

STATE OF MICHIGAN

65B JUDICIAL DISTRICT COURT (ITHACA, MICHIGAN)

PEOPLE OF THE STATE OF MICHIGAN,

File No. 19-1242-SD

v

EMMA LEE-SUNSHINE O'TOOLE,

Defendant.

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DAUBERT MOTION HEARING

BEFORE THE HONORABLE STEWART D. MCDONALD, DISTRICT JUDGE

Ithaca, Michigan - Monday, February 24, 2020

APPEARANCES:

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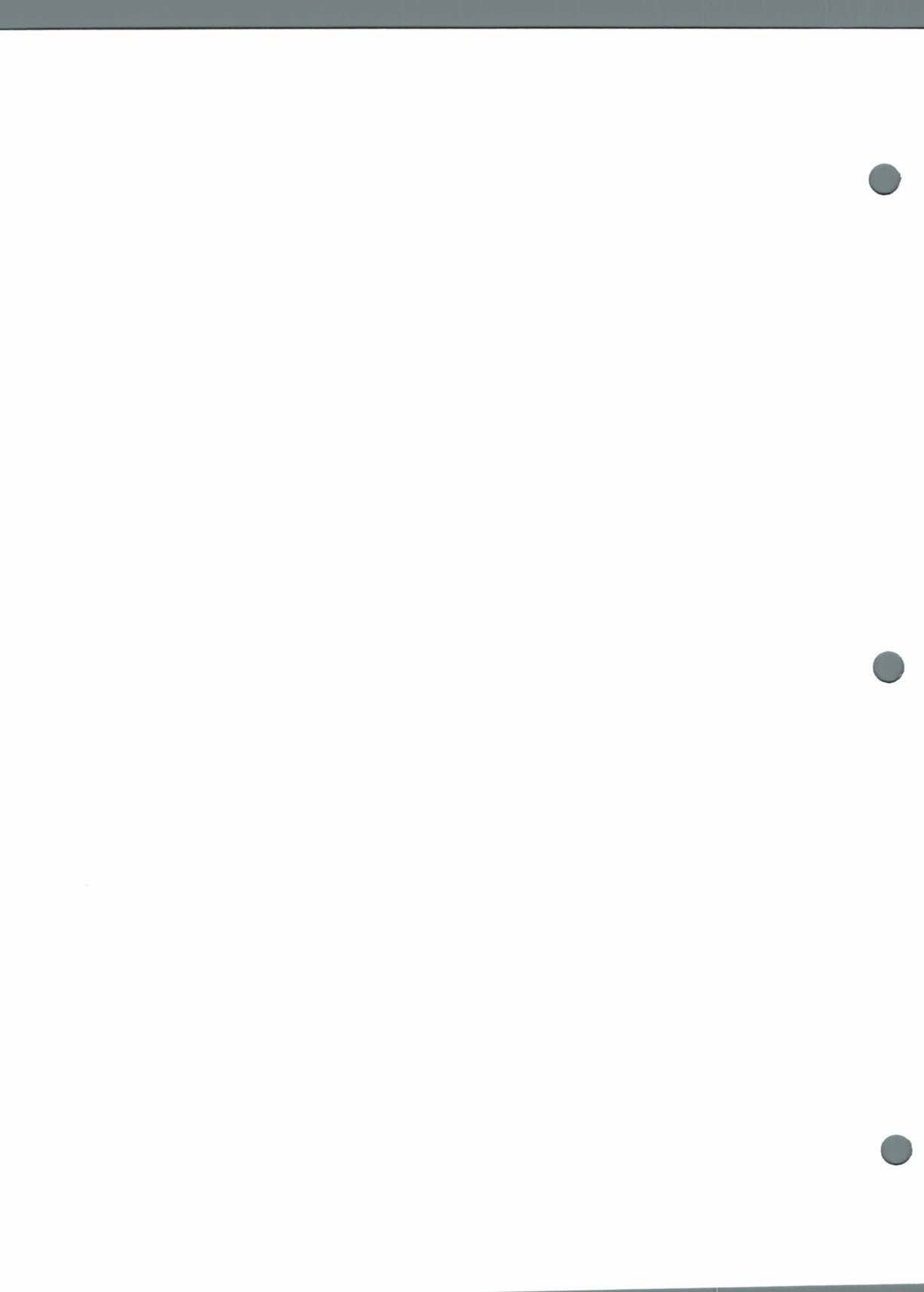


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1 Ithaca, Michigan

2 Monday, February 24, 2020 - 2:35 p.m.

3 THE COURT: And we're on the record, then, in the  
4 matter of People of the State of Michigan versus Emma Lee  
5 O'Toole -- Emma Lee-Sunshine O'Toole, File No. 19-1242. And  
6 Ms. O'Toole is present with her attorney Mr. Michael -- is it  
7 Komorn?

8 MR. KOMORN: Correct.

9 THE COURT: All right. Mr. Michael Komorn --

10 MR. KOMORN: -- good afternoon, Judge.

11 THE COURT: And also present on behalf of the People  
12 of the State of Michigan, Assistant Prosecuting Attorney,  
13 Jeffrey Hampel and Officer Christopher Drury or Sergeant  
14 Christopher Drury -- sorry I didn't mean to demote ya.

15 SERGEANT DRURY: Sir, it's alright.

16 THE COURT: With the Alma Police Department is also  
17 present. Today is the time and date set for hearing on  
18 defendant's motions. There are several motions before the  
19 Court, and I'll defer to counsel as to how they want to  
20 proceed. There's Defendant's Motion to Suppress Evidence or  
21 in the Alternative for Dismissal on the Basis of an Alleged  
22 Illegal Arrest and a brief in support of that motion. There's  
23 Defendant's Motion to Exclude Field Sobriety Tests from  
24 Evidence and a brief in support of that motion. There's also,  
25 finally, Defendant's Motion for a Daubert Hearing and a brief



1 in support of that motion. And then, finally, defendant has  
2 filed an object -- or Notice of Objection to the Introduction  
3 of Laboratory Reports at Trial under MRE or MCR 6.201(c)(2),  
4 which doesn't have to be addressed today.. And then the People  
5 have filed their combination response and brief regarding  
6 Defendant's Motion to Suppress or for Dismissal and to Exclude  
7 Field Sobriety Tests and also, then, a separate response and  
8 brief in regard to the requested Daubert hearing. Since it's  
9 the prosecutor's burden to show admissibility of evidence and  
10 since the rules of evidence don't apply under 10 -- MRE 104  
11 and 1101, let me defer to Mr. Hampel as to how you wanna  
12 proceed.

13 MR. HAMPEL: Your Honor, I don't care which group we  
14 do first. I have witnesses for both, ya know, Sergeant Drury  
15 and I have Samantha Kellogg from the Michigan State Police  
16 here to testify. I'm happy to go first with the Motions to --  
17 for Dismissal on the Basis of Illegal Arrest and their Motion  
18 to Exclude Field Sobriety Test first.

19 THE COURT: All right. What is Ms. Kellogg's  
20 testimony gonna relate to -- which motion or motions?

21 MR. HAMPEL: Hers is the Daubert hearing.

22 THE COURT: All right.

23 MR. HAMPEL: She's from the Michigan State Crime  
24 Lab.

25 THE COURT: All right. Well, since we have her here

1 why don't we take her testimony first, then, so that we can  
2 dispense with that issue and --

3 MR. HAMPEL: -- okay. Thank you. Then I would call  
4 as my first witness Samantha Kellogg from the Michigan State  
5 Police Forensic Science Lab.

6 THE COURT: All right. And, Ms. Kellogg, come on  
7 right up. And would you give us your first and last name for  
8 the record and spell both, please?

9 MS. KELLOGG: Yes. Samantha Kellogg, S-a-m-a-n-t-h-  
10 a K-e-l-l-o-g-g.

11 THE COURT: All right. Would you raise your right  
12 hand for me? Do you swear or affirm to truthfully testify in  
13 the matter now pending before the Court?

14 MS. KELLOGG: Yes, I do.

15 SAMANTHA KELLOGG

16 (At 2:38 p.m., called by Mr. Hampel and sworn by the  
17 Court, testified as follows)

18 THE COURT: All right. Go ahead and have a seat.

19 THE WITNESS: Thank you.

20 THE COURT: And, Mr. Hampel, your witness.

21 DIRECT EXAMINATION

22 BY MR. HAMPEL

23 Q Now, Ms. Kellogg, would you please tell us what your name is  
24 again and where you are employed?

25 A Yes. My name is Samantha Kellogg and I am employed with the





1 Michigan State Police Forensic Laboratory in Lansing.

2 Q And what is your position there with the laboratory?

3 A I am a forensic scientist in the toxicology unit.

4 Q Okay. And do you have a Curriculum Vitae?

5 A Yes.

6 Q And I will show you a copy and ask if this is an accurate

7 compilation of your Curriculum Vitae?

8 A Yes, this is accurate.

9 Q Is it accurate to say that your education consists as -- of an

10 undergraduate degree from Alma College and a -- with a

11 Bachelor of Science in Chemistry and Mathematics?

12 A Yes.

13 Q And that degree you received in 2013?

14 A Yes.

15 Q And, then, you have further education at the University of

16 Illinois in Chicago Illinois?

17 A Yes.

18 Q And is that a Master of Science and Forensic Science in 2014?

19 A Yes, it is.

20 Q And, then, you have some additional specialized training; is

21 that correct?

22 A Yes.

23 Q You have blood alcohol an -- analysis training program you've

24 completed?

25 A Yes.

1 Q And you've completed the Robert F. Borkenstein Course on  
2 Alcohol and Highway Safety?  
3 A Yes.  
4 Q And you've completed a THC Analysis Training Program?  
5 A Yes.  
6 Q And you've completed a Mass Spectral Interpretation Course?  
7 A Yes.  
8 Q And you've also had Expert Witness Training; is that correct?  
9 A Yes.  
10 Q And then you've also had this A-c-i-d-i-c, Neutral and Basic  
11 Drug Analysis Training Program?  
12 A Yes. Acid Neutral and Basic Drug Training.  
13 Q And you've had a LC-DOA Training Program?  
14 A Yes.  
15 Q And all of those you use as part of your training and  
16 background as a forensic scientist?  
17 A Yes, I do.  
18 Q And what are your duties, generally speaking, at the Michigan  
19 State Crime Lab?  
20 A I test blood and other bodily fluids for the presence,  
21 absence, and quantity of alcohol and drugs.  
22 Q And as a result of that, you receive samples of blood for  
23 analysis?  
24 A Yes.  
25 Q And when you receive them are you told what you are to look

1 for or do you do this on an independent basis to determine  
2 what is and what may not be present?

3 A The first thing we do with all of our cases is send it for  
4 alcohol testing and then based on that and what requests have  
5 been made by the submitting agency we determine if it needs to  
6 go on for any type of drug testing.

7 Q And then you test for other types of drug testing as the  
8 result of, ya know, possible requests for that?

9 A Yes.

10 Q And in this particular case with Ms. O'Toole you received a  
11 blood sample; is that correct?

12 A Yes.

13 Q And do you recall if it tested positive or not for the  
14 presence of alcohol?

15 A I believe it was negative for alcohol; however, I did not do  
16 that testing myself.

17 Q And did you do drug testing for the presence of THC?

18 A Yes, I did.

19 Q And did you do testing for the presence COOH?

20 A THC-COOH which we refer to as carboxy THC. Yes, I did test  
21 for that as well.

22 Q Okay. I'm going to -- I probably should have had this marked  
23 in advance, in fact, I'll have to go over here and get it  
24 marked.

25 (At 2:43 p.m., PX#1 marked)



1 I'm going to show you what has been marked as People's  
2 Proposed Exhibit No. 1. I just ask if you can identify what  
3 that is without telling us what it contains?

4 A Yes. This is the copy of the laboratory report that I  
5 prepared in this case.

6 MR. HAMPEL: I would move the admission of People's  
7 Exhibit No. 1.

8 THE COURT: All right.

9 MR. KOMORN: Well, Judge, yeah, I mean, that's the  
10 whole issue I'm -- our motion, basically, moves to keep that  
11 out based upon its lack of foundation. Doesn't meet the  
12 Daubert. I'd ask maybe the Court would wait until after the  
13 hearing until the cross-examination, maybe hold it in abeyance  
14 pending the -- I don't mind if it's looked at and/or -- or --  
15 or -- but -- but the ultimate issue I think is gonna be its  
16 admissibility but.

17 THE COURT: Okay. So what's the ultimate issue  
18 based on its admissibility? That we don't have a per se law  
19 in Michigan?

20 MR. KOMORN: That -- well, multiple reasons but one  
21 of which is that its unreliable on its face. There's a error  
22 rate --

23 THE COURT: -- why -- why does that error rate  
24 matter we don't have a per se law?

25 MR. KOMORN: Well, I mean, I can -- can we excuse



1 the witness if we're argue then? Cuz I -- I can tell ya about  
2 it I just don't want to --

3 THE COURT: -- well, --

4 MR. KOMORN: -- let's just excuse the witness --

5 THE COURT: -- you can -- you can voir dire  
6 regarding admissibility but I have to determine whether the  
7 evidence is admissible. And, of course, we know all relevant  
8 evidence is admissible and I'll determine what's relevant for  
9 admissibility purposes --

10 MR. KOMORN: -- sure. And it -- it is an issue of  
11 relevancy also.

12 THE COURT: So let me ask you this, --

13 MR. KOMORN: -- um-mum --

14 THE COURT: -- Counsel. If that report showed a  
15 result of zero THC and THC-COOH do you want it admitted into  
16 evidence in this trial?

17 MR. KOMORN: (No verbal response)

18 THE COURT: Yes or no?

19 MR. KOMORN: Well, there's no -- there would be --

20 THE COURT: -- it's a yes-or-no answer, Counsel.

21 MR. KOMORN: Say it again, Judge, I.

22 THE COURT: If this report showed -- I don't know  
23 what it shows -- if this report shows zero in terms of THC the  
24 result and zero in terms of the -- the THC-COOH the car --  
25 carboxy THC, do you want it admitted into evidence in this





1 trial?

2 MR. KOMORN: No. None of it should be admitted.

3 THE COURT: None of it should be admitted. So if  
4 she's gonna be tried for the offense of Operating While  
5 Intoxicated or under the influence of marijuana, you don't  
6 think whether or not a toxicology test that either shows the  
7 presence of THC, the active -- psychoactive ingredient of  
8 marijuana, either is or isn't present in her system, you don't  
9 think that's relevant?

10 MR. KOMORN: Well, what's -- what's relevant and  
11 better for us is that there's no -- there's no test. It can't  
12 -- it can't establish it because that's what -- it's --

13 THE COURT: -- there's no test that can establish  
14 that there's --

15 MR. KOMORN: -- no, no, no, no --

16 THE COURT: -- THC in her system --

17 MR. KOMORN: -- you're asking me about the  
18 admissibility of the report.

19 THE COURT: Okay.

20 MR. KOMORN: Zero and zero versus no report at all,  
21 I'd take no report at all. And no report according to the  
22 methods by which they're utilizing should be admitted because  
23 it doesn't meet a Daubert standard, it's not relevant, it  
24 can't validate it, there's no -- there -- there -- there's no  
25 defense of the -- the number that they put out there.



1 Furthermore, Judge, there's a -- reasons why this is which I  
2 think are quite alarming --

3 THE COURT: -- okay --

4 MR. KOMORN: -- and I wanted to cross-examine on  
5 that which --

6 THE COURT: -- well, then you can voir dire her  
7 right now then cross-examine on the admissibility.

8 MR. KOMORN: May I suggest this, Judge. The issue  
9 of admissibility of the lab report that we're discussing is  
10 one for whether it's admissible at trial, obviously, that's --

11 THE COURT: -- right --

12 MR. KOMORN: -- why we are having a preliminary.  
13 Obviously, the Court is gonna need to see it at some point but  
14 -- but I'm suggesting for purposes of the evidentiary hearing  
15 here today and for the Court to review it and understand the  
16 context which we're arguing, I don't have an issue allowing it  
17 to come in. But I'm certainly not waiving that for purposes  
18 of -- of any trial or admissibility for the jury.

19 THE COURT: Well, I'm gonna determine admissibility  
20 of this evidence at trial now.

21 MR. KOMORN: I understand --

22 THE COURT: -- at the conclusion --

23 MR. KOMORN: -- I under -- I --

24 THE COURT: -- of this hearing so that we can  
25 proceed.



1 MR. KOMORN: I understand that. I'm -- I'm moving  
2 off of my objection for you to see --

3 THE COURT: -- okay --

4 MR. KOMORN: -- at this particular time which I  
5 think the -- my objection and -- but I'm -- I wanna make it  
6 clear that, obviously, at the end of this hearing your gonna  
7 make a ruling or at the end the -- the -- you're gonna make a  
8 ruling -- I -- I acknowledge that --

9 THE COURT: -- right --

10 MR. KOMORN: -- that's not an issue. But in order  
11 for you to do so look at the, ya know, take it into evidence  
12 here for this evidentiary hearing and then -- then -- then, ya  
13 know, make your ruling but I'm not conceding its admissibility  
14 at trial. I know you rule on it but for purposes of today's  
15 hearing and today's hearing alone I don't have an issue.

16 THE COURT: Well, but today's hearing is the time to  
17 contest the admissibility of that evidence under Daubert. So  
18 if you're saying that their lab isn't accredited that they  
19 didn't follow proper scientific --

20 MR. KOMORN: -- can I -- can I cross-examine -- I  
21 mean, I --

22 THE COURT: -- sure --

23 MR. KOMORN: -- okay --

24 THE COURT: -- absolutely. Because this is the  
25 Daubert hearing and once we have it then I'm gonna determine



1 whether or not they followed proper protocol and procedures  
2 and testing requirements and whether their labs certified and,  
3 ya know, we'll go from there but so I'm not gonna bifurcate  
4 this and say okay it'll come in now but then there's gonna be  
5 another objection if we get to a trial phase and we're gonna  
6 do this all over again, we're not gonna do it twice.

7 MR. HAMPEL: May it please the Court --

8 MR. KOMORN: -- if -- if I may --

9 THE COURT: -- just a minute --

10 MR. KOMORN: -- just to try to clarify my point --

11 THE COURT: -- yep --

12 MR. KOMORN: We're here today, I understand, to have  
13 an evidentiary hearing regarding its admissibility at trial --

14 THE COURT: -- sure --

15 MR. KOMORN: -- I objected to its admissibility at  
16 trial that's the whole point of this --

17 THE COURT: -- right --

18 MR. KOMORN: -- for today's hearing I am not -- he  
19 moved to admit that right now -- right now 'cuz it's here so  
20 you can see it.

21 THE COURT: Right.

22 MR. KOMORN: And I objected.

23 THE COURT: Right.

24 MR. KOMORN: Okay. I -- I -- I --

25 MR. HAMPEL: -- Your Honor, for simplification I





1 will withdraw that and ask to admit it afterwards after I'm  
2 finished.

3 THE COURT: All right.

4 MR. HAMPEL: That will get it so we can get to the  
5 point.

6 THE COURT: All right. Go right ahead, then, we'll  
7 reserve that.

8 MR. HAMPEL: Okay.

9 BY MR. HAMPEL:

10 Q Now, you pre -- you prepared this report; is that correct?

11 A Yes.

12 Q And was this report based on another re -- report that came up  
13 with a different number than .6 THC?

14 A That report is based on the data that I've --

15 MR. KOMORN: -- objection. It's not -- it's not .6  
16 its six, if I may, just to clarify.

17 MR. HAMPEL: Not .6 -- six, I'm sorry.

18 THE COURT: Okay.

19 BY MR. HAMPEL:

20 Q Six -- it came in as six nanograms is that number based on a  
21 different number that you arrived at?

22 A Yes, sort of. That number is based on a truncated value of  
23 the full result that I received based on my analysis and the  
24 data that I processed from that analysis. So what I mean by  
25 that is there were decimal places that were omitted for the



1 report but it -- the number did begin with a six.

2 Q Do you know what that full number was before it was truncated?

3 A I believe it was 6.92 but I could be a little bit off with

4 that.

5 Q Okay. So --

6 MR. KOMORN: -- I -- I object just to the

7 speculative nature of that.

8 BY MR. HAMPEL:

9 Q Do you have an exact with you?

10 A Yes, I do.

11 Q Could you look and see?

12 A Yes. Yes, the exact number was 6.92.

13 Q So the actual number rather than a six nanograms was much --

14 much closer to a seven nanograms; is that correct?

15 A Yes, 6.92 is closer to seven than to six.

16 Q Now, would you explain what error rate is? It could be also

17 be an uncertainty measurement?

18 A Error rate is something that refers to more of a manufacturing

19 setting and that tells them how far off your product is

20 allowed to be from the specifications. What we use is

21 measurement uncertainty and that tells you if the analysis

22 were to be repeated it gives you a range in which you would

23 expect statically those results to fall.

24 Q Now, do you know what that percentage currently is be -- is

25 used in Michigan -- do you know that?



1 A I -- I know what it was for the time at which I did my  
2 testing.

3 Q What was that?

4 A At that time it was 24 percent for THC.

5 Q So does that mean that the .6 or not a point I keep -- I keep  
6 having trouble with the decimal -- 692 if you multiplied it by  
7 24 percent and added it to 692 you would come up with a number  
8 of eight?

9 A The actual full number would be 8.5808.

10 Q And if you subtracted 24 percent from 692 what would the low  
11 number be?

12 A It would be 5.2592.

13 Q So the actual THC in this particular person's blood would  
14 range from that low of that five number what you said to -- to  
15 a high of the high number which you described; is that  
16 correct?

17 A Yes. If the analysis were to be repeated, I would expect it  
18 to fall within that range.

19 Q So will you repeat those high and low numbers for the Court,  
20 please?

21 A Yes. It is 5.2592 to 8.5808.

22 Q So it would fall within that range?

23 A Yes.

24 Q And you're not testifying in any way that that amount of THC  
25 in any way impaired Ms. O'Toole; is that correct?



1 A I have no idea if that would be impairing to her or not.

2 Q You're just showing that that is the range of the marijuana  
3 that would be within her system?

4 A Yes. If I were to repeat this test that is the range I would  
5 expect to get a result within.

6 Q Now, in alcohol testing that error rate is listed on your  
7 report; is that correct?

8 A The measurement uncertainty is, yes.

9 Q And so if it was whatever, hypothetically, for alcohol 24  
10 percent that error rate would be on an -- an alcohol report?

11 A It would list something like the measurement uncertainty range  
12 is plus or minus say .010 which then you can add that and  
13 subtract it from the result to get that range.

14 Q And just like you did now for the marijuana?

15 A Yes.

16 Q Now, is there a reason that you, ya know, do not use it when  
17 you're reporting marijuana, but you do for alcohol?

18 A Yes. That is based upon Michigan having a per se limit for  
19 alcohol so the actual amount that is present is relevant to  
20 whether a person is over the limit or not.

21 Q So that a defense attorney seeing a result of .8 in theory  
22 could take that error rate which is reported and subtract from  
23 that .8 to get a number that potentially would be below .8?

24 A Yes.

25 Q Okay. But with marijuana it's not recorded because there is





1 no per se limit?

2 A That's correct.

3 Q In any way does that change the result of this testing?

4 A No. My result is accurate.

5 Q Now, the Michigan State Forensic Science Division are they --

6 is that laboratory accredited?

7 A Yes, we are.

8 Q Would you explain the accreditation?

9 A We are accredited by ANAB it was formerly ASCLD/LAB, but ANAB

10 has since absorbed that organization.

11 Q Do you know what ANAB, by chance, stands for?

12 A It stands for a bunch more acronyms, honestly.

13 Q Okay. If you don't know that's okay. Is that a national

14 accreditation service?

15 A Yes.

16 Q Does it accredit both public and private laboratories?

17 A I believe it does.

18 Q And has the Michigan -- in recent years or since you've worked

19 for within your knowledge, has the Michigan State Crime Lab

20 ever lost its accreditation?

21 A No, we have not.

22 Q And so based on your education, your knowledge, your

23 experience -- no, I wanna change that question. About how

24 many marijuana tests do you personally perform in a year?

25 A I'm not sure exactly in a year. I think I did about 1300



1 hundred last year, but I've done about 5600 hundred total in  
2 my career.

3 Q And this lab report falls within the norm of all of the other  
4 reports that you have prepared?

5 A Yes. There was nothing out of the ordinary about this test.

6 Q Have you ever done tests where the result is zero nanograms of  
7 marijuana when asked to look for marijuana?

8 A I have done testing on samples where there is no THC present,  
9 yes.

10 Q Okay.

11 MR. HAMPEL: Your Honor, I would move the admission  
12 at this time of People's Exhibit 1.

13 THE COURT: We're gonna give defense counsel a  
14 chance to voir dire the witness on the admissibility but go  
15 right ahead, Counsel.

16 MR. KOMORN: Is he -- are you done?

17 MR. HAMPEL: Yeah.

18 MR. KOMORN: Okay. You're done with your questions?

19 MR. HAMPEL: I'm done.

20 MR. KOMORN: Can I get that -- in -- in your motion  
21 that -- the exhibit that you presented, ya know, the -- not  
22 this but the -- in your response to that motion there was an  
23 exhibit that you attached.

24 MR. HAMPEL: That was one of them I also attached  
25 this one.



1 MR. KOMORN: Let me see. Do you mind if I show her  
2 this?

3 MR. HAMPEL: No. Go ahead. I have no objection to  
4 you using that document as long as I get it back, we're good.

5 MR. KOMORN: Thank you. Of course -- of course.

6 VOIR DIRE

7 BY MR. KOMORN:

8 Q So you've been working with the Michigan State Police Forensic  
9 Science Division for how long?

10 A About five years.

11 Q Okay. And you were hired in after undergrad; is that right?

12 A I was hired after grad school.

13 Q After grad school?

14 A Yes.

15 Q And you did your grad school where?

16 A University of Illinois at Chicago.

17 Q Okay. And your official title is -- is -- is what?

18 A I'm a forensic scientist.

19 Q Okay. You do the testing; do you do any administrative  
20 activities at the lab?

21 A What do you mean exactly?

22 Q I mean, there's people within the lab that do some of the  
23 administrative functions or team leaders or head of the la --  
24 the specific lab that you're at or is your role that of a  
25 testing -- more of a testing job?



1 A Yes. So I primarily do the analysis and write reports and  
2 testify about my findings in court. I don't have any sort of  
3 manager type role. I'm not in charge of any sort of specific  
4 tasks just testing cases, primarily.

5 Q All right. So after undergrad you were hired in to work for  
6 the -- the job you currently have; is that right?

7 A No. I went to undergrad and then grad school.

8 Q After grad school, I'm sorry.

9 A Yes.

10 Q Then -- then -- then started work at -- and you haven't worked  
11 for any other agencies; is that right?

12 A I had an internship at the Illinois State Police Lab but not  
13 as a full-time employee, no.

14 Q In your career, after -- your education has been exclusively  
15 with the Michigan State Police?

16 A Yes.

17 Q And that is who writes your checks? You get a check from the  
18 Michigan State Police; is that right?

19 A I believe it just says State of Michigan but, yes.

20 Q Okay. And were you involved with the accreditation process  
21 this last time the state got -- the state lab got accredited?

22 A I believe I was working there at the time, but I did not have  
23 any particular interaction with the accreditation process.

24 Q All right. So when you speak about whether or not they --  
25 there's been issues in the past about the accreditation can



1           you say that with any kind of specific knowledge?

2   A       I know we have not lost our accreditation at any point but  
3           beyond that I don't have a lot of more in depth knowledge  
4           about it.

5   Q       Are you aware that when the review comes up there's issues  
6           that have been pointed out and points that need to be fixed  
7           within the lab. Have you been made aware of that?

8   A       Yes.

9   Q       Okay. And those would be things that would not be  
10          internationally accredited compliant at the time that the  
11          review was done in certain specific changes need to be made.  
12          You're familiar with that as a part of the review process?

13   A       As a general process yes, I am.

14   Q       Okay. Are you -- do you know when the lab was last  
15          accredited?

16   A       I want to say it was 2016 but I'm not sure on that.

17   Q       And I don't want you to speculate. At that -- at that time  
18          were you -- were you working there at that time?

19   A       In 2016, yes.

20   Q       All right. Were you made aware of or was it brought to your  
21          attention what, if any, issues had come up with the  
22          accreditation in that -- that timeframe?

23   A       I cannot recall.

24   Q       All right. Specifically, do you have any recollection about  
25          uncertainty measurements as being an issue?

1 A I know there was conversation about that at some point, but I  
2 don't know exactly what it was.

3 Q Okay. Now, have you observed or seen the letter written by --  
4 you're not -- by Nicholas Filingher -- Fillinger?

5 A Yes, I have.

6 MR. KOMORN: And, if I may, can I mark this?

7 THE COURT: Go right ahead.

8 (At 3:02, p.m., DX-A marked)

9 BY MR. KOMORN:

10 Q I -- I'm gonna hand you this its marked Defense Exhibit A, I  
11 believe. Is that a document that you're familiar with -- have  
12 seen before?

13 A Yes, it is.

14 Q Okay. Can I ask some -- can I have it back and ask you some  
15 questions about it?

16 A Do you mind if I get -- I have a copy with me.

17 Q Please -- please I --

18 A -- just because I didn't write it, I want to be sure.

19 Q Sure. Absolutely. Now, this is -- first, who is Nicholas  
20 Fingerly?

21 A Nicholas Fillinger is --

22 Q -- I'm sorry --

23 A -- is the technical leader of the toxicology unit at the  
24 Michigan State Police Lab.

25 Q Is that of all of the units or just the lab that you're

1 working at?

2 A It is specifically for toxicology, so we actually only have  
3 one toxicology section we're only in Lansing. But for  
4 example, someone in the controlled substance section that  
5 would be their technical leader does oversee all of the  
6 controlled substance sections in all of our labs.

7 Q But there's only one toxicology unit you're saying?

8 A Yes.

9 Q Okay. And he's in charge of it?

10 A He is in charge of our quality control, our procedures, our  
11 accreditation that type of thing. We have separate people who  
12 are in charge of managing personnel.

13 Q It -- it -- do you know if it's -- if it's part of protocol  
14 that if that it would be a -- a lab technician would send this  
15 same letter out?

16 A I believe I may be able to send letters like this --

17 Q -- okay --

18 A -- I would have to have it approved by my supervisor first.

19 Q Certainly. But it wouldn't be outside of the -- you don't  
20 think it's outside of what you may be asked to do if -- if  
21 called upon?

22 A I don't believe so, no.

23 Q All right. So this letter if you would -- if -- if you -- if  
24 you wanna look at it please do -- the -- discusses the  
25 accreditation process and the hundreds of requirements that

1 the laboratory must adhere to and that whatev -- whatever this  
2 particular inquiry is it's the one that's of interest that  
3 caused this letter to be written if 5.10.3.1; is that right?  
4 A Yes.  
5 Q All right. And also the re -- speaks to an addition to that  
6 particular section the requirement is also found in 5.10.2 and  
7 then it states, test reports shall, where necessary for the  
8 interpretation of the test results, include the following. Do  
9 you agree with that?  
10 A Yes.  
11 Q Okay. And those numbers that I read off 5.10.3.1 and 5.10.2,  
12 are in reference to the American National Standard Institute  
13 or the ANAB ISO Accreditation Manual; is that right?  
14 A Yes.  
15 Q So there's specific sections within the accreditation manual  
16 that the lab -- your lab would be re -- would need to know  
17 about and that's what -- that's what at a minimum Mr.  
18 Fillinger is -- is stating here; is that right?  
19 A Yes. He's referring to a specific requirement that we do have  
20 to meet.  
21 Q Okay. And it does say shall; correct?  
22 A Yes.  
23 Q And it's referring to measurement uncertainty for THC; is that  
24 right?  
25 A This entire letter is referring to measurement uncertainty for

1 THC.

2 Q Okay.

3 A The specific requirement that he lists just refers to  
4 measurement uncertainty in general.

5 Q Okay. And it -- and it says shall --

6 A -- it does --

7 Q -- where applicable a statement on the estimate uncertainty of  
8 measurement information uncertainty is needed in test reports  
9 when it is relevant to the validity or application of that  
10 test results, when a customer's instruction so require, or  
11 when the uncertainty affects compliance to a specific limit.  
12 Do you agree with that?

13 A Yes.

14 Q Okay. And then -- then there's a little bit of an analysis  
15 here and I'm just summarizing to move through this -- when  
16 they consider five ten three -- five ten -- 5.10.3.1c, there's  
17 three separate components are present that dictate whether the  
18 unit must report measurement uncertainty?

19 A Yes.

20 Q And I wanna go through those --

21 A -- okay --

22 Q -- now, I noticed that there's no reference in the  
23 consideration of 5.10.2, are you familiar with 5.10.2?

24 A I don't know specifically what's listed in that requirement,  
25 no.

1 Q All right. But he -- he -- we -- we could agree that the  
2 directed -- the toxicology leader -- technical leader  
3 identifies two specific sections within the accreditation  
4 requirements and then goes on to explain what was considered  
5 for one of those two requirements; is that right?

6 A Yes, I believe so.

7 Q Because the second requirement 5.10.2, is not identified or  
8 explained or considered; is that right?

9 A I believe it has been considered but this is something that is  
10 in addition to that information.

11 Q Right. But this letter is all I'm asking about. That may be  
12 some --

13 A -- okay --

14 Q -- place else I don't know but he does not specifically  
15 address the considerations of why the uncertainty measurement  
16 for THC as required in 5.10.2, within this letter?

17 A Yes. He does not list out what those requirements listed in  
18 that other section may be --

19 Q -- all right --

20 A -- that would apply to this.

21 Q Okay. Now, the -- the next paragraph starts out first, I -- I  
22 -- I wanna ask you about that but the last sentence there's  
23 our customers are responsible for the application of the test  
24 results; is that right?

25 A Yes.

1 Q Now, would you agree that the methodology identified by --  
2 what is it called ANNLAB -- what is the --

3 A -- ANAB.

4 Q Yeah. ANAB as a default as identified here would re -- would  
5 have an accredited lab reporting uncertainty measurement.  
6 Would you agree with that?

7 A Can you rephrase that, I'm sorry?

8 Q Yes. Would you agree from what you know from the  
9 accreditation of ANAB that in -- in reading the two sections  
10 that are referred to by your -- by the technical leader, that  
11 the default for scientific reporting -- for forensic  
12 scientific reporting is to report an uncertainty measurement  
13 when reporting a result?

14 A I do not believe so, no.

15 Q You don't believe that's the default?

16 A I don't think so. It lists specific cases in which that would  
17 have to be done.

18 Q Okay. You're -- so -- you're -- your testimony would be that  
19 you don't believe -- it's not your understanding at least from  
20 your training within the lab, that there's a requirement when  
21 reporting a number --

22 MR. HAMPEL: -- Your Honor, at this point I'm going  
23 to object to the questioning because I see no possible  
24 relevance under a Daubert hearing, ya know, to whether, ya  
25 know, to this line of questioning. She has already testified

1 that it is not reported because it is not required because  
2 there is no specific quantity analysis that just simply shows  
3 the presence of the marijuana in the system.

4 MR. KOMORN: That's what he got during direct. I'm  
5 -- I'm in cross-examination right now. I don't know that  
6 that's.

7 THE COURT: All right. Well, --

8 MR. KOMORN: -- that's an objection that's --

9 THE COURT: -- my -- my concern is that it seems to  
10 be we're spending an awful lot of time on the non-reporting of  
11 the -- I don't want -- I don't want to misquote --

12 MR. KOMORN: -- uncertainty measurement --

13 THE COURT: -- the measurement uncertainty --

14 MR. KOMORN: -- right --

15 THE COURT: -- so if I understand the witness's  
16 testimony, measurement uncertainty is calculated it's just not  
17 reported in the report for the reasons indicated in Mr.  
18 Fillinger's letter. It can be reported, and it is reported in  
19 those at least three specific instances when it's relevant to  
20 validity or the application of test results when customer  
21 instruction so require or when the uncertainty affects  
22 compliance to this specification limit like a per se with  
23 alcohol. So here unless somehow it relates to Daubert and  
24 attacks the validity of the protocol and processes and testing  
25 of the specimen in and of itself, how is it relevant. It



1 seems to me that at trial if this comes in the error rate or  
2 not error rate the measurement uncertainty will come in and  
3 will be discussed at length and argued on both sides and  
4 subject to direct and cross-examination. But how does that  
5 relate to my decision as to whether or not the testing itself  
6 and the result reported satisfies Daubert?

7 MR. KOMORN: Well, we discussed and you -- I don't  
8 know that it's actually one of the elements of Daubert,  
9 measurement uncertainty is one, but you had referenced their  
10 accreditation. So I was --

11 THE COURT: -- sure --

12 MR. KOMORN: -- this is a letter that deals with  
13 accreditation. It identifies --

14 THE COURT: -- okay --

15 MR. KOMORN: -- two specific categories only one is  
16 addressed in this letter and I'm asking her about what she  
17 knows in her training she may not -- it may be a technical, ya  
18 know, the technical leader answer but I wanna know if she  
19 knows and can say --

20 THE COURT: -- sure --

21 MR. KOMORN: -- that she's been directed to not  
22 report -- or I'm sorry, two questions rather -- may -- may I --  
23 - I -- but that's the reason, Judge --

24 THE COURT: -- all right. So I'll -- I'll allow  
25 because it is cross-examination to the extent that you can



1 answer and -- and have knowledge --

2 MR. KOMORN: -- so the --

3 THE COURT: -- go right ahead.

4 BY MR. KOMORN:

5 Q To the extent that you know you believe from your training,  
6 that the accreditation that your lab maintains does not  
7 require the reporting of an uncertainty measurement when  
8 reporting THC; correct?

9 A Correct.

10 Q Okay. Now, the second portion of this letter -- second --  
11 starts off second --

12 A -- yes --

13 Q -- when a customer instructions so require and then it goes on  
14 to talk about how prosecutors and police are your customers;  
15 is that right?

16 A That is what it says, yes.

17 Q Okay. Do -- in other words, they're paying the lab and on  
18 behalf the lab was working for the customer; is that right?

19 A We are actually not paid for any of the testing that we do.

20 Q Okay. The -- I can't hel -- I mean, do you agree the word  
21 customer was -- is used here; right?

22 A Yes, I do.

23 Q Okay. And -- and there's certain allig -- allegiance or some  
24 kind of unique relationship as a customer versus everybody  
25 else. Would you agree with that?

1 A I believe there is a connotation that could be implied there.

2 Q Okay. And it seems as if the communication or the -- or the  
3 instructions by the customer somehow would have an impact on  
4 whether the uncertainty measurement is reported or not; is  
5 that right?

6 A That is what it appears from this, yes.

7 Q Now, do you know if the -- and who would the -- who would this  
8 customer be if you'd -- do you know who the customer is? I  
9 mean, is there one particular individual that identifies as a  
10 customer that interacts with on behalf of the customer?

11 A I honestly don't know. Our customers are often considered the  
12 submitting agencies --

13 Q -- okay --

14 A -- because they are the ones that we write the report to and  
15 its then sent to them and since they gave us the evidence and  
16 we give them the result I would consider them our customer.

17 Q Okay. There's prosecutors, also, that are customers that's  
18 what's listed on here is there someone that comes to mind is  
19 it PAAM or if you know -- I don't -- I don't wanna put words  
20 in your mouth -- PAAM or some other organization?

21 A They are sort of an organization who could request something  
22 of us based on what the other prosecutors in the state are  
23 asking for. Does that make sense?

24 Q Okay. All right. So is there a -- is there a comparable  
25 defense organization -- defense bar or some kind of



1 organization that represents criminal defense -- (in audible)  
2 criminal defense attorneys that would be the comparable of a  
3 PAAM, do you know, that -- that are customers?

4 A I'm not really sure what comparable defense organizations  
5 there could be.

6 Q Do you know of any?

7 A I don't.

8 Q If a defense attorney called you and asked you to specific  
9 instructions on how to report something would you -- would you  
10 do that?

11 A I would forward it to my supervisor and the technical leader  
12 because that's not a decision I can make on my own.

13 Q All right. Do you know of that ever happening?

14 A I'm not really sure. I have received calls from defense  
15 attorneys but not requesting something to be reported in a  
16 specific way.

17 Q Have you had a specific request from one of your customer --

18 MR. HAMPEL: -- Your Honor, objection. Relevancy to  
19 that line of questioning. Whether it's not, ya know, defense  
20 attorneys ever made a request or not really doesn't have  
21 anything to do with anything that we are doing here.

22 THE COURT: So the objection is on relevancy. How  
23 is that relevant that it -- it sounds like your point is that  
24 does your lab serve defense attorneys as customers and it  
25 sounds like the general answer is, no. We could explore how a



1 defense attorney might get a specimen tested and that, of  
2 course, could come through CDAM in conjunction with the  
3 Prosecuting Attorneys Association. If it was an association  
4 wide issue that was of import to the law of the criminal  
5 justice system and has any kind of state wide impact or I  
6 suppose a defense attorney could go to the prosecutor in a  
7 particular case and ask that -- that some particular relevant  
8 evidence that have been overlooked, subsequently discovered,  
9 not tested, be tested and the prosecutor in conjunction with  
10 the defense attorney could submit that request through the  
11 police agency. I suppose another -- and we could ask the  
12 sergeant, another possibility would be any evidence within  
13 control of the police depending on how it was procured whether  
14 it was tested or not. There could be a request by a defense  
15 attorney to have the agency submit it for testing and now  
16 whether that happens very often or not. I assume they're  
17 gonna serve people that are impacted as the -- the tack --  
18 because they're being paid by the taxpayers of the State of  
19 Michigan. But -- so I think we're getting a little far of  
20 field here.

21 This is a Daubert hearing. I gotta determine  
22 whether or not there are repeatable scientific principles  
23 behind the testing methodology. Whether the labs accredited.  
24 Whether she followed the proper protocol in this case. And  
25 I've already heard her say I've done 5600 hundred of these,





1 approximately, nothing was out of the ordinary in this one. I  
2 can give ya the error rate or the measurement uncertainty -- I  
3 don't want to call it error rate from -- and its 24 percent  
4 and we can do the math and we can get the high and low. So  
5 the bottom line is let's get to the issue of Daubert because  
6 we're now coming up to about an hour in this hearing and we're  
7 either gonna be here 'til 8:30 tonight -- I got another  
8 hearing at 3:30, by the way, gentlemen, 'cuz this was set for  
9 an hour. So we're either gonna take the other hearing 'cuz I  
10 got somebody lodged in jail it's coming -- that's got a  
11 defense attorney and a prosecutor coming down and I'll take  
12 that probation violation and then we'll come back to this and  
13 be here 'til 8:30 tonight or we'll get this done. I'll give  
14 ya as much time as ya need and if we can't get it done by  
15 about 8:30 or 9:00 o'clock tonight when we're all really tired  
16 and ready to go home then we'll come back another day. So, ya  
17 know, if we wanna get to it lets get to it. If we wanna  
18 dillydally around we'll continue to, ya know, exercise the  
19 rules of evidence when the rules of evidence don't really  
20 apply and we'll beat around the bush instead of getting right  
21 to the heart of the issues 'cuz that's what we're talking  
22 about aren't we, the heart of the issues? Whether or not the  
23 evidence that was obtained in this case was obtained legally  
24 or illegally. Whether the Fourth Amendment is impacted based  
25 on the unreasonableness of the police or the reasonableness

1           thereof. Whether or not Daubert is satisfied or not. Whether  
2           or not the evidence comes in or doesn't. That's what we're  
3           really talking about; right?

4                     MR. HAMPEL: Correct, Your Honor.

5                     THE COURT: Okay. And I think defense counsel would  
6           agree with that because this is the search for the truth.  
7           This isn't a search to convict somebody. The prosecutor's job  
8           is not to do that. It's the search for and hopefully find the  
9           truth. The defense job we know is to protect the  
10          constitutional rights and to the sta -- and the statutory  
11          rights and evidentiary rights of the defendant and that's what  
12          we're all trying to get to. So with that, I'll allow some  
13          latitude but just depends on how long we wanna be here. Go  
14          right ahead, Counsel.

15                    MR. KOMORN: Thank you.

16 BY MR. KOMORN:

17 Q    As a forensic scientist would you agree there's two things  
18    that you do in your field of toxicology, one, is you identify  
19    -- you look at samples and try to identify whether or not  
20    there's a controlled substance found within it -- is that one  
21    of the things that you would do?

22 A    Yes.

23 Q    Okay. Equally as important is also knowing what substances  
24    are on the controlled substances list or illegal and then  
25    reporting those. Would you agree with that?



1 MR. HAMPEL: Your Honor, objection. That is not, ya  
2 know, what the statute is nor is it what the law calls for.  
3 Its whether or not the substance in the system legal or not is  
4 impairing and is present.

5 MR. KOMORN: Judge, that -- that is not an objection  
6 to my question. My -- my question was about her field of  
7 study, you're gonna evaluate her in terms of what she does in  
8 her ex -- or her -- her qual -- qualifications and what her  
9 job tasks require of her that's what I'm asking. Merely about  
10 the reporting process 'cuz there's a report here --

11 THE COURT: -- all right. I'll allow some leeway.  
12 Go right ahead.

13 BY MR. KOMORN:

14 Q Would you agree that the reporting of the identified substance  
15 that you may find in your analysis requires some knowledge of  
16 the law?

17 A Honestly, not necessarily. I just report what I found. Some  
18 substances we look for are not controlled such as, for  
19 example, in our tier two A & B panel diphenhydramine which is  
20 Benadryl. To my knowledge that is not a controlled substance  
21 but it is something that has the potential to be impairing so  
22 there are things like that we look for and it is not up to me  
23 to decide if something is controlled or not and that's not  
24 something that goes anywhere on our report. But reporting the  
25 substances that are found and the amounts if it's something

1 we quantify yes, that is a major portion of my job.

2 Q Okay. In your training, do you know that COOH-11 or carboxy  
3 THC is not a controlled substance in Michigan?

4 A I am aware of that one, yes.

5 Q Okay. Are you aware of that there is a case in 2010 that says  
6 it's not a controlled substance and there's no impact on  
7 impairment --

8 MR. HAMPEL: -- Your Honor, relevancy --

9 MR. KOMORN: -- if she knows --

10 MR. HAMPEL: -- to the question --

11 MR. KOMORN: -- if she knows. She says she's aware  
12 of the case --

13 THE COURT: -- all right. I'll -- I'll allow her to  
14 answer or the question and the answer if she knows.

15 BY MR. KOMORN:

16 A I am aware that there is a case that talks specifically about  
17 that I don't know if it was in 2010 --

18 Q -- okay --

19 A -- but I know there was one, yes.

20 Q And it -- does your -- and you're -- you're -- and what do you  
21 recall from your training about that, if anything?

22 A About that specific case?

23 Q Yeah.

24 A I didn't learn about that as part of my training specifically.  
25 I've learned about it as I've been doing this type of testing.



1 Q Was it -- was it covered in your PhD class?

2 A It was not covered in my masters, no.

3 Q Okay. Your masters, I'm sorry. And are you familiar with

4 what -- what that case ult -- ult -- or what we're talking

5 about here is that the carboxy or the metabolite is -- does

6 not -- does not have a distinction of controlled substance; is

7 that right?

8 A Can -- can you rephrase.

9 Q The carboxy THC are what's being THC-COOH is not a controlled

10 substance; is that right?

11 A Yes, that's correct.

12 Q And -- but do you know why -- do you have a specific reason

13 that you know of why that's being reported on here on this

14 report?

15 A We report it because that is actually the compound that we

16 look for in our drug screen which tells us what something

17 might be possibly positive for. We look for the carboxy THC

18 which is the metabolite not specifically THC so then we do

19 continue to report it even though it's inactive on our

20 confirmatory testing.

21 Q Is this something that you know has been explained or

22 indicated and requested, for example, by your customer?

23 A Has it been requested that we do that that --

24 Q -- yeah --

25 A -- way? Not to my knowledge.



1 Q Do you know of -- of -- of any interactions from the  
2 prosecutor's office one way or the other requesting a  
3 prosecutor customer that requests the reporting of this on  
4 this report?

5 A Not to my knowledge, no.

6 Q Okay. And -- and when -- when -- and when we're talking about  
7 error rate, is there specific reason why it doesn't find  
8 itself on the report?

9 A As I've said before, the measurement uncertainty isn't  
10 reported in specifically THC cases because there is not an  
11 allowed level such as there is with alcohol. There's not a  
12 per se limit that it would be necessary to list the  
13 uncertainty to see if it -- if it were tested again if it  
14 could fall under that limit.

15 Q Now, are you familiar that the -- that your -- your lab did  
16 not report -- at some point in time was not reporting error  
17 rate regarding alcohol?

18 A I believe --

19 MR. HAMPEL: -- Your Honor, relevancy. This is  
20 about THC not alcohol.

21 MR. KOMORN: It's about reporting -- it's about  
22 reporting and it's about adding -- and -- and including it  
23 within the report --

24 THE COURT: -- well, okay. But -- but why is that  
25 relevant because I --

1 MR. KOMORN: -- because, Judge, it's relevant  
2 because the logic that's being used here as it'll lay out here  
3 is that we don't report it because there's no per se number.  
4 But when we look back at the history of the lab, they didn't  
5 report an error rate about alcohol even though there was a per  
6 se number. So the logic that's being used to defend the not  
7 reporting doesn't fly. There's a case Jabrocki out of Lansing  
8 that Felix Adatsi testified at and said we don't have an error  
9 rate and he was -- and since then they were ordered  
10 to and they've been producing an error rate ever since.  
11 Okay.

12 THE COURT: Because -- because it factually and  
13 legally relates to a per se alcohol charge.

14 MR. KOMORN: Okay. But the point is they were not  
15 doing it --

16 THE COURT: -- sure --

17 MR. KOMORN: -- and not reporting it.

18 THE COURT: And they were called out on it --

19 MR. KOMORN: -- correct --

20 THE COURT: -- by defense counsel as they should be,  
21 and it was corrected.

22 MR. KOMORN: Because it needed to be some kind of  
23 assurance, some kind of validity, some kind of ability to  
24 reproduce it over and over and over and over again within a  
25 range that's scientifically accepted because they were not

1 going to let it be admitable -- admissible other than that.

2 THE COURT: All right.

3 MR. KOMORN: So the reporting of it was something  
4 that in its -- in -- not that this is for today but there's an  
5 issue with that, ya know --

6 THE COURT: -- sure. But -- but here she's  
7 testified that there is an error rate. It can be reported.  
8 As a matter of fact, this report could be amended upon  
9 request, I mean, I can ask the question if I need to but I'm  
10 going to assume that this report could be amended upon request  
11 from the customer to report an error rate if they felt a need  
12 that -- I'll strike the error rate -- to report that  
13 measurement uncertainty and that could be reported; correct?

14 THE WITNESS: I don't know if we can do that for one  
15 specific case -- I mean, physically, yes, we can do that.

16 THE COURT: Physically you could whether that's your  
17 policy or not.

18 THE WITNESS: Right. It would have to be discussed  
19 --

20 THE COURT: -- right --

21 THE WITNESS: -- by people above me.

22 THE COURT: Right. Yeah. I'm not saying you'd do  
23 that on your own but it could be done because it exists and so  
24 when we're talking about relevant information to the trier of  
25 fact the jury we're not -- we're not gonna hide the ball on



1 'em its gonna -- it's gonna be there one way or the other. If  
2 it doesn't come out in a written report its gonna come out  
3 through testimony from Ms. Kellogg when she gets subpoenaed  
4 back to this trial; right?

5 MR. HAMPEL: Yes, Your Honor.

6 THE COURT: All right. So let's move on, Counsel,  
7 from there.

8 BY MR. KOMORN:

9 Q The -- the error rate uncertain -- I'm sorry, the uncertainty  
10 measurement we're talking about is cal -- calculated once a  
11 year; is that right?

12 A Yes.

13 Q How many times is it calculated for the blood testing in  
14 alcohol and blood? What's -- what's the frequency by which an  
15 error rate is determined for the frequency of blood?

16 A The measurement uncertainty is calculated for each analyte  
17 that we test for once a year.

18 Q For alcohol? What about for alcohol I should say?

19 A Typically, yes, we got some new instrumentation recently so  
20 there was a separate uncertainty calculated for that type of  
21 instrument versus the other type that we had been using so in  
22 that specific case, yes, it was calculated more than once but  
23 barring any new instrumentation it is calculated once a year.

24 Q You would agree with me that the error rate that we're  
25 discussing here today does not fall within the scientific



1 community's acceptability of reporting a number; is that  
2 right?

3 A I am not aware I am not sure.

4 Q Okay. You can say with any competence that 24 percent error  
5 or uncertainty measurement is -- do you know of a scientific  
6 community that's accepted that number as acceptable within the  
7 scientific community?

8 A I am not aware of any organization that has set out what is  
9 and is not acceptable that doesn't mean there's not one, but I  
10 am not aware.

11 Q In your -- in your master's degree that you -- took place I'm  
12 sure this is a topic of study for you; is that right? Dauber  
13 and or at least admissibility -- I'm sorry, not -- not Dauber  
14 not admissibility would not be there. More likely in your  
15 studies you would have learned about what is -- what -- what  
16 is the acceptable uncertainty measurement within the  
17 scientific community. Is that something you studied?

18 A That was not a topic covered in my master's degree.

19 Q All right. Okay. But it's something, obviously, that's  
20 relevant to your day-to-day operations when you -- when you  
21 function a -- in -- in your job; is that right?

22 A Yes.

23 Q Okay. And now it's -- isn't it true that in order to have an  
24 error rate of 24 percent there has to be some false positives?

25 A No. The measurement uncertainty is calculated based on our





1 control values because our controls are at a set level, we  
2 know what they are so its calculated based on how far off,  
3 essentially, our measurements of those are each time from the  
4 true value.

5 Q Now, there was a question that was asked you by the prosecutor  
6 about has there been zero nanogram case that you've had or  
7 something to that effect. Do you remember that question?

8 A Yes.

9 Q And I don't wanna misstate what he said but he was, I think,  
10 asking if you've ever reported out after a blood result a zero  
11 as the -- on a lab result; is that right? I mean on a lab --  
12 on a lab report.

13 A I don't know if that's exactly how he stated it but that was  
14 the general idea, yes.

15 Q Would you -- would you report it as zero or no THC or would  
16 you report it as none detected?

17 A Essentially, how it would look is just as though the line that  
18 says THC six nanograms per milliliter that wouldn't be there  
19 at all. It wouldn't say it was detected at zero it just would  
20 not be present on the report.

21 Q No references to THC be present on the report is what you're  
22 saying?

23 A Right. For example, in one that I have done that there was  
24 only the carboxy THC present instead of having a THC line at  
25 all it would just say the carboxy THC present at say ten



1 nanograms per milliliter.

2 Q So you would still report the carboxy THC?

3 A If it was high enough to pass our screen, yes.

4 Q Okay. Now, if somethings at one nanogram of THC -- have --  
5 have you had that situation develop?

6 A Yes.

7 Q Okay. And isn't it true there's some discretion that can be  
8 given in terms of how to report it by interacting with your  
9 superior?

10 A Not in any case I'm aware of, no.

11 Q Doesn't the protocol or policy in your training manual when  
12 it's at a one nanogram allow for or some discretion in terms  
13 of how to report that?

14 A If it is at a one nanogram we report it as one nanogram of  
15 THC.

16 Q I see. And you're -- you're not familiar with any other  
17 circumstance that -- that one nanogram is being reported at  
18 zero or where the tech or the lab director has -- had  
19 discretion? You're not aware of any of that?

20 A I mean, they could have that discretion, but I've never had a  
21 case come up where if it was one nanogram and it was positive  
22 based on the mass spectrum. I've never had a case where it  
23 was one nanogram and I wouldn't have reported it.

24 Q Okay. Using that 24 percent error rate -- I'm -- I'm sorry,  
25 uncertain -- uncertainty of measurement, on a one nanogram

1 that would put us potentially at zero or lower when you use  
2 those -- those numbers; is that right?

3 A It could put it at less than one which we would then not  
4 report, yes.

5 Q Well, if the number comes back at one nanogram is what I'm  
6 asking?

7 A Yes.

8 Q You'll report it as one; is that right?

9 A Yes.

10 Q Okay. And when you report it as one there's no reference  
11 anywhere within that particular report to an error rate; is  
12 that right?

13 A There is no reference to the uncertainty.

14 Q Okay. Even though that reporting that we just described could  
15 be zero; is that right?

16 A No. It would never be reported as zero it could be not  
17 reported at all but that is only based on our policy of  
18 truncating to a whole number. There's not a whole number less  
19 than one so we wouldn't be able to report it but that doesn't  
20 mean it's not there.

21 Q Understood. My point is that the number one that would report  
22 it or number two that would be reported -- let's just say two  
23 nanograms, without the error rate being reported on that  
24 particular report we would still agree that taking the 24  
25 percent uncertainty measurement and applying it to two



1 nanograms, one nanogram would result in either something above  
2 two or something maybe below zero; is that right?

3 A Not below zero below one.

4 Q Okay. Below one. Fine.

5 A Yes.

6 Q But -- but my point is that that would be sent out from your  
7 lab received by a prosecutor and that would be the evidence  
8 that could be used against the defendant; is that right?

9 A Yes.

10 Q Okay. And even though the possibility of if it was reported  
11 and tested again it could be something complete -- a complete  
12 different that would -- that would not be evidence of having  
13 it within a person's system; is that right?

14 A No. If it is positive, it's there. The uncertainty only  
15 refers to the specific amount.

16 Q If -- if we're at two nanograms and we have the 24 percent  
17 error rate that would be reported as two percent or two  
18 nanograms; right?

19 A Yes.

20 Q Okay. But we know that if we apply that number that we went  
21 through that had your -- in this -- obviously, it's more for  
22 the higher the -- the numbers that was up but still it would --  
23 -- on the high and the low would put it at a number that would  
24 be either reported higher or reported lower if it was -- if it  
25 was -- a second test was taken; is that right?

1 A Yes, --

2 Q -- okay --

3 A -- it's possible it could be higher or lower or the same.

4 Q Right. And if it -- and -- and within that -- considering the

5 possibilities there from a two nanogram, one of the

6 possibilities would be that it would be -- one of the test

7 results could be zero?

8 A No.

9 Q Or -- or less than one?

10 A No. I believe the lowest amount that you could end up with is

11 about a 1.5.

12 Q Why? Cuz that's 24 percent of two?

13 A Yeah.

14 Q Okay. What about one?

15 A So the lowest I would expect to see would be a .75.

16 Q Would you round up?

17 A No. That would not be reported.

18 Q Okay. And -- and who is deciding all this? Who's deciding

19 whether or not there's that -- these -- these variables are

20 going to be acknowledged within these forensic science

21 laboratory report?

22 A Since that is based on our accreditation requirements, it

23 would primarily be our technical leader but it's likely that

24 our supervisors and those higher up than them in the lab

25 system would also have input.





1 Q Okay. And, essentially, the third paragraph of this letter  
2 it's essentially saying that because there's no per se number  
3 of or amount of THC in one's blood under the law, that would  
4 be another reason why the error rate is not reported; is that  
5 correct?

6 A Yes.

7 Q And that's, essentially, because even though the numbers being  
8 reported the labs saying we're not suggesting that it's an  
9 accurate number?

10 A No. That's because there's not a set level at which everyone  
11 is impaired and that's why a level has not been set in  
12 Michigan.

13 Q But the reason why there's an error rate for the alcohol is  
14 because there is a per se number and because the lab wants to  
15 demonstrate or represent its competence level in that number;  
16 is that right?

17 A Yes.

18 Q Because you don't want someone to be convicted of a crime of a  
19 blood level that's inaccurate; is that right?

20 A Yes. We would want to give the two sides the chance to argue  
21 whether the number was accurate or if -- if there was a  
22 possibility it could have been lower than that amount.

23 Q But for alcohol you would say that we have some certainty and  
24 we can -- we can show by our -- our -- our uncertainty budget  
25 or uncertainty measurement what that range is and its decimal



1 point .004; is that right?

2 A That's a possibility, yes.

3 Q For alcohol, isn't that true, isn't the error rate  
4 approximately .004 per 100 liters of alcohol?

5 A I believe our measurement uncertainty is about 9.5 percent so  
6 --

7 Q -- say it again. I'm sorry, say it again.

8 A I believe it's about 9.5 percent its -- its varied. It is a  
9 percentage though based on the results that we have already  
10 obtained. So just like this one is 24 percent of the result  
11 that I have reported it would work out, basically, the same  
12 way so in some cases it could .004 and some cases it could be  
13 .017.

14 Q Right. You -- you're -- you did an alcohol report in this  
15 case; right?

16 A I don't think I did this one.

17 Q No. No. No. No. You saw it but you didn't conduct it.

18 A Yes.

19 Q If that's what I recall. Let me just show.

20 MR. KOMORN: Do you have a copy of that one?

21 MR. HAMPEL: No. I don't think I've ever -- as far  
22 as I know we didn't do an alcohol.

23 MR. KOMORN: I'm sorry. There was the report --

24 MR. HAMPEL: -- hold on I'll look. No, no alcohol  
25 required.



1 THE WITNESS: It looks like the alcohol report would  
2 of done by -- would have been done by Samantha Beauchamp.  
3 I don't have a copy of it.

4 MR. KOMORN: Right. There wasn't one done. I know.  
5 I -- I wanted to hand that to you, if I may.

6 THE COURT: While defense counsels looking just so I  
7 understand. So does your lab have a cutoff level for  
8 reporting, for instance, when urinalysis testing is done, the  
9 labs we use have cutoff levels below which they're not  
10 reporting any positive.

11 THE WITNESS: Yes.

12 THE COURT: So in this case, do you have a cutoff  
13 level for reporting a positive for the presence of THC?

14 THE WITNESS: Yes. The lowest amount we would  
15 report is one.

16 THE COURT: One.

17 THE WITNESS: Yes.

18 THE COURT: So we would -- would it be accurate to  
19 say the labs cutoff level for reporting of the presence of THC  
20 in a blood sample is one?

21 THE WITNESS: Yes.

22 THE COURT: And -- and if that number comes back one  
23 because you truncate to that one whole number so if it -- it  
24 comes back at one, you're gonna apply the error rate then not  
25 reporting -- report it 'cuz it doesn't meet the cut -- the



1 labs cutoff?

2 THE WITNESS: No. We do not apply the uncertainty  
3 on the front end.

4 THE COURT: You don't apply the uncertainty?

5 THE WITNESS: No.

6 THE COURT: Okay.

7 THE WITNESS: If it came back at exactly 1.00, I  
8 would report one nanogram of THC.

9 THE COURT: One. So it's -- so your report is to  
10 the whole number so its 1.00 or its 1.99 it's gonna be  
11 reported as one.

12 THE WITNESS: Yes. It would all be reported as one.

13 THE COURT: And that shows the presence of THC. The  
14 uncertainty rate, then, could show that it was at point as you  
15 said point --

16 THE WITNESS: -- .75 --

17 THE COURT: -- 75 --

18 THE WITNESS: -- or so.

19 THE COURT: Okay. So instead of one nanogram .75  
20 nanograms but still active THC in the blood specimen?

21 THE WITNESS: Yes.

22 THE COURT: All right. Go right ahead, Counsel.

23 BY MR. KOMORN:

24 Q But you wouldn't report an error rate at the bottom of the  
25 form of the lab report in that instance, would you?





1 A No.

2 Q And you'll agree with me that you never report on the lab  
3 reports with a decimal point regarding THC?

4 A That's correct, we don't.

5 Q So there would be no .75?

6 A No. I just mean if we were to apply the measurement  
7 uncertainty to a sample that was exactly one that would be  
8 about where the .75 would land.

9 Q But that's not indicated in a report that's not -- that's not  
10 part of the protocol?

11 A Correct.

12 Q You would have to get some kind of higher authority power -- I  
13 mean, ya know, higher authority to -- to allow that to happen;  
14 right?

15 A To allow it to be reported, yes. I can talk about it, I mean.

16 Q Sure. Ya know, I -- I think I left it in the car, Judge. I  
17 and -- but I wanna proceed I've got a temporary one I wanna  
18 see if she recognizes this document it's just a --

19 THE COURT: All right. Well, let's take a break so  
20 I can take this next case and try to get that concluded.

21 MR. KOMORN: All right.

22 THE COURT: All right.

23 (At 3:43 to 4:10 p.m., court recessed)

24 THE COURT: We're back on the record in the matter  
25 of People of the State of Michigan versus Emma O'Toole, Case



1 No. 19-1242. I apologize to counsel and the parties and  
2 witness for the Court's delay we had to handle another matter  
3 that we were able to take care of at least for today. So  
4 we're back on the record Ms. Kellogg has been sworn remains  
5 sworn for testimony and Mr. Komorn.

6 MR. KOMORN: Thank you, Judge.

7 (At 4:11 p.m., DX-B marked)

8 BY MR. KOMORN:

9 Q I'm gonna hand you this document tell me if you -- if it looks  
10 like something you've seen before or its familiar to you a  
11 little bit.

12 A Yes. So this is the standard format for our alcohol reports.

13 Q Okay.

14 MR. KOMORN: And I would move to admit it just for  
15 purposes of -- to -- to demonstrate the distinction of the two  
16 lab reports as they've been reported.

17 THE COURT: All right.

18 MR. HAMPEL: Your Honor, for the record, we will  
19 stipulate that there is a difference between the reporting in  
20 an alcohol case and in a drug case and question what the  
21 relevance is.

22 THE COURT: Okay.

23 MR. KOMORN: Well, that's the whole point of whether  
24 its -- meets the scientific standards and whether its --

25 THE COURT: -- all right. And so subject to that



1 objection, I'll allow it for purposes of this motion.

2 MR. KOMORN: Thank you.

3 BY MR. KOMORN:

4 Q Just to highlight a couple portions that they're distinct from  
5 the report of the THC. One, is that it says it's -- what --  
6 what is -- it says 90 -- was 97 percent certainty?

7 A Yes. So the uncertainty statement on this reads the  
8 calculated uncertainty of the alcohol measurement is estimated  
9 to be plus or minus 0.010 grams alcohol per 100 milliliters  
10 blood at the 99.7 percent level of confidence.

11 Q Ninety-nine point seven; right?

12 A Yes.

13 Q Okay. Now, in your training or experience, do you know if  
14 that is a threshold that is accepted within the scientific  
15 community?

16 A I believe it's accepted. I think there may also be a lower  
17 amount that's accepted as long as its stated what you're  
18 basing off from.

19 Q Okay. That would mean though, correct me if I'm wrong, that  
20 if you took that same blood and tested once, twice, three,  
21 four, or five times you would get the same result within a  
22 certain .005 number; is that right?

23 A That's not exactly what it means. So what this would mean is  
24 if we were to test the same sample 1,000 more times, we would  
25 expect 997 or 99.7 percent of those to come back within in

1 the uncertainty range.

2 Q A .0010?

3 A .010 of the reported result.

4 Q Okay.

5 A Yes.

6 Q Now, regarding the THC measurement here, correct me if I'm  
7 wrong, but if we're using that 24 percent uncertainty  
8 measurement and we have a six and we test it one time  
9 afterwards -- or a second time --

10 A -- yes --

11 Q -- we get to the whatever we said was three or four -- 5.2  
12 would be the low one?

13 A Yes.

14 Q Is that correct?

15 A Yep.

16 Q And then we tested it again from 5.2, is it true that we could  
17 get another number of, ya know, minus 24 percent of -- of  
18 that?

19 A No. So this uncertainty is based on the original result  
20 received and the fact that the calibration curve and the  
21 controls all passed with that batch. So we would expect any  
22 repeated results to fall within the 5.2 to 8.5 range except  
23 like I said, if you tested it 1,000 times 997 of them would  
24 fall within that range. The other three are statistically  
25 unpredictable so I can't say what those other three may be.

1 Q And they would be outside of that predicted value?

2 A They could be outside the range or they could be inside the  
3 range that's not something I can say.

4 Q They're unknown?

5 A Yes.

6 Q And we don't know this particular lab test, in particular,  
7 would be one of those that falls in the three percent range;  
8 is that right?

9 A Well, based upon the way the uncertainty is calculated since  
10 it's based off the lab result, no, it would be within the  
11 uncertainty. But it has to be based off from an already  
12 measured result because we don't know the true value, I guess,  
13 we are making a measurement of what we believe the true value  
14 to be.

15 Q And if taken 1,000 times it was tested; you're saying that  
16 there's the three percent unknown would be calculatable -- be  
17 able to be calculated, I should say?

18 A If we actually were able to test the same sample 1,000 times,  
19 I would expect the 997 of them to fall within the 5.2 to 8.5  
20 range and the other three you could have a one, you could have  
21 a 400 and you could have another six or something.

22 Q Or a zero?

23 A No.

24 Q Or something less than .1 -- less than one?

25 A Yes. It could be something less than one.





1 Q Okay. And we don't know because it's only tested once; is  
2 that correct?

3 A Yes.

4 Q This -- this sample was only tested once; right?

5 A Yes.

6 Q Okay. Is there an error rate that you know for the carboxy  
7 THC or the metabolite?

8 A There is a measurement uncertainty. Can I look at my notes?

9 Q Sure, please.

10 A That is 19 percent.

11 Q And do you know if there's been a request to report the -- if  
12 you know -- that there's been a request to report or not to  
13 report the error rate, ya know, from the client, do you know  
14 if -- which exists, if any, either of those?

15 A To my knowledge, I don't know of any requests we have received  
16 to either report it or to continue not reporting it.

17 Q What about regarding the COOH or the metabolite, same  
18 question? Ya know, request -- do you know if it -- if there  
19 exists a request to continue to report it or to not report it?

20 A I don't know.

21 Q All right.

22 MR. KOMORN: I have no further questions.

23 THE COURT: When you were giving your example of  
24 alcohol and you talked about the 99.7 percent level of  
25 confidence; correct?

1 THE WITNESS: Yes.

2 THE COURT: So do you have that same level of  
3 confidence -- does that same level of confidence in terms of  
4 the testing procedure apply to the testing for the THC?

5 THE WITNESS: Yes, it does.

6 THE COURT: Okay. So we don't have different  
7 confidence levels in your testing procedures and protocols for  
8 testing different types of potentially intoxicating or  
9 impairing substances?

10 THE WITNESS: No. That confidence level is  
11 something that can be statistically calculated. You can,  
12 basically, calculate your uncertain to be -- uncertainty to be  
13 at any level of confidence you want so we calculate all of  
14 ours to be at 99.7 percent.

15 THE COURT: All right. So when counsel said three  
16 percent we're -- we're talking not three percent three tenths  
17 of one percent.

18 THE WITNESS: Yes.

19 THE COURT: Correct?

20 THE WITNESS: Yes.

21 THE COURT: Point three percent?

22 THE WITNESS: Yes.

23 THE COURT: Less than one --

24 THE WITNESS: -- or three cases out of 1,000 --

25 THE COURT: -- right. Three cases out of 1,000 --



1 THE WITNESS: -- yes --

2 THE COURT: Where one percent would be ten cases out  
3 of 1,000?

4 THE WITNESS: Yes.

5 THE COURT: Okay. Just so we're -- we're clear.  
6 And is it that confidence level from a scien -- I'm asking you  
7 as a scientist, is it that confidence level that gives you the  
8 scientific reliability and repeatability of -- of your  
9 testing?

10 THE WITNESS: That confidence level is what allows  
11 us to -- basically, you pick the confidence level so the  
12 person calculating the uncertainty, which is not me, but I  
13 have a general understanding of how it's done --

14 THE COURT: -- okay --

15 THE WITNESS: -- that person would say, okay, I want  
16 to be 99.7 percent confident that repeated results will fall  
17 within this range. Then based on the way the uncertainty is  
18 calculated in all the different factors that go into it,  
19 there's a multiplication factor that is applied to the  
20 original number they receive to make it applicable to 99.7  
21 percent.

22 THE COURT: All right.

23 THE WITNESS: So -- and the way that the math is  
24 done that's, basically, how that confidence level applies.

25 THE COURT: Okay. And so just to -- for me to be

1 clear because I have to determine the issue here. Are we ever  
2 talking when we talk about the measure of uncertainty in  
3 conjunction with the level of confidence, are we ever talking  
4 about a situation where on that known sample that you test  
5 1,000 times incorporating in the measure of uncertainty that -  
6 - for instance, when you say 997 times we expect that the  
7 result will fall within that range based on the measure of  
8 uncertainty, and three times there gonna -- there's gonna be  
9 an outlier. Do we ever, from a scientific standpoint or, ya  
10 know, explain it as -- as best you can, do we ever have an  
11 expectation that one of those outliers is gonna show that  
12 there's -- that there is 0.00 that that substance is not in  
13 that sample?

14 THE WITNESS: No. Presence is determined  
15 differently than amount.

16 THE COURT: Okay. So explain that to me that  
17 presence is determined differently than amount.

18 THE WITNESS: Yes. So, basically, what I do is I  
19 look through all of the data I get back. I get what's called  
20 a chromatogram so I am looking for a peak shaped about like a  
21 bell curve that tells me there is something at the time which  
22 I would expect to see THC. I then also look at the mass spec  
23 data which allows me to identify if that compound is, in fact,  
24 THC or not.

25 THE COURT: Okay.



1 THE WITNESS: And then it's actually in a totally  
2 separate program on our computer that the amount of that  
3 chemical is calculated.

4 THE COURT: Okay.

5 THE WITNESS: So I would first determine if it's  
6 there and then put the amount into the report.

7 THE COURT: Because we know it's either there or  
8 it's not there?

9 THE WITNESS: Right.

10 THE COURT: And there could be no THC but there can  
11 be the metabolite the COOH --

12 THE WITNESS: -- yes --

13 THE COURT: -- because -- because that could be from  
14 a much more remote use?

15 THE WITNESS: Correct.

16 THE COURT: Can ya ever have THC in the -- in a  
17 sample without COOH -- without the metabolite?

18 THE WITNESS: I have never had -- I can only go  
19 based on what I have --

20 THE COURT: -- yeah --

21 THE WITNESS: -- personally tested --

22 THE COURT: -- sure --

23 THE WITNESS: -- I have never had a sample where  
24 there was absolutely none of the metabolite there. I have had  
25 it where that number was below our reporting limit so I could



4





1 only report the amount of THC. Typically, --

2 THE COURT: -- so would --

3 THE WITNESS: -- in that situation it could have  
4 been like they were smoking while they were driving and they  
5 got the blood so fast that not much of it had time to  
6 metabolize.

7 THE COURT: All right. I was gonna ask you what you  
8 attributed -- what phenomenon you attributed that to, but it  
9 would be timing --

10 THE WITNESS: -- it -- it would be --

11 THE COURT: -- of use?

12 THE WITNESS: Yes. Something very unique to that  
13 situation. It's not something we see hardly ever.

14 THE COURT: All right. And so your testing for THC  
15 in a blood sample on the same equipment and with the same  
16 procedures and protocols that you're testing any other -- for  
17 any other impairing substance including alcohol; correct -- on  
18 this grass -- gas chromatograph spectrum?

19 THE WITNESS: We use gas chromatography alone for  
20 alcohol. We use it in conjunction with mass spec for a lot of  
21 our drugs and then we can also use liquid chromatography mass  
22 spec for some of our drugs.

23 THE COURT: All right. And -- and the drugs will  
24 show different ranges of the spectrum?

25 THE WITNESS: Yes.

1 THE COURT: All right.

2 MR. HAMPEL: I have no other questions.

3 MR. KOMORN: Judge, may I -- just --

4 THE COURT: -- go ahead --

5 CROSS-EXAMINATION

6 BY MR. KOMORN:

7 Q Just want to clarify this, I know you were -- were talking  
8 about confidence levels in the reporting of the number

9 A -- yes --

10 Q -- and we were comparing alcohol to the THC in the blood. And  
11 we're talking about the example of testing that 1,000 times  
12 each one of those and if I'm not, -- correct me if I'm wrong,  
13 that regarding alcohol because there's a error rate identified  
14 and it is a low number or whatever its .005 or what --

15 A This is .01.

16 Q Point .01. Okay. That means that if -- if -- let's use an  
17 examp -- let's use 1.0 is that --

18 A -- sure --

19 Q -- a alcohol level? Okay. So 1.0 alcohol --

20 A -- sorry, do you mean .1?

21 Q Point one --

22 A -- yes --

23 Q -- grams per lit -- per 100 liters is that what it is?

24 A Per 100 milliliters, yep.

25 Q For 100 milliliters .1. So if you tested that a thousand

1 times knowing that .01 is the uncertainty measurement that  
2 means that each of the times you tested you've expected it to  
3 be .10 every single time with variation of maybe sometimes  
4 being .11; is that right?

5 A Yes. I would expect 997 of the tests to be between .09 and  
6 .11.

7 Q Okay. Now, just to draw the comparison of the THC, you got  
8 six nanograms here you're not saying that the level of  
9 certainty -- or I'm sorry, that -- that in testing a 1,000  
10 times that it's gonna be close to six, ya know, plus or minus  
11 -- you're saying it could be within the range of that eight to  
12 five or four whatever it may have been in any given test of  
13 the 1,000 times; is that right?

14 A In -- can --

15 Q -- in other words, if you take the -- take the six nanograms  
16 --

17 A -- yes --

18 Q -- you have six nanograms on the first test you test it again  
19 and it could fall within the range of that we described of the  
20 24 percent uncertainty measurement. So we said it could be  
21 eight or it could be five or something like that; right?

22 A Yes. I would expect it to be within that for 997 of the 1,000  
23 repeated tests.

24 Q Right. So it -- the range would be six could be eight or  
25 could be -- what did we say?

1 A Five point two to 8.5 it's about.

2 Q Okay. Anywhere within that -- those would be the -- the range  
3 that you would expect it to be within; right?

4 A Yes.

5 Q But certainly not close to -- you wouldn't expect it to be 6.0  
6 something you couldn't say with confidence it would be that --  
7 with the same confidence level and knowing the error rate for  
8 the alcohol; is that right?

9 A I -- because the uncertainty is larger, I would not  
10 necessarily expect repeated results to be as close to the  
11 original result in the THC as I would in the alcohol.

12 Q And it at best, you would expect the results to be within that  
13 24 percent in either direction from the six -- six nanograms  
14 of THC?

15 A Yes. Based on how the statics are calculated its more likely  
16 to be in the middle of that range and less likely to be on the  
17 outside but I can't tell you how many times I expect it to be  
18 seven or something like that.

19 Q And at least three or three of those -- three or 30?

20 A Three.

21 Q Three would be --

22 A -- of 1,000 --

23 Q -- would be outside of that range between eight and 5.2  
24 whatever it was; right?

25 A Not necessarily outside of that range we just can't predict

1           what they would be. It could be --

2 Q       -- okay. In other words, they can't -- there -- there's not  
3       predictability for them?

4 A       Right.

5 Q       You can't say with any confidence they would be within the  
6       range or outside of the range?

7 A       Correct.

8 Q       All right.

9                       MR. HAMPEL: One -- one follow-up question.

10                               REDIRECT EXAMINATION

11 BY MR. HAMPEL

12 Q       That's not three it's .3; is that correct?

13 A       Point three percent --

14 Q       -- point three --

15 A       -- or three tests out of 1,000.

16 Q       Okay.

17                       THE COURT: All right. So, Ms. Kellogg, my job is  
18       to determine, of course, whether or not the evidence in this  
19       case is admissible. So for it to be admissible I have to  
20       determine there's a reliable foundation upon which the testing  
21       was done, and the protocols were followed. And most  
22       importantly, then, I have to determine whether or not there  
23       was scientific technical or other specialized knowledge,  
24       training, and experience that was applied that produced the  
25       results here and, of course, the Court is instructed by law

1 under Daubert that the Court can rely on testing, peer review,  
2 known, or potential rates of error or this -- this -- these  
3 calculation variables we're talking about as long as they're  
4 considered generally acceptable within a relevant scientific  
5 community. Okay.

6 THE WITNESS: Yes.

7 THE COURT: So I'm giving you that because I'm gonna  
8 ask you a couple questions. So non-exhaustively this -- this  
9 testing procedure and the results. Okay. You base your  
10 opinion on the results by following that testing protocol;  
11 correct?

12 THE WITNESS: Yes.

13 THE COURT: Okay. And so your opinion is a theory  
14 of what substance was in this blood sample you tested based on  
15 the -- the testing procedure you followed. So claims could be  
16 that it was subjective, it was conclusory, there's no  
17 reasonable way to assess it for reliability and  
18 predictability. What would your response be to that? What's  
19 -- what's the objective protection here for the results that  
20 you report?

21 THE WITNESS: So one of the major ones is that we  
22 run calibrator and control samples with each batch of unknown  
23 samples and those all are samples which we know what the  
24 correct value is for them and they must come back within a  
25 certain amount of that known value in order for any cases from

1 that batch to be reported. So the fact that we are measuring  
2 samples of known concentration and those concentrations are  
3 coming back as accurate gives us certainty that the  
4 concentrations of unknown samples are also coming back as  
5 accurate.

6 THE COURT: Okay. Because when you say known  
7 samples you get to control the quality. You know what the  
8 concentration of THC is in the marijuana product or equivalent  
9 that you're testing for THC just like you know what the proof  
10 of alcohol is --

11 THE WITNESS: -- yes --

12 THE COURT: -- and the quality in your known sample.  
13 You don't in the unknown sample because you don't know what  
14 the -- what the concentration of THC level is in any possible  
15 unknown specimen and how it was ingested, edibles, smoked, or  
16 otherwise; correct?

17 THE WITNESS: Correct.

18 THE COURT: And how the body processed it and  
19 expelled it 'cuz you don't know what subject it came from --

20 THE WITNESS: -- right --

21 THE COURT: -- so all those things are the unknowns  
22 that -- that -- aren't -- don't exist in your control sample  
23 because you know you've got the THC concentration right there.  
24 Is it affected by the fact that it came from one's blood  
25 sample versus your known sample or is that in -- or do you





1 inject that in -- in blood and is that like a --

2 THE WITNESS: -- yes, we add our known samples to  
3 two milliliters of blood that we receive from a local hospital  
4 after it's been expired, and it can't be used to actually  
5 treat people anymore.

6 THE COURT: Okay.

7 THE WITNESS: We screen all of those blood samples  
8 to make sure they're actually negative for any of the drug  
9 testing --

10 THE COURT: -- drugs --

11 THE WITNESS: -- we would do.

12 THE COURT: Okay.

13 THE WITNESS: And then we do, actually, add our  
14 known standards into that blank blood --

15 THE COURT: -- okay --

16 THE WITNESS: -- so that we're working with the same  
17 matrix all --

18 THE COURT: -- so you're comparing --

19 THE WITNESS: -- of the same conditions, yes.

20 THE COURT: In the vernacular you're comparing  
21 apples to apples?

22 THE WITNESS: Correct.

23 THE COURT: Oranges to oranges?

24 THE WITNESS: Yes.

25 THE COURT: Okay. And so the -- the testing

1 procedure and theories behind the testing they've been subject  
2 to peer review and publication and have vetted through -- been  
3 vetted through these professional testing standards and  
4 laboratory accreditation requirements?

5 THE WITNESS: Yes.

6 THE COURT: Okay. And you meet that on a national  
7 and international level?

8 THE WITNESS: At least national --

9 THE COURT: -- sure --

10 THE WITNESS: -- I'm not sure --

11 THE COURT: -- okay --

12 THE WITNESS: -- if ANAB accredits international or  
13 not.

14 THE COURT: All right. And you followed standards  
15 that control your operation and you repeat those standards  
16 without substantial deviation or variation in each test?

17 THE WITNESS: Yes.

18 THE COURT: Okay. And that's part of your  
19 requirements you're legal and ethical responsibility as a  
20 scientist isn't it?

21 THE WITNESS: That's correct. To follow our  
22 protocol in each case.

23 THE COURT: Okay. And are your reported results  
24 when you perform these tests and you've performed over 5,000,  
25 ya know, blood tests on THC, do they receive general

1 acceptance within your scientific community and among your  
2 peers?

3 THE WITNESS: Yes.

4 THE COURT: Other labs accept your results?

5 THE WITNESS: Yes. We perform competency or I'm  
6 sorry, proficiency tests that are samples prepared by an  
7 outside organization. They send them out to a bunch of  
8 different labs and all of the different labs test them and  
9 then our technical leader makes sure that the results that we  
10 get are matching up with what other labs are getting as well.

11 THE COURT: Okay. And this sample once taken, do  
12 you preserve it for a period -- this particular sample in this  
13 case you -- you didn't know who it came from its just labeled  
14 and followed that protocol but is that sample still available  
15 to be retested if somebody wanted to have that tested in  
16 another lab?

17 THE WITNESS: Yes. We do keep all of our samples  
18 for two years.

19 THE COURT: Okay. All right. And so the work you  
20 do you do without regard to whether or not it's going to be  
21 called into -- well, let me put it this way, you don't do your  
22 work in preparation for litigation in any specific case, do  
23 you? I mean, you do your work and report the results  
24 regardless of whether or not the results are gonna be  
25 challenged, used at a trial, accepted without question, you --

1 you report -- you follow the same testing protocols and  
2 produce the same reports based on the testing results in each  
3 case?

4 THE WITNESS: Yes.

5 THE COURT: You -- you don't have different testing  
6 protocols or procedures for situations where a prosecutor will  
7 say hey, or the -- the Prosecuting Attorneys Association or  
8 the State Police will say hey, this is a high profile case  
9 this -- there's a lot at stake you gotta -- you gotta make  
10 sure all the T's are crossed and I's are dotted versus this is  
11 low level menial stuff you can cut corners here?

12 THE WITNESS: No. I --

13 THE COURT: -- nobody --

14 THE WITNESS: -- treat each case the same.

15 THE COURT: Okay. Nobody dictates to you what  
16 protocols you follow except the -- your supervisors and the  
17 certification requirements?

18 THE WITNESS: Right. The only time a case would be  
19 treated differently is if we get a call this is a high-profile  
20 case it needs to be rushed because it's going to court sooner  
21 and then the only difference --

22 THE COURT: -- so then it might go up in -- in the  
23 priority of testing --

24 THE WITNESS: -- yes --

25 THE COURT: -- in terms of when?



1 THE WITNESS: Yes.

2 THE COURT: But not how?

3 THE WITNESS: But not the actual testing.

4 THE COURT: Right. Not how?

5 THE WITNESS: Yes.

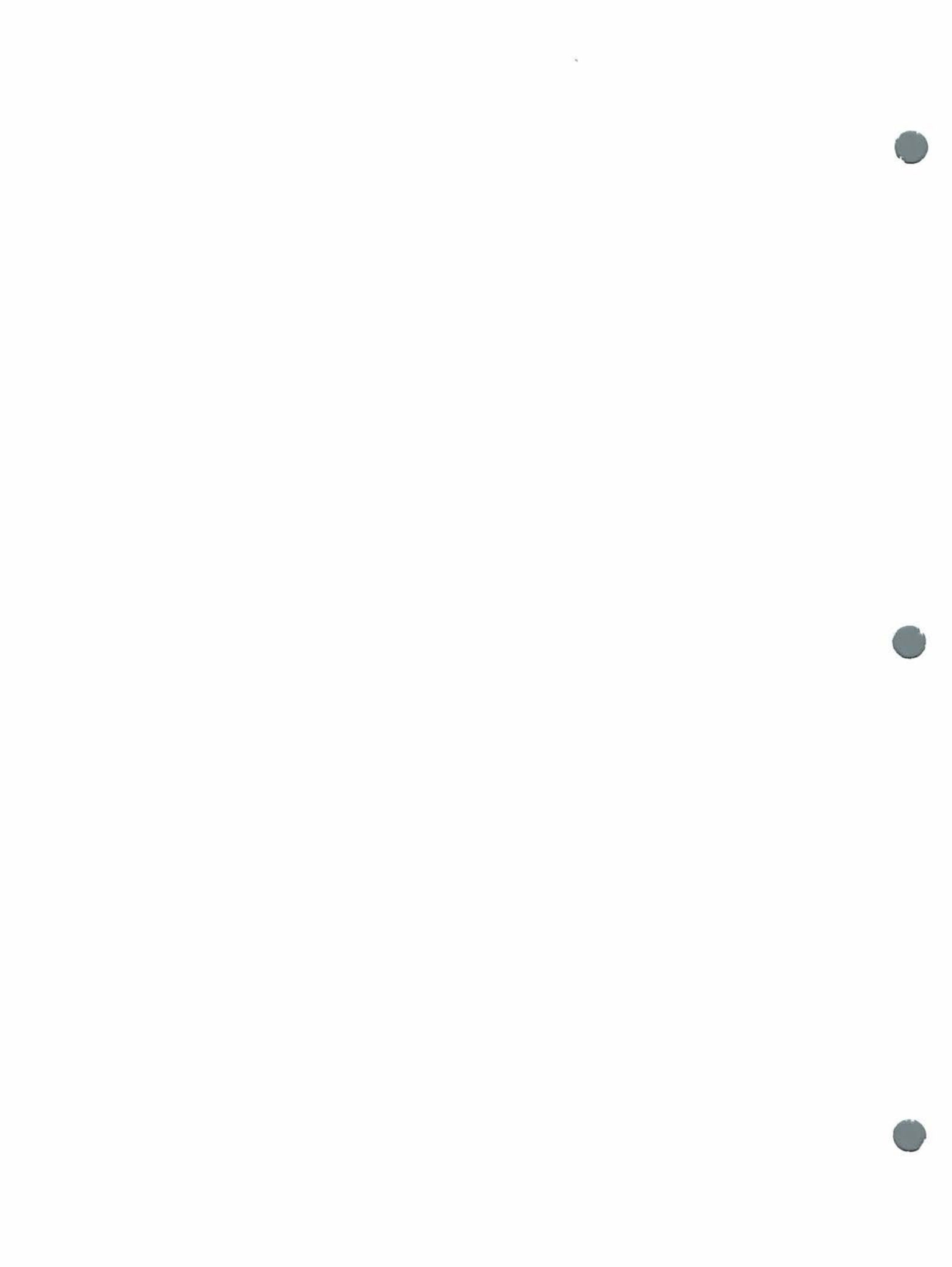
6 THE COURT: Okay. All right. All right. And so  
7 from a scientific standpoint, any -- any accounting for  
8 alternative explanations as to why this blood sample that you  
9 tested in this case has THC in it that would be -- would be a  
10 reasonable scientific explanation for something other than the  
11 sample from -- from whom the blood or the subject from whom  
12 the blood was taken ingested THC? In other words, is there  
13 another reasonable explanation for how THC got in that blood  
14 sample?

15 THE WITNESS: Honestly, I have no idea how THC gets  
16 in any of my blood samples. I'm not aware of other ways it  
17 can get in there other than the subject ingesting it. It's  
18 not something that occurs naturally in the body or anything  
19 like that.

20 THE COURT: Okay. All right. So, I mean, it's not  
21 like hey, I got diabetes and so something is occurring in my  
22 blood that's gonna cause a false positive for THC?

23 THE WITNESS: Right. No. As far as I am aware --

24 THE COURT: -- as far as you know from a toxicology  
25 standpoint --



1 THE WITNESS: -- there isn't anything that would  
2 cause it to be there.

3 THE COURT: All right. All right. I don't have any  
4 other questions. Go right ahead.

5 (At 4:37 p.m., DX-C, DX-D marked)

6 MR. HAMPEL: I have not seen any of these before.  
7 Do you have a copy for me?

8 RE-CROSS-EXAMINATION

9 BY MR. KOMORN:

10 Q I'm going to hand you this document that's marked --

11 MR. KOMORN: Judge, I don't know, did we admit the  
12 other things yet? If I didn't, I would move to admit A and B  
13 at the defense --

14 THE COURT: All right. I haven't seen 'em.

15 MR. HAMPEL: I don't know what A and B are.

16 THE COURT: Okay.

17 MR. KOMORN: B is -- B is the sample laboratory  
18 report of the alcohol testing. A was the --

19 THE WITNESS: -- you took A back --

20 MR. KOMORN: -- I know --

21 THE WITNESS: -- okay --

22 MR. KOMORN: -- A was the letter from the  
23 toxicologist supervisor -- I -- I'd like to publish this to  
24 the Court.

25 THE COURT: All right. Any objection, Mr. Hampel?





1 MR. HAMPEL: None.

2 THE COURT: All right. So Defendant's A and B will  
3 be admitted.

4 (At 4:37 p.m., DX-A, DX-B admitted)

5 Okay. Thank you.

6 BY MR. KOMORN:

7 Q I'm gonna hand you this, this is a -- go ahead and read the  
8 cover page see if it refreshes your recollections to what  
9 (in audible).

10 A Yes.

11 Q All right. So would you describe what -- what I just handed  
12 you? What it appears to be.

13 A This is a copy of a letter and I believe all of the documents  
14 that were requested by the defense in this case.

15 Q All right. And they came to you originally 'cuz you're the  
16 named lab reporter and was forwarded onto that person's seems  
17 to be supervisor some kind of FOIA?

18 A The request came to me, yes, and I forwarded it onto to  
19 Lindsay she does the majority of our FOIAs she's actually one  
20 of our forensic technicians, but she handles a lot of getting  
21 documentation to the right people.

22 Q All right. Does that look like -- so within that document --  
23 I mean, I know what I requested from you, but do you remember  
24 what we requested -- what Lindsay -- is it Lindsay?

25 A Yeah, Lindsay.

1 Q What Lindsay provided to us -- would -- would you summarize  
2 that as you recall?

3 A Yes. Some accreditation documents, the uncertainty procedure,  
4 and the case contents.

5 Q Okay. And was -- I want to ask you a question about it real  
6 quick. Have you -- have you reviewed these documents before?  
7 Do you -- are you familiar with them at all?

8 A I briefly flipped through

9 Q -- okay --

10 A I -- I looked at my case contents more closely but.

11 Q All right. Can -- some of these reporting deal with the --  
12 some of the documents within this deal with the accreditation  
13 process. Do you agree with that?

14 A Yes.

15 Q Okay. And I don't wanna -- I think -- so there's ten pa --  
16 there's like a ten -- there's 10 of 10 and then the rest of it  
17 is -- goes from here -- but -- but -- so there's ten of ten  
18 pages in here which seemingly referred to the accreditation  
19 process and measurement uncertainty. I'll show 'em to you in  
20 a second then.

21 A Okay.

22 Q And within those ten of ten, I'm gonna turn your attention to  
23 -- I'm gonna divide it so it's easier (in audible).

24 MR. HAMPEL: What's that exhibit number?

25 MR. KOMORN: C. I'm just breaking it up into (in



1           audible).

2 BY MR. KOMORN:

3 Q       So there's within this there's a measurement uncertainty  
4       report and it's one of ten pages so I'm gonna hand this to you  
5       in a second but I wanna draw your attention to -- maybe you  
6       could help explain some of this to me -- calculation of  
7       uncertainty budget for drug analysis by GCMS and this starts  
8       on page 7 of 10 --

9 A       -- okay --

10 Q       -- I think everything before that is done with alcohol  
11       uncertainty but if I -- if I could hand that to you and take a  
12       look at it and tell me if something you've reviewed before --  
13       have some familiarity with it?

14 A       Yes. This looks like a portion of our uncertainty procedure.

15 Q       Okay. In fact, I'm gonna (inaudible).

16 A       Yep.

17 Q       So there appears to be calculation for blood THC and  
18       uncertainly there's a type A and type B process of some kind;  
19       is that right?

20 A       Yes.

21 Q       Could you -- we didn't talk about that at all. What -- what's  
22       the difference between the type A and type B? And it isn't  
23       blood types; right? It's we're talking --

24 A       -- no, not blood types.

25 Q       Okay.



1 A Different types of measurements that go into the uncertainty  
2 calculation. I don't know a whole lot about this because  
3 calculating this is not part of my job description but -- so  
4 here it lists that the type A uncertainty are historical  
5 values for THC low, medium, and high positive controls. So  
6 the difference in the controls of known value that we run is  
7 one of the items that is calculated into this. And then type  
8 B uncertainty includes the glass pipettes that we use to  
9 measure the volume of the blood sample that we are analyzing.  
10 NIST traceable reference solutions so those would be our  
11 calibrator and control samples they give an uncertainty along  
12 with those when you order them.

13 Q So they -- that uncertainty is not necess -- necessarily  
14 something that the lab determines on its own it -- it comes  
15 from the supplier or the manufacturer of the sample?

16 A For those cerilliant standards, yes.

17 Q All right. But there's no other second -- you just -- you  
18 just take the manufacturer at their word then; is that right?

19 A We do first check them against our current calibration set and  
20 make sure that they are coming up at the right values.

21 Q All right. Is there some rep -- is there some report that --  
22 and what's -- what are those accuracy levels if you know?

23 A I don't know off the top of my head.

24 Q But that would be something should -- should or would be  
25 included within uncertainty?





1 A That would be something my technical leader would know when  
2 calculating the uncertainty, yes.

3 Q Okay. Well, that's -- that's the A and B and there's a  
4 combination one; right? Isn't that -- there's a combined  
5 uncertainty of some kind or -- tell me what this is average CV  
6 29 and 9.8 what -- what does that refer to?

7 A I don't know exactly what that percent CV is.

8 Q Okay. Moving down below --

9 A -- yes --

10 Q -- that refers to a combined uncertainty of some kind?

11 A Yes. That is the point at which the type A and type B  
12 uncertainties are being combined to form our final  
13 uncertainty.

14 Q All right. Now, that says 29 percent uncertainty, doesn't it?

15 A This does, yes.

16 Q All right. So the combined uncertainty reported through the  
17 ASCLD/LAB or INLAB what was it ANAB?

18 A ANAB, yes.

19 Q Seems to be 29 percent is reported within those -- within  
20 those produced documents that we requested.

21 A This is only an example calculation. It's not the actual  
22 calculation done to get the 24 percent that was accurate at  
23 the time of this sample. It's just an example of how the  
24 calculation is done.

25 Q What's the diff -- how -- how -- how can we explain the



1 difference between 29 percent and 24 percent, then, as an  
2 error rate as its -- as it seemingly reported there is a  
3 combined uncertainty level 29 percent?

4 A It's because this is only an example calculation. It's not  
5 the true calculation that gave this value.

6 Q I understand what you're saying. Cuz on the next page which  
7 is page 8 of 10 --

8 A -- yes --

9 Q -- all right -- sorry, 9 of 10 you're pointed out that 24  
10 percent THC uncertainty -- is that THC uncertainty to 99.7  
11 percent confidence level equals 24 percent --

12 A -- yes --

13 Q -- uncertainty cal -- I guess un-calculation. This is a  
14 summary of 2019 alcohol drug uncertainty calculations is this  
15 not a -- this isn't specific to Emma O'Toole or the accused in  
16 this case?

17 A No. It -- no, that would be -- that would cover all of the  
18 cases that were run while that particular document was active.

19 Q Which particular doc -- document was that?

20 A The uncertainty procedure. That page in the uncertainty  
21 procedure is the one that's updated each year.

22 Q Okay.

23 A There's a lot more background calculations that go into it  
24 but.

25 Q Then why'd they report -- this doesn't give any reference to



1 anything other than 15 nanograms, ya know, it just -- I mean,  
2 it just doesn't -- this doesn't refer to some generalize  
3 calculation it seems to be all of these are generalized  
4 calculations. I can't -- and I know you said -- gave a  
5 reason why 29 percent error rate is here and seemingly a, ya  
6 know, four -- I saw somewhere, yeah, plus four -- plus four  
7 nanograms per milliliter -- plus or minus four nanograms per  
8 milliliter in either direction.

9 A Okay.

10 Q Is that right?

11 A That's what that says.

12 Q Okay. Do you have any reason to dispute that -- I mean, could  
13 -- you see --

14 A -- I'd have to see all the pages together.

15 Q I know -- I know -- I know -- I know and I didn't mean to I  
16 was trying to see -- here's seven --

17 A -- yeah --

18 Q -- eight, all right. Go ahead.

19 A Okay. So starting here it says this is an example calculation  
20 for the blood THC uncertainty. And that --

21 Q -- is type A --

22 A No. This -- this should be like indented or something to  
23 indicate that this is all part of the example calculation is  
24 what he's doing here. So all the way until you get to this  
25 summary of 2019 alcohol and drug uncertainty calculations that



1 is all a part of this example calculation.

2 Q I know. Because this -- this is for -- for the accreditation;  
3 right? And I was looking at the past procedures of how  
4 they've been accredited in their --

5 A -- no, this is our actual procedure --

6 Q -- oaky --

7 A -- for uncertainty.

8 Q That's fine and when they combined -- combined protocol and  
9 reports as an example 29 percent error rate; right?

10 A Yes. It's saying with these example control values that he --  
11 he may very well have made these up just for the purposes of  
12 illustrating an example here. But using those gives you the  
13 uncertainty rate of 29 percent so then he applies this to an  
14 also made up case work example of where the THC level is 15  
15 and then using that 29 percent, yes, you get plus or minus  
16 four nanograms.

17 Q Okay. So that's -- that's for purposes of accreditation and a  
18 statement to the accrediting agency -- I theatrically truthful  
19 and representative of what's taking place in the lab, using an  
20 example with your data that there's a 29 percent error rate  
21 and then goes on to say that if it's a 15 nanograms it would  
22 be plus -- plus or minus four nanograms in either direction.  
23 So it would be 11 or 19; is that right?

24 A Yes.

25 Q Okay. Now, you're saying then that the 24 percent error rate





1 that is reported -- the following is not -- you said that it's  
2 for every case currently; right? You're gonna state that its  
3 24 percent error rate it's not based upon the number that is  
4 identified?

5 A It would be 24 percent of whatever number is identified.

6 Q Okay. The number -- the -- the -- the error rate doesn't go  
7 up when the number -- the reported number goes up? That would  
8 make no sense.

9 A Not the percentage, no. But like the plus or minus four  
10 nanograms here --

11 Q -- I understand --

12 A -- that differs based on the original result.

13 Q Sure. If -- if that example that gets us to 29 percent -- I'm  
14 having a tough time -- it may be me -- how do we get to 24  
15 percent? What's that data? And if the 29 percent is based on  
16 an example and a -- and -- and --

17 A -- yes --

18 Q -- the data that he had at the time -- is this a new year and  
19 different data that started if -- if you can explain that?

20 A This isn't even real data that he's using. He just has one of  
21 each control value whereas when he's calculating the full  
22 thing for real cases for a real year, he would have control  
23 values from every batch that had been run in the previous  
24 year. So using just one value from each just simplifies this  
25 is how I would do the calculation, but I would do it with a



1 lot more data.

2 Q But that's supposed to be a representative of the data for the  
3 -- the example that he's using is supposed to be some kind of  
4 representations not just --

5 MR. HAMPEL: -- Your Honor, I -- I am now at a loss  
6 for any possible relevancy to a Daubert, ya know, analysis.

7 THE COURT: I would sustain that.

8 MR. KOMORN: Okay. I'll move on.

9 THE COURT: Okay.

10 BY MR. KOMORN:

11 Q The next question dealing with just the tail end of this is --  
12 so the resources that are referred to here are the ASCLD/LAB  
13 AB guidance of estimations of measurement uncertainty. Would  
14 you agree with that?

15 A Yes.

16 Q So -- so when we're talking before about the various -- the  
17 letter there was I don't know, 10.2 or whatever it was that --  
18 that's what it's referring to, am I right?

19 A I don't know if it's in that specific section or if it's in  
20 another accreditation document.

21 Q All right. I'm gonna hand you what I think is that exact  
22 document --

23 A -- okay --

24 Q -- that's referred to when I printed out when I took the --  
25 the -- and just take a look at it its marked as Exhibit D.



1 Tell me if that looks somewhat like a corresponding document  
2 that that link would take me to?

3 MR. HAMPEL: Before you ever look at it, could I see  
4 what document you're putting in front of her?

5 MR. KOMORN: Sure, I'm sorry.

6 THE WITNESS: Do you want this page also?

7 MR. HAMPEL: I have no objection to the admission of  
8 this document.

9 MR. KOMORN: Thank you.

10 BY MR. KOMORN:

11 Q I was about to give them back to you maybe?

12 A I think --

13 Q -- these are yours, right?

14 A Yeah. I think --

15 Q -- I grabbed them --

16 A -- yep. I think you have the rest of it.

17 Q Okay.

18 A This was just this page.

19 Q That's fine. I'm giving you back Exhibit D and I was asking  
20 if you saw that correlating or, ya know, the -- what am I  
21 calling it -- that's the re -- documents --

22 A -- resources, yes.

23 Q The resources refers to ASCLD/LAB International Accreditation  
24 and I'm just asking you if Exhibit D is the, in fact, the  
25 corresponding document if you can tell?



1 A I don't think so because this ALPD number the two of them that  
2 are listed here are not the same as this document number that  
3 I'm seeing here. And our uncertainty procedure I have 30 60  
4 and 30 57 and this is 30 51. That has a completely different  
5 name.

6 Q Your saying that this one 30 60?

7 A Yeah.

8 Q How would you distinguish this from not being a controlling  
9 document, if you know, from the procedures that you're  
10 operating under under that accreditation?

11 A Oh, it could also be a controlling document, I was just  
12 answering specifically to --

13 Q -- okay --

14 A -- I don't think it's the two listed here.

15 Q All right. Can we agree that that is a representation of the  
16 -- the accrediting institutions procedures on uncertainty  
17 measurements?

18 A I believe so but I honestly have not seen this document before  
19 so I can't be certain.

20 Q Okay. Well, when you -- when you were testifying about the  
21 letter and the ability to report or not report on the lab  
22 report the uncertainty, you were doing that not because you'd  
23 read the accreditation manual because that's the way you were  
24 trained; is that right?

25 A Somewhat but I have, also, actually seen that specific portion





1 of the manual that was referenced there.

2 Q All right. Let me ask you this, then, about this document --

3 A -- sure --

4 Q -- 'cuz it -- the reporting requirements say here that the  
5 estimated measurement uncertainty communicated as an expanded  
6 uncertainty, including the coverage factor and coverage  
7 probability, must be in the test or calibration report or in a  
8 attachment to the report that is communicated to the customer.  
9 This to me seems to be a statement of the international --

10 MR. HAMPEL: -- Your Honor, I'm going to object.

11 This ground has been plowed several times. I don't know what  
12 more is to be gained.

13 MR. KOMORN: Well, she just answered --

14 MR. HAMPEL: I'm -- I'm gonna use relevancy.

15 MR. KOMORN: I'm almost done I'm promise -- I'm  
16 almost done.

17 THE COURT: All right.

18 MR. KOMORN: And -- and this is just a follow up on  
19 some stuff we talked about.

20 THE COURT: Okay.

21 MR. KOMORN: Fine.

22 THE COURT: I'll agree. I'll -- I'll allow you to  
23 wrap up here, Counsel.

24 MR. KOMORN: It's just on the reporting requirements  
25 then I'll move on.



1 THE COURT: Okay.

2 BY MR. KOMORN:

3 Q But -- but -- so -- I'm -- I'm taking that assuming that this  
4 is a controlling document, I'm taking it to mean that the  
5 default is to report as a matter of requirement for the  
6 international accreditation?

7 A It does say that, but the next paragraph also says for certain  
8 testing applications, the laboratory may have an agreement  
9 with the appropriate legal or judicial customers that the  
10 estimated uncertainty is not required in a test report unless  
11 the measurement result considering the expanded uncertainty  
12 falls within a certain range around a legal specification.

13 Q Understood. So really -- so -- I asked you a question before  
14 about the def -- default, like, does science require  
15 uncertainty rate as a manner of science? That would seem to  
16 say, yes. Would you agree with me?

17 A That its required that we calculate it, yes.

18 Q And report it absent a request from your customer. In other  
19 words, if you can answer the question I asked go ahead and  
20 answer if not I can rephrase it. Did you understand my  
21 question?

22 A If you can say it one more time, please?

23 Q All right. I asked the question if the international  
24 accreditation default is that you have to re -- or that you  
25 shall report the uncertainty budget in the reporting document?



1 That's the only area that I'm inquiring here.

2 A Okay.

3 Q I'm reading that to say you do -- all scientist do as a matter  
4 of scientific principles and the scientific community would  
5 expect the reporting of an uncertainty measurement on any  
6 report that is -- exists that they would produce. Do you  
7 disagree with that reading it that way?

8 A If that was all it said I would agree.

9 Q Okay. Fine. That's -- that's fair. We can agree that that  
10 statement seems to suggest what I just said absent what comes  
11 after --

12 MR. HAMPEL: -- Your Honor, this seems to be go to  
13 argument not to let -- letting her answer the question.

14 MR. KOMORN: I'm asking one question --

15 MR. HAMPEL: If she --

16 MR. KOMORN: -- I'm almost done I promise.

17 MR. HAMPEL: But she hasn't answered your question  
18 yet because you have interjected your view of it not her  
19 answer to it.

20 THE COURT: All right.

21 MR. KOMORN: Can we --

22 MR. HAMPEL: -- and so, therefore, I object.

23 MR. KOMORN: I'll rephrase -- I'll rephrase -- I'll  
24 rephrase.

25 THE COURT: Go ahead and rephrase it.

1 BY MR. KOMORN:

2 Q I know that there's a second part of this document but can we  
3 agree that the first part that I read and the (in audible)  
4 seems to suggest that the default of the place where  
5 scientific community would be expected to report in a lab  
6 report would include an uncertainty measurement just looking  
7 at that one section.

8 A Again, with just that one section, yes.

9 Q Very good. And your answer would be different in looking at  
10 the second section because there seems to be a reason why one  
11 would not report and that's because that the customers  
12 request it to not be reported?

13 A It just says an agreement. I don't know at what point that  
14 agreement would have come into play.

15 Q Well -- well, who would of asked to -- who would have brought  
16 this agreement into -- do you think the scient --

17 MR. HAMPEL: -- Your Honor, hold on -- I'm -- I'm  
18 going to object to this whole line of questioning. Has  
19 nothing to do with the reliability of this test. There's  
20 already been testimony ad -- ad nauseam about an error rate --

21 THE COURT: -- all right --

22 MR. HAMPEL: -- that still shows --

23 THE COURT: -- well, I'm -- I'm gonna sustain it and  
24 we're gonna conclude it with this. Okay. This witness isn't  
25 on trial. This witness is testifying as a forensic scientist.



1 There was a motion that hasn't been ruled on yet because we're  
2 still in voir dire to qualify her as an expert. But let me  
3 ask you a hypothetical question. Okay. Assume that the  
4 accreditation standards, the committees, the -- the --what's  
5 the new acronym whatever the new one is I -- I remember the  
6 old one but -- so all the accreditation bodies required in the  
7 reporting require both that you calculate the measurement of  
8 uncertainty and that when you promulgate your reports you  
9 report it. Okay. Assume that to be true and assume that your  
10 lab dropped the ball on the last one and didn't report it in  
11 your results, does it affect the scientific validity and  
12 repeatability of your testing procedure?

13 THE WITNESS: No.

14 THE COURT: Or does it go to a non-compliance with a  
15 report out?

16 THE WITNESS: Yes. I would expect it -- it wouldn't  
17 affect the validity of the result. It may affect our  
18 accreditation the next time they come through and assess it.

19 THE COURT: Sure. Because they may say well, wait a  
20 minute, you're not a lab that's telling both sides what that  
21 measure or uncertainty is so you're trying to hide that ball  
22 from somebody and that's gonna call into question whether or  
23 not you're following proper procedures because if you're  
24 making that determination about the measure of uncertainty and  
25 your incorporating that in your calculations then there's no



1 ball to hide you just report it out; right?

2 THE WITNESS: Right.

3 THE COURT: But you don't make that determination as  
4 the -- as the toxicologist, the scientist that's doing the  
5 texting -- testing that's above your paygrade just like a  
6 bunch of stuffs above my paygrade.

7 THE WITNESS: Yes.

8 THE COURT: That's why I got a Court of Appeals and  
9 you got supervisors; right?

10 THE WITNESS: Yes.

11 THE COURT: Okay. I get it. And so what you're  
12 telling me is, as far you understand, Ms. Kellogg, there is  
13 not a requirement currently imposed in your department in the  
14 toxicology unit when it comes to this kind of testing. Let's  
15 just narrow it to blood testing on THC to report that measure  
16 of uncertainty rate in your document unlike your lab has  
17 reported for blood --

18 THE WITNESS: -- for alcohol --

19 THE COURT: -- that there's -- that there's no --

20 THE WITNESS: -- yes --

21 THE COURT: -- current requirement that you report  
22 that measure of uncertainty like you do for blood in --  
23 denoted in Defendant's Exhibit B; right?

24 THE WITNESS: Correct.

25 THE COURT: And your explanation is you're relying



1 on your supervisor Nicholas Fillinger's letter that was  
2 reported in Defendant's Exhibit A that says there's only three  
3 reasons we report the measure of uncertainty and they're  
4 listed here and one of 'em is if the law requires it. If it's  
5 a violation that requires that we know what the uncertainty is  
6 because that's relevant to the trier of fact to determine  
7 whether or not it hits that number on the head at or above?

8 THE WITNESS: Correct.

9 THE COURT: Is that right?

10 THE WITNESS: Yes.

11 THE COURT: Okay. Anything else, Mr. Hampel?

12 MR. HAMPEL: No, Your Honor.

13 THE COURT: Anything else?

14 MR. HAMPEL: Oh, I do have one thing, Your Honor.

15 THE COURT: Okay.

16 MR. HAMPEL: I have neglected to request that  
17 Samantha J. Kellogg be qualified as an expert in the forensic  
18 -- as a forensic scientist in the analysis and quantification  
19 of drugs and alcohol.

20 THE COURT: All right. And your response to the  
21 motion to qualify her as an expert?

22 MR. KOMORN: Can we include in there knowledge of  
23 the -- an expert in procedure and protocol within the Michigan  
24 State Forensic Science Lab?

25 THE COURT: Do you feel you have sufficient



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expertise?

THE WITNESS: In the procedures relating to toxicology.

THE COURT: Okay.

THE WITNESS: I don't want to say I know anything about latent prints or something.

THE COURT: All right.

MR. KOMORN: No, that's fine.

THE COURT: All right.

MR. KOMORN: Are we including it in -- in specificity as to the accreditation procedures or is that not --

MR. HAMPEL: -- Your Honor, I would object to that 'cuz she's testified that she's not participating in that nor part of that.

THE COURT: Do you have any supervisory or employment authority or responsibility regarding the licensing and compliance procedures at your lab?

THE WITNESS: Only -- not to make sure we're complying. Only if when the assessors are there to accredit us if they ask me something, I have to answer their questions.

THE COURT: Sure.

THE WITNESS: But --

THE COURT: -- and you have to follow the procedures that are in place --

1 THE WITNESS: -- yes --

2 THE COURT: -- that are required for the lab to  
3 maintain their accreditation?

4 THE WITNESS: Yes.

5 THE COURT: But you don't contract with the  
6 accrediting agencies or -- or ultimately sign the  
7 documentation that certifies your labs accreditation?

8 THE WITNESS: No.

9 THE COURT: Okay. That's a supervisor or somebody  
10 above you?

11 THE WITNESS: Yes. I believe that's our captain,  
12 actually.

13 THE COURT: Your lab director?

14 THE WITNESS: Yes.

15 THE COURT: Person in charge of the lab. All right.  
16 Well, subject to the caveat any objection? I mean, --

17 MR. KOMORN: -- for purposes of this hearing, no.

18 THE COURT: Right. Okay.

19 MR. KOMORN: And -- and I would ask that -- the  
20 document that -- D I think it was also be received from the  
21 Court.

22 THE COURT: All right. Any objection, then --

23 MR. HAMPEL: -- no objection.

24 MR. KOMORN: And also -- I'll put it back together  
25 C, if I may. And I'll hand that to the Court as well. Thank



1           you.

2                       THE COURT: All right. And so first of all, I will  
3 grant the prosecutor's motion to qualify Ms. Kellogg as an  
4 expert witness as a forensic scientist in the area of  
5 toxicology and in the requirements for lab protocols and  
6 testing as it relates to blood specimens and most specifically  
7 in this case as to the testing of the THC. But I need to  
8 know, Mr. Hampel, from your standpoint your position on  
9 admission of C and D -- defense C and D?

10                   MR. HAMPEL: I have no objection to their admission.

11                   THE COURT: All right.

12                   MR. KOMORN: While we are admitting things, Judge, I  
13 did bring some items I wanted to have marked as well, I'll  
14 show them right now to other counsel but they're --

15                               (At 5:08 p.m., DX-C, DX-D admitted)

16                   MR. HAMPEL: Well, when it's time then it's time.

17                   MR. KOMORN: I do think there's some relevance --  
18 I'm moving to admit I guess it would be Exhibit E, but I have  
19 to have it marked.

20                   MR. HAMPEL: There's been no testimony about Exhibit  
21 E.

22                   MR. KOMORN: I know. It's a state report.

23                   THE COURT: Right.

24                   MR. KOMORN: The -- from the Michigan State Police  
25 and it's the March 19th Impaired Driving Safety Commission





1 Report and I -- I think it stands as itself it's -- it's a  
2 state document it's a report produced and as the Court said  
3 we're determine question, ya know, preliminary questions the  
4 Court can take if for whatever its worth I'm gonna mark it  
5 now.

6 (At 5:08 p.m., DX-E marked)

7 THE COURT: Mr. Hampel, have you -- its appended to  
8 the defense brief in the motion -- in the motion to exclude  
9 field sobriety tests.

10 MR. HAMPEL: I don't think it has anything to do  
11 with this Daubert hearing. It may have something to do with  
12 the other hearing.

13 THE COURT: I would agree.

14 MR. KOMORN: Well, it's -- I would say to the extent  
15 that Daubert discusses to some extent relevancy and I would  
16 say that it would offer a legal position for me to argue  
17 regarding relevancy as well.

18 MR. HAMPEL: Your Honor, I'm going to object to the  
19 admission of this because it has absolutely nothing to do with  
20 this Daubert hearing whatsoever.

21 THE COURT: All right. Well, we'll take it up at a  
22 later time. I think I can probably consider it anyway, quite  
23 frankly, --

24 MR. HAMPEL: -- if the Court wants to consider it --

25 THE COURT: -- under the --



1 MR. HAMPEL: -- I won't stand in the way, Your Honor  
2 --

3 THE COURT: -- under the exceptions in the rules of  
4 evidence and --

5 MR. HAMPEL: -- and I will not object.

6 THE COURT: Okay.

7 MR. HAMPEL: Because --

8 THE COURT: -- to the extent -- to the extent that  
9 it is a public document I believe it might meet one of the  
10 exceptions under 902(2), but we can get to that or no, we'll  
11 leave it at that because I don't have a certified copy of it  
12 but be that as it may.

13 MR. KOMORN: I mean, I know I can include it but for  
14 evidence purposes.

15 THE COURT: I'll admit it --

16 MR. KOMORN: -- okay --

17 THE COURT: -- here over the objection. Okay.

18 (At 5:11 p.m., DX-E admitted)

19 All right. So I have defense A through E admitted. And then  
20 I have the witness and prosecutor's motion granted to qualify  
21 the witness and the -- you moved the admission of witnesses  
22 CV?

23 MR. HAMPEL: Yes.

24 THE COURT: And that was admitted -- that marked as  
25 People's Exhibit --



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MR. HAMPEL: -- I better get that one marked --

THE COURT: -- okay.

(At 5:11 p.m., PX#2 marked)

MR. HAMPEL: I know we discussed it and Exhibit 1 also -- prosecutor's Exhibit 1.

THE COURT: And Exhibit 1 --

MR. KOMORN: -- that's the blood results --

MR. HAMPEL: -- that was the blood test results

THE COURT: Test results. All right. So any objection to Exhibit 2 which is Ms. Kellogg's Curriculum Vitae?

MR. KOMORN: No.

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

(At 5:12 p.m., PX#2 admitted)

MR. KOMORN: For -- purposes of this -- today's evidentiary hearing, no.

THE COURT: All right.

MR. HAMPEL: And here's one right here --

THE COURT: -- and Exhibit 1 the blood result. Then any other position regarding the admission of the result?

MR. KOMORN: I know we for some reason I -- I don't feel like I was communicating well earlier and I -- I guess -- obviously, I'm objecting to its admissibility in general. I don't have a problem with the Court for purposes of today's



1 hearing reviewing it and taking into evidence for that limited  
2 purpose if you rule against me then, obviously, you're gonna  
3 admit it at trial but for purposes for today and your  
4 assessment and analysis of the issues that we -- the facts  
5 that have been presented in -- in the legal arguments we're  
6 gonna make in closing I would --

7 THE COURT: -- all right --

8 MR. KOMORN: -- just for that limited purpose.

9 THE COURT: All right. And just to confirm, Ms.  
10 Kellogg, showing you People's Exhibit or People's Exhibit 1  
11 that is your report from the forensic testing you did on the  
12 specimen identified in that report?

13 THE WITNESS: Yes. The first two pages are my  
14 actual report and the third page, I think, just prints out  
15 when you download a report from the system.

16 THE COURT: All right. Okay. And that's accurate  
17 --

18 THE WITNESS: -- yes --

19 THE COURT: -- in terms of reported information?

20 THE WITNESS: It is.

21 THE COURT: Based on your testimony. All right.  
22 It'll be admitted.

23 (At 5:13 p.m., PX#1 admitted)

24 MR. KOMORN: If -- if I'm not mistaken just -- the --  
25 -- the -- my -- that packet of stuff that I received has all





1 other data from this particular test as well beyond that --

2 THE WITNESS: I believe so, yes.

3 MR. KOMORN: So, Judge, so what -- what I'm saying I  
4 think it's my Exhibit C or D the -- the more full -- it's got  
5 a paperclip on it --

6 THE COURT: -- okay --

7 MR. KOMORN: -- has the -- what would you call it  
8 the data from the GCMS and.

9 THE WITNESS: Yes. All of the case contents.

10 MR. KOMORN: Right.

11 THE COURT: Okay.

12 MR. KOMORN: It all that in there.

13 THE COURT: All right. All right. So we -- those  
14 will be admitted.

15 (Already admitted on page 99)

16 And, then, any other evidence from this witness?

17 MR. HAMPEL: None, Your Honor.

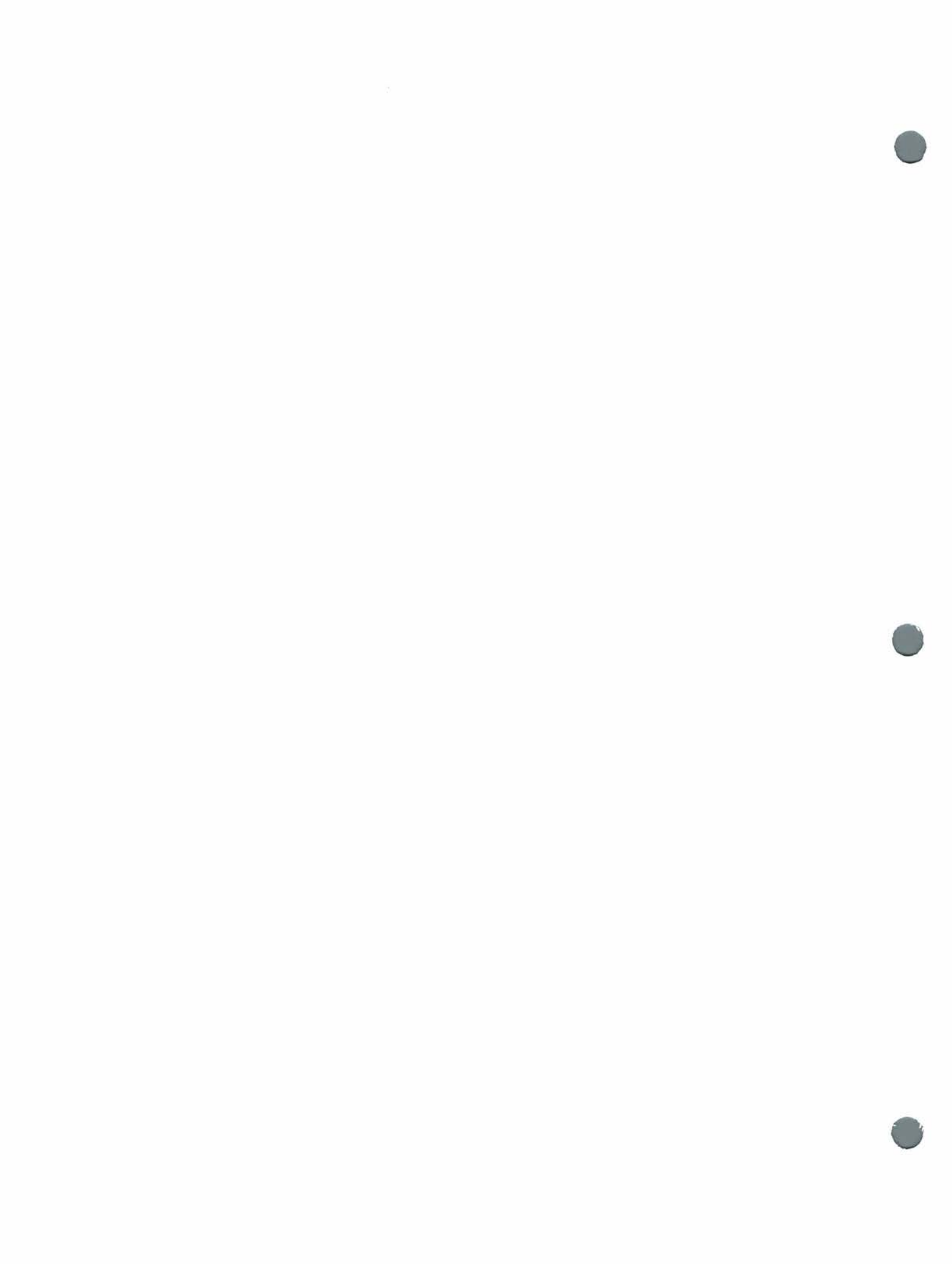
18 THE COURT: Any other evidence from Ms. Kellogg?

19 MR. KOMORN: No. No further questions.

20 THE COURT: All right. May she be excused then?

21 MR. HAMPEL: I was going to ask that. Yes, she can  
22 be excused.

23 THE COURT: All right. No requirement that she --  
24 do we have another expert or anybody else? Is she the only  
25 expert today?



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MR. HAMPEL: I don't have any do you?

MR. KOMORN: I'm -- I didn't bring any witnesses today.

THE COURT: Okay.

MR. KOMORN: I would call an expert depending on where we are --

THE COURT: -- sure -- well, but I mean, if we're gonna have another expert and then you wanna call her on rebuttal I don't want her to leave but if that's not gonna happen today --

MR. HAMPEL: -- yeah, and that's my position if --

THE COURT: -- I'm sure she'd like to get back on the road.

MR. HAMPEL: Yes.

THE COURT: Thank you, ma'am, you're excused for today. Thank you for being with us.

(At 5:13 p.m., witness excused)

MS. KELLOGG: Thank you.

MR. HAMPEL: Thank you, Your Honor.

THE COURT: All right. And --

MR. HAMPEL: The People rest at this point. We have no more -- we have no more witnesses for the --

THE COURT: -- on the Daubert hearing --

MR. HAMPEL: -- on the Daubert motion.

THE COURT: Okay. All right. And any other

1 evidence on the Daubert hearing?

2 MR. HAMPEL: None, Your Honor.

3 THE COURT: From defense standpoint.

4 MR. KOMORN: None.

5 THE COURT: All right. Well, based upon the  
6 totality of the evidence that's been presented and the  
7 testimony consists solely of the testimony of the forensic  
8 psychologist[sic] Samantha Kellogg and the Court's review of  
9 the exhibits that have been referenced and admitted both by  
10 the People and defense, I find that the evidence that the  
11 methodology, the principles, the procedures, the practices  
12 followed here were consistent with the requirement to comply  
13 with the -- all the testing and certification requirements  
14 imposed by the lab certification authorities as well as the  
15 followed the testing and protocol of the Michigan State Police  
16 Forensic Laboratory based upon the testing of Ms. Kellogg.  
17 And I find that they satisfy the requirements of Daubert in  
18 all respects and they'll, therefore, be admissible in evidence  
19 both in this proceeding and at trial. And I would incorporate  
20 all of the testimony that was given by Ms. Kellogg including  
21 the Court's inquiry regarding the methodology followed and the  
22 fact that regardless of the non-reporting of the measure of  
23 uncertainty that she calculated the measure of uncertainty  
24 she's able to report it and she followed the same protocol  
25 merely that it did not report out in the report because it's



1 not their labs procedure to do so only in the exceptions or  
2 the three instances identified by Nicholas Fillinger in the  
3 letter that was also admitted. And so for those reasons I'm  
4 satisfied that defendant's motion to or defendant's motion  
5 that requested or that challenged the evidence and the  
6 admissible of the evidence in violation of Daubert be denied.

7 MR. KOMORN: Judge, I didn't get a chance to make my  
8 argument as to point out exac -- somethings that came out --

9 THE COURT: -- all right. Let's go ahead and we'll  
10 -- I'll hear argument, but I don't know what argument is  
11 gonna change the evidence.

12 MR. KOMORN: Okay. Well, --

13 THE COURT: -- but go ahead. I mean,

14 MR. KOMORN: -- I'll -- I'll refer it in the  
15 prosecutor's brief where he cites Daubert accurately that  
16 amongst other things that the focus of the Court should be in  
17 principles and methodology in its inquiry. It is to be  
18 flexible may consider many factors including whether there is  
19 a theory or technique in question and -- and whether it has  
20 been subject to peer review and publication. It's known or  
21 potential error rate in the existence of maintenance and  
22 standards controlling its operations. These are the elements  
23 of Daubert, and I know -- and I'm not arguing with the Court  
24 I'm making my argument. But there's unequivocally Daubert  
25 requires in a measurement uncertainty in error rate. It also

1 must be subject to peer review and publication and accepted  
2 within the scientific community. Those two things are missing  
3 from this report. Furthermore, the report itself identifies a  
4 control -- a -- a -- a substance on there that's not a  
5 controlled substance and should not be reported at all its not  
6 relevant. It's not something that would -- that is relevant  
7 'cuz it's not illegal C -- COOH metabolite is report on there  
8 in legal error -- it's legal error. The -- the -- the case is  
9 gonna escape me now but its --

10 THE COURT: -- Feasel --

11 MR. KOMORN: Feasel -- Feasel -- Feasel is very  
12 clear that this is not a controlled substance. Why would a  
13 forensic scientist be reporting on its report a metabolite  
14 that is irrelevant for all purposes? Not in controlled  
15 substances its -- it's like saying that they've got kale in  
16 their bloodstream or something like that. It -- its literally  
17 it's not on the realm of something that the Court has  
18 identified that's -- could -- someone could be convicted of or  
19 relevant to. Now, with that being said there's a reason for  
20 it -- the reason for it 'cuz the customer -- clearly the  
21 customers got some communication with the lab above her  
22 paygrade that -- that witness todays paygrade but we know from  
23 that particular report that -- and I'm sorry that the Court  
24 didn't take the same, ya know, response that I did that the  
25 state lab which by definition should be neutral, that is



1 should be objective, that shouldn't be, ya know, shouldn't  
2 have to give the appearance of subjectivity but right within  
3 their answer an explanation is our customers the people that  
4 have a different relationship with us than everybody else that  
5 are relying on us to get convictions in court every single  
6 day. Our customers have not requested it when for all  
7 purposes the ASCLD/LAB and the re -- other requirements state  
8 within that document, Judge, that uncertainty must be  
9 reported. And why wouldn't they report it. And why wouldn't  
10 they? Because if the 24 or 29 percent error rate showed up  
11 like they did in the alcohol reports no court would ever admit  
12 it into evidence 'cuz it's not within the scientific range of  
13 accepted variables. It just isn't. She couldn't say she knew  
14 of one. She knows that in her training and other experiences  
15 that that level of alcohol of .01 as a error rate is accepted  
16 within the scientific community. There's decimal points there  
17 .01 that's an error rate that they can predict that it's going  
18 to be, ya know, as we used the example .1 -- one or .09 it's  
19 gonna be within that range over, over, over, over again and  
20 that is relev -- that's deemed acceptable within the  
21 scientific community. The reason why they don't report,  
22 Judge, I'm gonna suggest is because that number makes that  
23 number irrelevant. It doesn't help. It could be in either  
24 direction shouldn't even get to the jury 'cuz it's not  
25 reliable enough. It's not in a frame of reliability and we

1 don't want the jurors speculating. That's the whole point of  
2 Daubert we're not gonna, ya know, we don't let someone just  
3 come in and say, ya know, I did this and the weather was that,  
4 ya know, licking my finger with some kind of crazy measurement  
5 to try to figure something out and just get up there and throw  
6 it at the jury. We don't let that happen.

7 Daubert -- you're -- you're the gatekeeper to  
8 determine whether or not these -- these types of pieces of --  
9 which is normally hearsay piece of paper, ya know, reporting  
10 whatever its gotta have some kind of scientific attachment to  
11 it some reliability that would be reproduced over and over  
12 again. To say that these numbers could come in at any  
13 variable and -- and they're the ones doing the calculations  
14 and they're the ones that are doing the numbers -- we've got  
15 two different types of variables they're using its 29 is one  
16 example, 24's another. This is not -- this is speculation --  
17 its speculation and the greatest -- the greatest -- and -- and  
18 -- it -- and when -- when I say to you, Judge, that they the  
19 rea -- I know you're -- I know you're focusing -- and I would  
20 agree that there's a no per se number that's fine. I know  
21 that's the excuse that they give. But the other excuse they  
22 give number two, I think, is even more significant. If we're  
23 talking about truly objectivity that we wanna rely on this lab  
24 that is -- that is the MSP FSD Michigan State Police  
25 Scientific Division by definition that's seems to be

1 inappropriate.

2 But beyond that who are the customers. Prosecutors  
3 they're the ones who have a stake in it. I'm not even blaming  
4 the lab themselves. They know -- they know they're supposed  
5 to report uncertainty unequivocally. They -- they were told  
6 to do it originally with the alcohol and they've been doing it  
7 and they know everywhere within their -- their documentation  
8 here under ASCLD/LAB they're required to -- to report it.  
9 They're required to have an uncertainty rate and the  
10 determination is based on each situation. But to get their  
11 accreditations as it says in the exhibit -- the last exhibit  
12 that was admitted reporting uncertainty is a -- is a -- is a  
13 absolute it's not something to be waived. Why? Because if  
14 you're gonna have it admitted in court you wanna let the other  
15 side have the benefit of the doubt. Think of all the times --  
16 think of all the times that some lawyer -- court appointed  
17 lawyer didn't ask for -- find out about the uncertainty value.  
18 Think about the people that have been reported out at one  
19 percent one -- one nanogram -- two nanograms and they don't  
20 disclose that -- they don't disclose the -- the error rate.  
21 And the whole case is about do you -- do you know were they --  
22 did they even have it in their system at all. Why would they  
23 not be disclosed and it -- other than they know that is a  
24 weakness in their case and the only way they can run it is to  
25 add this high number of the COOH which has nothing to do with

1 it and shouldn't even be in the  
2 fray. That document, Judge, is so unreliable and doesn't meet  
3 a legal standard that would allow reasonable people to or  
4 that reasonable people should even debated -- debated. The  
5 variable that we're talking about here are too great under  
6 Daubert to be accepted. The -- Daubert doesn't play around  
7 with an error rate it says there has to be an error rate and  
8 it has to be reported.

9 The lack of objectivity here and the idea that the  
10 prosecutors or police can request how the report is produced  
11 when, in fact, Judge, it's really like almost Brady issue.  
12 The non-disclosure of this error rate that I had a FOIA to  
13 request the fact that it doesn't come on the report I would  
14 argue it's like hiding evidence a Brady issue. Why? Because  
15 if I'm going to trial and I don't know what the error rate is  
16 it's not reported I -- I got less to cross-examine about. I  
17 can't even bring doubt to the -- the document itself that it  
18 reports. They make that representation that document that  
19 it's -- that there's 100 percent certainty. They make that  
20 representation of that document that they tested it tw -- a  
21 thousand times it'd be six nanograms of THC every time. That  
22 is not what that document stands for. And the reality that  
23 they can say just goes to show the presence of it if that's  
24 their defense then fine. Let's -- let's -- let's scratch that  
25 document and say there's a presence -- we don't know the



1 number is, it's a presence. Cuz that's all it really should  
2 be that -- that's the best their response is we don't have to  
3 prove a -- a, ya know, a .5 or not five nanograms of THC is a  
4 per se number. If they don't do that in defense as well,  
5 there's some presence that it was just one factor to think  
6 about. They're not even willing to state and stand -- stand  
7 behind that number they're just saying it's just one factor  
8 and shows the presence of it -- one factor. So if we're gonna  
9 do that we don't know what the number really is, or what it  
10 means, or what's -- whether it's higher or lower or tested  
11 again with its higher lower and we got this wide range that  
12 doesn't mean scientific community then the lab report stands  
13 for one thing and one thing alone that there was a presence.  
14 All the other stuff is irrelevant because they can't validate  
15 it. You would never let a breathalyzer or a blood test from  
16 alcohol in if there was a 24 percent error rate that be  
17 absurd. It wouldn't -- it would never -- it would never meet  
18 a Daubert standard because --

19 THE COURT: -- to establish the presence as opposed  
20 to establish --

21 MR. KOMORN: -- well, too -- I'm sayin --

22 THE COURT: -- a per se violation --

23 MR. KOMORN: -- well --

24 THE COURT: -- there's a difference.

25 MR. KOMORN: I agree with you and that's my point --



1 THE COURT: -- okay --

2 MR. KOMORN: -- the point is to establish a presence

3 --

4 THE COURT: -- well, maybe that's all that's gonna  
5 happen here, Counsel. We haven't even gotten to that point  
6 yet. Maybe that's all that's gonna happen in this trial  
7 before the jury as the trier of fact is they're going to be  
8 told that the defendant had the presence of active marijuana  
9 the psychoactive ingredient in marijuana the controlled  
10 substance THC in her system -- active in her system at the  
11 time she was operating the vehicle. In which case, I might  
12 agree with you that the number -- some number without  
13 relationship to impairment might not be relevant --

14 MR. KOMORN: -- thank you --

15 THE COURT: -- okay --

16 MR. KOMORN: -- and -- and we can rely on the -- the  
17 report to, ya know, the impaired driving --

18 THE COURT: -- well, we haven't -- haven't gotten  
19 there yet.

20 MR. KOMORN: I know but -- but it's -- it supports  
21 what we're -- I -- what were -- what we agreed about --

22 THE COURT: -- sure -- sure --

23 MR. KOMORN: -- 'cuz it says the number doesn't  
24 matter -- doesn't --

25 THE COURT: -- which is why I asked her the question





1 does it -- does it change the number that you're reporting.  
2 Does it change the reliability of the testing protocol on the  
3 1,000 tests you do with the three outliers and 997 that come  
4 within that confidence range. Does it change that you missed  
5 reporting the measure of uncertainty? And -- and what we've  
6 done is put the lab on trial, yet again, and that isn't the  
7 first time that's happened in this court and other courts.  
8 That soon -- hopefully sooner rather than later they'll report  
9 the measure of uncertainty for other substances just like they  
10 were forced to do by competent defense counsel in alcohol  
11 cases. But this isn't a trial about the lab because, quite  
12 frankly, from a trial standpoint my 29 years in defense  
13 practice I wanted every possible hole in every report that was  
14 -- that I knew was gonna come into evidence so that I could  
15 make all those great arguments that were just made to the jury  
16 to show how subjective this is and how much subterfuge there  
17 is and how much hiding the ball there is and how tenuous these  
18 arguments are that somebody was impaired by this substance  
19 because you gotta tie the two together and there's no per se  
20 here.

21           And I know what's up in the Court of Appeals right  
22 now just like you do and I know what we're looking for and I  
23 know the -- the case that's pending in the Court of Appeals  
24 that my bench mate in St. Johns stayed his case for further  
25 proceedings just the last week or two, is on whether or not



1 prosecutors even get an impaired instruction because it's not  
2 in the statute. So we all know what we're arguing about here.  
3 I -- this isn't my first redo and I wasn't born an night.

4 I've only been doing this for 41 years --

5 MR. KOMORN: -- I don't disagree with you --

6 THE COURT: -- okay --

7 MR. KOMORN: -- that the holes in the case theory I  
8 agree with that but I'm -- I'm but -- but I'm just bringing to  
9 the Court --

10 THE COURT: -- sure --

11 MR. KOMORN: -- as a gatekeeper --

12 THE COURT: -- sure --

13 MR. KOMORN: -- when we throw this up on the wall --

14 THE COURT: -- sure --

15 MR. KOMORN: -- does this mean --

16 THE COURT: -- but let me tell ya as the gatekeeper,  
17 this case isn't gonna go away on the basis that there was no  
18 marijuana in the defendant's system because I don't -- I mean,  
19 unless you can make me an offer of proof that you're gonna  
20 bring in an expert that's gonna say that these lab reports are  
21 a bunch of hooey and there's no way that there's any level of  
22 competence -- confidence that there was any THC in this  
23 system.

24 MR. KOMORN: May I -- may I have the opportunity to  
25 do that?



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THE COURT: Sure.

MR. KOMORN: Thank you. I will do that. I --

THE COURT: -- sure because --

MR. KOMORN: -- I believe -- I -- I've been --

THE COURT: -- because -- because that's what we're really talking about. If we're talking about the admissibility of this evidence then I -- I assume we're gonna get other scientific evidence from somebody that's just as qualified that's gonna repeat these tests that's gonna say this is a bunch of hooey and then that's what you're really talking about at a Daubert hearing that you got competing scientific theories with -- with the proper methodology that says this doesn't hold water. And I assume when you do that then the prosecutors gonna want yet another expert here to -- to counter act that and so we'll have many evidentiary hearings about the admissibility of this evidence before we ever get to trial which we'll be six months down the road by the time we get there which'll be easy to explain to SCAO why I can't get the trials done in 126 days 'cuz we don't get the lab reports back timely and then it takes all the rest of the time to argue about the admissibility of the evidence so that's fine.

MR. KOMORN: As an offer of proof we're -- and -- and --

THE COURT: -- okay --



1           MR. KOMORN: -- I haven't ident -- I've identified  
2 who the experts gonna be but as the Court may be aware there  
3 was a -- what I call scandal that arouse out of the lab in  
4 that they were reporting, and still in some cases, are  
5 reporting the non-plant material marijuana as could be  
6 marijuana or could be from a synthetic source. I -- I had the  
7 case that kind of erupted and we got all the emails and I saw  
8 the communications between the lab and prosecutors office and  
9 sheriff saying, ya know, if you charge 'em with synthetic THC  
10 we can take their car and their card won't work for them --  
11 things like that so I'm of the mindset --

12           THE COURT: -- right --

13           MR. KOMORN: -- some subjectivity that is  
14 influencing the independent lab and during that period of time  
15 John Collins, the retired head of the lab at that time, who  
16 had quit or retired or whatever was interviewed and he said  
17 the constant pressure of police and prosecutors on the lab  
18 make for a terrible working environment non-scientific. And  
19 when I saw that report that our customers tell us this is what  
20 went off in my head. So I'm gonna try to get John Collins  
21 he's -- I don't know if he lives in the state anymore but I  
22 know he published a book and I've been following him that  
23 would be my intention. Or the other one is Jay Siegel who  
24 served as an expert he trained -- he's professor of Emeritus  
25 and MSU taught many of the forensic science, ya know, degree,





1 ya know, people who got degrees that went onto work at the  
2 lab. So those are my two identified experts in -- in that  
3 area so.

4 THE COURT: Okay. So -- so as far as -- as far as  
5 the evidence that I have at this point it sounds like the  
6 hearing on the admissibility isn't complete because although  
7 today we don't have any defense evidence -- you have a right  
8 to present it and you're telling me yeah, I wanna present it.

9 MR. KOMORN: I would like to.

10 THE COURT: So I was premature in making any kinda  
11 ruling because this Court in the 11 years that I've sat here  
12 I've never made short shrift of cases that have major  
13 significance for defense and prosecutors regarding the state  
14 of the law and the admissibility in -- of evidence in the most  
15 evolving area now which is OWIs by controlled substance most  
16 specifically by marijuana. And we knew this was coming with  
17 recreational marijuana. We knew the next big battle ground of  
18 fertile litigation in Michigan was gonna be OWIs with  
19 marijuana and we know the report from the taskforce says  
20 Michigan declined to create any per se level and then it all  
21 is fact driven based on officers observations in the field if  
22 you get over probable cause to make an arrest in the first  
23 place. And that -- all that goes to the jury and that goes to  
24 the jury with all the stuff about the lab and what you may  
25 wind up be -- being left with is the defendant had THC in her



1 system and oh, by the way it's not illegal to have THC except  
2 when you're under 21 so there's a problem for this defendant  
3 but that's other arguments. And just like it's not illegal to  
4 have the presence of alcohol in your system and it -- and it  
5 was a different field day when we were trying drunk driving  
6 cases when I was in practice before there was the per se  
7 limits. And then when, of course, when it came in it started  
8 at one five in the old borkalayzer so --

9 MR. HAMPEL: -- I remember those days --

10 THE COURT: -- ya know, this is a field of evolving  
11 and ever-changing litigation and its gonna continue and -- and  
12 it won't stop here no matter what we do it's not gonna stop  
13 here. It's going to the Court of Appeals and it's going to  
14 the Supreme Court and its coming back and we'll get more  
15 instruction and Sergeant Drury as a DRE he'll get more  
16 education and more experience which is exactly what the report  
17 says everybody ought to be doing. So I knew when this got  
18 scheduled, we might as well schedule it for two days not an  
19 hour or two hours. And, ya know, prosecutors are gonna have  
20 to be ready for this if they wanna stay in District Court and  
21 litigate OWI cases otherwise they're gonna one, -- you're  
22 gonna wanna ask to get transferred to paternity cases or  
23 something where the field of law is more settled -- I'm being  
24 facetious at this point. So I don't know how much more we can  
25 do today but we got Officer Drury here if we wanna get into



1 the other motions I'll reserve my decision on the Daubert  
2 motion and we'll, ya know, pick that back up --

3 MR. KOMORN: -- I appreciate that --

4 THE COURT: -- but we got -- we got two other  
5 motions, obviously, we've got the Motion to Suppress Evidence  
6 or Dismissal on the Basis of an Illegal Arrest and then we've  
7 got the Motion to Exclude the Field Sobriety Test Results  
8 from Evidence so that's gonna probably be another couple  
9 hours.

10 MR. HAMPEL: I would anticipate.

11 THE COURT: Right.

12 MR. HAMPEL: Yes.

13 MR. KOMORN: And there's a video also that --

14 THE COURT: -- right. So --

15 MR. KOMORN: -- at some point I'd ask ya to --

16 THE COURT: -- so how much time do you wanna stay  
17 here tonight, Mr. Hampel? You gotta full day tomorrow.

18 MR. HAMPEL: Unfortunately, I do have a full day  
19 tomorrow and a dog that's absent my wife to be let out.

20 THE COURT: Well, Counsel, we're gonna be back --

21 MR. KOMORN: -- that's fine, Judge --

22 THE COURT: -- and the -- the next -- the next case  
23 matters on the -- I mean, the next docketed dates are,  
24 obviously, gonna get moved --

25 MR. KOMORN: -- okay --



1 THE COURT: -- based on -- based on -- I mean, if  
2 there's no objection they're gonna --

3 MR. KOMORN: -- no, not at all --

4 THE COURT: -- because we're gonna have to have more  
5 time --

6 MR. KOMORN: -- we -- we -- we waive any -- at this  
7 time any speedy trial issues or what have you.

8 THE COURT: Okay. All right.

9 MR. KOMORN: I know -- and I -- and I -- it turns  
10 out I gotta application on an appeal from District Court to  
11 Circuit Court on a similar issue in Roscommon that they  
12 scheduled for the 19th which I think is our --

13 THE COURT: -- okay --

14 MR. KOMORN: -- jury selection dates --

15 THE COURT: -- yep --

16 MR. KOMORN: -- so I have a problem with -- I was  
17 gonna ask the Court, ya know, to bring that to the Court's  
18 attention --

19 THE COURT: -- okay --

20 MR. KOMORN: -- if --

21 THE COURT: -- all right. So I think that's the  
22 more prudent course of action to take because that -- that  
23 allows Mr. Hampel and defense counsel to talk about other  
24 witnesses and evidentiary procedural type issues going into  
25 the next motion and to try to make a realistic assessment of





1           how much time we're gonna take because I'm happy to, ya know,  
2           schedule as much time as necessary but given enough lead time  
3           and given a realistic appraisal of how much more time its  
4           gonna take we can -- we can schedule the right amount time.  
5           We can start it at 8:30 in the morning and have all day.

6                     MR. KOMORN:    Okay.

7                     MR. HAMPEL:    Your Honor, I do have a request, in  
8           order to get rebuttal or contrary witnesses I'm gonna need the  
9           names of their expert that they intend to call --

10                    THE COURT:    -- sure --

11                    MR. KOMORN:    -- that's fine --

12                    MR. HAMPEL:    -- so that I can adequately prepare and  
13           have adequate time --

14                    THE COURT:    -- yep --

15                    MR. HAMPEL:    -- and I suspect that's gonna be at  
16           least 30 days from when I know who their witness is gonna be.

17                    MR. KOMORN:    That's fine.  I mean --

18                    THE COURT:    I mean, yeah, because I'd -- I'd rather  
19           not bifurcate this 'cuz otherwise what's gonna happen is then  
20           we're gonna come in with your witnesses and then the  
21           prosecutors gonna say, okay, now that I know his witnesses  
22           now, I'm gonna bring back these other -- and that's not, ya  
23           know --

24                    MR. KOMORN:    -- I understand.  That's fine.

25                    THE COURT:    That's -- that's not an efficient way to



1 -- to litigate the evidentiary issues so, Counsel, how much  
2 time do you need to disclose your experts for evidentiary  
3 purposes and trial purpose for any motions and trial?

4 MR. KOMORN: I'd like as much as you'll give me is  
5 asking 30 days too much?

6 THE COURT: No.

7 MR. KOMORN: Okay.

8 THE COURT: That's fine. So 30 days to disclose  
9 those. Once they're disclosed, then, Mr. Hampel, how much  
10 time are you gonna need because what I wanna do is, then, get  
11 the --

12 MR. HAMPEL: -- I'm gonna need another 30 days 'cuz  
13 I may have to locate one --

14 THE COURT: -- all right. So there's 60 days before  
15 we can schedule any hearings --

16 MR. KOMORN: -- okay --

17 THE COURT: -- but I recognize that experts are hard  
18 to get into court so once we know that then we're gonna have  
19 to schedule the matters accordingly --

20 MR. KOMORN: -- coordinates everybody's --

21 THE COURT: -- right. Coordinates with the experts.  
22 Okay.

23 MR. KOMORN: Thank you, Judge.

24 THE COURT: Okay. So you're gonna do that with Ms.  
25 Moon so you're gonna give them your email and direct phone



1 number. Okay. So that you can coordinate those dates and  
2 times with Ms. Moon.

3 MR. KOMORN: Okay.

4 THE COURT: All right.

5 MR. KOMORN: Very good. Like a control date like 60  
6 days out or something like that?

7 THE COURT: Yep. I will. I'll do an order and I'll  
8 send that out and it'll have those control dates in it so 30  
9 days for defenses witnesses 30 more for prosecutors. We'll  
10 take up, then, the balance of the motions including the  
11 Daubert issue and without addressing the other motions because  
12 -- and, Officer Drury, -- I hope it wasn't a complete waste of  
13 your time?

14 SERGEANT DRURY: It's always educational, sir.

15 THE COURT: You get to hear all the legal stuff  
16 before we get to the factual stuff but.

17 SERGEANT DRURY: Yes, sir.

18 THE COURT: Okay. Anything else at this point?

19 MR. HAMPEL: No, Your Honor.

20 THE COURT: All right.

21 MR. KOMORN: Thank you, Judge.

22 THE COURT: We'll -- we'll, then, conclude for today  
23 and we'll be in recess, but this will be by way of a  
24 continuance because this is a continuing proceeding and does  
25 everybody have copies of the exhibits that were already

1 admitted?

2 MR. HAMPEL: No, I do not. I have no copies of the  
3 defense exhibits at all.

4 THE COURT: All right. So what I can do is have --  
5 we'll hold these, and I'll have Ms. Moon make copies -- I have  
6 People's Exhibits 1 and 2 and Defense Exhibits A, B, C, D and  
7 we'll copy them in their entirety and then send them back  
8 to both counsel. Okay.

9 MR. HAMPEL: So I'll get a copy of the exhibits?

10 THE COURT: Yes, you're gonna get a copy of the all  
11 the exhibits as will Mr. Komorn and we'll be all set. Okay.

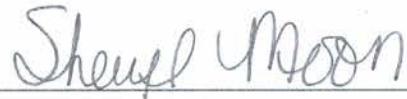
12 MR. HAMPEL: Thank you.

13 THE COURT: All right.

14 (At 5:40 p.m., court recessed)  
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I certify that this transcript, consisting of 127 pages, is a complete, true, and accurate transcript, to the best of my ability, of People of the State of Michigan v Emma Lee-Sunshine O'Toole and testimony taken in this case as recorded by Sheryl Moon, CER 8396 on Monday, February, 24, 2020.

Date: March 10, 2020



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