIPI:

11 Q How would you specifically go about obtaining that data?

12 A Personally, I have a link to obviously the data, it is owned  
13 by Michigan State Police. So, I have a link and can pull up  
14 that data on my personal computer when I'm there at the office  
15 with just a couple of clicks of the mouse.

16 Q And--

17 A Other individuals, such as yourself or Mr. John Q Public  
18 simply makes a Freedom of Information request saying that they  
19 would like the information and then we'll provide that.

20 Q And, were you able to obtain any data as it relates  
21 specifically to the machine that was used by Michigan State  
22 Police Department from a period of December '17 to June 2019?

23 A I did. I pulled the records and plotted the actual results of  
24 those simulated breath samples, the 40, 80, 200 over an  
25 extended period of time.

1 Q And, did you create any particular graphs that would show how  
2 the data represented itself over that period of time?

3 A I did.

4 Q And, if I showed you that sample would you be able to identify  
5 that as work that you made based off of the information from  
6 Michigan State Police?

7 A I would.

8 MS. TRIPI: Your Honor, at this time the People move  
9 to admit People's Exhibit #2, which is the stability and  
10 accuracy from simulated breath samples from DMT 300330,  
11 Michigan State University Police Department which is from a  
12 time period of December 2017 through June 2019.

13 THE COURT: Let's have the witness lay the foundation  
14 for its admissibility first.

15 BY MS. TRIPI:

16 Q So regarding the--

17 THE COURT: You can show it to him.

18 MS. TRIPI: Yeah, may I have permission to approach,  
19 Your Honor?

20 THE COURT: Yup.

21 MR. NICHOLS: May I see it?

22 THE COURT: Mmhmm, you have not seen it yet? Okay.

23 MS. TRIPI: Your Honor, I did show it to defense  
24 counsel before the hearing.

25 THE COURT: Okay.

1 MS. TRIPI: I'm approaching the witness now.

2 BY MS. TRIPI:

3 Q Can you please take a look at the document that I've handed to  
4 you. Do you recognize it?

5 A I do.

6 Q And, what is it?

7 A This is as labeled the Stability and Accuracy from Simulated  
8 Breath Samples from DMT serial number 300330 which is located  
9 at the Michigan State University Police Department and the  
10 data ranges from December 2017 through June 2019. And,  
11 basically what we're looking at, I'm pulling all of the  
12 technician data that is generated onsite when they are doing  
13 the 120-day checks or actually anytime that they are onsite  
14 and plotting those results, what were the .04 results, or the  
15 .08, or the .2 and we're looking at that as the title says,  
16 the accuracy, how close does that value fall to the .2 target  
17 value or the .08 target or .04. And also, the range between  
18 the data points and the stability, that is how the data change  
19 over time. So, that's the spread from December 2017 through  
20 June of '19.

21 Q And, is that why you chose a larger period of time to look at  
22 in regards of the accuracy of the weekly checks?

23 A There are a number of ways to look at data. If one wants to  
24 look at stability then there are short-term stability, for  
25 example, you could run and instrument or repeat samples, you

1 know, 100 samples run right after another in an hour period.  
2 If you are looking long-term stability, then you are going to  
3 pull data over a long period of time. I did not have access  
4 to the instrument to do short terms stability, it was in  
5 service. But I did have the access and I did have the data  
6 for a long-term stability, so I graphed it to see what the  
7 data would tell me.

8 Q And, can you--If you don't mind if I show it to the Court.  
9 What does this first red line indicate on the top?

10 A We're looking at all three solutions. So, the top line is at  
11 the .200 level and--

12 MR. NICHOLS: Just as a point of order, the exhibit  
13 is not admitted.

14 THE COURT: Right. I was--

15 MS. TRIPI: I apologize, Your Honor.

16 THE COURT: Would you--You've identified it that it's  
17 your work product, you generated that over the time period of  
18 December of '17 to June 2019, right?

19 THE WITNESS: That's correct.

20 THE COURT: And, it relates specifically all of the  
21 data is data that you pulled from the instrument that is  
22 specific to Mr. Finnerty's case, that is Michigan State  
23 University Police Department DataMaster 300330, correct?

24 THE WITNESS: Correct.

25 THE COURT: All right. Would you like to admit it,

1 Ms. Tripi?

2 MS. TRIPI: Yes, Your Honor.

3 THE COURT: Any objections, Mr. Nichols?

4 MR. NICHOLS: I'd like to voir dire the witness, Your  
5 Honor.

6 THE COURT: All right.

7 MS. TRIPI: Your Honor, I'd ask that defense counsel  
8 have a shorter voir dire with the witness on this matter.

9 THE COURT: Well, we'll see. He's entitled as long  
10 as it's relevant to take as long as he needs.

11 VOIR DIRE

12 BY MR. NICHOLS:

13 Q December 2017 to June 2019, sir? Is this--

14 A I believe those were the dates.

15 Q Okay. What was the lot number for the dry gas tank that was  
16 used for these accuracy checks?

17 A Those were simulated wet bath. They are simulated breath  
18 samples so they would come from a wet bath. That has nothing  
19 to do with dry gas.

20 Q Okay. What was the lot number for the wet bath solution?

21 A Each of those had--There would be a number of different wet  
22 baths lot numbers. Obviously, the 04 and the 08 are doing to  
23 have different lots and within one particular concentration  
24 we're going to be using multiple batches over that same period  
25 of time. Do I have them with me? No. Do I have them and

1       you're welcome to do (inaudible) of analysis on those? Yes.

2   Q       Where are they?

3   A       Again, any date range as I've requested, just give me a date  
4       range as to what's requested and what the Court would want to  
5       be provided to you, I'll provide it.

6   Q       You're seeking to admit December 17, 2017 to June 17, 2019,  
7       that would be the date range, sir.

8   A       That's fine. I'd be more than happy to provide it to you.

9   Q       Okay. Because you realize that--

10               THE COURT: So, you want the lot numbers for every  
11       wet bath solution?

12               MR. NICHOLS: Correct.

13               THE WITNESS: That's fine.

14 BY MR. NICHOLS:

15   Q       And, the certificates of analysis for the thermometers that  
16       would have been used to maintain the temperature for that wet  
17       bath solution.

18   A       That's fine, as well.

19   Q       That's important, right?

20   A       Could be.

21   Q       Because you want to see what the variance is in that  
22       thermometer, right?

23   A       Well, again, the way a simulator is going to be run, you're  
24       going to be comparing that simulator at discrete points of  
25       time. Now, it maybe every six months, it may be every year,



1 so there's going to be some documentation. The simulator is  
2 reading 34.02, this and this thermometer is reading 34. So,  
3 we have a comparison but it's not going to be done every time.  
4 You are not going to use your NIST thermometer every time you  
5 utilize your simulator.

6 Q Thank you for that explanation. Here's my point, this  
7 proposed exhibit will have no meaning unless you can show all  
8 of the different parts that were used to reach these results  
9 that are displayed here. Do you agree with that?

10 A No, I don't.

11 Q Okay.

12 A That may be your opinion, but the data speaks for itself. It  
13 shows that the simulated value--the simulated breath samples  
14 provide meaningful data to a chemist. Whether or not it  
15 provides meaningful data to you as a lawyer, I can't answer  
16 that question.

17 Q Okay. I appreciate that. I appreciate that. But you have no  
18 idea what my educational background is, right?

19 A I haven't the slightest idea.

20 Q Okay. The point here is before you express something in court  
21 you have to be able to show how you arrived at the numbers as  
22 you have here in proposed Exhibit #2, right?

23 A I explained how I generated that data. If you don't like how  
24 I did that or have a question about that, you are more than  
25 welcome to ask that question. If you would like copies of

1       that data that I used to generate that, like I said, I'm more  
2       than happy to give it to you.

3   Q    Okay.  Let's not--We're getting argumentative here.  What I'm  
4       looking for sir is what I've heard you explain is you analyzed  
5       the data of somebody else's work product, is that correct?

6   A    I did.

7   Q    Okay.  Somebody who you probably have never met before?

8   A    Potentially going back to 2017 whoever that technician was who  
9       was onsite then I would say I do not know that individual.

10  Q    And since you're coming in new here, and welcome to Michigan  
11       by the way--

12  A    Thank you.

13  Q    You would have to know, I'll use the term quality of the  
14       materials that whoever did these simulator solutions, these  
15       simulators, you want to know the quality of the materials that  
16       they used, wouldn't you?

17  A    We do know what solutions were used.  We have the lot numbers,  
18       as I said, and the certificates of analysis that go with each  
19       of those, and the lot numbers are going to be recorded on that  
20       data packet that goes back to December 2017.

21  Q    And just explain to Judge Larkin, she's heard it before a  
22       little bit but we are getting into some science here.  The  
23       certificates of analysis tells you what about for example the  
24       simulator solution?

25  A    COA on a simulator solution is going to tell you, one, who

1 manufactured it, assuming you are purchasing it from a  
2 company. It's going to give you the target value. It's going  
3 to tell you what the analysis is of that value. Any  
4 stipulations on that, for example, must be used within 24  
5 hours after opening, has an expiration date, some manufactures  
6 provide bottle numbers. They actually specifically number  
7 each individual bottle.

8 THE COURT: So just in my lay-persons term, if you've  
9 got a value in the simulator sample that's .04 then the  
10 machine registers a .039 or a .041 then it's within an  
11 accuracy range that's acceptable, correct?

12 THE WITNESS: The actual--Yes and no. The accuracy  
13 range is what's--is what is deemed acceptable is up to the  
14 actual program, that would be as defined within the  
15 administrative rules. The manufacturer is going to provide  
16 one this analysis, we've analyzed this solution to .04 and we  
17 find it to be .04 plus or minus--

18 THE COURT: The solution itself.

19 THE WITNESS: Yes.

20 THE COURT: The sample, okay. All right.

21 THE WITNESS: Correct.

22 THE COURT: And then--

23 THE WITNESS: They may say three percent like Guth  
24 does. Other manufacturers provide an actual number but that  
25 means at 34--in a breath test simulator, properly working

1 simulator at 34 degrees this will provide a vapor sample at  
2 .04 grams of alcohol per 210 liters of breath.

3 THE COURT: And then the machine is actually run?

4 THE WITNESS: Then you would run that sample and  
5 compare the result.

6 THE COURT: And if the--

7 THE WITNESS: You get a number and you compare that  
8 to--

9 THE COURT: Right.

10 THE WITNESS: --the expected value.

11 THE COURT: And if the result is within a statistical  
12 range of acceptability then its deemed that the machine is  
13 running accurately.

14 THE WITNESS: That's correct.

15 THE COURT: All right.

16 BY MR. NICHOLS:

17 Q The--And an important point for--I want to make sure that the  
18 record is clear, and Judge Larkin is clear. The temperature  
19 of that solution, right? If there is one-degree difference--  
20 You are familiar with the conforming products list, right?

21 A I am.

22 Q And you are familiar with the research that is on the  
23 conforming products list not just for breath test devices but  
24 also all of the equipment that's used, there are separate  
25 lists, right?

1 A Correct, there is.

2 Q And the federal government has published research by a  
3 researcher named Harger, H-A-R-G-E-R, that says one-degree  
4 difference will give you a seven percent over inflation in the  
5 reported result. You are familiar with that, right?

6 A It does. What it does is it changes your target value because  
7 the way Henry's law operates, and the simulator works on  
8 Henry's law there is a relationship between temperature and  
9 the amount of alcohol that's driven from the solution into the  
10 head space and hence that simulated breath sample.

11 Q Okay. And without getting too deep into the science weeds  
12 here with Henry's law, my point on proposed 2 we can assume  
13 and we can expect the judge, and me, and Ms. Tripi that the  
14 solution temperature was maintained properly, the ampules  
15 weren't expired but we don't know that until we see it. Would  
16 you agree with that?

17 A Yes and no. First, regarding ampules. There are no ampules.  
18 We purchase--

19 Q Okay. Sir?

20 A --500 mL solutions.

21 Q How about I don't ask you if you agree with anything because  
22 you are going to say yes and no. How about if I just say--

23 A Well--

24 Q How about if I just say you've got no way to prove to us right  
25 now as it stands here that all of the component parts that

1 underlie this data is used correctly?

2 A I would disagree. And I would answer your question, if you  
3 ask compound questions that I agree with one part and the  
4 other you leave me no choice but to say yes and no.

5 Q Okay.

6 A If you ask me one question--

7 Q It's Tuesday--

8 A --it's a little easier.

9 Q It's Tuesday.

10 A I would agree.

11 Q Okay. Can you show us--

12 A At least here in the United States it's Tuesday.

13 Q Can you show--

14 THE COURT: Good point.

15 MR. NICHOLS: That's going to be a yes and no.

16 That's another yes or no.

17 THE COURT: Right, it's factually accurate.

18 BY MR. NICHOLS:

19 Q The--You cannot show us that all of the component parts that  
20 go into this data were used correctly. You might be able to  
21 say I'm pretty sure it was or I'm absolutely sure it was, but  
22 that's different than showing us.

23 A That particular information would not be reflected on the  
24 actual data that you have in front, the graph. If we look at  
25 the raw data from the 120-day check that does include, for

1 example, the lot number that is used, it would also allow you  
2 to look at the COA that gives you the expiration date of that  
3 information. Now if the technician recorded the actual serial  
4 number of the simulator that they used at that time that that  
5 solution was in you would have to know that information.  
6 Additionally, if they recorded the temperature of the  
7 simulator at that time you would have that information. Now,  
8 in 2017, I don't believe that was being done. One of the  
9 changes I have made to the program since my arrival is that  
10 the technicians do record that specific information, they do  
11 record the actual lot number that's been used, that's simply a  
12 continuation. They do record the serial number of the  
13 simulator that that .04 solution is in. And also, they record  
14 the temperature at the time that sample is provided to each  
15 individual instrument. So, for some of the later data, yes  
16 that information is there you can look at the data packet,  
17 it's there. 2017 long before I got here, I don't know if they  
18 did that or not?

19 MR. NICHOLS: I think, Your Honor, this data--I mean  
20 you say you compiled it from looking at other's work product.  
21 I suppose it's admissible for that purpose. I don't know if  
22 I'm going to get anywhere--

23 THE COURT: Okay. I mean, it's a collection of the  
24 accuracy checks and stability checks that were done over that  
25 period of time, right?

1 THE WITNESS: Yes.

2 THE COURT: It's like if somebody measured my  
3 cholesterol once a month for the last five years, you wouldn't  
4 know who did it or how much blood they used, et cetera, but  
5 you would see the actual data of it?

6 THE WITNESS: If we were to graph it, yes. I went  
7 back and looked at the actual lab reports from the--looked at  
8 the original data, I would have some of that information.

9 THE COURT: Okay. And, this is just a compilation of  
10 the actual reports?

11 THE WITNESS: It is.

12 THE COURT: Okay. All right.

13 BY MR. NICHOLS:

14 Q Okay. From the OD-84 logs then? He just looked at the OD-84  
15 logs, took that data down--

16 A That would be the wet bath simulators would be all the 120-day  
17 checks.

18 Q Okay.

19 A If you say that's OD-84 then that's fine with me.

20 Q Okay and just--

21 A Like I said, I don't know?

22 Q And, I don't mean to argue with him. I just want to make sure  
23 I'm clear on the vernacular he's using. I think he's saying  
24 the weekly Monday morning 4:00 a.m. dry gas checks are  
25 accuracy checks?



1 A Michigan calls those accuracy checks. The data that you're  
2 looking at does not reflect any of the dry gas. These are all  
3 what are called simulated breath samples.

4 Q Right.

5 A So the technician is at the location, he has the simulator, he  
6 is blowing through the simulator creating a simulated breath  
7 sample of this alcohol concentration and that goes directly  
8 into the instrument for analysis.

9 Q And that's what's plotted here?

10 A That is.

11 Q Right? Okay. All right. Thank you.

12 MR. NICHOLS: We kind of got off on voir dire but I  
13 appreciate you letting me have that follow-up, Your Honor.

14 THE COURT: All right. Exhibit 2 will be admitted.

15 (At 10:44 a.m., People's Exhibit 2, admitted)

16 MS. TRIPI: Thank you, Your Honor. If I may go back  
17 to approaching the witness?

18 THE COURT: Mhmm. And, because we don't have a jury  
19 in front of us and there are no victim's present in the  
20 courtroom you two, you and Mr. Nichols, both don't have to  
21 request my permission to approach the witness. That's fine.

22 MS. TRIPI: Thank you, Your Honor.

23 DIRECT EXAMINATION (CONTINUED)

24 BY MS. TRIPI:

25 Q If you can let me have--Just showing once again--Let's talk

1 about the top line that is red in color that's listed around a  
2 range of 0.200. Can you define specifically for each of these  
3 red lines what you are looking to see in the data?

4 A We're simply plotting--

5 MR. NICHOLS: Your Honor, can I just come up and  
6 look?

7 THE COURT: Sure.

8 MS. TRIPI: Yeah.

9 MR. NICHOLS: I'm not going to bite you.

10 THE WITNESS: Anyway, we're basically looking at a  
11 graph starting with the .2 that you have referenced--

12 MS. TRIPI: May I stop you real quick? Your Honor, I  
13 have an extra copy of it just because they are digital  
14 technical.

15 THE COURT: Okay. A copy for me to use? That would  
16 be great.

17 MS. TRIPI: Yes, Your Honor, that way you can see--

18 THE COURT: Next time you can bring one for me and  
19 one for Mr. Nichols, we can all sort of stay where we are.  
20 All right. Thank you.

21 MS. TRIPI: Yes.

22 BY MS. TRIPI:

23 Q Please go back to your explanation of the--

24 A As we're looking at the .2 it would be the top line. So,  
25 we're simply looking at those simulated breath samples over an

1 extended period of time. It is one way of getting some idea  
2 as to the instrument's performance over that time period.  
3 That is, is it a straight line? Is it always above the .2  
4 line? Is it always below the .2 line? We also--I did include  
5 some basic information such as the mean of all these, you  
6 know, seven or eight, six or seven data points. We have a  
7 mean of .198. And, I also posted the range, the lowest  
8 reading obtained was a .194, the highest reading a .203. And  
9 again, these would be provided by the technician who is on  
10 site.

11 THE COURT: And can I just stop you for a minute  
12 there?

13 THE WITNESS: Sure.

14 THE COURT: Between 10/17/2018 and 11/17/2018, which  
15 are the relevant dates here, it looks like it's just a minute  
16 amount above the line, is that correct?

17 THE WITNESS: From--I'm sorry, going back to the  
18 data, which--

19 THE COURT: December--I'm sorry, October 17, 2018 to  
20 11/17/2018.

21 THE WITNESS: To 11--

22 THE COURT: It's right about at .20, maybe a hair  
23 above?

24 THE WITNESS: Sorry. I would agree. It looks like  
25 the value around 10/17 would be right around the .200 range.

1 Again, we'd have to go back and look at the actual raw data to  
2 get that exact number.

3 THE COURT: Okay.

4 THE WITNESS: And then, the highest would appear to  
5 be around 2/17/2019 and by looking at the range I can say that  
6 it is--That's probably going to be our data point of .203.

7 THE COURT: .203, okay. And then, that little bit  
8 low point at December '17 and again in July of '17 is probably  
9 that .19843.

10 THE WITNESS: Well, the .19843 is simply an average  
11 of all these data points.

12 THE COURT: Oh, I see. Okay. All right.

13 THE WITNESS: Yeah. You know, it would all encompass  
14 a number of different technicians--

15 THE COURT: I meant a .194, that's those two low--

16 THE WITNESS: Yeah.

17 THE COURT: --points. All right. Okay.

18 THE WITNESS: So, it's just one way of looking at the  
19 data because we're looking at it from a number of different  
20 technicians who obviously don't know each other or probably  
21 don't know each other. They are there at different times.

22 THE COURT: Whatever shift they are working, right.

23 THE WITNESS: Well, as I said, some of these  
24 technicians from December 2017 are no longer involved in the  
25 program--

1 THE COURT: Right.

2 THE WITNESS: --they are no longer here as compared  
3 to Mr. Nichols made a reference to Mr. Clark. He started  
4 sometime in 2018. So, we have different technicians doing the  
5 same task and it's one way of looking at do we get about the  
6 same number or is there a bias in the instrument, that is, is  
7 there a calibration bias?

8 THE COURT: And at the .08 range and the .03957 or I  
9 guess that would be .04 range, it shows a fair amount of  
10 stability and accuracy from December '17 to June of 2019, is  
11 that--

12 THE WITNESS: It does. That would be the conclusion  
13 as somebody who is on the program level, I'm looking at the  
14 large picture, hence why I look at a large data span and that  
15 would be the conclusion I would draw. The instrument seems to  
16 be holding its calibration nicely, at least from the period of  
17 12/17 through 6/17/19.

18 THE COURT: And again, the relevant period from  
19 October 17, 2018 to 11/17/2018 on both the .08 measurement  
20 line and the .04 measurement line it looks like it's just  
21 right about at the line, is that correct?

22 THE WITNESS: It is.

23 THE COURT: Okay. All right.

24 BY MS. TRIPI:

25 Q And, what would that data indicate to you based off of that

1 specific time period with the data that's presented here  
2 regarding how proper the machine is calibrated?

3 A It would tell me that the instrument had the capability of  
4 holding its calibration. It is holding its calibration. And,  
5 we are provided with samples at various concentrations. We  
6 are getting the right number when it comes back.

7 MS. TRIPI: Thank you, Your Honor. I have another  
8 document that would--this focuses specifically to the  
9 stability and accuracy of the breath samples.

10 THE COURT: You have another exhibit you would like  
11 to introduce?

12 MS. TRIPI: Yes, Your Honor. I have one more  
13 exhibit.

14 THE COURT: Okay.

15 MS. TRIPI: And, I did show this to defense counsel  
16 beforehand.

17 THE COURT: Exhibit 3?

18 MS. TRIPI: Yes, Your Honor.

19 THE COURT: All right. Can we take just about a two-  
20 minute break?

21 MS. TRIPI: Yes, Your Honor.

22 THE COURT: I'll be right back.

23 (At 10:50 a.m., off record-recess)

24 (At 10:52 a.m., on record-continued)

25 THE COURT: All right. We're back on the record in

Exhibit 3.

MS. TRIPI: Yes, Your Honor.

THE COURT: Can you tell me what Exhibit 3 is called?

MS. TRIPI: Your Honor, it is called Dry Gas Calibration Checks Deviation from Target Value for DMT: 300330 MSUPD from January 2018 to July 2019.

THE COURT: Same time period as the--Oh to July?

Okay.

MS. TRIPI: That is--there was more data, I believe,  
on--

THE COURT: All right. So, the instrument that is used in Mr. Finnerty's case? All right.

MS. TRIPI: Yes, Your Honor. And to establish the foundation I'm going to ask a few questions.

BY MS. TRIPI:

Q Do you--

A      Okay.

Q --recognize this piece of paper?

A I do.

Q What is it?

A It's the graph that I prepared, and you just read from the title. It is a plot where we have time on the X axis and on the Y axis we have the deviation from our predicted value on the dry gas samples. When a dry gas sample is run there is a

1 predicted value based on the barometric pressure at that  
2 location and at that particular time and that value does  
3 change. So, it does have to be normalized and that's why we  
4 plot deviation instead of the actual value.

5 Q So speaking specifically to this form, does it include  
6 information from the DataMaster that was used at Michigan  
7 State University Police Department regarding the case of  
8

9 A It does.

10 Q And how were you able to verify that?

11 A I simply asked for the logs and more importantly I wanted the  
12 actual accuracy check results from the instrument, those are  
13 retained by the custodian of records. I just asked for a copy  
14 of those.

15 Q And I'm going to--Is the data something that you solely  
16 created based off of the data that you received?

17 A It is. Again, it is something that the program administrator  
18 --this data is going to tell me something. I expect it to  
19 look a certain way so I can plot the raw data and see what the  
20 overall trend looks like and whether it is something that is  
21 something I would expect or if it surprises me.

22 MS. TRIPI: Your Honor, similarly to People's Exhibit  
23 2, the People are requesting that People's Exhibit 3 be  
24 admitted for the dry gas calibration checks based off the data  
25 that was collected, that he reviewed, and assembled the graph.



1 THE COURT: Any objection, Mr. Nichols?

2 MR. NICHOLS: Voir dire, please?

3 THE COURT: Yup.

4 VOIR DIRE

5 BY MR. NICHOLS:

6 Q You said you reviewed the OD-33s before you did this graph  
7 which is reflected in prosecutor's Exhibit 3?

8 A The data that was provided to me, yes.

9 Q Okay. Did they tell you that for two weeks between October 1<sup>st</sup>  
10 and October 25<sup>th</sup>, which is actually 24 days there were no  
11 accuracy checks?

12 A I believe there was a period of time where the instrument was  
13 out of service.

14 Q Okay. So, shouldn't 3 contain a gap for that time period  
15 because I don't see a gap in your data plots?

16 A No. This simply is the data over that entire period. So,  
17 those data points--Generally it's on a weekly basis but we'd  
18 go back and look at the original data to see what the actual  
19 value was at any given date. Obviously, the dates that it  
20 didn't run there's no data point.

21 Q But that's not reflected in 3?

22 A I did not put that in there that way, no.

23 Q We would have to for it to be complete and accurate, right?

24 A No we wouldn't. This is a report of the actual values. If  
25 there's no value, then there's no data plot.

1 Q Handing you what's been marked for identification purposes as  
2 Defense Exhibit B. Do you see where there is a gap for the  
3 relevant period in this case, which is October 2018?  
4 A I see you do have one. That's fine.  
5 Q Wouldn't that be more complete and accurate?  
6 A Depends on what your overall intent of looking at that data  
7 is. Looking at your data for the short period of time from  
8 4/23 to 2--2/25, I would want to go back further and actually  
9 see your data doesn't show the actual trend that's developing.  
10 When we look at dry gas in a breath test instrument, not only  
11 the DMT but any dry gas, any breath test instrument, we are  
12 looking for a particular trend. There is a pattern that we're  
13 looking to see. Your data wouldn't go back far enough. If  
14 you included other data you may see the same graph, I would  
15 expect you'd see the same data as I have.  
16 Q Thank you for that explanation. My question is, wouldn't a  
17 gap need to be reflected in your data for it to be complete  
18 and accurate?  
19 A No. My data is premised on the actual results that are  
20 obtained. If there are no results, then there is no data to  
21 plot. You simply chose to make a break in the graph because  
22 on your X axis time--  
23 Q Sir?  
24 A --you have--Let me finish my answer.  
25 Q You plotted data where there is no data to plot.

1 A No, there is no data at all.

2 Q And yet, you've got a--

3 A I think we're splitting hairs here. I'm looking at your data  
4 --

5 Q Sir--

6 A --over the time period. I have no problem with you making  
7 that break in the graph like that. I simply have connected  
8 those dots.

9 THE COURT: So, yours is from December of '17 through  
10 July of '19?

11 THE WITNESS: My graph is January of 2018--

12 THE COURT: Okay.

13 THE WITNESS: --through July of 2017. It includes  
14 all data that was generated. You have data--Or, your graph  
15 includes all data that was generated plus data that was not  
16 generated. That's the distinguishing difference between the  
17 two.

18 BY MR. NICHOLS:

19 Q Your testimony is that your proposed exhibit shows all data  
20 that was generated?

21 A It shows the data that was generated, when we got results.

22 Q On October 1, 2018 there was not a dry gas accuracy check  
23 result, there was a filter wheel error, that's not plotted in  
24 your proposed exhibit that you brought to this court.

25 A My graph does not--

1 Q Right?

2 A Excuse me, let me finish. My graph is not--

3 Q It's a yes or no question.

4 THE COURT: No, I'd like him to finish because this  
5 will help me in deciding how much weight to give his graph.  
6 Go ahead.

7 THE WITNESS: My graph is not intended to show when  
8 the instrument is taken in or out of service. If you'd like  
9 to look at that we can. You could title in your graph or you  
10 could look at yours and title it Dry Gas Analysis, you've done  
11 yours in a percentage for all dates. You have all dates.  
12 Whereas mine has dates that include when data was generated.  
13 It's like when you plot a graph of a car with miles driven.  
14 If you drive your car today, you'll have a number. If you  
15 don't drive for a number of days, it doesn't change mileage.  
16 So, you can either plot that and include zero miles driven,  
17 zero miles driven, zero miles driven, or you could just draw  
18 it on the dates and include the dates where you actual drove  
19 that vehicle. And simply, you chosen to plot X and I've  
20 chosen to plot Y. Neither one is correct, neither one is  
21 incorrect.

22 MR. NICHOLS: Well, with that--

23 THE COURT: Just different data points.

24 THE WITNESS: It's just different data points.

25 BY MR. NICHOLS:

1 Q With that, he just admitted his data is not correct. October  
2 1, 2018, filter wheel error, that's the data, correct?

3 A No. That's a result. There is no data. If you look at the  
4 title of the graph, mine has the dry gas calibration check.  
5 What you have is a cause, the filter wheel error is what  
6 caused there to be no data. If there was a number, it would  
7 be reflected. If there is no data, then it's not. I think  
8 its semantics where you are including those dates because you  
9 have actually plotted on the X axis every single data point on  
10 Monday morning. Whereas I have just chosen a range. If  
11 there's no data generated during that time period, then it  
12 doesn't exist.

13 THE COURT: Do you know what the data point was  
14 closest to October 1<sup>st</sup> for which there was actual data?

15 THE WITNESS: On--Looking at Mr. Nichols' graph,  
16 again, he has it in percentages. He doesn't have a raw value.  
17 I have mine, you said October--What was the date?

18 THE COURT: Just early October, closest to the one  
19 that apparently showed no data because of a filter wheel issue  
20 on October 1<sup>st</sup>.

21 MR. NICHOLS: I've got the OD-33 logs, that might be  
22 helpful for him.

23 THE WITNESS: That is (inaudible) and that's what we  
24 would have to go back to. At that point in time it looks like  
25 and again I don't have the exact data, we're close to the 00

1 deviation to .001 below. And again, mine is on an absolute  
2 value, yours is on a percentage and without doing the math, I  
3 don't know if your percentage is correct or not. Sorry.

4 THE COURT: So, you don't have a date on which an  
5 accurate set of data was--

6 THE WITNESS: We would go back. In that instance we  
7 would look at the raw data, the original data, which would be  
8 the instrument printouts. That data would then be transferred  
9 over to the logs. So obviously on those dates where there is  
10 a filter wheel error, there is no data. So, I suspect the  
11 logs says something like internal service, no data, or  
12 whatever that individual chose to record.

13 THE COURT: So, your exhibit that's been marked as  
14 Exhibit 3 would show over time approximately a year and a half  
15 for where there is data the accuracy of that particular  
16 machine?

17 THE WITNESS: Yes.

18 THE COURT: And where there is no data is there any  
19 value to your Exhibit 3?

20 THE WITNESS: Again, we're looking at the overall  
21 trend. Do we see the expected trend in that change in dry gas  
22 over time? I have no problem saying there is a filter wheel  
23 error and there would be no data represented. But, again,  
24 that doesn't factor into the actual question that I'm trying  
25 to answer.

1 THE COURT: Which is how accurate in general has this  
2 machine been over a--

3 THE WITNESS: Well, I'm looking at the overall  
4 change--

5 THE COURT: --year and a half period of time.

6 THE WITNESS: --in that dry gas, yes.

7 THE COURT: All right. I will admit the exhibit for  
8 that limited purpose understanding that there is going to be a  
9 robust cross-examination regarding the early October filter  
10 wheel lack of data result. All right? Go ahead, Ms. Tripi.

11 MS. TRIPI: Thank you, Your Honor.

12 (At 11:03 a.m., People's Exhibit 3, admitted)

13 DIRECT EXAMINATION (CONTINUED)

14 BY MS. TRIPI:

15 Q The point that's listed dry gas calibration check deviation  
16 from target value, what specifically are you looking for  
17 regarding dry gas calibration checks?

18 A We are looking to see and we're plotting the actual value  
19 that's obtained versus the predicted value, whether that  
20 actual analysis is higher than, equal to, or lower than the  
21 predicted value over time. We're looking at that change.

22 Q And do you know what the predicted values range is?

23 A To look at the actual predicted value on each given date what  
24 we'd have to do is look at the actual raw data because that's  
25 the--the predicted value is generated based upon the

1 barometric pressure, part of the normal dealings with a dry  
2 gas sample. So, that predicted value does change. Generally,  
3 it's going to be around and round number to the .08 level  
4 because here we're slightly above sea level we're going to see  
5 levels .077, .078, we may see .079, we may see .076, but that  
6 does change.

7 Q And, specifically when looking at the overall information from  
8 the January of 2018 to July of 2019, what do you see in--Let  
9 me rephrase. When you see the data that's collected from  
10 these points, what does it indicate to you regarding the  
11 deviation from those target values?

12 A I see an instrument that's behaving normally with dry gas.  
13 That is, at the very beginning of the graph we see lower than  
14 expected or lower values as compared to the target value. And  
15 then, excuse me. In early April of 2018 we see the technician  
16 do a tank change. That is, they are changing the tank of dry  
17 gas. Immediately after that, we see results being slightly  
18 higher than the predicted value by about .001 and then over a  
19 period of another year or so, we see that value slowly falling  
20 overtime until we get down to July of 2019 when we are again  
21 about .003 on the low side as compared to the target value.  
22 This is what you'd expect to see with dry gas used over an  
23 extended period of time. When you change out the tank you  
24 expect it to be relatively high over a period of time, it  
25 slowly falls or it creeps back down to a low end and I suspect



1 in August or September we are going to do a tank change at MSU  
2 and we'll see the graph jump back up over time. So, in a way,  
3 I'm looking at this is what I expect an instrument to be doing  
4 over a long period of time. You plot the data and it also  
5 will give you an idea as to when that tank is going to fall  
6 below its target value or when it will fall outside of the  
7 accepted value. Essentially, you can look at it and say I'm  
8 going to be needing to do a tank change July, August,  
9 September, sometime around this point.

10 Q And why is--Can you explain the factors that make it result  
11 not as a straight line like the other chart?

12 A Here we are looking at one dry gas sample, or excuse me, one  
13 dry gas tank over an extended period of time. And so, we  
14 expect that tank to change based upon contamination and use  
15 through the process. Ideally would it stay the same? Yeah.  
16 You'd see .08 over the life of that tank until pressure drops  
17 to a too low of a value to be usable, but that's not what  
18 happens. Every time that valve opens then we are introducing  
19 bacteria into the valve. There are a number of bacteria that  
20 live on alcohol and this is what we see in the whole of dry  
21 gas and the extended period of time. Comparing that and why  
22 we don't see that same pattern when you look at simulator  
23 solutions, simulator solutions are used in a very short period  
24 of time. They are open and may be retained by the technician  
25 for that day, maybe two days and then they're discarded, and a

1 new lot or a new bottle, potentially with that same lot or  
2 potentially with a different lot, will be reopened and poured  
3 into the simulator. If we were to use a simulator for an  
4 extended period of time, 30-days, 60-days, something like  
5 that, we would also see the same change in alcohol  
6 concentration. That is, it's going to start at a predicted  
7 value and overtime it falls down, one, because of usage in a  
8 simulator, two, because of bacterial contamination.

9 Q And, for the--Around the approximate time of October and  
10 November 2018, do you see anything specific regarding about  
11 how you believe the canisters are behaving during that--the  
12 canisters behavior during that time?

13 A The same pattern continues on. If we look at how the--If we  
14 look at the graph before the instrument goes out of service  
15 with the filter wheel we are on a downward trend. After that  
16 filter wheel is either adjusted or whatever was done by the  
17 technician then we see that continuing onward on into July.  
18 So, you know--

19 THE COURT: Do you have a date for when that filter  
20 wheel was adjusted?

21 THE WITNESS: I haven't looked at the actual data.

22 THE COURT: But you could find that?

23 THE WITNESS: I believe Mr. Nichols said something  
24 about October.

25 THE COURT: You could find that?

1 THE WITNESS: Oh, yes. I'm sure both parties have  
2 that data already or if they don't it can easily be provided.

3 BY MS. TRIPI:

4 Q And is there anything to indicate that the dry gas calibration  
5 check during that time period was--Actually allow me to  
6 rephrase. During that time period that I previously  
7 mentioned, was the deviation from the target value at an  
8 appropriate range for the natural use of that type of  
9 canister?

10 A It is. It's about what I would expect looking at both graphs.  
11 I draw the conclusion that the instrument was behaving as I  
12 would expect it to. I don't see anything unusual.

13 THE COURT: Was it behaving in a way that was  
14 producing accurate measurements, I guess is what we're trying

15 --

16 THE WITNESS: Based upon the calibration data, yes.  
17 Whether or not that action--Certainly it gives the idea when  
18 you draw a conclusion that the instrument had the capability  
19 to provide accurate results on any given individual during  
20 that time period. It obviously would not say anything about  
21 how any one individual was tested or the testing protocol or  
22 what acts that operator took. But simply on an instrumental  
23 basis we tend to look at larger periods of data and we look  
24 for trends. Did this instrument do anything unusual? For  
25 example, we are looking at both of these, do our number jump

1 above and beyond the graph, above the graph or below our  
2 target values randomly or is there a pattern? If there is a  
3 pattern, what does it look like? And, that's all I've  
4 attempted to do here with this.

5 MS. TRIPI: Your Honor, no further questions from  
6 prosecution at this time.

7 THE COURT: Mr. Nichols?

8 MR. NICHOLS: Thank you. I'm going to start by going  
9 ahead and moving for the admission for Exhibit A, which is our  
10 OD-33 logs and associated accuracy check tickets, it's 39-  
11 pages two of those pages and that's going to be at--

12 THE COURT: That's Exhibit what?

13 MR. NICHOLS: A.

14 THE COURT: A, okay.

15 MR. NICHOLS: That will be at pages 34, 35, 36. I'm  
16 sorry, three of those pages--37--four pages are what I suppose  
17 and believe are the tickets that were generated, some of the  
18 tickets that were generated during October 25, 2018 service  
19 call. And, I've got three copies, one is marked.

20 THE COURT: Okay.

21 MR. NICHOLS: I think Sergeant Porter is here to at  
22 least do some of the foundation, but I don't know that we've  
23 got any real move for it?

24 THE COURT: Ms. Tripi, do you have any objection to  
25 the admission of Exhibit A?

1 MS. TRIPI: Your Honor, I haven't had a chance to  
2 review this at all. Defense counsel is showing it to me for  
3 the first time. So, before I want to--

4 THE COURT: Can you lay a foundation through this  
5 witness or not, Mr. Nichols?

6 MR. NICHOLS: I'll try. May I approach?

7 THE COURT: I mean, if you can't we can wait until we  
8 get Sergeant Porter.

9 CROSS-EXAMINATION

10 BY MR. NICHOLS:

11 Q Handing you what's been marked as Exhibit A, sir. You said  
12 you reviewed data before you prepared both Exhibits 2 and 3.

13 A I did.

14 Q Okay. Do you recognize this data as the data that you  
15 reviewed or at least some of the data that you reviewed?

16 A I would say it's consistent. Whether or not this includes all  
17 of the data, I can't say if a page was missing on the data  
18 that I got or the data that you have here. I can look at it  
19 and say that it is identified as coming from MSUPD. It has  
20 the serial number that I have referenced. It is the same type  
21 of data. I don't question it. However, I didn't provide the  
22 data to you so I can't vouch for the continual chain as it's  
23 moved through the process. So--

24 Q Sure.

25 A Hopefully that answers your question?

1 Q No. I mean, you are doing what you can. I get it. We got  
2 this--When we get a case like this, we do a Freedom of  
3 Information Act request--

4 A Sure.

5 Q --to the university. We get the relevant dates.

6 A Right. And, that's why I say, I don't question the document.  
7 But again, I didn't provide it you. If you were to ask me are  
8 all pages included with what I reviewed I would have to  
9 obviously do a page by page comparison and I wasn't  
10 anticipating--

11 Q Sure.

12 A --that. Is it something I would do in the future, provide  
13 documents in advance? Sure.

14 Q And, you probably heard me frame the issue and I think the  
15 judge kind of understands where we're going with it. We see  
16 for some reason somebody does and the name's redacted on my  
17 copy, which is disappointing, but somebody does a manual  
18 accuracy check on September 27<sup>th</sup> that produces a filter wheel  
19 error and for your reference it's--

20 A Hang on here, let me--

21 Q --page five.

22 A September 2018--

23 Q Yup. They're date stamped at the lower left-hand corner.

24 A Okay. Your date you're referring to again was September what?

25 Q September 27<sup>th</sup> is the last entry.

1 A Correct.

2 Q Okay. And then, the case 300330 purportedly analyzed Mr.

3 Finnerty's breath on November 3<sup>rd</sup>, right? So, we see in

4 October the filter wheel error that we've already discussed on

5 October 1<sup>st</sup>.

6 A Hang on. Let me find my--

7 Q Sure.

8 A Let me find October.

9 Q I just want to kind of cut to the chase for us here because--

10 A Sorry. I go from August to--I only have October.

11 Q It's there. It's page six.

12 A Okay. I'm looking at the bottom and it's dated November. But

13 that would be the conclusion I guess is when it was signed off

14 by this individual. Okay. I'm with you now. Continue.

15 Q Okay. October 1<sup>st</sup> of 2018 would have been a Monday.

16 A Okay.

17 Q Filter wheel error--

18 A Okay.

19 Q And then we have two entries where there's no accuracy check

20 test--

21 A Okay.

22 Q --inferring perhaps that the instrument took itself out of

23 service.

24 A It would have.

25 Q And then here's the big piece of this whole puzzle that we

1        need to figure out.  October 25<sup>th</sup> Andrew Clark or somebody  
2        signing Andrew Clark's name does some work on this instrument.  
3        Do you see that entry there?  
4    A    I do.  
5    Q    Okay.  And then all I've got to show for that are at 34  
6        through 37 of the exhibit.  
7    A    Page 34 and page 37?  
8    Q    Page 34 through page 37.  And, I had asked you about getting  
9        the OD-84 and the COAs for the thermometer and the simulator  
10       solution and exactly what it is that Mr. Clark would have done  
11       and whether it was done properly, do you recall that  
12       testimony?  Do you recall me asking you that?  
13    A    I remember talking about the thermometers and discussion about  
14       Mr. Clark, but exactly--that's all.  
15    Q    Okay.  Carry on?  
16    A    Sure.  
17    Q    Okay.  Because whether or not what he did was done correctly  
18       is kind of the key question for us if we're talking about a  
19       test that was November 3<sup>rd</sup>, do you follow me?  
20    A    I do.  
21    Q    Okay.  And, you said you can find at your office the OD-84  
22       log--  
23    A    Well, I think you've already got it.  I think this is--I  
24       believe that's what you have here.  You have that log.  
25    Q    Nope.  The OD-84 log is something different.



1 A All right. Talk English to me here. The police and all their  
2 bazaar numbers I'm--Like I said, I'm a toxicologist, I'm  
3 learning this.

4 Q No, it's fine. I mean, I know--

5 A Yeah.

6 Q --you're just learning the terms.

7 A I'm learning the Michigan system.

8 Q An example, let me just mark these. Just so you can see them  
9 for your future--

10 A That's fine. I was thinking that the OD-84 was the actual  
11 breath test result from an individual.

12 Q OD-80.

13 A That's the OD-80? Okay. I need a cheat sheet.

14 Q That part of this is not really that big of a deal. You'll  
15 figure that out. The name for it is DMT Evidential Breath  
16 Tester Inspection Report.

17 A Okay. That's fine.

18 Q Have you talked to Andrew Clark about instrument 300330 at the  
19 MSUPD?

20 A In regard to this issue? No, I have not.

21 Q Okay. You started in January?

22 A End of January.

23 Q You were going through training as one would expect?

24 A Yeah. A lot of HR stuff.

25 Q At what point did you start, shall I say, getting your hands

1 dirty with the instruments around the state of Michigan?

2 A Almost immediately. One of the tasks I was assigned through  
3 the command staff would be to evaluate the program, get an  
4 idea what we are doing and how we stand or how the program  
5 stands compared to everybody else. So, almost immediately I  
6 started looking at data trying to figure out what's going on?  
7 What checks are being done? What checks are not being done?  
8 How the paper trailed? How are things filed? Learning the  
9 numbers as we have referred to here, the 33, the 80, the 84,  
10 all these things. I would much prefer we just use the actual  
11 title. The Accuracy Check Log instead of referring to the  
12 number but they didn't ask me. Those types of things.

13 Q You've met Andrew Clark I take it?

14 A I have. I've had a number of phone conversations and phone  
15 meetings with all of the technical staff telling them--  
16 informing them of new procedures, how things are being done,  
17 how I would like things to be done, how I would like data  
18 presented to me. That type of thing.

19 Q You testified earlier about new service techs. We've got Mr.  
20 Clark replaced Mr. Gier on the eastern side of the state,  
21 right?

22 A I don't know. That was before my time.

23 Q Okay.

24 A I know there was a changeover. You mentioned Gier. I have  
25 seen that name on some documents, where he was I don't know.

1 Q And, Mr. John replaced Mr. Haverdink on the western side of  
2 the state?  
3 A I'll take your word for it.  
4 Q Okay. We'll get those spellings later. It would be important  
5 to know exactly how the service tech did what he or she did by  
6 looking at their records that they produced and kept?  
7 A The records could indicate exactly what was done. I'd have to  
8 go back and look at the actual OD-84, which is I believe what  
9 you called it, the first page is typically a summary as to  
10 what's done, why they were one site, what was done--  
11 Q Right.  
12 A --it may or may not have all that information. In which case,  
13 again, I would just be reading from that document. I suppose  
14 if you really want to know what was done by Mr. Clark on what  
15 is it? October 25<sup>th</sup>. We'd have to ask him.  
16 Q I've got Exhibit D which is not admitted but it is the new  
17 version of the same DMT Evidential Breath Tester Inspection  
18 Report, but just for the record--  
19 A Okay.  
20 Q --and for the Judge's benefit, the tech is supposed to check  
21 the date and time. I'll give you a copy so you can follow  
22 along.  
23 A Yes.  
24 Q But they check the date and time, right?  
25 A Well, first of all, what you are showing me is very outdated.

1           Whether this was being used back before I got here, I don't  
2           know? This is one of the documents that I've made major  
3           changes in.

4   Q       Good.

5   A       Actually, this is not the current one either.

6   Q       You changed it again?

7   A       I have, yes.

8   Q       Okay. So then, if you would look at D and tell me what's  
9           different, what's been removed, what's been added?

10  A       At D, which one is D?

11           MS. TRIPI: Your Honor?

12           MR. NICHOLS: You're holding it.

13           THE WITNESS: All right. Nothing is labeled.

14           MS. TRIPI: Your Honor? I do have an objection. I  
15           haven't received a copy of this. I'm not sure what they're  
16           speaking to? So, I would like to at least be present.

17           MR. NICHOLS: She can have mine.

18           THE COURT: Okay. This is--

19           MS. TRIPI: Thank you.

20           THE COURT: --Exhibit D, proposed Exhibit D?

21  BY MR. NICHOLS:

22  Q       I just want to illicit the testimony of what the--Well,  
23           October 27, 2018, what the service tech was supposed to do to  
24           repair the instrument, if this witness knows? He may not know  
25           because he was not here until January 2019.

1 A Correct. I could not say exactly what action was taken. With  
2 a filter wheel error there could be a number of things that  
3 were causing it. There could be a number of solutions.  
4 Obviously, the technician who goes out to the site, Mr. Clark,  
5 would be tasked with finding out whatever the issue is and  
6 resolving it. And again, he would be the one. I could not  
7 tell you.

8 Q Right. Okay. Sergeant Gettl would be the person who at that  
9 point in time was in charge of the Alcohol Enforcement Unit,  
10 is that correct?

11 A Again, before my time--

12 Q If you know?

13 A --I couldn't say.

14 Q That's okay. Yeah, that's okay.

15 THE COURT: So just as a point of reference for me,  
16 October 1<sup>st</sup> was a Monday and there was the filter wheel issue.  
17 Would there have also been standard checks on Monday the 8<sup>th</sup>,  
18 Monday the 15<sup>th</sup>, Monday the 22<sup>nd</sup>, and Monday the 29<sup>th</sup> all of  
19 which were before this defendant's arrest?

20 MR. NICHOLS: And, that's a big question.

21 THE WITNESS: I think I can answer that.

22 BY MR. NICHOLS:

23 Q Okay.

24 A When there is a filter wheel error the instrument is going to  
25 go out of service. It takes itself automatically, it goes

1 into a different version of software. The only way it can be  
2 returned to service is by a technician coming and entering the  
3 appropriate password and taking the appropriate steps to, one,  
4 put it back into service and, two, logically fix whatever  
5 caused the problem to begin with.

6 THE COURT: And it won't go back into service unless  
7 the issue is resolved satisfactorily according to the tests--

8 THE WITNESS: Correct.

9 THE COURT: --that calibration test?

10 THE WITNESS: Right.

11 THE COURT: And then, would there have been a  
12 standardized Monday calibration test for all of the weeks  
13 after Monday the first and up until and including October 29<sup>th</sup>?

14 THE WITNESS: On the 29<sup>th</sup>--The technician is there on  
15 October 25<sup>th</sup> and puts it back into service and that's what was  
16 on that--

17 THE COURT: So, on the 29<sup>th</sup> is--

18 THE WITNESS: On the 29<sup>th</sup> there would be. Prior to  
19 that between the dates when the instrument goes down in  
20 service for the filter wheel error there would not be any  
21 results because the instrument is out of service.

22 THE COURT: But, on the 29<sup>th</sup> it would be--

23 THE WITNESS: After it goes back into service there  
24 would be.

25 THE COURT: And, do you have data that shows that

1       it's back in service and that it's functioning accurately?

2               THE WITNESS: Yes.

3               MR. NICHOLS: May I approach? I've got a few extras  
4       here.

5               THE COURT: All right. And then, what about on  
6       November 5<sup>th</sup>? So, we've got the Monday before the defendant's  
7       test and the Monday after the defendant's test. Was the  
8       machine functioning accurately at that period of time?

9               THE WITNESS: It was.

10              THE COURT: Okay.

11              THE WITNESS: Now they are really out of order.

12              THE COURT: And those are standard Monday tests that  
13       are just run automatically by the machine with no technician,  
14       correct?

15              THE WITNESS: Correct.

16              MR. NICHOLS: I've tendered to the bench Exhibit A,  
17       that's the October log. And so, the \$65,000 question is, what  
18       was done on the 25<sup>th</sup> and I think we need Mr. Clark to explain  
19       that and whether he did it correctly.

20              THE COURT: Or is that a \$10,000 question because  
21       this witness has testified the machine would not have gone  
22       back into service unless it was working accurately and had  
23       been repaired.

24              MR. NICHOLS: And part of that is, exactly--And,  
25       that's why I was getting into with the witness what's supposed

1 to be done during the 120-day? The records we have shown that  
2 one of, at least one of the steps in returning that instrument  
3 to service is an RFI check, radio frequency interference.  
4 This came up in that trial--

5 THE COURT: In the trial, mmhmm.

6 MR. NICHOLS: --six weeks ago. What we have and  
7 suggested was not done, at least not done correctly. Now, the  
8 systems summary reports data should tell us unequivocally what  
9 was done and what wasn't done on October 25<sup>th</sup> and frankly for  
10 that matter, well I guess October 25<sup>th</sup> would be the--when the  
11 tech came.

12 THE COURT: But I think he just testified, correct me  
13 if I'm wrong, that on October 29<sup>th</sup> an accuracy test was done  
14 and I'm looking at it right now with a .0--

15 THE WITNESS: Right.

16 MR. NICHOLS: Right. And, Your Honor--

17 THE COURT: --8 standard.

18 MR. NICHOLS: --I absolutely understand your point  
19 and I've got a few more questions for this gentleman on that  
20 score. But I just want to make sure that we took a little  
21 break because I--

22 THE COURT: Okay.

23 MR. NICHOLS: --want to hone in on where the--

24 THE COURT: And, you've got the actual tickets here  
25 that show the accuracy results on the Monday before Mr.



1 Finnerty was tested and the Monday after he was tested, right?

2 MR. NICHOLS: Correct. And, if you look at--

3 THE COURT: And, it looks--It appears to be--

4 MR. NICHOLS: --October--

5 THE COURT: --operating accurately or within the  
6 range 077--0761, 077--the target was 0773 and it was operating  
7 at 0761, right?

8 MR. NICHOLS: You're looking at the 29<sup>th</sup>, Your Honor?

9 THE COURT: Yup.

10 MS. TRIPI: Your Honor, I'd like to state for the  
11 record that there seems to have been a request by defense  
12 counsel to have the technician there but here we have an  
13 expert who has reviewed the data, looked to see whether or not  
14 it's possible that the machine was in working order based off  
15 of the data concluded, and this appears to be a fishing  
16 expedition for defense counsel to not be able to clearly  
17 articulate what went wrong with the test. There is an  
18 accuracy check test that shows that it's within the proper  
19 deviation and several accuracy check tests that show that was  
20 within the proper deviation.

21 THE COURT: There certainly are--there is a test  
22 before and a test after Mr. Finnerty, but I think that the  
23 defense is entitled to explore what happened on the 25<sup>th</sup>. It  
24 appears to the Court and it certainly could be argued by the  
25 prosecution at the trial that the machine was brought back

1 into service, that it attained accuracy shown by these two  
2 tests that I'm looking at, and it's probably a better idea if  
3 Technician Clark actually testifies about what he did. I  
4 think it all goes to the weight since there was an accuracy  
5 check test done after the filter wheel error and before Mr.  
6 Finnerty's test and then another one after Mr. Finnerty's test  
7 that showed it was working properly. But I think that the  
8 defense counsel is entitled to explore any inaccuracies or  
9 issues with regard to this instrument since it is the  
10 instrument that we are relying on. Although, I will note that  
11 at a .13 this witness testified earlier that if a test is  
12 close to the line these accuracy tests can--Let me see if I  
13 can specifically reference that. That they become even--That  
14 that valid measurement becomes even more important. Here they  
15 are what? Thirty-five, 40 percent above the legal limit,  
16 allegedly, so I don't see anything in any of these tests so  
17 far that show this machine was that inaccurate. But--but I  
18 think he's entitled to continue to explore that. So, you can  
19 continue Mr. Nichols although I'm not sure that this witness  
20 is going to be able to help you out because he's not Mr. Clark  
21 and he wasn't here in October of '18 and I think you've got to  
22 get Officer Clark or Mr. Clark or Dr. Clark, whoever it is--

23 MR. NICHOLS: I don't think he's a sworn police  
24 officer.

25 THE COURT: Okay.

1 MR. NICHOLS: I don't know. I have never met the  
2 man.

3 THE COURT: Have you tried to subpoena him?

4 MR. NICHOLS: I tried to subpoena his boss, Sergeant  
5 Gettl. She--

6 THE COURT: Right. And, I read that email exchange.

7 MR. NICHOLS: Yeah.

8 THE COURT: I think Katelyn was copied on them.

9 MR. NICHOLS: But I do have--I agree with Your Honor.  
10 I would have just a couple of questions for witness Fondren--

11 THE COURT: Okay.

12 MR. NICHOLS: --on a couple of things he's testified  
13 about before that I think might help us a little bit.

14 BY MR. NICHOLS:

15 Q You've testified previously and this is kind of the general  
16 area that you can calibrate and do calibration checks on  
17 instruments but that tells you how the instrument performs  
18 when you dose it with a known solution like dry gas or a wet  
19 bath simulator, right?

20 A (inaudible)

21 Q And then there's a human contribution with every breath test,  
22 the human factor, that adds a different type of variability to  
23 a test, is that also correct?

24 A It does.

25 Q All right. Since you've taken over the Michigan program, did

1       you notice that RFI checks were not being performed correctly  
2       by the 120-day service techs?

3   A    Going back in history I noticed that at some point and I  
4       noticed the same reference that you did. Back in November, I  
5       believe it was November--October 25<sup>th</sup> on the OD-84 sheet there  
6       is a reference that an RFI check is completed but there wasn't  
7       objective evidence, what's used in the world of accreditation  
8       we say objective evidence, a test record, a printout if you  
9       will, that that actually was completed. So, I did notice  
10      that. Going forward have I seen other instances where RFIs  
11      have not been? No, I have not. I have seen them being done.  
12      As I reviewed documents that the technicians are submitting to  
13      the MSP those are some of the things that I'm looking at.

14   Q    Okay. Now, I appreciate that answer, but I want to make sure  
15      I understand something because you made reference to OD-84 and  
16      maybe we are getting off on a nomenclature thing. Do you mean  
17      the OD-80 ticket? Or, what are you--were you talking about  
18      the example that I gave you?

19   A    Correct. This is an example. One of the things that the  
20      technicians complete, which is the DMT Evidential Breath  
21      Testing Inspection Report. On this example that you have, and  
22      this is from a different instrument, from a different  
23      technician, there is a check box where it says check for radio  
24      frequency interference. And using your example which just for  
25      clarity of the record is Defense Exhibit D as in David, that

1 check box which is number seven is checked. It is in the  
2 affirmative that a check for radio frequency was completed.

3 If we go back to the instrument in question here--

4 Q I need to stop. I really apologize but I just want to make  
5 sure Judge Larkin understands this OD-84 is an exemplar, it's  
6 not from this case?

7 A Correct.

8 Q Okay.

9 A That's why I just for clarity of the record.

10 Q Yup, thank you.

11 A They would all be about the same at that particular time. In  
12 the instance here with the MSUPD instrument, Mr. Clark had  
13 indicated and had checked the box that an RFI check was  
14 completed. When I looked at the documentation that would go  
15 with that included within the data packet, I did not see that  
16 RFI, as you called it a ticket. So, again, whether or not  
17 that was done or was not done, I can't say. Obviously, I'm  
18 not Mr. Clark. I mean, just like anybody I can look at the  
19 inspection report and say, yes, the box is checked. There's  
20 no doubt about that. I can look in the paperwork that is--  
21 that I have and presumably that you have as well and say that  
22 that ticket is not included. Whether or not it was done,  
23 whether or not he still has that and never forwarded it.  
24 Obviously, he's scanning these and putting them into a PDF  
25 it's not unheard of that two pages go through a scanner at the

1 same time and it's not noticed. Again, this was back in  
2 October. I wasn't here, so I did not review the data until  
3 now.

4 Q Okay.

5 A Again, we'd have to ask Mr. Clark.

6 Q Let me just--

7 A I don't know.

8 Q --take D as in David back from you.

9 A Sure. I've kind of separated the pages because you have some  
10 other miscellaneous pages in here as well.

11 Q Okay. We'll put them back together. The--There's a way to go  
12 into the instrument and just see the performance of the  
13 instrument. For example, on October 25<sup>th</sup> you could open up the  
14 dropdown menu and do a system summary report and see if it was  
15 done?

16 A Sure.

17 Q Okay. All right.

18 A Assuming the instrument has that data and goes that far back.  
19 I will say that the instrument is exceedingly limited in the  
20 amount of data that it stores. Potentially it would be there,  
21 we just need a date range as to what dates we're looking at  
22 and that can be provided.

23 Q The--To your knowledge and if this is something you don't feel  
24 comfortable answering because you're still kind of new here,  
25 just say the word. Everything that is listed out for the 120-

1 day accuracy--if it's a service call or it's a 120-day  
2 maintenance call, you still have to do the same steps before  
3 you certify the instrument and put it back into service.  
4 Correct?  
5 A You do.  
6 Q The RFI check, the radio frequency interference check, is one  
7 of those?  
8 A It is.  
9 Q Based on everything we've covered here today I take it you  
10 don't want to change anything in your testimony, right?  
11 A No.  
12 Q Okay. One of the things we covered when we went through the  
13 job description when you applied for this job was ensure  
14 compliance with the rules of breath testing, correct?  
15 A Sure.  
16 Q And, you testified that you've got to follow those rules to  
17 have a valid breath test, right?  
18 A There are administrative rules that are defined.  
19 Q Okay. I have just a couple more questions about the data that  
20 you plotted--  
21 A Sure.  
22 Q --they are 2 and 3, prosecutor's 2 and 3. On 2, did you do an  
23 uncertainty calculation for your data points?  
24 A No you wouldn't. What you'd--  
25 Q The answer is no?

1 A To--No, this would not be suitable data to make that  
2 determination.  
3 Q Same question for 3? Same answer for 3?  
4 A Correct. It would be inappropriate. I wouldn't think you  
5 could do uncertainty with this data.  
6 Q I asked you a series of questions about at least 2, which  
7 would be the simulator, the wet bath simulator data, about lot  
8 numbers and expirations dates, the certificates of analysis,  
9 likewise for 3, you know the lot number for the dry gas  
10 canisters that were used?  
11 A If you look on the actual printouts, the raw data, it lists  
12 the lot number.  
13 Q Okay. That's not what I asked you though, I appreciate that  
14 answer but do you know?  
15 A Do I know it off the top of my head? No, I would have to look  
16 at the page.  
17 Q You could get it?  
18 A I believe you have it right here. All we have to do is look  
19 here.  
20 Q Great. Great point. I'm glad you brought that up.  
21 A I typically don't memorize things that I can simply look up.  
22 There wasn't a tank change after April 2018. So, any time  
23 after that we can look at 4/30/2018 we see a lot number of the  
24 dry gas of 875088.  
25 Q I'm looking at the OD-33, how come the lot number is not on



1 the OD-33s? I thought it was supposed to be?

2 MS. TRIPI: Your Honor, I would object because that  
3 refers--That question speaks to a question that cannot be  
4 answered by this particular witness. He was not responsible  
5 for the maintenance of the logs and therefore, he would have  
6 no direct knowledge of--

7 THE COURT: He might have been trained since--

8 MS. TRIPI: --why something--

9 THE COURT: --he started. I mean, if you know and if  
10 you don't know--

11 MR. NICHOLS: And, I'm not. Yeah. I will open that  
12 question, if you know? If you don't know that's fine too.

13 THE COURT: And all questions obviously should only  
14 be answered if you know the answer to them. You've done a  
15 good job so far of saying I don't know it happened before I  
16 got here.

17 THE WITNESS: Agreed. Thank you. And, looking back  
18 through the pages the current OD-33 I do believe has the lot  
19 number up on the top and it's also reflected, as I said, on  
20 the original data, the raw data. That's why I always go back  
21 to the raw data because we're looking at a transformation, a  
22 data transformation from point A to point B and obviously  
23 errors do occur. So, raw data printed by the instrument is  
24 always better. These particular ones, I believe, are older  
25 forms. I believe the form has been revised. I don't know

1           when it was revised. But I think the newer one does have the  
2           serial number on it.

3 BY MR. NICHOLS:

4 Q       We had a concern about that. I thought that the rules  
5       required the lot number on the log.

6 A       I don't believe there is any requirement for what the log is  
7       supposed to contain other than the--it's done at 4 a.m.  
8       automatically or that it can be done automatically by the  
9       instrument, it is recorded on a log and I do think they make a  
10       reference to the actual unique number, you know, OD-33.

11 Q       Are we getting beyond here--

12 A       I have to look through the administrative rules. It's not  
13       something that I have committed to memory.

14                 THE COURT: And those 4 a.m. tests, again, that's 4  
15       a.m. on Monday mornings?

16                 THE WITNESS: Correct, it is.

17 BY MR. NICHOLS:

18 Q       Okay. Can I have my exhibits back and I'll get those pages  
19       sorted.

20 A       Yeah. Just for reference, you've got some PBT pages, which I  
21       have no idea--

22 Q       We just gave everything we got. All right. So--

23                 THE COURT: This has not been admitted, right?

24                 MR. NICHOLS: I think it has been?

25                 THE COURT: Exhibit D?

1 MR. NICHOLS: Oh.

2 MS. TRIPI: No, Your Honor.

3 MR. NICHOLS: That's A, Your Honor.

4 THE COURT: Oh, this is A. Okay.

5 MR. NICHOLS: Yeah, that's been admitted.

6 THE COURT: This was A? Oh, right. We were only  
7 looking at that time pages 34, 35, and 36. Okay.

8 MR. NICHOLS: Okay.

9 THE COURT: All right.

10 BY MR. NICHOLS:

11 Q I've--Were you the one that went to Meridian Township and got  
12 the summary report data?

13 A I did.

14 Q Okay. How long did that take you?

15 A Counting the drive? Probably about an hour or so.

16 Q Okay. Could you do that for the MSU instrument?

17 A One, I don't even--That's not normally something that I do. I  
18 was going out to see what an instrument site looked like. Can  
19 I do it? Sure. Would I have access to the MSUPD instrument?  
20 They probably are not going to let me in because they don't  
21 know me.

22 Q I see that--

23 A I don't even know where it is?

24 Q You see that good-looking guy in the stripes over there,  
25 that's your gatekeeper.

1 A If that individual allow--Allows me to the instrument--

2 MS. TRIPI: Your Honor, objection for relevance.

3 THE COURT: We're doing a little discovery--

4 MS. TRIPI: He's trying to make him go on a field  
5 trips--

6 THE COURT: --here and we're doing a little bit--

7 MS. TRIPI: --to different sites and that's not part  
8 of Mr. Nichols' job.

9 THE COURT: We'll let you guys work this out through  
10 the normal discovery process.

11 MR. NICHOLS: And at this point, I mean, I want to be  
12 able to get some objective data about what happened on the 25<sup>th</sup>  
13 of October.

14 THE COURT: Mmhhh. True.

15 MR. NICHOLS: So, that's all I have. Other than  
16 nobody objected that I called Sergeant Porter good looking.

17 THE COURT: Any redirect, Ms. Tripi?

18 MS. TRIPI: Yes, Your Honor.

19 REDIRECT EXAMINATION

20 BY MS. TRIPI:

21 Q Regarding the exhibit--

22 THE COURT: And how many more witnesses do we have in  
23 terms of the court's scheduling because I have a probation  
24 violation arraignments at one, a probation violation  
25 sentencing at 1:20 and then starting two o'clock through eight

1 o'clock tonight I have informal hearings today and then at  
2 night court. So, today is done.

3 MS. TRIPI: Yeah.

4 THE COURT: As of--In 15 minutes from now, 17 minutes  
5 from now.

6 MS. TRIPI: Your Honor, I have a very short amount of  
7 redirect and then we would intend to call Sergeant Porter who  
8 is the record keeper for MSUPD regarding the DataMaster logs.

9 THE COURT: Unfortunately, that's probably not going  
10 to happen today.

11 MS. TRIPI: Yes, Your Honor. So, I believe there  
12 just would be a new date in the future.

13 MR. NICHOLS: I think we've admitted the logs. I  
14 don't know that we need Sergeant Porter.

15 MS. TRIPI: Your Honor, I would actually disagree  
16 because there's different testimony if he's talking about the  
17 consistency of what he's done versus someone who has actual  
18 knowledge of working directly with the machine in question.  
19 So, I would disagree.

20 THE COURT: Okay. All right.

21 BY MS. TRIPI:

22 Q Earlier defense counsel showed you the page that was dated  
23 October 2018 where there was some sort of decommission,  
24 correct? Regarding the evidential breath testing?

25 A That's fine.

1 MR. NICHOLS: I didn't--I didn't understand that  
2 question. Could you just repeat it?

3 THE COURT: Decommission? It was taken out of  
4 service.

5 MR. NICHOLS: Okay. All right. Thank you.

6 THE WITNESS: Taken out of service.

7 BY MS. TRIPI:

8 Q And, do you see--What is the date that the technician Arnold  
9 (sic) Clark is supposed to have been there to work on the  
10 machine?

11 A The document that you've presented to me, the OD-33, indicates  
12 the date to be October 25<sup>th</sup>.

13 THE COURT: And just for the record, I think it's  
14 Andrew Clark not Arnold Clark.

15 MS. TRIPI: Oh, I apologize.

16 THE COURT: It's okay.

17 BY MS. TRIPI:

18 Q Andrew Clark. And, what happened--What were the results on  
19 the October 29<sup>th</sup> of the accuracy check?

20 A Again reading from this, about what we would expect. The  
21 target value being .0773 and the actual value being .0761,  
22 which due to the quick math is .0012 lower than the target  
23 value. Which if we would go back to the graph that continues  
24 in the same direction, so obviously whatever was done on the  
25 25<sup>th</sup> has no great change in the calibration.

1 Q Do you see that--Based off the data that you received, do you  
2 believe that the DataMaster was in proper working order based  
3 off of the calibrations and data that you looked at?

4 A Taken all of the data in as a whole? Yes. It's my opinion  
5 that it was operating correctly.

6 MS. TRIPI: Thank you, Your Honor. No further  
7 questions. I just would like to say that if Your Honor--  
8 According to *People v Valeck* 223 Mich App 48 (1997)--

9 THE COURT: I'm sorry. Can you give me that cite  
10 again?

11 MS. TRIPI: Sure. 223 Mich, dot, App--

12 THE COURT: You don't have to do the punctuation. I  
13 know Mich App.

14 MS. TRIPI: Sure. Sorry, Your Honor.

15 THE COURT: I just want the volume and the page.

16 MS. TRIPI: 997

17 THE COURT: 997?

18 MS. TRIPI: 1997. Sorry. It's 48 then from 1997.

19 THE COURT: 223 Mich App page number?

20 MS. TRIPI: 48.

21 THE COURT: 48, got it. Okay. Thanks.

22 MS. TRIPI: Your Honor, it was found that it's there  
23 for the Court to order defense counsel to be allowed to  
24 inspect the breath test instrument when there's a generalized  
25 allegation that the type of instrument is unreliable as

1       opposed to the specific instrument used. Your Honor, there  
2       has been plenty of testimony to show that based off the  
3       overall data that if there wasn't--when there was an issue  
4       that it was corrected and if it had not been corrected it  
5       would not have been able to enter into a mode in which it  
6       could offer results and data. And for this reason, the People  
7       are asking that the Court consider denying proceeding with  
8       this motion--

9               THE COURT: Oh, I thought you had another witness  
10       that you wanted to present?

11              MS. TRIPI: Well, Your Honor, we are asking for the  
12       consideration because there's the new date that's being  
13       speculated but we're just stating our objection for the  
14       equivalent defense attorney looking into the allegations  
15       without having anything to sustain it. There is no issue that  
16       shows that there is a subsequent error message after that  
17       time.

18              THE COURT: Wait. I'm not sure--I'm not sure what  
19       you're asking the Court for now? Are you--

20              MS. TRIPI: Your Honor, I'm just stating the case law  
21       so that the Court would continue to have that in line  
22       regarding continuing the deep dive into the DataMaster and  
23       whether or not it's a fishing expedition that's almost  
24       parallel to the (inaudible) hearing, Your Honor, regarding the  
25       validity of the scientific testing method.



1 THE COURT: Okay. How much time do you think you  
2 need with Sergeant Porter?

3 MS. TRIPI: Your Honor, I don't believe I would take  
4 very long--

5 THE COURT: You can step down by the way.

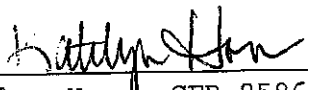
6 (At 11:46 a.m., witness excused)

7 (At 11:46 a.m., Excerpt of proceeding requested has  
8 concluded)

1 State of Michigan )  
2 )  
3 County of Ingham )  
4

5 I certify that this transcript, consisting of 97 pages is a  
6 complete, true, and accurate transcript to the best of my ability  
7 of the proceedings and testimony taken in this case on Tuesday,  
8 July 16, 2019.

9  
10 Dated: October 20, 2019

  
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