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MUNICIPAL COURT
CLERMONT COUNTY, OHIO

STATE OF OHIO, :
Plaintiff, :
vs. : CASE NO. 2020 TRC 01810
AMANDA REID CATON, : **PARTIAL TRANSCRIPT**
Defendant. : **TESTIMONY OF LOUIS F.**
DELL'OSSO, Ph.D.

APPEARANCES

On behalf of Plaintiff: On behalf of Defendant:
THOMAS SCOVANNER, ESQ. ZACH GOTTESMAN, ESQ.
KEN CREHAN, ESQ.

BE IT REMEMBERED the above-entitled
hearing came on to be heard on the 23rd day of
April, 2021 before the Honorable Kevin Miles,
Judge.

TRI-COUNTY COURT REPORTING
(513) 732-1477

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I N D E X

WITNESS

Louis Frank Dell'Osso, Ph.D.

Direct by Mr. Gottesman: 4, 36

Cross by Mr. Scovanner: 14, 41

1 MR. GOTTESMAN: Yes, Your Honor. At this
2 time I'd ask the bailiff to call the hallway for
3 Louis Frank Dell'Osso.

4 THE COURT: Mr. Dell'Osso, good morning,
5 sir. If you would follow my bailiff up to the
6 witness stand. As you arrive if you would remain
7 standing for just a moment he's going to swear you
8 in. If you would raise your hand for him.

9 THE BAILIFF: Raise your right hand.

10 (Witness duly sworn)

11 THE BAILIFF: All right.

12 THE COURT: If you would have a seat, sir,
13 and make yourself comfortable. You can certainly
14 pull that down if you'd like. You're protected
15 behind plastic or Plexiglas per COVID protocol. So
16 as long as you're comfortable doing that, it's a
17 personal choice, if you want to pull it down feel
18 free to do it.

19 MR. CREHAN: Judge, may I approach the
20 witness?

21 THE COURT: Yeah, sure. You've got
22 another binder?

23 MR. CREHAN: We do, Judge.

24 Good morning, sir. If I can take that
25 from you and I'll exchange it with this bigger

1 binder.

2 THE COURT: All right, Mr. Gottesman.
3 He's been sworn in. You may proceed.

4 MR. GOTTESMAN: Thank you, Your Honor.

5 THE COURT: Um-hum.

6 DIRECT EXAMINATION

7 BY MR. GOTTESMAN:

8 Q. Sir, would you please state your full
9 name and your current professional address?

10 A. Louis Frank Dell'Osso. I live at home.
11 I'm retired. So it's 2356 Tutor Drive, Cleveland
12 Heights, Ohio.

13 Q. Just to ensure since we're behind these
14 plastic glass shields, please keep your voice up as
15 loud as possible. I know it's...

16 A. I know, I'm having trouble hearing for
17 the same reason.

18 Q. Okay, I'm sorry. I'll try and keep my
19 voice up.

20 A. One of the secondary effects of COVID.

21 Q. Right, exactly. We'll work through it.
22 Please tell the jury if you would, sir, what's your
23 educational background and what do you do for a
24 living or what did you do for a living before you
25 retired?

1 A. Okay, I studied electrical engineering at
2 Brooklyn Polytechnic University. Graduate work on
3 electrical engineering before I decided to go into
4 biomedical engineering at the University of
5 Wyoming. I got a scholarship to go there and went
6 to see the west and got a Ph.D. in biomedical
7 engineering. I believe it was the first in the
8 country but that was a long time ago.

9 I have been studying all of my life
10 because I have nystagmus. I was born with it as
11 Mrs. Caton was born with it. You can't see it
12 because I have special glasses that tamp it down.
13 But if you look, at least the jurors in the front
14 should be able to see my eyes wiggling. And you
15 can tell the other jurors.

16 Q. Can you look at the Judge and show him
17 too so you know what you're showing them?

18 A. Do you see it?

19 THE COURT: I do, yeah.

20 A. Okay.

21 Q. So, Dr. Dell...

22 A. I have no choice, I can't stop that.

23 Q. Mr. Dell'Osso, there is a binder before
24 you. It's got a series of tabs. Behind tab G I'd
25 ask you to look at that document for me please.

1 A. Okay.

2 Q. Do you recognize that document as your
3 curriculum vitae?

4 A. Yeah, that's my curriculum vitae as of
5 October 29th, 2020.

6 Q. Did you prepare that document, sir?

7 A. Yes.

8 Q. Does that document accurately reflect
9 your training, your education and your professional
10 efforts in the field of Ph.D. bio...what was it,
11 biomechanical engineering?

12 A. Biomedical engineering.

13 Q. And evaluation of nystagmus in people?

14 A. Yes, it does.

15 Q. Thank you. So you just covered your
16 education and what you went through, after you
17 completed your education what did you do
18 professionally?

19 A. Well, I believe I went to work for
20 Westinghouse to develop biomedical apparatus,
21 mainly in the area of cardiac arrhythmias. And for
22 a while I was in that area but then I returned to
23 my original Ph.D. work in studying eye movements
24 and got a position at the University of Miami. And
25 began my official work studying nystagmus, which

1 was built upon 25 years of observing nystagmus and
2 its effects because I have it. And...

3 Q. Was that in 1970 approximately?

4 A. Yes.

5 Q. Okay, so from 1970 until your retirement
6 has the focus of your professional efforts been the
7 study of nystagmus?

8 A. Even after my retirement. I've published
9 14 papers and a book since I retired on nystagmus.
10 So...

11 Q. When did you...

12 A. I haven't really retired.

13 Q. ...when was your official retirement?

14 A. 2010.

15 Q. And then when was your second retirement?

16 A. It hasn't come yet.

17 Q. Okay.

18 A. I really like what I do.

19 Q. Have you had the opportunity to publish
20 papers or journal articles on the subject matter of
21 nystagmus?

22 A. I think hundreds.

23 Q. I would like you to turn in the notebook
24 before you to the tab marked F. No, not F, excuse
25 me, E.

1 A. E?

2 Q. E...

3 A. E.

4 Q. ...as in echo.

5 A. Echo. Okay.

6 Q. What's been marked as tab E is that a 32
7 page document that you created, sir?

8 A. Yes, as of October.

9 Q. Okay, so I realize it may be missing four
10 articles, but is that a list of the journal
11 articles and research papers you've authored or co-
12 authored that deal with the issue of nystagmus?

13 A. Yes, it is.

14 Q. Okay, in the course of your teaching have
15 you actually taught students, medical doctor
16 students?

17 A. Absolutely, many

18 Q. Okay.

19 A. And residents and fellows.

20 Q. Now in...sometime in the last year did
21 you have an occasion to come into contact with the
22 woman you now know to be Cincinnati Police Captain
23 Amanda Caton?

24 A. Yes, I was asked to witness an
25 examination of her by Dr. Richard Hertle in Akron.

1 Q. Okay, so who is Dr. Richard Hertle?

2 A. He's probably the foremost pediatric
3 ophthalmologist who specializes in nystagmus in the
4 world.

5 Q. And where is his office located?

6 A. Akron Children's Hospital.

7 Q. And did you go there and participate in
8 an evaluation of Amanda Caton with Dr. Hertle?

9 A. Right, I observed his examination and I
10 examined her myself and I examined eye movement
11 data that was taken in his laboratory showing the
12 nystagmus and its sway form.

13 Q. Was it Amanda Caton's eye movement?

14 A. Eye movement sway form. Yeah, her, her
15 eye movement.

16 Q. And, sir, when approximately was it that
17 you had that opportunity to do that if you know?

18 A. It was last fall.

19 Q. So I have one more tab for you to look at
20 sir and that would be tab, excuse me, F.

21 A. F?

22 Q. F please.

23 A. Yes.

24 Q. Is the document behind tab F a document
25 that you recognize?

1 A. Yes, I believe that's my report.

2 Q. Is that a report you prepared, sir, after
3 evaluating Amanda Caton.

4 A. Yes.

5 Q. With Dr. Hertle?

6 A. Yes, it is.

7 Q. Okay. Now, sir, have you also had a
8 chance to observe a video of an incident where Ms.
9 Caton was stopped by a police officer on the night
10 or the early morning hours of February 9th, 2020 by
11 a Loveland Police Officer and subjected to what
12 purported to be a horizontal gaze nystagmus test
13 and a vertical gaze, a vertical nystagmus test?

14 A. Yes, I saw the video.

15 Q. Okay, so you watched the video. Sir,
16 I'm going to ask you, based on your examination of
17 Captain Caton, your education, your training, your
18 experience, have you been able to formulate an
19 opinion whether or not the HGN test as administered
20 on the early morning hours of February 9th, 2020 is
21 a reliable or valid indicator of alcohol
22 consumption by Police Captain Amanda Caton?

23 A. I have, I have formed that opinion.

24 Q. And, sir...

25 MR. SCOVANNER: Your Honor, what was

1 that? I'm sorry.

2 MR. GOTTESMAN: He says he has formed
3 that opinion.

4 A. I have formed that opinion.

5 MR. SCOVANNER: Okay, thank you. I just
6 didn't hear you.

7 Q. You...correct, sir, you do have that
8 opinion?

9 A. Yes.

10 Q. And, sir, please tell the ladies and
11 gentlemen of the jury what your opinion is and then
12 I'm going to ask you to explain it.

13 A. Okay, that opinion is that the
14 performance of that test on Mrs. Caton cannot be
15 taken as an indication of alcohol consumption.

16 Q. And, sir, why do you say that?

17 A. For the same reason it could not be taken
18 as an indication of my alcohol consumption. She
19 has nystagmus since birth. Her eyes are shaking.
20 Taking alcohol is not going to indicate anything
21 other than that her eyes are still shaking. As a
22 matter of fact, alcohol and other sedative drugs
23 like marijuana reduce nystagmus rather than induce
24 it as it does in normals. So you can't give a test
25 looking for a sign that's already there, her eyes

1 shaking, especially out in lateral gaze and say it
2 indicates something when the day she was born her
3 eyes were shaking. And I'm sure if she was given
4 the test then she would have failed it also.

5 Q. So, sir, there's been testimony about
6 different clues that the officer claims to have
7 observed during administration of that test. When
8 you, are you familiar with the terminology ques?

9 A. I, I remember reading it but I don't have
10 it in front of my.

11 Q. Okay, if you'll look at that report that
12 you've got there marked as tab F does, specifically
13 on pages 2, 3, 4, and 5, would that help refresh
14 your recollection as to those ques?

15 A. Well, she mentioned she has a lazy eye.
16 That should have immediately warned the officer not
17 to perform the test.

18 Q. And why do you say that?

19 A. Lazy eye means, it's a common term, it
20 means your eyes are misaligned. If she is looking
21 at something with this eye, this eye might be in or
22 out. If she is looking with this eye, this eye
23 might be in or out. That is called strabismus,
24 misalignment of the eyes. And many people with
25 strabismus also have nystagmus. So anyone trained

1 in eye movements and in ophthalmological diseases
2 knows strabismus and nystagmus are partners.

3 Q. In addition to the strabismus were there
4 other findings specific to Captain Caton's eyes
5 that would have affected the reliability of the HGN
6 test as the officer administered that night?

7 A. Well, her eyes, she had nystagmus. And
8 if you're looking for nystagmus and someone has it
9 naturally it just invalidates the whole approach.

10 Q. Understood, sir. Stand by for me for
11 just a second. What about the position of the
12 stimulus as you observed it in the video? Where
13 the officer positioned the pen as he was
14 essentially performing that HGN test, did you
15 identify any problems with that?

16 A. Absolutely.

17 Q. Could you explain that to the jury?

18 A. When we record peoples' eye movements we
19 naturally put their head down a little so they're
20 in an up gaze to get their eyelids out of the way
21 so that you can see the eyes and what they're
22 doing. The same thing is spelled out in the way
23 the nystagmus test is supposed to be given, you're
24 supposed to hold the target above midline so the
25 person is looking slightly up and you can see their

1 eyes. When I looked at that video it appeared from
2 the video and I tried to look at the horizontal
3 that he was holding the target at her nose level,
4 below her midline and going left and right. And
5 that was further complicated by the fact that Mrs.
6 Caton had another condition called droopy eyelids.
7 Her eyes normal...her eyelids are normally down
8 blocking the vision of her eyes. So in her case
9 especially you have to keep her in up gaze in order
10 to see her eyes. When we examined her in Dr.
11 Hertle's officer, we had to put her in up gaze so
12 we could see what the eyes were doing. Does that
13 answer your question?

14 Q. It does. Thank you, sir. Excuse me,
15 sir, for just a moment.

16 A. It's a lot of reading.

17 MR. GOTTESMAN: Dr. Dell'Osso, thank you
18 very much for your testimony. That's all the
19 questions I have for you at this point. Mr.
20 Scovanner may have questions for you.

21 THE COURT: Thank you, Mr. Gottesman.

22 Mr. Scovanner, do you wish to cross?

23 CROSS-EXAMINATION

24 BY MR. SCOVANNER:

25 Q. Sir, are you, I look at your report of

1 October...excuse me. I look at your report of
2 October 28th of 2020. I believe that's tab F.

3 A. Correct.

4 Q And it listed the things that you looked
5 at, the medical report and horizontal gaze
6 nystagmus court transcript, the dash video of the
7 incident.

8 A. Excuse me?

9 Q. The dash video of the incident, that's
10 something you reviewed?

11 A. I'm not, I'm not hearing you.

12 Q. Looking at your October 28th, 2020
13 report.

14 A. What page?

15 Q. The very first page.

16 A. Oh, okay.

17 Q. Talking about the things that you
18 reviewed.

19 A. Right.

20 Q. The dash video is something that you
21 reviewed?

22 A. Dash video?

23 Q. Yes, sir.

24 A. Oh, yes.

25 Q. Okay.

1 A. I'm sorry. I couldn't hear that word.

2 Q. Okay.

3 A. Yeah.

4 Q. I note that you did not list the National
5 Highway Traffic Safety Administration Manual which
6 the officer was trained to use?

7 A. I believe I reviewed that too.

8 Q. Is that listed on your 13 items?

9 A. Apparently not.

10 Q. Now you testified a moment...well, tell
11 us what horizontal gaze nystagmus is. Tell us what
12 HGN is.

13 A. Okay, normal.

14 Q. Yeah.

15 A. Normal people when they look to the right
16 or left develop a jerk nystagmus, usually in the
17 direct they're looking. And scientific articles
18 have been published to show that in 12% of the
19 normal people develop it at 10 degrees, another 20%
20 at 20 degrees and about 25% at 30 degrees. So this
21 is normal nystagmus in non-clinical patients,
22 normal people, that develops when they look
23 laterally, left or right. It does not require 45
24 degrees as I believe that document you refer to
25 states.

1 Q. Okay, so and you would agree with me,
2 virtually everyone has nystagmus, it's whether or
3 not we can perceive it?

4 A. In lateral gaze?

5 Q. Yes.

6 A. Yes.

7 Q. Yes. Now, what's positional alcohol
8 nystagmus?

9 A. It's pretty much the same thing.

10 Q. Okay.

11 A. It's, its gaze evoked nystagmus. It
12 appears as you look lateral, right or left.

13 Q. Okay and positional alcohol nystagmus,
14 that's due to alcohol consumption of the human
15 body, is that not correct?

16 A. That's correct.

17 Q. Okay and the alcohol enhances it so it's
18 easier to see?

19 A. In normals, not in people who have
20 nystagmus.

21 Q. It's going to make it easier to see in
22 everybody isn't it?

23 A. No, it reduces the nystagmus of people
24 who have it. If I took a drink now my nystagmus
25 would go down.

1 Q. Okay and you said that marijuana...

2 A. Marijuana also, yes.

3 Q. ...but are you aware that NHTSA says not
4 to use marijuana because it doesn't show nystagmus?

5 A. Am I aware that what?

6 Q. The NHTSA Manual says you are not to say
7 nystagmus HGN testing with marijuana because it has
8 no value?

9 A. That's correct, it has no value.

10 Q. Okay, but you said it has an impact?

11 A. No, marijuana reduces nystagmus. So if
12 you're looking for nystagmus that test would make
13 it more difficult to find it.

14 Q. Now...

15 A. That's why it has no value. The reason
16 it has no value in alcohol is because there are
17 many things that cause nystagmus in normals.

18 Q. Yes.

19 A. And, therefore, finding nystagmus does
20 not equate to you have had alcohol. Does not.

21 Q. That's your opinion?

22 A. That's my opinion. That's correct.

23 Q. Okay, are you familiar with studies from
24 California that indicate that nystagmus is a valid
25 test with alcohol?

1 A. There are no studies published in peer
2 reviewed journals that attest the validity of what
3 was done in California.

4 Q. So there was a study in California?

5 A. The studies in California are the studies
6 that invented this test.

7 Q. Okay, your opinion?

8 A. My opinion and published data. And
9 actually...

10 Q. Do you have that published data with you,
11 sir?

12 A. It was taken away from me.

13 MR. GOTTESMAN: Your Honor, if he could
14 be permitted to finish his answers before the
15 prosecutor moves on.

16 THE COURT: Hold on a second, doctor.
17 Hold on a second, doctor.

18 The objection is let him finish his
19 answers?

20 MR. GOTTESMAN: Yes.

21 THE COURT: Yes, sustained.

22 A. There is a published; in the folder I had
23 there is a publication and a peer review journal
24 which actually refers to this test as scientific
25 fraud. Okay.

1 Q. One thing, one report. When was that
2 done and who did that?

3 A. I don't have it front of me.

4 Q. Okay.

5 A. They took it away.

6 Q. Okay, fine. Are you familiar with the
7 resolution by the American Optometric Association
8 House of Delegates? Twice now saying that it
9 acknowledges the scientific validity and
10 reliability of the HGN test as a field sobriety
11 test when administered by a properly trained
12 certified police officer and when used in
13 combination with other evidence?

14 A. I've never seen that document.

15 Q. Forgive me for a moment here please.
16 Let's go to your specific report, sir, tab F.

17 A. Got it.

18 Q. Do you disagree that the officer did the
19 testing the way he was trained to according to the
20 Highway Safety Administration?

21 A. Except as I pointed out he was holding it
22 too low.

23 Q. Okay and the purpose of holding it up is
24 so you can see the eyeball?

25 A. That's correct.

1 Q. If I can use the term eyeball?

2 A. That's correct.

3 Q. Okay, okay.

4 A. Both eyeballs.

5 Q. Okay, both eyeballs. If the officer
6 testified that he could clearly see the eyeballs
7 then that's not a problem, correct?

8 A. Except he couldn't because of her
9 eyelids.

10 Q. Well, now you weren't looking at it from
11 his perspective were you, sir?

12 A. Yes, in Hertle's office I was and you
13 could not see the eyeball.

14 Q. You weren't there on the morning of
15 February 9th, 2020 when this officer contacted the
16 horizontal gaze nystagmus on this defendant?

17 A. Unless you're implying that her eyelid
18 ptosis suddenly resolved at 2:00 o'clock in the
19 morning there is no way he could have seen her
20 eyes.

21 Q. The officer testified that he did.

22 A. I'm sorry, he couldn't.

23 Q. Your opinion?

24 A. Right.

25 Q. Okay, let's talk about your opinion, sir.

1 Let's talk about your report. Go to paragraph
2 number 13 on page 7.

3 A. 7. What paragraph?

4 Q. Number 13 I believe.

5 A. Number 13.

6 Q. It starts with, "After taking an initial
7 left turn."

8 A. Okay, got it.

9 Q. The dash cam video shows...this is your
10 report, correct, this is what you...

11 A. That's my report, yes.

12 Q. Okay, the dash cam shows Ms. Caton drove
13 through six curves in the road without ever
14 crossing or even touching the midline, that was in
15 your report?

16 A. Yes, that's the road, not intersections.

17 Q. Oh, wait a minute. Probably need to
18 bring the lights down some, Your Honor.

19 MR. CREHAN: Your Honor, can we, can we
20 approach?

21 THE COURT: Yeah, sure.

22 (Sidebar discussion)

23 THE COURT: Go ahead.

24 MR. CREHAN: Your Honor, do you have your
25 binder?

1 THE COURT: I do not. (Inaudible)

2 MR. GOTTESMAN: We're about to begin a
3 discussion of paragraph 13. Now at the beginning
4 of this trial.

5 THE COURT: (Inaudible).

6 MR. GOTTESMAN: Yeah, it was specifically
7 issues that the prosecutor successfully requested
8 that we've been prohibited from going into. And
9 now he's going into them.

10 MR. SCOVANNER: This isn't about the
11 driving. Your Honor, what I specifically, very
12 specifically, very accurately objected to was a
13 sentence about half way down where it says
14 "However, crossing the dash line would not be
15 illegal." That's a legal conclusion beyond his
16 expertise.

17 THE COURT: Um-hum.

18 MR. SCOVANNER: What I'm going to do now
19 is not a legal opinion, that's his opinion as to
20 watching the video. That's not a legal opinion.

21 The exclusion was as to the legal opinion
22 beyond his expertise. The same thing with the next
23 section, "After a long period of safe driving where
24 the defendant was stopped. Why was the defendant
25 stopped in the first place?" Again, that's beyond

1 his expertise.

2 These are opinions that aren't legal,
3 aren't medical. They're based on his (inaudible).

4 MR. CREHAN: (Inaudible). He didn't
5 testify to it on direct. His assessment of the
6 officer's cruiser video is not within the relevance
7 of Mr. Dell'Osso, he's an expert. It's just, it's
8 not a question you would ask an expert. It's
9 improper.

10 THE COURT: The first, the first thing
11 (inaudible). (Inaudible) called for a legal
12 opinion. The other thing, the report is subject to
13 cross, it could potentially show bias. It could
14 potentially show...I'm going to give him, allow him
15 to do cross. I think it's appropriate. Note the
16 objection for the record.

17 (End of sidebar)

18 MR. SCOVANNER: May I approach the
19 witness, Your Honor?

20 THE COURT: Yeah, sure.

21 Q. I'm going to hand you a document, sir,
22 marked State's Exhibit 6. Now I'm going to direct
23 your attention to the screen for a moment.

24 A. That's hard to see.

25 Q. If you watch the screen please, I believe

1 you'll see that that's a...

2 A. There is a lot reflection here. Can I
3 get around?

4 THE COURT: Yeah, sure, if you want to
5 move around to get a better view of it. Certainly,
6 feel free to.

7 (Playing video)

8 Q. I believe you'll see that that's a
9 screenshot capture from this video.

10 A. Okay.

11 Q. Is that the screenshot capture that
12 you're seeing?

13 A. Yes.

14 Q. She's beyond the intersection there isn't
15 she?

16 A. She just exited it.

17 Q. So she's beyond the intersection?

18 A. Correct.

19 Q. Okay, she's left of center there isn't
20 she?

21 A. She just got out of an intersection.

22 Q. I'm sorry, sir, the question is is she
23 out of the intersection?

24 A. Yes.

25 Q. And she's totally left of center at the

1 intersection?

2 MR. CREHAN: Objection, leading.

3 MR. SCOVANNER: I'm allowed to lead.

4 A. Can you see a center line?

5 THE COURT: Hang on?

6 A. I don't see a center line.

7 THE COURT: Hang on a second, doctor. I
8 know it's hard to hear me. There is an objection.
9 I'm going to rule on that before we go forward.

10 You certainly can lead. I think you're
11 asking for a legal conclusion so I'll sustain the
12 objection.

13 MR. CREHAN: Thank you, Judge.

14 THE COURT: Um-hum. Please continue,
15 please continue your cross, Mr. Scovanner.

16 MR. SCOVANNER: I'm asking him whether or
17 not that vehicle was left of center. That's not
18 asking for a legal opinion, Your Honor.

19 THE COURT: If he believes it's left of
20 center.

21 MR. SCOVANNER: Left of center.

22 THE COURT: In his opinion, certainly.

23 A. The center line, I don't see a center
24 line is the problem. My, my report...

25 Q. Got it. Show you this and maybe this will

1 help you a little bit better.

2 MR. GOTTESMAN: Whoa, Your Honor, that's
3 not going to translate to a record.

4 THE COURT: Yeah, yeah, it's...

5 MR. GOTTESMAN: ...and I...there's no way
6 for us to use that.

7 THE COURT: ...let's keep it to the
8 screen and the video.

9 MR. SCOVANNER: Here it is. That's what
10 I was looking at. Bear with me, sir.

11 Q. Doctor...

12 A. If you, if you read what I said here it
13 says, "While she's driving..."

14 Q. Sir, I'm asking you a question, sir.

15 A. All right.

16 Q. There is the marking, the lane markings.
17 Is she to the right or left of that, sir?

18 A. It looks like she just crossed over it,
19 yes.

20 Q. Okay.

21 MR. GOTTESMAN: Counsel, if you'd
22 indicate the time on the image you were just using?

23 MR. SCOVANNER: 29 seconds.

24 A. Do you need this? Can I go back?

25 Q. No, I'm going to show you a couple more,

1 sir.

2 A. Okay.

3 Q. Just missed it. Sorry. I'm going to
4 hand you what's been marked State's Exhibit Number
5 7. Does that appear to be a screen capture of
6 that?

7 THE COURT: Mr. Scovanner, what's the
8 time on the image?

9 MR. SCOVANNER: The time is 1:14.

10 A. Do I have a question?

11 Q. Yes. Does that appear to be...

12 A. Oh, I'm sorry.

13 Q. Number 7 appear to be the screen capture
14 of that?

15 A. Yes, it does.

16 Q. And in that screen capture do you see
17 that her car is over the center line, both...on top
18 of both yellow markers?

19 A. It looks; it looks like she's right
20 between the two lines.

21 Q. Okay. Oops. What the heck happened?
22 Aw, missed it. Well, that's about, this is at
23 2:05. That is about a second late. I can make it
24 more accurate if you need it to be. This is
25 State's Exhibit Number 8, doctor. And State's

1 Exhibit 8, would you agree with me that, that
2 State's Exhibit 8 is probably about a half a second
3 or so before this image that we stopped on?

4 A. Yes.

5 MR. GOTTESMAN: Counsel, are you going to
6 provide them to me?

7 MR. SCOVANNER: Yes, I am.

8 Q. And in State's Exhibit 8 she is on or
9 over, the tires of her vehicle are on or over the
10 white line?

11 A. As she enters the intersection.

12 Q. The question is the tires on or over the
13 white line, sir?

14 A. It is.

15 Q. Thank you. You can explain. And I'll
16 hand you State's Exhibit 9, is that a screen
17 capture approximately at the same location as shown
18 on the video right now?

19 MR. GOTTESMAN: Counsel, again with the
20 time please?

21 A. Yes, as she exited the intersection.

22 MR. SCOVANNER: It's at 2:09, counsel.

23 Q. And her tires are over the yellow line
24 again?

25 A. Coming from...

1 Q. You can laugh, sir. Are the tires over
2 the line, sir?

3 MR. CREHAN: Objection, Your Honor.

4 A. There was no yellow line.

5 Q. Are the tires over the line, sir?

6 THE COURT: Hang on a second, Mr.
7 Scovanner.

8 A. They are at that instance.

9 THE COURT: Doctor, doctor, hang on. Can
10 you hear me? Hang on. All right, let's be civil.
11 Questions asked. Give him an opportunity to answer
12 it. Just answer the question as posed to counsel.
13 You'll have an opportunity to clarify perhaps if
14 counsel wants you to through their examination. Go
15 ahead, just answer the question.

16 A. What I specifically said in my report...

17 THE COURT: Okay, hang on.

18 A. ...intersections are not included.

19 THE COURT: Hang on. You can certainly
20 clarify that at a later time but just answer
21 counsel's questions, okay.

22 Mr. Scovanner, do you want to answer the
23 question...ask the question again, sir?

24 Q. Screen capture, State's Exhibit Number 9,
25 are her tires on the yellow line, sir?

1 A. Yes, they are.

2 Q. Now, I'm looking at...you can have a seat
3 again, sir. I'm looking at again number 13, "After
4 taking" and I'm quoting this from your report and
5 tell me if I'm not correct. "After taking an
6 initial left turn the dash cam video shows Ms.
7 Caton driving through six curves in the road
8 without every crossing (or even touching) the
9 midline. At the intersection before she was
10 stopped she had to bear left in order to proceed up
11 the road. Her tires did touch (but did not cross)
12 the midline as she drove through the intersection."

13 A. I believe that's just what we showed.

14 Q. Okay and that's referencing that very
15 first incident or State's Exhibit 6. That's the
16 intersection you're referring to there?

17 A. The first picture, yeah, shows her right
18 in the middle of the two lines.

19 Q. And that's the first intersection?

20 A. And that's the intersection.

21 Q. That's the first, that's what you're
22 referring to when you say the intersection?

23 A. Yes.

24 Q. Okay, you don't talk about the
25 intersection with any of these other things did

1 you, sir?

2 A. No, I didn't mention the other ones but
3 the sentence before said, "Through the curves." I
4 was talking about when she was riding the road, not
5 going through intersections.

6 Q. Okay and that...but you didn't say not
7 going through intersections in your report did you,
8 sir? In your original report it doesn't say not
9 going through intersections does it?

10 A. It says, "Driving through curves in the
11 road."

12 Q. Okay.

13 A. "Without ever crossing or touching the
14 midline."

15 Q. There's nothing about intersections?

16 A. All the stuff you skipped.

17 Q. Is there anything in your report that
18 says about the intersections and the curves?

19 A. No, because there are no lines in the
20 intersections.

21 Q. Then you say, "Later when talking to the
22 passenger the officer claimed that she had crossed
23 the midline a couple of times." Quote, "That is
24 contradicted by the video which shows no crossings
25 of the midline despite driving on a very curvy

1 road." That's what your report says isn't it?

2 A. That's correct.

3 Q. Were you paid to be here today, sir?

4 A. Excuse me?

5 Q. Were you paid to be here today, sir?

6 A. I'm paid for my time as you are.

7 Q. Okay and were you paid for your expenses
8 to come down here?

9 A. Of course.

10 Q. And when you did the examination of her
11 eyes were you living in Cleveland at that time or
12 were you living in Florida?

13 A. Cleveland.

14 Q. Okay, okay, now I'm going to ask you if,
15 if...were you told that Ms. Caton drank any alcohol
16 that night?

17 A. Was I told?

18 Q. Prior to your investigation?

19 A. No.

20 Q. Okay.

21 A. I investigated her eyes at the time...

22 Q. That's fair.

23 A. ...in the fall.

24 Q. That's fair. If a person drinks seven,
25 eight, nine, ten beers, bottled beers.

1 MR. GOTTESMAN: Objection.

2 Q. The equivalency of bottled...

3 MR. GOTTESMAN: Objection, Your Honor,
4 there's no basis for that. That's completely
5 improper.

6 A. I wouldn't know what would happen if...

7 THE COURT: Hold on a second, doctor.

8 MR. GOTTESMAN: He has to have a basis
9 for his questions and there is simply no such
10 evidence.

11 THE COURT: He's an expert. You can ask
12 a hypothetical question to him. Overruled.

13 Q. A person drinks five, five beers, would
14 you expect to see nystagmus in their eyes?

15 A. In a normal person?

16 Q. Yes.

17 A. Or her?

18 Q. In a normal person?

19 A. In a normal person that wasn't very large
20 I would expect it.

21 Q. With a woman would it be more likely?

22 A. More likely, correct.

23 Q. Okay.

24 A. That's a normal woman.

25 Q. That was the question that was asked,

1 yes, sir.

2 A. Okay.

3 Q. I'll ask you to turn to tab G. That's
4 your curriculum vitae?

5 A. Correct.

6 Q. We used to call them resumes?

7 A. Same.

8 Q. Yeah, okay. I'm old enough to remember
9 resumes. I'm going to assume you do too.

10 A. (Inaudible) too.

11 Q. Okay, going down on page number 3, about
12 the fourth line, fourth entry down. Case Western
13 Reserve University, July 1980-June 2010, professor
14 of neurology. And then the next entry Case Western
15 Reserve University, July 1980-June 1010?

16 A. Correct.

17 Q. That's a misprint isn't it; you didn't
18 retire in June 1010 did you?

19 A. 2010 it says. Mine says 2010.

20 MR. SCOVANNER: May I approach?

21 THE COURT: You may.

22 A. Oh, the next one?

23 Q. Yes.

24 A. I'm sorry, that is a misprint.

25 Q. Okay.

1 A. 2010.

2 Q. Okay. Now you...

3 A. I was looking at the one above it.

4 Q. Yeah, okay, you provided this curriculum
5 vitae to Mr. Adams, prior counsel, correct?

6 A. Yes.

7 Q. You prepared that curriculum vitae,
8 right?

9 A. Well, it gets prepared all your life. I
10 didn't look back. I didn't make it for him.

11 Q. Okay.

12 A. It's online as a matter of fact.

13 Q. And the very next line says Case Western
14 Reserve; it makes the same error, Case Western
15 Reserve University July 1010 again?

16 A. Yes, it probably was lifted and copied.

17 MR. SCOVANNER: Okay, no further
18 questions.

19 THE COURT: Thank you.

20 Any redirect?

21 THE WITNESS: I'll have to correct that.

22 REDIRECT EXAMINATION

23 BY MR. GOTTESMAN:

24 Q. Dr. Dell'Osso, sir, how old are you?

25 A. 80.

1 Q. 80 years old. Sir, were you, when you
2 were engaged to come and testify on behalf of
3 Captain Caton were you asked to analyze her driving
4 and provide your analysis of it?

5 A. No.

6 Q. No. In fact, you were asked; you were
7 asked I believe to give opinions on nystagmus?

8 A. Only.

9 Q. Right?

10 A. Yes.

11 Q. So that discussion of what was observed
12 up here in these slides of Mr. Scovanner was
13 questioning you on did you have any opinions about
14 any of this that you wanted to share with the jury?

15 A. Well, at the age of 80 I've been driving
16 over 60 years. Had I been following that car I
17 would not have recognized any impairment in that
18 driver at all.

19 Q. Okay.

20 A. And I have life experience there, not
21 expertise in driving. I know what a drunk driver
22 looks like. I know what a car looks like when it...

23 MR. SCOVANNER: Objection, Your Honor.

24 A. ...by a drunk driver.

25 THE COURT: Hang on, doctor. Hang on,

1 doctor. There's an objection. The objection is to
2 the last portion of his answer?

3 MR. SCOVANNER: Yes, sir.

4 MR. GOTTESMAN: I think he opened the
5 door, Your Honor.

6 THE COURT: I think, I'll...to some
7 degree but the last, his answer as to I know what a
8 drunk driver looks like, I'll sustain that
9 objection. And it will be stricken, ladies and
10 gentlemen, not to consider it for any purpose.

11 Q. No problem, doctor. Just bear with me
12 and let me get my question in, okay?

13 A. That's why I offered my opinion. If I
14 had been following that person I would said there
15 is nothing wrong with that person.

16 Q. Thank you. Doctor, you used the term on
17 cross-examination, scientific fraud. Do you
18 remember what you were referring to?

19 A. A paper that was in my folder.

20 Q. And he asked you what was that that you
21 called that scientific fraud, he was talking about
22 California studies?

23 A. I think it was, yes.

24 Q. Right, sir, do you, do you recognize what
25 I'm holding in my right hand?

1 A. I believe that's my folder.

2 Q. Okay and in this folder are there
3 documents that you prepared in the anticipation of
4 your testimony that might refresh your recollection
5 as to what the journal article was that referred to
6 the study as scientific fraud?

7 A. Yes, I had a review of the literature.

8 Q. If I handed this to you could you find
9 that journal article?

10 A. I'm pretty sure I could.

11 MR. GOTTESMAN: May I approach, Your
12 Honor?

13 THE COURT: You may.

14 MR. GOTTESMAN: Without a mask?

15 THE COURT: You may.

16 A. It says, "The horizontal gaze nystagmus
17 test, fraudulent science in American courts."

18 Q. Sir, what, where...is that a journal
19 article?

20 A. Yes, it...

21 Q. Hold on, sir, don't go on without me. I
22 have to ask questions.

23 A. I'm sorry.

24 Q. Is it a peer reviewed journal article?

25 A. Yes.

1 Q. And what does peer reviewed mean?

2 A. It means that scientists and researchers
3 in the field of the particular paper get to review
4 the paper, comment on it, point out its strengths
5 and witnesses. It's then sent back to the author.
6 The author gets to change it and answer the
7 questions of the reviewers. And only when both
8 sides are satisfied does it get published or
9 rejected.

10 Q. And so if an article is peer reviewed in
11 your field of study does that mean it's held to a
12 higher standard?

13 A. We...in the scientific community that's
14 the highest standard.

15 Q That's right. Is it reviewed, peer
16 reviewed, not to be flip, but is it sent to police
17 officers for their input on it?

18 A. Thank you. It's tough for me.

19 Q. You know what, I'm going to withdraw that
20 question anyway, I think it was argumentative.
21 What journal was that article published in?

22 A. It says here U.S. Science and Justice,
23 2004. Published by Elsevier which is a recognized
24 publishing house for scientific journals in all
25 fields.

1 Q. Stand by for just a moment, doctor, let
2 me confer with my co-counsel.

3 MR. GOTTESMAN: That's all the questions
4 I have for you. Thank you, sir.

5 THE COURT: Thank you, Mr. Gottesman.
6 Any recross, Mr. Scovanner?

7 MR. SCOVANNER: One moment, Your Honor.

8 THE COURT: Um-hum

9 RECCROSS-EXAMINATION

10 BY MR. SCOVANNER:

11 Q. Are you aware of any other studies in the
12 field from California and Florida validating
13 horizontal gaze nystagmus, doctor?

14 A. Peer reviewed studies or non-peer
15 reviewed?

16 Q. Validation studies in the...again in the
17 National Highway Traffic Safety Administration
18 Manual, you're familiar with that manual?

19 A. I read it once.

20 Q. You read it...when did you read that
21 manual?

22 A. I believe last fall.

23 Q. Okay and they, they talk about the
24 validation studies that were done in that manual?

25 A. The very same studies that are called

1 fraud in that paper.

2 Q. Well, that was California?

3 A. Yeah.

4 Q. I talked about Florida, Colorado; I
5 didn't talk about the California studies.

6 A. Oh, okay.

7 Q. And so NHTSA says there are other
8 validation studies that support horizontal gaze
9 nystagmus?

10 A. As far as I know there have been no
11 validation studies...

12 Q. Sir, sir, the NHTSA Manual is what we're
13 talking about. In the NHTSA Manual did they talk
14 about validation studies of the horizontal gaze
15 nystagmus?

16 A. Apparently so.

17 Q. Okay.

18 A. But I don't remember them; I would have
19 to see them.

20 Q. Thank you.

21 A. I don't know where they were published.

22 THE COURT: Very good. Thank you. Thank
23 you, doctor.

24 MR. GOTTESMAN: Nothing further, Your
25 Honor.

1 THE COURT: That concludes your
2 testimony. You may step down.

3 (End of testimony)

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C E R T I F I C A T E

STATE OF OHIO

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COUNTY OF CLERMONT

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I further certify that I am not counsel, attorney, relative or employee of any of the parties hereto, or in any way interested in the within action.

IN WITNESS WHEREOF, I have hereunto set my hand on this _____ day of _____, 2021.

My Commission Expires: _____
Cindy Elaine Meguire
May 3, 2024 Notary Public-State of Ohio