

No. _____

In The
SUPREME COURT of the UNITED STATES
October Term, 2020

BRIAN SMITH,
Petitioner,
vs.
THE STATE OF WASHINGTON,
Respondent.

On Petition for a Writ of Certiorari
to the Supreme Court of the State of Washington

APPENDIX TO
PETITION FOR WRIT OF CERTIORARI
pp. 200a-446a

LENELL NUSSBAUM
Counsel of Record

Law Office of Lenell Nussbaum, PLLC
2125 Western Ave., Suite 330
Seattle, Washington 98121
lenell@nussbaumdefense.com
206.728.0996

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1 inquire about that may change that.

2 MR. RANDS: Thank you.

3 THE COURT: First witness?

4 MR. HULBERT: The first witness is Officer Tiemersma
5 from the Everson Police Department.

6 OFFICER MARK TIEMERSMA

7 Having been duly sworn, testified, as possible

8 DIRECT EXAMINATION

9 BY MR. HULBERT:

10 Q. Can you please state your name and spell your last name
11 for the record?

12 A. My name is Mark Tiemersma, T-I-E-M-E-R-S-M-A.

13 Q. And how are you employed?

14 A. I'm employed with the Everson Police Department.

15 Q. How long have you held that position?

16 A. Since March of 2014.

17 Q. What is your position?

18 A. Officer.

19 Q. And so you're a police officer?

20 A. Correct.

21 Q. Do you have any law enforcement experience before the
22 Everson Police Department?

23 A. I worked 10 years in the local tribes as a police officer.

24 Q. Were you employed and on duty on December 5th, 2014, in
25 the evening?

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1 A. Yes.

2 Q. Were you dispatched to the location at or about
3 Christopher Lane and Kale Street in Whatcom County?

4 A. Yes.

5 Q. What was the nature of the reason you were dispatched
6 there?

7 A. The original was a motor vehicle versus pedestrian, and
8 while I was en route, they upgraded to motor vehicle
9 versus motorcycle crash.

10 Q. What time did you receive that dispatch?

11 A. At 2044 hours.

12 Q. That's 8:44 p.m.?

13 A. Yes.

14 Q. What can you tell us about the general nature of that, of
15 the area to which you responded? What sort of a
16 neighborhood is it?

17 A. It's a, there's a neighborhood on Christopher Lane, a
18 housing development on Christopher Lane, and it intersects
19 with Kale Street which is a state highway.

20 Q. Is there a -- how would you characterize it as far as like
21 urban or rural or farmland? How would you describe that?

22 A. There is farmland up against and around the housing area,
23 the housing development.

24 Q. You mentioned that it is a housing development?

25 A. On Christopher Lane, yes.

1 Q. Can you approximate the size of the housing development?

2 A. Oh, maybe 30 homes.

3 Q. How did you get from -- well, strike that. Do you
4 remember where you received this call?

5 A. I believe I was at the Everson Police Department.

6 Q. How did you get to the scene to which you responded?

7 A. Hmm, based on the call that came out.

8 Q. What, what mode of transportation did you use?

9 A. Oh, my car, my patrol car.

10 Q. Can you describe your patrol car, please?

11 A. It's a standard Crown Vic patrol car, light, sirens,
12 marked vehicle.

13 Q. Crown Victoria, Ford?

14 A. Crown Victoria.

15 Q. Four-door sedan?

16 A. Four-door sedan.

17 Q. Does it have any emergency equipment?

18 A. Yes.

19 Q. Does it have any markings?

20 A. Yes.

21 Q. What sort of markings?

22 A. It's marked with Everson Police on the side, and it's
23 lights, siren, everything.

24 Q. What color?

25 A. It's a white car.

1 Q. Do you have any black and white markings or all white?

2 A. The markings are blue and gray.

3 Q. What was going on when you arrived at the scene?

4 A. There was a lot of people. They were all around. When I
5 first arrived on the scene, I saw the motorcycle down with
6 extensive damage in the westbound lane, and I didn't see
7 the other vehicle right away or the motorcycle driver.

8 Q. Did you, did you, did you -- how many people would you
9 estimate were present?

10 A. At least 10.

11 Q. What did you -- well, strike that, where did you park?

12 A. I parked right on Kale in the westbound lane headed west.

13 Q. You said it was -- what did you say, you received a call
14 at 8:44 p.m.?

15 A. Yes.

16 Q. And this is December?

17 A. Yes.

18 Q. Is it dark outside?

19 A. Yes.

20 Q. Can you describe the ambient light conditions?

21 A. I don't recall. I believe there're street lights on
22 Christopher Lane.

23 Q. Uh-huh. You mentioned that your police car is equipped
24 with emergency equipment. Was any of that activated?

25 A. Yes, the lighting.

1 Q. The lighting?

2 A. Yeah.

3 Q. So flashers?

4 A. Yes.

5 Q. What color are they?

6 A. Red and blue and white.

7 Q. Was your siren on?

8 A. It was until I arrived, and I killed it when I arrived.

9 Q. What did you do when you parked?

10 A. I exited my patrol vehicle and headed to the motorcycle
11 first.

12 Q. What did you do next?

13 A. I asked the people standing there where the driver of the
14 motorcycle was, and they all pointed to the white vehicle,
15 the white suburban which was parked northbound on
16 Christopher Lane.

17 Q. What happened next?

18 A. I ran over there with my partner, and I did have Reserve
19 Officer Smit with me, and we observed the motorcycle
20 driver on the hood of the car, and with that information,
21 when I saw that there were people caring for him, and
22 Officer Smit also assisted.

23 Q. Did the person who was on the hood of the SUV appear to
24 have sustained some sort of injury?

25 A. Yes.

1 Q. Did the SUV appear to have sustained any damage at some
2 point in the recent past?

3 A. At the time it was crashed, yes.

4 Q. Yeah, what, what sort of damage did the SUV have?

5 A. The windshield was smashed.

6 Q. Anything else?

7 A. I don't recall.

8 Q. What did you do next?

9 A. I updated my dispatch with patient information that it was
10 serious.

11 Q. Uh-huh.

12 A. And I needed medics which were already en route, and then
13 my reserve officer, our reserve officer assisted with
14 stabilizing the patient.

15 Q. What did you do next?

16 A. I asked for the driver of the Suburban which was
17 involved --

18 Q. Explain that a little bit more. Did you call out?

19 A. Yeah.

20 Q. How did that work?

21 A. Everybody was busy, all the people on scene, so I did call
22 loudly, "Where's the driver of the Suburban?"

23 Q. What happened next?

24 A. I believe Mr. Smith walked to me and said he was the
25 driver.

1 Q. When you say Mr. Smith, are you talking about someone
2 that's currently present in the courtroom?

3 A. Yes.

4 Q. And is that the gentleman seated in the sort of tan and
5 brown shirt next to Mr. Rands?

6 A. Yes.

7 Q. How were -- how -- well, strike that. When you called out
8 for him, did he respond verbally or called out for the
9 driver, did Mr. Smith respond verbally? So Officer
10 Tiemersma, let me ask you a question, what are you looking
11 at?

12 A. Yes, I'm looking at my report to see --

13 Q. So do you have, do you have a copy of your incident
14 report --

15 A. Yes.

16 Q. -- in your hands?

17 A. Yes.

18 Q. When I see you look down, are you looking at the report to
19 refresh your recollection --

20 A. Yes.

21 Q. -- of the, of the, of the event?

22 A. Yes.

23 Q. When you do that, will you please let us know that that's
24 for purposes of the record --

25 A. Right.

1 Q. -- that you're looking down to refresh your recollection
2 from your incident report, just so it's clear for the
3 record that that's what you're doing?

4 A. Yes.

5 MR. RANDS: I don't have any objection as long as the
6 officer articulates that he has no independent
7 recollection at the time.

8 MR. HULBERT: Well, I think that, I think that --

9 THE COURT: If he just lets the Court know that he
10 needs to refresh his recollection about the specifics,
11 that's sufficient.

12 MR. HULBERT: But if he can't recollect at all, and
13 he's just reading his report, he should say that to the
14 Court and should reflect he's doing so; is that correct?

15 THE COURT: That's correct.

16 MR. RANDS: Yes, please. Thank you.

17 MR. HULBERT: What were we talking about?

18 THE WITNESS: Mr. Smith.

19 Q. (By Mr. Hulbert) I was asking you whether or not
20 Mr. Smith approached you.

21 A. Right.

22 Q. Do you recall how that went?

23 A. Hmm, not exactly.

24 Q. Okay. At some point, do you recall your attention being
25 drawn to him?

1 A. Yes.

2 Q. Did you approach him at that point?

3 A. Yes.

4 Q. Can you tell us how you were dressed that evening?

5 A. How I was dressed?

6 Q. Yes.

7 A. In my uniform, police uniform.

8 Q. Similar to what you're wearing now?

9 A. Yes.

10 Q. It was winter. Did you have a coat on or anything like
11 that?

12 A. I do not recall.

13 Q. Did you have a badge?

14 A. Yes.

15 Q. Did you have a firearm?

16 A. Yes.

17 Q. How far away from your car were you when you contacted
18 Mr. Smith, if you can estimate?

19 A. It was parked on Kale Street, and I was all the way down
20 Christopher at least 40 feet.

21 Q. And the lights were on?

22 A. Yes.

23 Q. And, and did you, did you draw your gun at any point?

24 A. Draw my gun?

25 Q. Yes.

1 A. No.

2 Q. Did you raise your voice when you initially approached
3 Mr. Smith?

4 A. No.

5 Q. Was this like a high risk felony stop or anything like
6 that?

7 A. No.

8 Q. Did you -- when you first saw him, did you, did you
9 restrain him or take him into custody?

10 A. No.

11 Q. Did you handcuff him?

12 A. No.

13 Q. Did you, did you confine his movement in any sort of
14 enclosed space?

15 A. No.

16 Q. Once you found out that he was the driver, did you, what
17 did you say to him?

18 A. I do remember I told him that we were going to need to
19 talk to him later and not to leave.

20 Q. So he wasn't free to leave at that point?

21 A. No.

22 Q. Did you tell him he was under arrest?

23 A. No.

24 Q. Did you Mirandize him?

25 A. No.

1 Q. Did you touch him?

2 A. No.

3 Q. After you told Mr. Smith that he needed to stick around,
4 what did you do next?

5 A. Due to the injuries, I needed to get back to the highway
6 and start clearing a path for the medics which were still
7 en route.

8 Q. Did you have any further contact with Mr. Smith before the
9 state patrol got on the scene?

10 A. I do not recall. I would like to look at my report.

11 Q. Go ahead if that will refresh your recollection.

12 A. No. Sorry.

13 Q. Just to clarify, are you saying that you didn't have
14 contact, or that you don't remember whether or not that
15 happened?

16 A. I don't remember.

17 Q. Thank you. Did -- after you asked who the driver of the
18 SUV was, do you recall whether or not Mr. Smith made any
19 statements about whether or not he was the driver of the
20 SUV?

21 A. He told me he was the driver.

22 Q. Did he say who owned the SUV?

23 A. I don't recall.

24 MR. HULBERT: No further questions.

25 THE COURT: Mr. Rands?

1 MR. RANDS: Thank you.

2 CROSS-EXAMINATION

3 BY MR. RANDS:

4 Q. Good morning, officer.

5 A. Good morning.

6 Q. Could you set the scene in a little bit more detail for
7 me? As I understand it, the state route was intersected
8 by Kale. Is this a T-type intersection?

9 A. It's a T, yes.

10 Q. So when you arrived, you saw a motorcycle on the state
11 route?

12 A. Yes.

13 Q. And you indicated that that was down, meaning it was on
14 its side on the road?

15 A. On its side, yes.

16 Q. And that was -- in which lane was it down?

17 A. It was in the westbound lane.

18 Q. Westbound lane, okay, and you approached travel in which
19 direction, sir?

20 A. Westbound from Everson.

21 Q. As you approached, it was in your path of driving?

22 A. Correct.

23 Q. If you had continued further, correct?

24 A. Yes.

25 Q. And its location as to where it was, did you turn onto

1 Kale before coming to that motorcycle, or did you have to
2 drive around it, and then go onto Kale?

3 A. Onto Christopher?

4 Q. Sorry, Christopher. My mistake.

5 A. No, Christopher was on this side of the motorcycle.

6 Q. Okay.

7 A. And I did not drive onto Christopher. I kept my patrol
8 car on Kale.

9 Q. And in doing that, when your patrol car came to a stop,
10 did you stop in the lane of travel, or did you pull off as
11 much as you could?

12 A. I stopped in the lane of travel.

13 Q. Was that for traffic safety issues for vehicles coming
14 behind you?

15 A. Yes.

16 Q. Your emergency light remained fully on?

17 A. Yes.

18 Q. And when you talk about these emergency lights, you're
19 talking about fairly intense red and white wig-wags,
20 emergency red and blues?

21 A. Yes.

22 Q. Is your Crown Vic equipped -- the wig-wag was on the front
23 of the car as well as the light bar?

24 A. Yes.

25 Q. And so there's no problem seeing your vehicle at this

1 point, right?

2 A. Correct.

3 Q. So you indicated that there was a lot of people around.
4 Where were they mostly congregated, and then what was the
5 vehicle situation like on the road?

6 A. I don't recall seeing too many people on the state route
7 on Kale. Everybody was on Christopher, several people on
8 Christopher, and then many vehicles parked along that side
9 of Kale.

10 Q. Okay. The vehicles that were parked, was there vehicles
11 parked on the state route?

12 A. Yes.

13 Q. And were they parked facing westbound and eastbound?

14 A. They were eastbound.

15 Q. Eastbound?

16 A. I was facing westbound.

17 Q. So there was vehicles pulled to the side of the road
18 facing you as you approached?

19 A. Correct.

20 Q. Do you remember how many?

21 A. No, not exactly.

22 Q. How far from them had your vehicle come to stop from maybe
23 the first one? I'm assuming they're parked in a line?

24 A. It would have been the first one with its flashers on
25 heading eastbound, and I was, I don't recall exactly how

1 far.

2 Q. And there was cars then parked behind that first vehicle?

3 A. Yes.

4 Q. And were they parked in the roadway or on the side?

5 A. They were in the roadway.

6 Q. And was there any people on the state route?

7 A. I believe, I don't recall exactly. There may have been
8 some standing outside their vehicles.

9 Q. And when I ask that question I meant these are outside the
10 vehicles. Thank you. The majority of the people were
11 over on the side streets; is that correct?

12 A. Correct.

13 Q. And was there cars parked over there as well?

14 A. Yes.

15 Q. Hmm, where were you in terms of the scene that you just
16 set when you had contact with Mr. Smith, initial contact
17 that is?

18 A. On Christopher Lane next to his Suburban.

19 Q. Okay. So had you, had you walked over to the Suburban,
20 seen the person on the Suburban getting treatment, and
21 then ask at this point who was the driver?

22 A. Yes.

23 Q. Do you recall where you were standing in relation to that
24 Suburban?

25 A. I was on the passenger side, the right side.

1 Q. Okay, and when you asked who was the driver, the answer
2 was from Mr. Smith, himself?

3 A. Yes.

4 Q. Okay. Did you see where he was when he spoke up and said
5 he was the driver to your request?

6 A. I believe he just came walk up to me from an unknown
7 direction.

8 Q. Did you see him approach you, or did you have to turn
9 around?

10 A. I believe I saw him walking towards me, and I believe he
11 was verbally telling me that he was the driver.

12 Q. Okay. Once he told you that he was the driver -- once he
13 told you that he was the driver, you indicated at that
14 point that he needed to remain there?

15 A. Correct.

16 Q. And that either you or somebody else would have questions
17 for him?

18 A. Correct.

19 Q. Did you ask him for anything at that point other than to
20 remain there such as identification or anything like that?

21 A. I don't recall.

22 Q. Would that be the extent of your interaction with him
23 before you took on other matters? Who's the driver? I
24 am. Stay here. And you had other things to do?

25 A. And asked about passenger information, if there was any

1 passengers in his vehicle.

2 Q. Did he answer you?

3 A. Yes.

4 Q. Did you learn there was any passengers?

5 A. Yes.

6 Q. And did you get the names or information?

7 A. There were no other passengers.

8 Q. So yes, you learned about passengers. No, there were no
9 passengers?

10 A. Right.

11 Q. Thank you. What else did you ask him, if anything, other
12 than what we just covered?

13 A. I don't recall asking any other questions.

14 Q. Okay. When you told him to remain there, did you require
15 a particular position? Did you say just the area? Did
16 you point? How did you inform him that he needed to
17 remain in this place?

18 A. It was very quick, and I just said stay on scene or
19 remain. I don't remember my exact words, but no, I
20 didn't.

21 Q. And to the best of your recollection, do you -- at this
22 particular time, I imagine a lot was going on. Do you
23 remember the tone that you used?

24 A. I don't recall. Normal tone.

25 Q. Then when you were talking to him, did you make note of

1 how he appeared?

2 A. No.

3 Q. Better yet, do you recall how he appeared?

4 A. He was very cooperative at that point.

5 Q. Did he seem as you might expect on an accident scene like
6 this, anxious, afraid, scared, nervous?

7 A. I cannot recall.

8 Q. Okay. You had an opportunity to see him approach you
9 though, correct?

10 A. Yes.

11 Q. And when he approached, did you make any note of how he
12 walked or came towards you?

13 A. I did not.

14 Q. When you first had contact with him, did you make any
15 observations of his appearance in terms of face or eyes or
16 speech?

17 A. I did not.

18 Q. And when you say that you had to -- your main goal at this
19 point was to clear a path. What's involved in doing that?
20 What did you have to do?

21 A. I just went back out on the highway to make sure there was
22 no traffic backing up and moving into the -- I knew the
23 medics were going to be coming from Everson and also from
24 Bellingham, so from both directions. I needed to get the
25 roadway cleared and vehicles out of the way if there were

1 any.

2 Q. Okay.

3 A. And I don't recall if they were or not, but that's where I
4 headed back to.

5 Q. And did you feel at this point that because of the amount
6 of help that the person was receiving back at the SUV that
7 this was the next best thing to do?

8 A. Yes.

9 Q. Did it appear as though you needed to provide aid in any
10 way, shape, or form, or offer any that wasn't already
11 being offered?

12 A. No.

13 Q. So once you update dispatch, I assume you did that by
14 radio?

15 A. Yes.

16 Q. And you do that through the car or the one on your
17 shoulder?

18 A. The one on my shoulder.

19 Q. Do you stay out on the roadway and direct traffic as it
20 arrives?

21 A. Traffic was clearly stopped, and it was just a matter of
22 clearing and moving any for the medics, and they arrived
23 very quickly.

24 Q. When they arrived, what direction did they arrive from?

25 A. I don't recall whether Bellingham arrived first before

1 Everson. I don't recall which one.

2 Q. Where did they go once they arrived? Where did the
3 vehicles go in terms of the intersection?

4 A. They were parked on Christopher.

5 Q. And in relation to the SUV, do you recall where they were
6 parked?

7 A. No.

8 Q. Did they take up the roadway?

9 A. Yes.

10 Q. And what number of vehicles arrived in the form of medics?

11 A. I don't recall.

12 Q. Would it unusual to have a fire truck and, say, an
13 ambulance-type vehicle?

14 A. Usually in the medical -- yeah, I can't recall, but no, it
15 wouldn't be unusual.

16 Q. Once they arrive, did you go back to that area where you
17 initially had contact with Mr. Smith?

18 A. I don't recall where I went.

19 Q. Okay. Who arrived next?

20 A. I believe Sumas police arrived, and I was directing them
21 to start blocking roadways via radio. I didn't actually
22 see them.

23 Q. And at some point, did the state patrol arrive?

24 A. Yes.

25 Q. Did you happen to see them or anyone in the troopers

1 arrive?

2 A. I don't recall.

3 Q. Do you happen to see where their vehicles went when they
4 arrived?

5 A. I don't recall where they were parked.

6 Q. As the activity grew, did additional bystanders come to
7 the scene?

8 A. Yes.

9 Q. How many additional people do you think arrived?

10 A. I don't recall exactly.

11 Q. What if any additional contact did you have with Mr. Smith
12 after you had said remain here and went and did what you
13 needed to do?

14 A. I don't believe that I had any further contact.

15 Q. Thank you, officer. No further questions.

16 THE COURT: Mr. Hulbert?

17 REDIRECT EXAMINATION

18 BY MR. HULBERT:

19 Q. Can you describe in a little bit more detail what you
20 meant when you said that you used a normal voice when you
21 told Mr. Smith that he needed to stick around?

22 A. It would have just been my normal voice. It wouldn't have
23 been a command voice.

24 Q. Did you yell?

25 A. No.

1 Q. Would you describe, describe it as conversing, as
2 conversational in tone?

3 A. Yes.

4 Q. How would you compare it to the volume that your voice,
5 the voice that you're using when you're speaking right
6 now?

7 A. Maybe a little louder due to the noise.

8 Q. What was going on?

9 A. Yeah.

10 Q. Okay.

11 MR. HULBERT: Those are all the questions that I have.

12 THE COURT: Anything else?

13 MR. RANDES: No follow-up, Your Honor. Thank you.

14 THE COURT: You may step down. Thank you.

15 We can start with this next witness. I assume we won't
16 finish.

17 MR. HULBERT: He's going to take -- you know.

18 THE COURT: We might as well use what time we've got.

19 MR. HULBERT: Yes, yes. So I would call Trooper
20 Beattie.

21 **TROOPER BRAD BEATTIE**

22 Having been duly sworn, testified, as follows:

23 THE COURT: Have a seat, please.

24 MR. HULBERT: Ready, Your Honor?

25 THE COURT: Yes, I am.

DIRECT EXAMINATION

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BY MR. HULBERT:

Q. Please state your name and spell your last name for the record.

A. Brad Beattie, B-E-A-T-T-I-E.

Q. How are you employed?

A. I'm employed with the Washington State Patrol as a trooper.

Q. How long have you held that position?

A. Since June 2013.

Q. Have you held any other positions with law enforcement before your tenure as a Washington State Patrol trooper?

A. No.

Q. Did you bring a copy of your incident report with you?

A. I did, sir.

Q. Is it, is that what you're holding in your hand?

A. Yes, sir.

Q. All right. So I'm going to, I'm going to ask you to testify first from your independent recollection to the event that I ask you about. If you, if you, if you don't have independent recollection, and you look at your incident report to refresh your memory, would you please state so for purposes of the record, and so counsel can make note of that?

MR. RANDS: Thank you.

1 THE WITNESS: Yes, sir.

2 Q. (By Mr. Hulbert) Were you working on December 5th, 2014?

3 A. Yes, sir.

4 Q. Do you remember what your shift was that particular day?

5 A. I believe I was working the 5:00 p.m. to 3:00 a.m. shift.

6 Q. Did you get a call to respond to an incident that occurred
7 at Kale Road and Christopher, Christopher Lane?

8 A. Yes, sir.

9 Q. At what time did you get -- what time did your dispatch
10 tell you to go there?

11 A. I, I would have to refresh my memory, sir.

12 Q. Could -- I would ask that you look at the materials that
13 you have there. If it refreshes your recollection, tell
14 us. Say, yes, it refreshes your recollection.

15 A. It refreshes my recollection, sir.

16 Q. So what time did you receive that call?

17 A. P.m. 2051 hours.

18 Q. Do you remember where you were when you got the call?

19 A. I don't remember specifically. I was inside the city
20 limits of Bellingham.

21 Q. Do you remember the route that you took to get there?

22 A. I do not, sir.

23 Q. Do you remember whether you took county roads or the
24 interstate, or do you remember in general terms?

25 A. It would have been a mixture of county roads and state

1 routes getting --

2 Q. How long were you stationed in Whatcom County?

3 A. Two years, just under two years, sir.

4 Q. Have you recently been transferred?

5 A. I have.

6 Q. What's your current station?

7 A. I'm in Tacoma now, Pierce County.

8 Q. All right. So do I correctly infer that you went in a
9 somewhat urgent fashion to the scene where this took
10 place?

11 A. Yes, sir.

12 Q. What was that -- what do you remember dispatch conferring
13 to you, or communicating to you about what exactly you
14 were responding to?

15 A. Initially, dispatch said it was a motor vehicle versus
16 motorcycle collision, and they didn't have any further
17 information. While I was en route, they notified that the
18 motorcyclist was being transported to the hospital.

19 Q. Do you recall what time you arrived at the scene of the
20 collision?

21 A. I do not specifically remember what time, sir.

22 Q. Would you be, would it refresh your recollection to look
23 at your incident report?

24 A. Yes, sir.

25 Q. Go ahead and do that.

1 A. I do not recall the specific time, sir.

2 Q. Do you, do you recall having communication with Detective
3 Drew about the timing of that, and were you party to the
4 email, an email timeline?

5 A. I didn't get the exact timeline, sir.

6 Q. Would you have, do you have a CAD slip with you that would
7 refresh your recollection?

8 A. I don't have one with me, sir.

9 Q. Would it refresh your recollection to look at a call-out
10 sheet?

11 A. Yes, sir.

12 Q. All right. Bear with me a second.

13 MR. HULBERT: May I please have this marked?

14 THE CLERK: Petitioner's Exhibit Number 1 marked.

15 (Plaintiff's Exhibit 1 marked for identification.)

16 MR. HULBERT: May I approach?

17 THE COURT: You may.

18 Q. (By Mr. Hulbert) Handing you what's been marked as
19 Petitioner's Exhibit Number 1 --

20 THE COURT: It should be Plaintiff's.

21 MR. HULBERT: What's that?

22 THE COURT: It would be Plaintiff's.

23 MR. HULBERT: Yeah, it says Petitioner's, but you know
24 what we mean.

25 Q. (By Mr. Hulbert) Okay. Do you recognize the form of the

1 document that I've given you?

2 A. Yes, sir.

3 Q. Do you recognize what it is?

4 A. It's a CAD log.

5 Q. Do you recognize the incident to which the CAD log refers?

6 A. Yes, sir.

7 Q. Is it, is it reference to this specific incident?

8 A. Yes, sir.

9 Q. Does that contain any information that would refresh your
10 recollection as to what time you arrived on scene?

11 A. Hmm, yes, sir. I'm, I'm not, I don't think this is the
12 state patrol CAD log, sir.

13 Q. Okay. Directing your attention to the line that starts
14 with 20:51:49, read, can you read to yourself the rest of
15 that line?

16 A. The 20:51:49 you said?

17 Q. Does that refresh your recollection as to when the
18 Washington State Patrol arrived on the scene?

19 A. Umm, it says 615 on scene.

20 Q. Uh-huh.

21 A. That's not my badge number, and I don't know whose badge
22 number that is.

23 Q. Okay. Okay. Do you have any, any recollection at all
24 regarding what, or any information available to you that
25 would tell you what time you arrived on the scene?

1 A. I, I know just from my experience, it would take me
2 approximately 20 to 25 minutes to get out to that
3 location.

4 Q. Uh-huh.

5 A. I recall I was running lights and sirens going as fast as
6 I could to get out there. So it probably would be 20 --
7 15, 20 minutes after I was advised by communications.

8 Q. So if you, if you received the call at 8:51 p.m., and it
9 would take you 15 to 20 minutes to get there based on what
10 you know about the geography, can you estimate what time
11 you got there?

12 A. It would be approximately nine, 9:00, 9:05-ish.

13 Q. Does that, does that estimation of time fit with your
14 general recollection of when you got there?

15 A. Yes, sir.

16 Q. Do you remember when you got there whether or not the
17 injured party was still on scene?

18 A. He was not, sir.

19 Q. He was already gone by the time that you arrived?

20 A. Yes, sir.

21 Q. What do you recall about the time of day -- strike that.
22 Was it dark outside?

23 A. Yes, sir.

24 Q. Do you -- had you ever been to this location before?

25 A. I had not for a call. I've driven through the area

1 before.

2 Q. Now, that Kale Street, that's a state route as well, isn't
3 it?

4 A. Yes, sir. It's a State Route 544.

5 Q. Is it known by another name beside Kale Street or Route
6 544 as it goes through the county?

7 A. Hmm, I'm not sure, sir.

8 Q. Okay, and what can you tell the Court about what was going
9 on when you arrived?

10 A. I arrived from the west, and I observed a motorcycle down
11 in the westbound lanes on State Route 544 with extensive
12 damage. There were several police officers already on
13 scene. I -- there was an ambulance. I'm not sure how
14 many ambulances or fire trucks. It was a very chaotic
15 scene, and I observed a white SUV parked on Christopher
16 Lane.

17 Q. How would you describe the ambient lighting conditions?

18 A. It was dark out on Christopher Lane. There're street
19 lights, and then there were from the police vehicles,
20 there was lights, emergency lights.

21 Q. Were there any homes in the immediate area?

22 A. On Christopher Lane.

23 Q. Was the Sub -- and the SUV was parked on Christopher Lane?

24 A. Yes, sir.

25 Q. So were there lights coming from these homes visible?

1 A. Yes, sir.

2 Q. On Christopher Lane?

3 A. Yes, sir.

4 THE COURT: Mr. Hulbert, I see that the attorneys and
5 the parties for my next trial have arrived, so I think
6 we'll have to break at this point.

7 MR. HULBERT: Understood.

8 THE COURT: So you and Mr. Rands and Mr. Kaiman can
9 talk about who you wish to have and how you wish to
10 schedule next Tuesday's special set. Hopefully, by then
11 we won't spend 20 minutes getting ready to know what we're
12 going to do, and we will start then taking testimony.

13 MR. HULBERT: Before you throw us out, will you sign
14 our trial setting order?

15 THE COURT: Sure, be happy to. I'm not going to throw
16 you out.

17 MR. HULBERT: We'll get that going, Your Honor.

18 THE COURT: Mr. Smith, it's been told to me, Mr. Smith,
19 by counsel that you're willing to agree to have the case
20 continued into January. Is that all right with you, sir?
21 Are you in agreement with that?

22 THE DEFENDANT: Yes.

23 MR. RANDS: He's asking if it's okay to continue.

24 THE DEFENDANT: Yes, Your Honor.

25 THE COURT: Why don't you prepare your order,

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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON.

FOR THE COUNTY OF WHATCOM

STATE OF WASHINGTON,)	
)	
Plaintiff,)	
)	
vs.)	Cs. No. 14-1-01457-3
)	COA No. 76340-7
BRIAN J. SMITH,)	
)	
Defendant.)	

-----REPORTER'S TRANSCRIPT-----

BE IT REMEMBERED THAT on the 3rd of November 2015, the above-entitled and numbered cause came regularly on for hearing before the Honorable CHARLES R. SNYDER, Superior Court Judge for the County of Whatcom, State of Washington.

JAMES HULBERT, Deputy Prosecuting Attorneys, Whatcom County, Washington, appeared for the State.

JONATHAN RANDS, Attorney at Law, Bellingham, Washington, appeared for the Defendant.

1 THE CLERK: Your Honor, as I got the exhibit out on
2 State v. Brian Smith, and I noted that it was Plaintiff's,
3 and on evidentiary hearings, it should be Pretrial, so I
4 took the liberty to correct that.

5 THE COURT: Mr. Hulbert noted that last time.

6 MR. HULBERT: I forget what it was called.

7 THE COURT: It said Petitioner's.

8 What are we doing today?

9 MR. HULBERT: Well, I wanted to speak about that.

10 I -- when last we broke, the Court had my second
11 witness was on the stand, and we had just scratched the
12 surface of that person's testimony, and the Court had
13 ordered me to bring him back, and I've done so.

14 The Court had also expressed some skepticism about
15 proceeding in the sort of piecemeal fashion that the
16 Defense has chosen to precede in, and what has happened in
17 the interim is that yesterday -- yesterday, the Defendant,
18 the Defendant filed 16 more pages of this canned briefing,
19 and you know, so, I'm in the position of having to put on
20 testimony, and I don't really know what the issues are at
21 this point. I don't know -- you know, it looks like just
22 the sort of canned briefing where they cite Delaware, New
23 Jersey case law and things of this nature, and you know,
24 it's, it's easy to just look at that, and sort of, hmm,
25 and, and, and sort of think, well, the Washington case law

1 is what is going to control, focus more on that, but the
2 problem is if you talk to our appellate division, what
3 they will say is that there are like kernels of issues in
4 there, and the appellate courts will look at it as if the
5 Defendant has raised it, and so it creates a burden on the
6 State to create a factual record that addresses each and
7 every one of these arguments that are raised by the
8 Defense no matter how arcane.

9 So I'm in the position of having to create this factual
10 record, and I think that at some point, and look, the
11 briefing history here, the Defendant filed seven pages of
12 briefing on September 18th, and in order to get this, this
13 rolling, and then noted up the hearing, you know, I filed
14 my response on October 22nd -- or excuse me October 20th,
15 which was seven days ahead of the last hearing.

16 On October 22nd, the Defendant filed 15 pages of this
17 briefing, and then the day -- and then the hearing begins,
18 and we actually start taking testimony. In the middle of
19 that hearing, they file more briefing on me, and you know,
20 I feel like it's a situation where the target is moving a
21 little bit here after the testimony has begun, and I think
22 that, that really, you know, I don't know what to do at
23 this point.

24 I have my witness here. I didn't feel comfortable, you
25 know, the Court having ordered me to have him present, you

1 know, just calling it off and saying I need more time. I
2 didn't feel comfortable with that, but he's driven three
3 hours to be up here. He's incurred, you know, time and a
4 half for the last hearing and this hearing. So it's not
5 great.

6 At this point, I sort of think that, that just saving
7 this until the morning of trial or at least the week of
8 trial is really going to be the only way to, to get all
9 the briefing in before, before the litigation starts, and
10 so, you know, I wanted to put that on the record.

11 I, I -- if we start here, and even if we were to
12 complete the trooper's testimony today, and there are
13 additional issues, back points raised by additional
14 briefing that was filed either last night or will be filed
15 again, you know, and I have to bring this back, it's at
16 significant cost. This is a trooper who is now stationed
17 in -- where are you stationed?

18 TROOPER BEATTIE: Tacoma.

19 MR. HULBERT: And he drove three hours to be up here,
20 and the sergeant is not real thrilled about the overtime
21 that that's taking.

22 So I'm ready to, I'm ready to proceed with testimony.
23 My preference would be that we not do this piecemeal,
24 particularly, if as we were talking about after the last
25 hearing, I think that the plan was to, was to entertain

1 Defense expert and State expert testimony involving the
2 medical examiner, and it just seems like that is
3 unwieldily at this point. So that's the concern that I
4 have about how to progress, but I'm ready to resume the
5 testimony if the Court decides that that's what you want
6 to do.

7 THE COURT: So the trial date is next week?

8 MR. HULBERT: No, the trial date is now in January.

9 THE COURT: That's right. You picked a new date when
10 you were here last.

11 MR. HULBERT: That's exactly right.

12 THE COURT: When we were here last, I understood we
13 were doing a 3.5/3.6 hearing, and we were taking testimony
14 regarding statements made by the Defendant. What else are
15 we here about today?

16 MR. HULBERT: There's --

17 THE COURT: Because I received this other brief here
18 about excluding evidence on the basis of his not having
19 the right to counsel which I received yesterday. It was
20 filed with the clerk yesterday. I'm assuming that the
21 State isn't expected to deal with that.

22 MR. HULBERT: They're, they're --

23 THE COURT: I understand.

24 MR. HULBERT: Yeah.

25 MR. RANDS: Your Honor, the motions haven't changed.

1 The motions were filed timely a long time ago. Because
2 we're in a position where the Court can only accommodate
3 one hour at a time, and I was prepared for a different
4 motion at the time with the issues in terms of what
5 Mr. Hulbert was prepared for last time and what I was
6 prepared for. We scraped the retrograde extrapolation
7 issue, and we moved into a 3.1/3.6. The 3.1 motion has
8 been filed. The 3.6 motion on the right to counsel was in
9 motion, so it was filed. Because we had to do it
10 piecemeal, I took it upon myself to do some additional
11 briefing knowing that we were still engaged in the
12 3.1/3.5/3.6 hearing today. I came prepared today and
13 anticipated that we would continue with the trooper and
14 continue with his cross-examination.

15 I also took it upon myself to coordinate with your
16 judicial assistant and try to find a block of time in the
17 near future between now and January when we would have
18 more than just an hour. It's my understanding that it
19 just isn't possible, and so we have some additional
20 tentative dates that she's issued to me.

21 I, like, Mr. Hulbert, thought it would be nice if we
22 could get it all done in a block of time, and we just
23 can't do that at this time, and the issues are extensive
24 enough and deep enough and complex enough that I think
25 waiting for the week of or the morning of trial would be a

1 little bit of a -- I would see it as an opportunity missed
2 in terms of what we can do pretrial.

3 THE COURT: What's your trial date again?

4 MR. RANDS: January 25th, I believe.

5 MR. HULBERT: It's that week. It's -- it might be
6 Martin Luther King holiday, but --

7 MR. RANDS: It's the week after that.

8 THE COURT: The calendar here doesn't tell me when the
9 holiday is the next year. I think it may be the 18th, but
10 I'm not certain.

11 THE CLERK: That's correct.

12 MR. HULBERT: Yeah, it's the 25th is the one we took.

13 THE COURT: Well, okay. Let's get a couple of things
14 clarified here. First of all, Defendant is moving to
15 exclude evidence under 3.5, statements of the Defendant,
16 and 3.6, the results of the search, and your 3.1 motion is
17 seeking to exclude all that evidence based upon the fact
18 that after the time that he was first contacted, I assume
19 at some point, because he didn't get access to counsel.

20 So it seems to me that the factual questions about
21 the -- regarding that are going to have to do with what
22 was said to him about counsel and when and under what
23 circumstances, and what happened after he left the scene
24 and went to the hospital with the blood draw, when was the
25 warrant done, all that sort of thing seems to relate to

1 the 3.1.

2 I'm not sure that Mr. Hulbert anticipated when he was
3 in court that that was what we were going to delve into
4 today. I thought we were going to finish up the 3.5/3.6
5 about the statements made out there, and maybe I
6 misremember this, but my recollection was that at some
7 point, he was placed in the car, read his Miranda rights,
8 and then the next thing was he was transported to the
9 hospital for a blood draw.

10 I don't recall, and I've only gotten partial
11 information, of course, whether or not there were any
12 statements pursuant to interrogation or not pursuant to
13 interrogation, whatever, from the time that he was
14 formally arrested and read his rights and placed in the
15 police car at the scene.

16 MR. RANDES: There is additional interaction between him
17 and the troopers and officers at the hospital post 3.5.

18 THE COURT: At the hospital?

19 MR. RANDES: Yes.

20 THE COURT: Okay.

21 MR. RANDES: And the --

22 THE COURT: Do you have the witnesses here for that
23 part, Mr. Hulbert?

24 MR. HULBERT: The trooper can talk about the things --
25 all of the statements that were made that we would be

1 offering, you know, that when he's fighting and actually
2 trying to resist the warrant, the trooper would be the
3 witness that I would need for that.

4 You know, unless there's additional briefing that's
5 going to come down the pike, and it raises -- see, that's
6 the problem that I have.

7 THE COURT: I understand that. I agree when you say
8 it's a moving target. When I read this other brief
9 yesterday afternoon, I thought what in the world are we
10 doing tomorrow?

11 MR. HULBERT: Right, right. Well --

12 MR. RANDS: This --

13 MR. HULBERT: Can I talk, can I talk for a minute?

14 MR. RANDS: Sure.

15 MR. HULBERT: I think that part of the confusion comes
16 when you, we have a 3.5 hearing. We have a 3.6 hearing.
17 We have a 3.1 hearing. All of those, all of those are
18 distinct, you know, legal analyses, right? But I think
19 that it's customary when the, when we can, and I know that
20 I've been through hearings like this with Your Honor many,
21 many times to combine the facts of, the facts, the
22 testimony for those when we can, because a lot of the
23 times, the facts are sort of -- or the testimony sort of
24 overlaps.

25 THE COURT: Right, and I think in this case, there's

1 some of that, too.

2 MR. HULBERT: Particularly closely overlapping the 3.1
3 and 3.5 issues, you know, and you know, I think that,
4 that -- so a lot of the testimony would be similar, but I
5 don't know that it's identical based upon the scheduling
6 of the briefing. I feel like I have a right to know
7 exactly what defense issues are going to be raised before
8 I take the testimony. Otherwise, I'm going to have to
9 bring him back.

10 THE COURT: Mr. Rands, how do you --

11 MR. Rands: Your Honor, the 3.1 and the 3.6 and the 3.5
12 put the State on notice that the motion were filed. I
13 filed supplemental briefing. Some of it is pertinent to
14 today. Some of it is pertinent to future issues because
15 of the way that we have to go about this with the one hour
16 block that we have. So I agree with Mr. Hulbert, yeah,
17 there are overlapping issues, because there is an
18 overlapping issue in terms of the Miranda warnings and the
19 invocation of counsel and how 3.1 affects that, I found it
20 appropriate to supplement the motion with some briefing on
21 Criminal Rule 3.1.

22 And to be honest with you, I don't think we're actually
23 even going to get through or to that issue given how we
24 are starting this hearing like we did last time where
25 we're spending some time trying to figure things out,

1 rather than just taking testimony on the 3.6/3.5/3.1 --

2 THE COURT: Well --

3 MR. RANDS: -- which if there was some misunderstanding
4 from the State as to how we were going to proceed today,
5 I'm not sure where it came from, because the filing of the
6 brief was a divergence, if you will, but I came prepared,
7 and I believe that the State came prepared with having the
8 trooper here prepared to continue on with wherever we were
9 at, and the issue was -- also, on the 3.6 issue was the
10 administration of the field sobriety tests where Your
11 Honor indicated that there would an opportunity to
12 cross-examine the officer on that.

13 So with that issue in mind and only having an hour, I'm
14 not sure that we're even going to get to some of the
15 issues that were supplementally briefed.

16 THE COURT: That's my concern, and my concern is that
17 also the testimony is going to be broken up, and it's
18 going to be difficult for counsel and the Court to sort of
19 synthesize that all into a single set of circumstances and
20 know exactly what happened when and what the rules are
21 going to be here.

22 MR. RANDS: And it would be wonderful if we had more
23 than an hour of time that we could find for that. I know
24 that Mr. Hulbert and I talked briefly about this at the
25 end of the last hearing in terms of maybe finding an

1 opportunity on a particular day where it was behind a
2 trial that may not go, and Your Honor would have a good
3 two or three hours for us to knock these issues out.

4 THE COURT: That's all very unpredictable, and you will
5 not know until the day before about the availability of
6 witnesses. That strikes me as being a real problem in a
7 situation such as that.

8 The problem is we have so much work and so many cases
9 set, and we end up as we have every week, we have stacked
10 criminal cases that on Wednesday look like they're going
11 to trial, and on Monday, they don't, and so we put civil
12 cases in, and we try civil cases. That's what I'm going
13 to be doing the rest of today.

14 I don't know if there's any way we can do that short of
15 giving you a trial date, and all the trial dates between
16 now and your current trial date are full with criminal
17 cases, 25, 30 cases set on every one of those dates, and
18 that's the same -- I mean, that's what we've got. Every
19 department faces the same situation. You got the holidays
20 coming up, and people are going to be on vacation. Some
21 of your witnesses may not be available.

22 So if it's going to be this complex, I think what we
23 should do while we have the trooper here is get the
24 testimony we can regarding the 3.5 and 3.6 issues. The
25 3.1 hearing I think may be an entirely different issue,

1 and maybe we're going to need to resolve that one on the
2 morning of trial, and we won't call the jury in until
3 Tuesday, and we'll plan on that. Monday, we'll spend all
4 of our time thrashing out whatever else needs to be done
5 on the 3.5/3.6, and we will do the 3.1 and any other
6 motions in limine that you have, and then we'll pick a
7 jury on Tuesday, and we'll go forward at that point. That
8 seems to me to be the only really practical way to do this
9 short of setting aside a day on Monday and telling another
10 criminal case you will start on Tuesday instead of Monday.

11 MR. RANDS: My anticipation will also be, Your Honor,
12 at the conclusion of whatever testimony we get that would
13 focus on the 3.5 and 3.6 was to have it transcribed, turn
14 it over to the State, and also talk about whether that
15 would be a sufficient amount of information to deal with
16 the 3.1 on a different basis. So I'm going to do
17 everything I can in order to make our time with the Court
18 most productive.

19 THE COURT: But it strikes me that Mr. Hulbert is --
20 has a legitimate complaint when we're here on a 3.5/3.6,
21 and we decided last week -- yes, last week, we were going
22 to do the 3.5 and the 3.6. We didn't even talk about the
23 3.1, and we said that's the testimony we're going to take,
24 and we started doing it, and we ran out of time, so now
25 we're going to finish that up today.

1 For him to address the 3.1 with regards to testimony,
2 he may need to put on other information. He may need some
3 more time to think about what other testimony he needs to
4 put on. I don't think that we should tread into that.

5 MR. RANDS: Then don't address the 3.1 today.

6 THE COURT: We should just talk about the 3.5 and 3.6
7 with the understanding that both sides are going to have
8 the complete freedom to bring forth whatever additional
9 testimony you wish to address the other issues, and the
10 State won't be hampered or somehow restrained by having
11 put on testimony now that would prevent you from doing it
12 again later if you need to address other issues with the
13 same trooper.

14 MR. HULBERT: So the plan then if I'm understanding you
15 correctly would be just take as much testimony as we can
16 today?

17 THE COURT: About what happened on the evening of the
18 event.

19 MR. HULBERT: And then, but, but --

20 THE COURT: Beyond that, I guess what I will leave you
21 with is this, I will give you two options. You're going
22 to do it on the morning set for trial, the 25th, plan on
23 picking your jury on the 26th, or I will -- we'll look at
24 a week that you think -- you need to tell me what week
25 will work, and we'll give you Monday, and we'll start

1 whatever criminal trial, if there is a criminal trial to
2 go that week, we will start that trial on Tuesday, which
3 means your colleagues are going to have to be willing
4 to -- we're just going to have to do that.

5 MR. HULBERT: Well, I mean, the problem is that I'm
6 also set in in-custody cases, and I can't, I might not be
7 in a position --

8 THE COURT: And I may be trying Chabuk starting Monday.

9 MR. HULBERT: I just don't think that's going to work
10 at all. I think that, that the only date that we're going
11 to be able to call our own --

12 THE COURT: Is your trial date.

13 MR. HULBERT: -- aside from these piecemeal is our
14 trial date, and I sort of overheard counsel talking, and
15 all of those are during, on or about when I'm out of the
16 area. They're Thanksgiving, and then the day after
17 Thanksgiving.

18 THE COURT: It won't be the day after Thanksgiving.

19 MR. HULBERT: The day after vacation.

20 MR. RANDS: 12-1 and 12-2, and I would only propose
21 those days if there's some issues that we can work out
22 locally, for instance, the retrograde where the State
23 wanted to have the medical examiner come in or things of
24 that nature.

25 THE COURT: I think it makes sense for a couple of

1 reasons to resolve all of these at once, to have some
2 point where it's all resolved so you can decide what
3 you're going to do with your trial. If we have to do it
4 on Monday the 25th, and you have to start trial on the
5 26th, that's probably the best way to do it.

6 Let's use the time that we have with the trooper here
7 and get his testimony, and whatever we don't get today
8 we'll address on the 25th.

9 It's been a week, but you're still under oath.

10 THE CLERK: Marking Pretrial Exhibit Number 2.

11 **TROOPER BRAD BEATTIE**

12 Having been previously sworn, testified, as follows:

13 MR. HULBERT: May I approach, Your Honor?

14 THE COURT: You may.

15 DIRECT EXAMINATION (continued)

16 BY MR. HULBERT:

17 Q. So I'm handing you what has been marked as Pretrial
18 Exhibit Number 2, a document consisting of several pages.
19 Do you recognize that document?

20 A. Yes, sir.

21 Q. What is that document?

22 A. It's a Washington State Patrol CAD report.

23 Q. Is that the Washington State CAD report for this event?

24 A. Yes, sir.

25 Q. Do you remember that -- do you remember during the

1 testimony when, when you were handed the other CAD sheet
2 and said it was from a different law enforcement agency,
3 it would be of limited help in refreshing your
4 recollection of your, of your moments and your responses?

5 A. Yes, sir.

6 Q. Would, would that document in your estimation be more
7 helpful as far as refreshing your recollection of this
8 event?

9 A. Yes, sir.

10 Q. So again, same as with, same as with the incident report.
11 I think the Court is going to request that you testify, if
12 I ask you questions, and you don't recall specific
13 details, testify from your memory first. Let us know if
14 you have to look at any documents to refresh your
15 recollection, and then say which documents you've looked
16 at.

17 A. Yes, sir.

18 Q. Do you understand?

19 A. Yes, sir.

20 Q. Okay. So I had asked you a question about, about going
21 back to the evening of December 5th, 2014. I had asked
22 you a question about what time you arrived on scene, and,
23 and at the time, your recollection was not great.

24 Have you had a chance to look at anything or refresh
25 your recollection since the, since the previous hearing

1 regarding your arrival at the scene?

2 A. Yes, sir.

3 Q. Did it refresh your recollection as to your time of
4 arrival?

5 A. Yes, sir.

6 Q. So what time did you arrive?

7 A. Approximately 9:27 p.m.

8 Q. What time was the arrest?

9 A. I would need to look at my report.

10 Q. Yeah, could you look at your report to refresh your
11 recollection?

12 A. Yes, sir. I arrested him at approximately 9:40 p.m.

13 Q. Uh-huh. So the, so the DUI investigation only took 13
14 minutes from the time that you arrived to the time that he
15 was arrested?

16 A. Yes, sir.

17 Q. Okay. So what was going on when you arrived?

18 A. When I arrived, I observed there were multiple police
19 vehicles there. Ambulances there. I observed a
20 motorcycle sitting, laying on its side in the westbound
21 lane with a lot of debris covering State Route 544. I
22 observed a white SUV that was parked on Christopher Lane.

23 Q. Was it dark outside?

24 A. Yes, sir.

25 Q. Can you describe the ambient lighting questions?

1 A. There were -- on Christopher Lane, there's streetlights,
2 and houses that have lights. There were also police
3 vehicles with their emergency lights on.

4 Q. What were you wearing?

5 A. I was wearing my state patrol uniform.

6 Q. Did you have a badge and a gun?

7 A. Yes, sir.

8 Q. How did -- what manner of conveyance did you take to get
9 to the scene?

10 A. My fully marked patrol vehicle.

11 Q. Does it have emergency equipment?

12 A. Yes, sir.

13 Q. Consisting of what?

14 A. I have a light bar on top with emergency lights. It's
15 also equipped with a siren.

16 Q. Were either of those devices activated during your
17 response to the scene?

18 A. Yes, sir, both were.

19 Q. Did you -- strike that, can you estimate how many other
20 emergency vehicles were on scene when you got there?

21 A. I can't, probably somewhere between five to 10. I can't
22 remember exactly how many.

23 Q. What did you do when you parked?

24 A. I parked and exited my vehicle and was immediately
25 contacted by an Everson police officer.

1 Q. Where did you park?

2 A. I parked, it would be partially on State Route 544, and
3 Christopher Lane on the shoulder. It was the eastbound
4 side of State Route 544 faces towards Christopher Lane.

5 Q. Okay. So I want to back you up. You testified in the
6 last hearing that you were someplace in the City of
7 Bellingham?

8 A. Yes, sir.

9 Q. When you, when you, when you got this call, do you
10 remember that?

11 A. Yes, sir.

12 Q. And you testified that you drove directly from
13 Bellingham -- strike that. What time did you -- were you
14 dispatched? What time did you receive the call?

15 A. I would need to refresh my memory from my report.

16 Q. Okay. Can you do that please, quickly?

17 A. It was approximately at 8:51.

18 Q. 8:51?

19 A. Yes, sir.

20 Q. And do you remember, do you remember saying that or
21 testifying that it took you -- well, strike that. How
22 many miles was it, is it from Bellingham to where this
23 took place?

24 A. I can't exactly recall how many miles it is, sir.

25 Q. Uh-huh. Do you remember testifying that it took you 15,

1 20 minutes, 10-15 minutes to get to the scene?

2 A. Yes, sir.

3 Q. All right. Does that, does that -- now, I think that I
4 understood your testimony before you said that you arrived
5 at 9:27?

6 A. Yes, sir.

7 Q. And that's approximately 40 minutes. Are you certain that
8 it was 9:27?

9 A. Hmm, that is on my collision report. That's the time that
10 is listed as my arrival.

11 Q. Okay. So it could have taken you up to 40 minutes to
12 drive --

13 A. Yes, sir. I don't have an independent recollection of
14 exactly how long or the miles that it took me to get
15 there, sir.

16 Q. Okay. Thank you. So you mentioned that when you were
17 starting to describe how when you arrived, you were
18 approached?

19 A. Yes, sir.

20 Q. Who approached you?

21 A. It was -- I don't know how to say his last name. It was
22 the officer that testified last week.

23 Q. Tiemersma?

24 A. Yeah, Officer Tiemersma.

25 Q. The other gentleman that testified in this pretrial

1 hearing?

2 A. Yes, sir.

3 Q. What was the nature -- strike that. Did he communicate
4 with you when he approached?

5 A. Yes, sir.

6 Q. Did -- what was the nature of your communication with that
7 person?

8 A. He was advising me of what was going on at the scene. He
9 advised that the victim who had been on the motorcycle had
10 already been transported, was en route to hospital and was
11 no longer on the scene.

12 Q. So he was -- the victim wasn't even there when you got
13 there?

14 A. No, sir.

15 Q. Were you the first Washington State Patrol trooper on
16 scene?

17 A. Yes, sir.

18 Q. What did you do after you spoke with Officer Tiemersma?

19 A. Officer Tiemersma, he had handed me the Defendant's
20 driver's license, and stated that he was the driver of the
21 vehicle. I took the license from him. He stated he was
22 in the back of an ambulance on Christopher Lane.

23 Q. Let's be careful about our pronouns here. When you say
24 "he stated he was," can you state it with names?

25 A. Yes, Officer Tiemersma stated that the Defendant was in

1 the rear of an ambulance being checked out by paramedics.

2 Q. What did you do after that, after he told you that?

3 A. I approached the SUV to see what damage there was, and
4 look in the interior of the vehicle and get the
5 registration or get the license plate number for the
6 vehicle.

7 Q. Okay. What did you do next?

8 A. I approached the ambulance and observed that there were
9 two white males standing on the sidewalk outside of the
10 ambulance.

11 Q. Do you see, did you -- was your attention directed at
12 either of these males in the context of the investigation
13 at that point?

14 A. I remember I asked if one of the males had been driving
15 the white SUV, and the Defendant stepped forward and
16 stated that he was the driver of the white SUV.

17 MR. HULBERT: You know, Your Honor, I forgot to address
18 this during when we were talking before. I have a motion
19 to exclude witnesses at this time.

20 THE COURT: Do we have any other potential witnesses
21 here?

22 MR. HULBERT: I don't have any. I don't know whether
23 the Defendant --

24 THE COURT: Does the Defense have anybody here that is
25 going to testify in this hearing other than your client?

1 MR. RANDS: I believe Mr. Smith's wife is present in
2 the courtroom, Your Honor. She is a potential witness.

3 THE COURT: I think it would be appropriate for her to
4 wait outside.

5 We want to make sure that your testimony is from your
6 memory and not from something that you might have heard in
7 the courtroom.

8 Q. (By Mr. Hulbert) So you asked these gentlemen if either
9 was the driver?

10 A. Yes, sir.

11 Q. Did you receive a response from anybody?

12 A. Yes, sir, from the Defendant.

13 Q. And when you say the Defendant, do you see that person in
14 the courtroom today?

15 A. Yes, sir.

16 Q. Is he the gentleman sitting in the plaid shirt at counsel
17 table?

18 A. Yes, sir.

19 MR. RANDS: I object to that. It's a leading question
20 for identification.

21 THE COURT: Because it's for that purpose, and this is
22 a pretrial hearing, the objection will be overruled.
23 Different for trial, of course.

24 Q. (By Mr. Hulbert) What, what did you do?

25 A. I asked the Defendant what had happened.

1 Q. So when you approached the Defendant, did you have a gun
2 drawn?

3 A. No, sir.

4 Q. Did you yell at him?

5 A. No, sir.

6 Q. Was this like a high-risk type of a felony stop situation
7 at that point?

8 A. No, sir.

9 Q. Did you restrain him?

10 A. No, sir.

11 Q. Did you handcuff him?

12 A. No, sir.

13 Q. Did you touch him?

14 A. No, sir.

15 Q. Did you other than the fact that he had been told by
16 Officer Tiemersma to remain at the scene, did you restrict
17 his movement at that time?

18 A. No, sir.

19 Q. Did you tell him that he was under arrest?

20 A. No, sir.

21 Q. Did you issue him any commands?

22 A. No, sir.

23 Q. Describe the tone of voice that you used to speak with
24 him.

25 A. Just normal conversational tone, sir.

1 Q. I imagine that there was some stuff going on, some ambient
2 noises and things of that nature; is that correct?

3 A. Yes, sir.

4 Q. So how did that factor into the volume of voice that you
5 used?

6 A. I can't remember specifically the volume on my voice, sir.
7 It might have been a little louder than normal, but it was
8 not a yelling or an extremely loud tone.

9 Q. How many -- strike that. Describe the distance between
10 you and the Defendant when you initially spoke with him.

11 A. Approximately four, five feet.

12 Q. Were there any other law enforcement officers with you
13 when you did this?

14 A. I do not believe so.

15 Q. Do you have independent recollection of there being any
16 other officers as like a show of force with you when this
17 took place?

18 A. No, sir.

19 Q. So what, what did you ask him?

20 A. I asked the Defendant what had happened.

21 Q. Did he respond to that?

22 A. Yes.

23 Q. To that question?

24 A. Yes, sir.

25 Q. What did he say?

- 1 A. He told me he had been at a BP Christmas party earlier in
2 the night. His family and he then went to the Rusty Wagon
3 and had dinner. They were on their way home. He stated
4 he was westbound on State Route 544 attempting to turn
5 left into his development which is Christopher Lane.
- 6 Q. Let me stop there. Are you sure he said westbound?
- 7 A. Can I look at my report real quick?
- 8 Q. If you don't have independent recollection, and it would
9 refresh your recollection to look at your report --
- 10 A. Yes, sir, it would.
- 11 Q. Please do so.
- 12 A. All right. I, I -- correction. He was headed eastbound,
13 sir.
- 14 Q. Okay. Go on.
- 15 A. He stated he was trying to take a left into his
16 development which was Christopher Lane. He stated he
17 stopped, and there was a vehicle coming toward him. He
18 waited for the vehicle to pass. He began a turn left into
19 his development, and at the last second, he saw a
20 motorcycle strike the front of his SUV.
- 21 Q. What happened after this conversation?
- 22 A. I remember asking the Defendant for his registration,
23 insurance, that type of information, and he stated that it
24 was in his vehicle.
- 25 Q. So how would you characterize this level of interaction

1 with him? And I guess what I'm asking you to characterize
2 is the level of, of -- was this a command or a request?

3 A. It was a request, sir.

4 Q. A request that he produce those documents?

5 A. Yes, sir.

6 Q. Why did you request that he produce documents for you?

7 A. It is normal in a collision investigation for me to be
8 able to do a collision report, and I, I need insurance
9 information, and I need vehicle registration as well.

10 Q. Do you normally ask for identification as well?

11 A. Yes, sir.

12 Q. Do I correctly infer from your prior testimony that you
13 already had that?

14 A. Yes, sir.

15 Q. So what happened when you asked the Defendant for these
16 documents?

17 A. The Defendant stated that those documents were inside the
18 vehicle, and he walked over to the vehicle to retrieve
19 them.

20 Q. What happened next?

21 A. He -- the driver's door would not open. He walked to the
22 passenger side. He got inside the vehicle and began to
23 look around.

24 Q. Can I stop, can I stop you there?

25 A. Yes, sir.

- 1 Q. You've described the, you've described parts of the
2 collision scene, and for purposes of this hearing, we're
3 not going to go into the full mapping out of the scene,
4 but you mentioned that there was a motorcycle, there was a
5 motorcycle that was involved in this accident, or
6 apparently involved in this accident as well, correct?
- 7 A. Yes, sir.
- 8 Q. Where was the motorcycle oriented in that intersection?
- 9 A. It was, it was in, in the middle of the westbound lane of
10 State Route 544.
- 11 Q. And how much, how much distance was there between where
12 the motorcycle was and where the SUV that appeared to have
13 been involved in the collision finally came to be parked?
- 14 A. Approximately, probably 50 to 75 feet away.
- 15 Q. So the, the discussion, the movements that you're
16 describing right now, the Defendant, the door that was
17 damaged in the collision, that's in an SUV that's parked
18 some distance away from the motorcycle?
- 19 A. Yes, sir.
- 20 Q. Is that accurate?
- 21 A. Yes, sir.
- 22 Q. Okay. So there was damage, and the -- did the Defendant
23 try to get in the driver's door? Is that how you knew
24 there was damage?
- 25 A. Yes, sir.

1 Q. And then he entered the vehicle through a different door?

2 A. From the passenger side.

3 Q. Did he get in the front seat or the back seat?

4 A. I don't recall which seat, sir.

5 Q. What do you remember happening after he entered the
6 vehicle in the passenger side?

7 A. I remember him looking in the glove box area in the center
8 console area. I remember him locking several of the
9 doors.

10 Q. What do you remember about that?

11 A. I remember him -- the back driver's side door, him pushing
12 the lock down, him pushing the front passenger door lock
13 down.

14 Q. So it wasn't like he did one switch that did them all at
15 once? He went around and manually did --

16 A. Yes.

17 Q. -- the doors?

18 A. Yes, sir.

19 Q. What happened next?

20 A. He exited the vehicle, locked -- I can't remember if he
21 exited the front passenger door or the rear one.

22 Q. Uh-huh.

23 A. I observed him push that lock down and shut the door.

24 Q. What did you do after that happened?

25 A. He approached me and said he could not locate the

1 information.

2 Q. What happened next?

3 A. I asked, I remember asking him why he locked the doors to
4 his SUV.

5 Q. Did he reply to that question?

6 A. I can't specifically remember if he replied to that
7 question.

8 Q. Would it refresh your recollection to look at your report?

9 A. Yes, sir.

10 Q. Go ahead.

11 A. When I asked him, he said that he wasn't sure, and that
12 the doors -- I asked him why he had just locked the
13 doors. He said he wasn't sure, and they must have been
14 damaged during the collision.

15 Q. Did -- how would you describe his demeanor during that
16 particular exchange?

17 A. Umm, calm. I don't, just, just a normal, what I believed
18 to be a normal interaction, sir. I, I remember thinking
19 that that was extremely odd behavior that I had never
20 encountered before at a collision scene.

21 Q. Did you make note in your report of the Defendant smiling
22 and laughing at this point?

23 A. Yes, sir.

24 Q. What was he laughing about?

25 A. I'm not sure, sir.

1 Q. And do you know what he was smiling about?

2 A. No, sir.

3 Q. Was this during the exchange about, about his license and
4 registration that he was smiling and laughing?

5 A. Yes, sir.

6 Q. Why did that strike you as odd?

7 A. I've never encountered someone involved in a serious
8 collision like that to be smiling and laughing and locking
9 doors in their vehicle.

10 Q. Did you make any notes about -- or -- well, let me ask
11 you, let me ask it a different way. Do you have any
12 training with respect to the identification of the effects
13 of alcohol consumption?

14 A. Yes, sir.

15 Q. Where did you receive that training?

16 A. The state patrol academy.

17 Q. In general terms, how would you describe that training?
18 Was it a classroom? Was it in the field? What was it
19 like?

20 A. It was a mixture of both, sir. For -- we have a week at
21 the state patrol academy where they instruct us on DUIs.
22 Part of that is classroom, and part of it is also a wet
23 lab where it's -- they have people come in, consume
24 alcohol. They know the level of consumption, and we
25 actually go out and perform the field sobriety tests on

1 them.

2 Q. Okay. We can talk more about field sobriety tests a
3 little later, but I want you to focus -- the questions
4 that I'm asking right now just have to do with demeanor
5 and symptomatology, you know, aside from field sobriety
6 tests. Do you understand what I'm saying?

7 A. Yes, sir.

8 Q. All right, and, and how long did you say during the last
9 hearing that you had been employed as a Washington State
10 Patrol trooper?

11 A. For approximately two and a half years.

12 Q. Two and a half years as of now, or as of the time of the
13 collision?

14 A. As of now, sir.

15 Q. So how many times have you participated in DUI
16 investigations?

17 A. Over, approximately over 250. Are you asking just
18 investigated?

19 Q. No, how many times participated. It was a question as to
20 how many times you've participated in DUI investigations,
21 and so, so I have some follow-up questions that I could
22 ask you, but I don't want to interrupt you.

23 A. As far as investigations go, when I'm on night shift, it's
24 almost nightly that I am investigating a potential DUI.
25 I, I -- it's almost every single night that I do an

1 investigation. I thought you were specifically asking for
2 that.

3 Q. I'm asking -- you're giving, you're giving the exact level
4 of information that I was going to ask about in follow-up
5 questions. So is it an accurate statement to say that
6 basically on a nightly basis you are, your job involves
7 you assessing the demeanor and symptomatology of a person
8 in light of your training to investigate whether or not
9 they had been consuming alcohol?

10 A. Yes, sir.

11 Q. Okay. So in light of all of that training, during your,
12 the course of your speaking with the Defendant, was there
13 anything about his speech patterns or the way that he
14 talked that had any relevance in the context of an alcohol
15 and driving related investigation?

16 A. Yes, sir.

17 Q. Can you describe?

18 A. I observed that his speech was slightly slurred, that he
19 was repetitive with his statements.

20 Q. Did you make any other observations about the way his face
21 looked or just his countenance in this early stage of your
22 contact with him?

23 A. I believe his face was flushed, and that I observed that
24 his eyes were bloodshot and watery.

25 Q. So what did you do at this point?

1 A. At this point, I asked the Defendant how much he had had
2 to drink.

3 Q. Why did you ask him that?

4 A. I believed he had potentially been consuming alcohol.

5 Q. What did he say?

6 A. He stated he had not been drinking, and he stated that he
7 had had some sodas at the restaurant, but that was all he
8 had been drinking.

9 Q. The Rusty Wagon?

10 A. Yes, sir.

11 Q. So at this point, was the Defendant under arrest?

12 A. No, sir.

13 Q. Before your initial conversation with him, did you tell
14 him that he was under arrest?

15 A. No, sir.

16 Q. At, at, after he, after the episode with him, asking for
17 the registration documents, in your conversation up to
18 this point, did you, did you raise your voice at him
19 after, after that happened?

20 A. No, sir.

21 Q. Did you restrain him after that happened?

22 A. No, sir.

23 Q. Handcuff him?

24 A. No, sir.

25 Q. Did you touch him?

1 A. No, sir.

2 Q. Did you ask him at this point questions about whether he
3 would perform field sobriety tests?

4 A. Yes, sir.

5 Q. Now, what essentially are field sobriety tests?

6 A. Essentially --

7 Q. Hold on. Hold on a second.

8 A. Yes, sir.

9 MR. HULBERT: I guess, Your Honor, at this point, I, I
10 would want some clarification from the Court as to, as to
11 whether or not it's the intent to have, have, to take
12 testimony from this witness at this time. You've said
13 that you wanted to focus on the 3.5 and 3.6 vis-a-vis the
14 other limine motion. We can go through the field sobriety
15 tests in a manner that would be fairly quick if we're
16 doing just the 3.5/3.6. I anticipate that the testimony
17 regarding the other issue will take quite a bit longer.

18 Is the Court able to give any guidance as to whether or
19 not we're going to do the motion to exclude testimony
20 right now?

21 THE COURT: About the only guidance I can give you is
22 you have about 15 more minutes, more like 12, probably.

23 MR. HULBERT: Okay.

24 THE COURT: So I guess I would just suggest that you
25 use that time in the most effective way that you can think

1 of in light of what you think you have to prove.

2 MR. HULBERT: Okay. I understand.

3 Q. (By Mr. Hulbert) What are field sobriety tests? I think
4 that you started to answer this, and I interrupted you.
5 Go ahead.

6 A. Yes, sir, basically field sobriety tests are a tool we use
7 to, to determine if someone is impaired by alcohol or
8 drugs or any substance.

9 Q. And where did you learn how to give these tests?

10 A. At the Washington State Patrol Academy.

11 Q. Is there, there are set tests that you give, or do you
12 just make them up as you go or explain to the Court how
13 that works.

14 A. There's a set, a standardized group of tests that we
15 perform.

16 Q. And, and those are tests that were taught to you at the
17 academy or the -- when you, before you became a trooper?

18 A. Yes, sir.

19 Q. How are they taught to you?

20 A. They were taught partially, the beginning stages are
21 taught in the classroom.

22 Q. Uh-huh.

23 A. And then like I stated earlier, there's another part where
24 we're in a wet lab situation with real people performing
25 them there.

1 Q. So is it, is the environment that the tests are given in
2 controlled?

3 A. Yes, sir.

4 Q. Do you -- is there any sort of like, do you give them
5 under, under, do you, do you learn them under conditions
6 as they would be in the field? I mean, are they all done
7 like in a gymnasium with lines painted on?

8 A. They're done in a gymnasium. At one point, they turned
9 off all the lights. They try to replicate the road as
10 much as they can.

11 Q. Okay. So what, what are the field sobriety tests that you
12 decided to administer on the evening in question?

13 A. I did the HGN test which is horizontal gaze nystagmus, did
14 the walk-and-turn test, the one-leg stand, and the
15 portable breath test.

16 Q. Why did you select those particular field sobriety tests?

17 A. Those are the standardized field sobriety tests, sir.

18 Q. Was there anything about this situation in your training
19 and experience that would lead you to believe that, that
20 they couldn't be performed under the circumstances as they
21 were presented to you on December 12th?

22 A. No, sir.

23 Q. So the first test that you gave was, was, you said
24 something about nystagmus?

25 A. Yes, sir, horizontal gaze nystagmus.

1 Q. What is that test?

2 A. That is a test where we look at the eyes of the subject.
3 There's several different steps.

4 Q. Nystagmus refers to lack of smooth eye movement, does it
5 not?

6 A. Yes, sir. So nystagmus is the involuntary jerking of your
7 eye. Everyone has nystagmus, but it's not visible when
8 you're not impaired by something. As you look left and
9 right, the eye appears to be tracking normally. The
10 horizontal gaze nystagmus, the nystagmus, the eyes
11 actually slow down when you're under the influence of
12 alcohol or some drugs, and it makes that nystagmus
13 visible.

14 Q. How many times have you performed the horizontal gaze
15 nystagmus test in your years as a Washington State
16 trooper? Estimate?

17 A. Estimate? I -- during the night shift again, I would
18 probably do the HGN test anywhere from four to 10 times a
19 night.

20 Q. On one shift?

21 A. Yes, sir.

22 Q. So did the Defendant when you asked him to engage in the
23 field sobriety tests, did he tell you that he would?

24 A. Yes, sir.

25 Q. What do you remember about the verbiage that he used?

1 A. I asked the defendant if he would do some voluntary field
2 sobriety tests.

3 Q. What did he say?

4 A. Absolutely.

5 Q. That was the word that he used?

6 A. I believe so, sir.

7 Q. So then, then you began the horizontal gaze nystagmus?

8 A. Yes, sir.

9 Q. And did he, did he perform that test with you?

10 A. Yes, sir.

11 Q. And did his performance -- strike that. What did his
12 performance on the test tell you about whether or not he
13 had been consuming alcohol in light of your training and
14 experience?

15 MR. RANDS: Objection on foundation. I don't know that
16 it's been laid for the trooper to have any sort of opinion
17 at this time.

18 THE COURT: I think he's qualified to answer.

19 You may answer.

20 THE WITNESS: I believe that at that point that his
21 result showed me he was under the influence of alcohol.

22 Q. (By Mr. Hulbert) Or at least consumed?

23 A. Yes, sir, yes.

24 Q. What was the next test that you endeavored to perform?

25 A. The walk-and-turn test.

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- 1 Q. Walk-and-turn test, sounds fairly intuitive. What does
2 that involve?
- 3 A. It involves taking nine heel-to-toe steps down a line,
4 turning around, and taking nine heel-to-toe steps back
5 along that same line.
- 6 Q. How do you explain to a subject what is expected of them
7 during the walk-and-turn test?
- 8 A. I explain all the different facets, that they need to
9 walk, take nine heel-to-toe steps down the line, keep
10 their arms down to their side, look down at their feet,
11 counting step out loud so I can hear them, to not stop the
12 test until they've completed it. I explain it to them,
13 and then I also give a physical demonstration of how to
14 perform the test.
- 15 Q. You do it yourself?
- 16 A. Yes, sir.
- 17 Q. Describe the importance of a subject's ability to follow
18 the instructions correctly during this particular test.
- 19 A. This particular test is considered a divided attention
20 test, sir. So you're looking not only that they're
21 physically able to balance and maintain, but also that
22 they're able to remember and perform the instructions as,
23 as you told them.
- 24 Q. So did you ask Mr. Smith to perform this test?
- 25 A. Yes, sir.

1 Q. After you had demonstrated yourself?

2 A. Yes, sir.

3 Q. Now, there's no trick from you. You demonstrate exactly
4 what it is that you want them to do; is that correct?

5 A. Yes, sir, the only difference is I take three steps
6 instead of the nine steps.

7 Q. Uh-huh.

8 A. And I state that twice to them at the end of the three
9 steps. I say, I took three steps. Again, you are going
10 to take nine steps, turn around, come back. Again, I took
11 three steps. You are going to take nine steps. That's
12 the only difference.

13 Q. And did he, did he endeavor to perform this test?

14 A. Yes, sir.

15 Q. And what did his performance on the test do to your
16 suspicions that he had been consuming alcohol?

17 A. It added to that suspicion, sir.

18 Q. Was his performance on the test consistent with his
19 consumption of alcohol?

20 A. Yes, sir.

21 Q. What was the next test that you asked him to perform?

22 A. The one-leg stand test.

23 Q. Okay. Do I correctly infer from your prior testimony that
24 this is also a test of physical coordination?

25 A. Yes.

1 Q. What is the one-leg stand test?

2 A. The one-leg stand, you, the subject gets to pick whichever
3 one they're more comfortable with and instruct them
4 they're going to lift that leg approximately six inches
5 off the ground, pointing their toes so they keep their
6 foot parallel to the ground. Keep both their legs
7 straight. Your arms down near the side, and they look
8 down at their foot and count out loud until I tell them to
9 stop.

10 Q. Do you demonstrate this test?

11 A. Yes, sir.

12 Q. Do you do it for the full, the full count or do you do it
13 for a shorter count?

14 A. I do it for a shorter count, sir.

15 Q. Do you explain that to the person?

16 A. Yes, sir, I say again, you're going to keep going until I
17 tell you to stop.

18 Q. And did the Defendant endeavor to perform this test?

19 A. Yes, sir.

20 Q. Was his performance on the, on this test consistent with
21 his having consumed alcohol?

22 A. Yes, sir.

23 Q. What was the, where did these tests take place?

24 A. They took place on the sidewalk on Christopher Lane.

25 Q. Actually, on the sidewalk?

1 A. Can I refresh my memory?

2 Q. Please.

3 A. From my report, sir?

4 Q. Please.

5 A. Yes, sir, they were performed on the sidewalk of
6 Christopher Lane.

7 Q. So it wasn't actually in the surface of the street?

8 A. No, sir.

9 Q. Can you -- strike that. Do you recall the ambient
10 lighting conditions on that section of the lighted
11 sidewalk?

12 A. I remember there -- again, there's streetlights and lights
13 from the housing. There were -- from the houses there on
14 Christopher Lane, sir.

15 Q. Is there enough light for you to see the field sobriety
16 tests without, like a flashlight or something?

17 A. I don't specifically recall. I recall that I did have my
18 flashlight with me and was using it, sir.

19 Q. All right.

20 THE COURT: Tell me when you get to a good place to
21 break.

22 MR. HULBERT: Well, I think -- I've given the time,
23 given the timing, I can -- this is probably a good place
24 to break, and I have one more field sobriety test to
25 describe, but it's going to take five, six minutes.

1 THE COURT: Okay. I have a lot of folks arriving for
2 my trial.

3 MR. HULBERT: Yeah.

4 THE COURT: We'll break at this point, and I guess
5 we'll resume -- we'll resume all of this the morning of
6 the 25th of January unless you find some other opportunity
7 between now and then. I'm always open to you finding one,
8 but once again, as I noted, it's going to be difficult.

9 MR. HULBERT: Would the Court be open to like a
10 briefing deadline in light of the way that the briefing
11 has gone so far?

12 THE COURT: It seems to me that there ought to be
13 something like that. Counsel have a suggestion as to when
14 you might be able to get all your briefing done?

15 MR. RANDS: If we're going to stick to the -- if we're
16 going to stick to the deadline of the 25th, I can have it
17 done a month beforehand, but if we're in a position where
18 we can pick some other date for other period of time, I
19 will do the best I can in order to get it in as soon as
20 before that hearing an issue comes up.

21 THE COURT: Why don't you plan on you getting your
22 briefs to Mr. Hulbert by the 4th? That gives you three
23 weeks then to --

24 MR. HULBERT: Fourth of January?

25 THE COURT: Yes.

1 MR. HULBERT: Yeah, I just need --

2 THE COURT: That way you know it's out there, and I
3 think you have to assume that if we can find another time,
4 great, and if we have to talk about briefing for that,
5 we'll do that, but right now, I think we'll just assume
6 we're going to be back here on the 25th of January.

7 MR. HULBERT: Great.

8 MR. RANDS: There's really only one other issue that I
9 intended on briefing, so I can have that well in advance
10 of the deadline.

11 THE COURT: That would be good. Thank you.

12 MR. HULBERT: Your Honor, thank you for making time
13 this morning.

14 THE COURT: We'll be adjourned.

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CERTIFICATE OF COURT REPORTER

STATE OF WASHINGTON)
) ss.
COUNTY OF WHATCOM)

I, RHONDA G. JENSEN, a certified shorthand reporter, County of Whatcom, State of Washington, do hereby certify that the foregoing pages comprise a true and correct transcript of the proceedings had in the within-entitled matter, reported by me by stenotype on the day herein written and thereafter transcribed into printing by computer-aided transcription.

DATED this _____ day of _____ 2017.

Rhonda G. Jensen

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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF WHATCOM

= = = = =)
STATE OF WASHINGTON,)
Plaintiff,)
vs.) Cs. No. 14-1-01457-3
BRIAN SMITH,) COA No. 76340-7
Defendant.) VOLUME II
) PAGES 61-169

VERBATIM REPORT OF PROCEEDINGS

MONDAY, JULY 18, 2016
**
WEDNESDAY, JULY 20, 2016
**
MONDAY, AUGUST 8, 2016
**
MONDAY, OCTOBER 17, 2016

THE HONORABLE CHARLES R. SNYDER

RHONDA JENSEN, CSR
OFFICIAL COURT REPORTER
WHATCOM COUNTY SUPERIOR COURT
BELLINGHAM, WASHINGTON
(360) 778-5608

1 (Proceedings of October 17, 2016.)

2 THE CLERK: State of Washington versus Brian Smith.

3 THE COURT: Good morning, everybody.

4 MR. ROCHE: Good morning.

5 MR. RANDS: Good morning, Your Honor.

6 THE COURT: Are we ready to proceed this morning?

7 MR. RICHEY: Yes, Your Honor.

8 MR. ROCHE: State would recall Brad Beattie to the
9 stand, Your Honor.

10 THE COURT: Okay. Trooper, please, since it's been a
11 long time, I'm going to swear you in again.

12 TROOPER BRAD BEATTIE, WSP

13 Having been duly sworn, testified, as follows:

14 DIRECT EXAMINATION (continued)

15 BY MR. ROCHE:

16 Q. I know the answers to some of these questions, but who do
17 you work for?

18 A. I work for the Washington State Patrol.

19 Q. How long have you been employed with the state patrol?

20 A. Just over five years.

21 Q. Is that your first career in law enforcement with state
22 patrol or have you work with another agency?

23 A. That's it.

24 Q. What, what's your basic function as a trooper with your --
25 do you work the road? Do you do collisions?

1 A. I work the road. We do collisions, basic traffic
2 enforcement.

3 Q. Okay. Where are you currently stationed?

4 A. I'm currently stationed in Pierce County.

5 Q. Before you were stationed in Pierce County, were you
6 located here in Whatcom County District 7?

7 A. Yes, sir.

8 Q. I'm going to recall your attention to November 3rd of
9 2015. Do you recall testifying in this courtroom on that
10 date?

11 A. I do sir.

12 Q. Okay. You previously testified that you performed a one
13 leg stand test with the Defendant in this case, and that
14 it showed signs of impairment; is that correct?

15 A. Yes, sir.

16 Q. Okay. Can you describe what signs of impairment you saw
17 during the one leg stand test?

18 A. Could I refresh my memory from my report?

19 Q. Certainly. If you wouldn't mind reading it and then --

20 A. The Defendant, he started the test early after I
21 instructed him to wait until I told him to begin. He used
22 his arms for balance throughout the test twice, and he
23 also put his foot down.

24 Q. Okay, and how did you score that test?

25 A. I had two out of four clues present.

1 Q. And that indicated a possible sign of impairment to you?

2 A. Yes, sir.

3 MR. RANDS: Objection to the form of the question. The
4 trooper testified that it was consumption, not impairment.

5 THE COURT: He can ask this question I think if he
6 wants to clarify.

7 Overruled.

8 Q. (By Mr. Roche) So that indicated possible consumption of
9 alcohol?

10 A. Yes, sir.

11 Q. I refer to November 3rd, 2015, you also testified that the
12 Defendant performed a walk and turn test, and you saw
13 signs of possible consumption of alcohol through that
14 test, correct?

15 A. Yes, sir.

16 Q. Can you describe what you saw on that test to us?

17 A. Can I refresh my memory --

18 Q. Certainly, go ahead --

19 A. -- in my report?

20 Q. -- read that.

21 A. The Defendant used his arms for balance, stepped off the
22 line once, and missed heel to toe twice.

23 Q. Is it fair to say that walk and turn and one leg stand are
24 both tests of physical coordination?

25 A. Yes, sir.

1 Q. And what you saw was the Defendant having difficulty with
2 balance?

3 A. Yes, sir.

4 Q. During the test, difficulty following the directions that
5 you had given him as to how to perform the test?

6 A. Yes, sir.

7 Q. You previously testified that you had the defendant
8 perform a horizontal gaze nystagmus test?

9 A. Yes.

10 Q. And that you saw signs of impairment?

11 A. Yes, sir.

12 Q. Can you describe to us what you saw?

13 A. I saw six of six clues in the HGN test.

14 Q. Did you offer the Defendant a portable breath test?

15 A. Yes, sir.

16 Q. Okay. Can you describe, did you explain how to perform
17 that test to the Defendant?

18 A. Yes, I did.

19 Q. Okay. Is that consistent with standard practice in
20 Washington State Patrol, you instruct people in the same
21 format?

22 A. Yes, sir.

23 Q. Okay, and did the Defendant submit to a sample of his
24 breath and a portable breath testing device that you had?

25 A. He did.

1 Q. Were you able to get a reading in terms of concentration
2 of alcohol?

3 A. I was.

4 Q. And what was that reading?

5 MR. RANDS: Foundation, Your Honor.

6 THE COURT: I will sustain that objection.

7 Q. (By Mr. Roche) And exactly what portable breath testing
8 device were you using?

9 A. I don't know the exact number. It's my department-issued
10 portable breath test.

11 Q. Okay. So it was issued to you by Washington State Patrol?

12 A. Yes, sir.

13 Q. And do you have those portable breath testing devices
14 calibrated on a regular basis?

15 A. Yes, sir.

16 Q. Who calibrates those for you?

17 A. It is our BAC tech.

18 Q. Okay. Do you know who the BAC tech for District 7 would
19 be?

20 A. It is Cam Berman, I believe, sir.

21 Q. Okay. So in December of 2014, Cam Berman would have been
22 responsible for certifying the device that you were using
23 in the field?

24 A. Yes, sir.

25 Q. Okay. Was your portable breath test certified for use in

1 the field by Washington State Patrol on December of 2014?

2 A. Yes, sir.

3 MR. RANDS: Objection. Calls for speculation.

4 THE COURT: Is it to your personal knowledge?

5 THE WITNESS: Yes, sir.

6 THE COURT: I will overrule.

7 Q. (By Mr. Roche) So your portable breath test was, in fact,
8 certified by the Washington State Patrol?

9 A. Yes, sir.

10 Q. And the Defendant submitted to that test on that portable
11 breath test device that you had?

12 A. Yes, sir.

13 Q. And what was the reading on that?

14 MR. RANDS: Still foundation.

15 THE COURT: Overruled. You can answer.

16 MR. RANDS: Your Honor, the specific statutes are
17 Washington Administrative Code 4.15 and haven't been
18 complied with for this hearing.

19 THE COURT: For purposes of this hearing, the rules of
20 evidence don't strictly apply. I'm going to allow him to
21 testify.

22 Q. (By Mr. Roche) What was the Defendant's reading on the
23 portable breath test?

24 A. A .145.

25 Q. At the conclusion of the portable breath test, did you

1 make a decision to arrest the Defendant?

2 A. I did.

3 Q. And what was the basis for that decision?

4 A. The totality of the circumstances. I always say the first
5 field sobriety test is driving. There was a collision
6 involved. The odor of alcohol coming off of his breath,
7 bloodshot, watery eyes, his responses and interactions I
8 was having with him as well as his performance on the
9 field sobriety test.

10 Q. Okay. Do you recall when you arrived at the scene of the
11 collision?

12 A. Yes, sir.

13 Q. What time was that?

14 A. I'm not specifically sure what time I showed up, sir.

15 MR. RICHEY: Your Honor, may I approach the witness?

16 THE COURT: You may.

17 Q. (By Mr. Roche) Handing you what's been previously admitted
18 as Pretrial Exhibit Number 2, what is that document?

19 A. This is a Washington State Patrol we call it a CAD log.

20 Q. If you were to review that CAD log would it refresh your
21 recollections to when you arrived at the scene of the
22 collision?

23 A. Yes, sir.

24 Q. If you wouldn't mind doing that?

25 A. It says I arrived at 2107.

1 Q. Okay. If you were to review that document, would it
2 refresh your recollection, refresh your recollection as to
3 what time you made an arrest decision in this case?

4 A. Yes, sir.

5 Q. If you wouldn't mind reviewing?

6 A. It says in custody at 2133.

7 Q. Okay. So that's 26 minutes, correct?

8 A. Yes, sir.

9 Q. So your roadside portion of this DUI investigation lasted
10 for a total of 26 minutes?

11 A. Yes, sir.

12 Q. Okay. When you arrested the Defendant, did you read the
13 Defendant his Miranda warnings?

14 A. Yes, sir.

15 Q. And, and do you know exactly what warnings you read him?

16 A. I read -- we're issued a Miranda card from the Washington
17 State Patrol that I carry on me, and that's what I read.

18 Q. Okay. You read that to him verbatim from your department-
19 issued card?

20 A. Yes, sir.

21 Q. Do you have the card with you today?

22 A. I don't.

23 Q. Okay. Just for context, you showed up not in uniform
24 today. Is there a particular reason why you're not in
25 uniform today?

1 A. I had shoulder surgery in July, so I'm currently on light
2 duty. I'm not authorized to be in uniform.

3 Q. Okay, and that's where you typically house your
4 department-issued Miranda card?

5 A. Yes, sir.

6 Q. Okay, and so it's currently located in your uniform?

7 A. Yes, sir.

8 Q. Do you, how many times do you think that you've read
9 Miranda warnings to people in the field from that
10 particular card?

11 A. Hundreds of times, in excess of 300 times.

12 Q. Do you think that without looking at the card today you
13 could tell us the Miranda warnings that you read to the
14 Defendant in December of 2014?

15 A. Not -- I, I wouldn't want to. I rely on the card to read
16 it exactly every time.

17 Q. Okay, and you're certain in this case that you did read
18 those warnings to the Defendant verbatim from a
19 department-issued Miranda card?

20 A. Yes, sir.

21 Q. Prior to placing under the Defendant under arrest, did you
22 put him under any physical restraint? Had you touched
23 him? Had you had to influence him physically in any way?

24 A. No, sir.

25 Q. Okay. After you placed him under arrest, did you, did you

1 restrain the Defendant in any way?

2 A. Yes, sir, I placed him in handcuffs.

3 Q. Okay. Did you place the Defendant into your car after
4 handcuffing him?

5 A. Yes, sir; into the rear of my patrol vehicle.

6 Q. Okay. Did you ask the Defendant, did you read him his
7 Miranda warnings when he was in the car, or did you read
8 it to him prior to putting him in the car?

9 A. I don't specifically remember exactly if he was in the car
10 or outside of the car when I read them to him.

11 Q. Okay. Do you recall asking the Defendant if he understood
12 the rights that you had read him?

13 A. Yes, sir.

14 Q. Okay. Did the Defendant have a response?

15 A. He stated that he didn't completely understand them.

16 Q. Okay. Did you ask for clarification after that?

17 A. I did, and then he responded that he wanted to know when
18 he could speak with his attorneys --

19 Q. Okay. Was that --

20 A. -- attorney.

21 Q. -- his only question concerning the Miranda warnings?

22 A. Yes, sir.

23 Q. Were you able to provide him an answer to that question?

24 A. Yes, sir, I advised that at that point, I couldn't get him
25 in contact with an attorney; that once we arrived at the

1 jail, I would give, I would get him in contact with an
2 attorney, and that I wouldn't ask him any more questions.

3 Q. Okay. So you stopped asking him questions at this point
4 in time?

5 A. Yes, sir.

6 Q. Is that typical practice for you in arrests that you, when
7 you place somebody under arrest, you're not going to hand
8 them a phone; instead you will provide contact with an
9 attorney from the jail?

10 A. Correct.

11 Q. Is that consistent with Washington State Patrol policy to
12 wait until defendants are in the jail before providing
13 them access to a phone to potentially call an attorney?

14 A. I'm not sure of the exact wording of the policy. I know
15 the policy is to give access as soon as we possibly can,
16 and in many times, that's as soon as we can get them in
17 contact.

18 Q. Okay. Is it fair to say that the facilities for providing
19 the Defendant an opportunity to call a lawyer are located
20 at the jail and not with you in the field?

21 A. Yes, sir.

22 Q. After informing the Defendant that you were going to
23 provide him access to an attorney from the jail, did that
24 seem, did he seem agreeable to that concept? Did he
25 express further concern at this point in time?

1 A. He seemed agreeable.

2 Q. Hmm, at that point in your investigation, did you decide
3 to remain at the accident scene?

4 A. Yes, sir.

5 Q. Okay, and can you tell us why were you deciding to remain
6 at the scene at that point in time?

7 A. At that point in time, I wanted more information on the
8 victim and the victim's state. Everson PD, they're great
9 officers. They don't deal with collisions of that
10 magnitude on a regular basis, and a lot of them don't have
11 the same training that the state patrol has in collision
12 investigation, so I was the only trooper out there. There
13 were no other troopers available, so I wanted to remain on
14 scene until another, my sergeant or another trooper could
15 come out there to take over the scene and make sure it was
16 processed appropriately.

17 Q. In Whatcom County, does Washington State Patrol handle
18 essentially all injury collisions that occur?

19 A. Yes, sir.

20 Q. Okay. Did you call a supervisor and ask them and inform
21 them that you were at the scene and that you needed to
22 transport the Defendant?

23 A. I did, sir.

24 Q. And did they tell you to remain on scene until other
25 troopers were available?

1 A. Yes, sir.

2 Q. Okay. Did you request a collision tech respond to the
3 scene at that time?

4 A. I did, sir.

5 Q. Did you ask Everson Police to begin securing the accident
6 scene?

7 A. Yes, sir.

8 Q. And what did they do to facilitate that?

9 A. I'm not exactly sure on the specifics because I was
10 dealing with the Defendant. I know I have, I told them to
11 not have any traffic coming through the scene and to start
12 detouring people and shut the road down.

13 Q. Okay. When, when did another trooper make it to the
14 accident scene, can you tell? If you need to refresh your
15 recollection with the CAD report --

16 A. I need to refresh my -- the next one on scene was Sergeant
17 Shane Rogers, and the CAD log says he arrived at 2205.

18 Q. Did the CAD log also indicate at what point in time you
19 departed for the hospital?

20 A. It does, sir. I believe it says at 2222 I departed.

21 Q. Okay. So Sergeant Rogers arrived at 2205, and you
22 departed at 2222. Is it fair to say that you briefed him
23 before departing the scene?

24 A. Yes, sir.

25 Q. What did you explain to Sergeant Rogers before you left?

1 A. I explained the situation, went through the crime scene,
2 explained that I had one in custody for DUI, that I was
3 getting updates from the hospital from Trooper Williams,
4 and that at that point, the victim had serious injuries
5 and was being rushed into the hospital or surgery, and
6 that I was working on a search warrant for the Defendant's
7 blood.

8 Q. Okay. You'd already begun work on the search warrant for
9 the Defendant's blood?

10 A. Yes, sir.

11 Q. Did you begin that during the period of time you were
12 waiting for Sergeant Rogers to arrive on scene?

13 A. Yes, sir.

14 Q. Why did you decide to pursue a search warrant in this
15 case?

16 A. When the crime is a felony, we're required by policy to
17 get a search warrant for a blood sample.

18 Q. That's Washington State Patrol policy to always pursue a
19 search warrant?

20 A. Yes, sir, in a felony case.

21 Q. You're still getting updates on the status of the victim,
22 so you weren't entirely certain of what the nature of the
23 crime you were investigating would be effectively yet?

24 A. Correct.

25 Q. You were assuming that it was a vehicular assault at this

- 1 point in time?
- 2 A. Yes, sir.
- 3 Q. You left the scene at 2222, and you had arrested the
4 Defendant at 2133. So you were on scene for 49 minutes
5 with the Defendant in the back of the car?
- 6 A. Yes, sir.
- 7 Q. Were you asking the Defendant questions during that period
8 of time?
- 9 A. No, sir.
- 10 Q. Do you know what time you arrived at the hospital?
- 11 A. I would have to refresh my memory.
- 12 Q. If you would do that?
- 13 A. At 2241.
- 14 Q. Okay. You arrived at the hospital at 2241?
- 15 A. Yes.
- 16 Q. I'm going to take you back just a second. In the 49
17 minutes post-arrest that you were sitting on the scene
18 with the Defendant in the car, you didn't ask him any
19 questions; that was your prior testimony?
- 20 A. Correct.
- 21 Q. Did the Defendant volunteer any statements to you during
22 that period of time? Was he talking in the back during
23 that 49 minutes?
- 24 A. I don't specifically recall.
- 25 Q. Okay. So it took you just under 20 minutes to drive to

1 the hospital?

2 A. Yes, sir.

3 Q. Is that a consistent time of travel from Everson to Saint
4 Joe's Hospital?

5 A. Yes, sir.

6 Q. At the time you arrived at the hospital, did you provide
7 the Defendant access to a phone immediately?

8 A. No, I did not.

9 Q. Okay, and why didn't, why didn't you do that?

10 A. I didn't because I was not questioning or interrogating
11 him, and there was fleeting evidence. I needed to get a
12 blood sample as quickly as possible.

13 Q. Okay. Can you describe what do you mean by the evidence
14 is fleeting?

15 A. There's possible evidence of intoxicants in his blood, and
16 the more time that goes on, the more that dissipates out
17 of your blood.

18 Q. Did you apply for the search warrant once you arrived at
19 the hospital?

20 A. Yes, sir.

21 Q. Okay. Do you recall what time you called for a search
22 warrant?

23 A. I don't, sir.

24 Q. Do you -- if you refreshed your recollection, would you be
25 able to determine when you made that call?

1 A. I might be able to, sir. I don't have it, the specific
2 time written in my report, sir, and I'm not finding it in
3 the CAD report.

4 Q. When you arrived at the hospital, can you give an
5 estimation of the amount of time it took you before you
6 were able to secure a search warrant?

7 A. I had to call the felony on-call prosecutor, discuss the
8 details with him. He then calls the on-call judge and
9 puts me in telephonic contact with that judge. It would
10 take 15 to 20 minutes to secure a search warrant.

11 Q. Okay, and that's on average?

12 A. Yes, sir, on average.

13 Q. Okay. Do you recall if this was an average case you were
14 able to secure a search warrant with that kind of speed,
15 or did it take a greater amount of time?

16 A. I don't recall it taking any greater amount of time.

17 Q. Did you have any other troopers at the hospital with you?

18 A. Umm, Trooper Williams showed up after I had arrived at the
19 hospital.

20 Q. Okay, and what -- was Trooper Williams just there to
21 assist you?

22 A. Yes, sir.

23 Q. What was he doing while you were applying for the search
24 warrant?

25 A. Umm, I don't believe he had arrived at the hospital while

1 I was applying for the search warrant. I believe he
2 showed up right after I had got off the phone and had
3 obtained the search warrant.

4 Q. Okay. Where was the Defendant while you were applying for
5 the search warrant?

6 A. He was in the backseat of my patrol vehicle.

7 Q. And you were in the front?

8 A. I can't remember if I was in the front. Sometimes I'm in
9 the front seat; sometimes I step out, and I talk while I'm
10 on the outside of my patrol vehicle.

11 Q. Okay. Were you, were you questioning the Defendant at all
12 during that period of time?

13 A. No, sir.

14 Q. Did you have any discussions with the Defendant at all?

15 A. Not that I recall, sir.

16 Q. Was the Defendant volunteering any statements to you?

17 A. Not that I recall.

18 Q. After you secured a search warrant, you did secure a
19 search warrant in this case, correct?

20 A. Yes, sir.

21 Q. After you secured it, did you take the Defendant inside
22 the hospital?

23 A. No, sir, I had Trooper Williams bring the Defendant inside
24 the hospital.

25 Q. Okay, and what were you doing during that period of time?

1 A. I was finishing filling in the search warrant and printing
2 it out at that time.

3 Q. Okay. You do that from your car?

4 A. Yes, sir.

5 Q. Okay. So you were finalizing the details of having the
6 search warrant ready to serve on the Defendant?

7 A. Yes, sir.

8 Q. At that point in time, you went inside the hospital?

9 A. Yes, sir.

10 Q. And made contact again with the Defendant and Trooper
11 Williams?

12 A. Yes, sir.

13 Q. Did you make an effort to serve the search warrant on the
14 Defendant at that time?

15 A. We did. When, when I was in my patrol vehicle, Trooper
16 Williams contacted me over the radio and said that they
17 were having issues with the Defendant in the hospital
18 room, so I went inside and made contact with him.

19 Q. Okay. Can you describe "issues"? What do you mean by
20 that?

21 A. When I went in, Trooper Williams told me that the
22 phlebotomist had entered the room and was preparing the
23 needles and everything, and the Defendant stated that he
24 wasn't going to allow a blood draw.

25 Q. Okay, and you went into the room and made contact with

1 Trooper Williams and the Defendant at that time?

2 A. Yes, sir.

3 Q. Can you describe the Defendant's behavior once you got
4 there?

5 A. I talked to the Defendant, and I told him that I had a
6 search warrant to get a sample of his blood. The
7 Defendant told me several -- he told me a blood draw was
8 against his religion. He then told me that he was afraid
9 of needles. He then told me if we tried, he was not going
10 to submit to a blood draw, and that if we attempted to get
11 blood from him, he would not allow that.

12 Q. Okay. Were you asking the Defendant questions during this
13 period of time, or did you just give him the statement
14 that you had a search warrant and that you intended to get
15 a sample of his blood?

16 A. Umm, I, I don't recall asking any questions other than
17 just a discussion about the blood draw.

18 Q. Okay. Did you try to give the Defendant his copy of the
19 search warrant?

20 A. I did, I asked if he wanted to see a copy of the search
21 warrant.

22 Q. And did the Defendant want to see the search warrant?

23 A. No.

24 Q. Okay. Did you try, did you make physical effort to try to
25 give that to him?

1 A. It was in my hand, and I showed it to him, and he said he
2 didn't want to see it.

3 Q. Okay. Is it fair to say that you were trying to hand it
4 to him?

5 A. Yes, sir.

6 Q. And he refused to take it?

7 A. Yes, sir.

8 Q. Did you feel that the Defendant was becoming combative?

9 A. At that point, I didn't. We had him exit that room, and
10 he actually was out of handcuffs, and I let him -- he
11 needed to use the restroom. I let him use the restroom,
12 and we walked into another room kind of in the back of the
13 hospital, and that is where he became combative with us.

14 Q. Okay. So why did you -- you let the Defendant use the
15 restroom, and you unhandcuffed him?

16 A. Yes, sir.

17 Q. Why did you do those things?

18 A. When you're getting a blood draw from someone, it's very
19 difficult if they're handcuffed behind their back to be
20 able to get a blood sample, and the Defendant to this
21 point had been calm and compliant with me. That's just a
22 tactic I use; take the handcuffs off. It's more relaxed.
23 I will let you use the restroom, just to try to get them
24 more relaxed and not all excited just to kind of calm the
25 situation down, especially when he was saying he didn't,

1 he wasn't going to give us a blood sample. It's a tactic
2 I've used before when someone said similar things. Just
3 talk to them; calm them down; get them out of handcuffs,
4 just to try to relax the situation.

5 Q. Okay. When you -- during that period of time you allowed
6 the Defendant to use the restroom, were you asking him
7 questions?

8 A. No, sir.

9 Q. Did the Defendant volunteer statements to you at that
10 point in time?

11 A. I think all he said is he needed to use the restroom. I
12 let him go in.

13 Q. You let him go in by himself?

14 A. Yes, sir.

15 Q. At any point during this process, did you stop and give
16 the Defendant a phone and let him make phone calls?

17 A. No, sir.

18 Q. Why didn't you do that?

19 A. Hmm, because I had the search warrant from the judge, and
20 I knew the amount of time that it had taken on the
21 collision scene to drive to the hospital. We were
22 getting -- usually, our rule of thumb is you want to get a
23 blood sample within two hours of the collision, and I knew
24 we were exceeding that amount of time, and we needed --
25 the most important thing in my mind was we needed to get a

1 blood sample as quickly as possible.

2 Q. Okay. When you moved into the -- why did you move into a
3 new room as opposed to the room you were in before?

4 A. Because the Defendant was stating that he was not going to
5 let us get a blood sample. That's why we moved into the
6 other room.

7 Q. Okay, because you felt like a new room might change the
8 scenario?

9 A. The new room has a hot -- the first room we were in is
10 just kind of the first area you go when you go into the
11 hospital where they check your vitals, and that's normally
12 where we go to get a blood sample.

13 Since he was getting a little tense and saying he
14 wasn't going to allow us to get a blood sample, we moved
15 him to another room where there was a hospital bed where
16 he could be restrained to the bed if he chose to
17 physically try to prevent the blood draw.

18 Q. Okay. So already in your mind you were already thinking
19 this process might not go well; I need to be in a
20 different location?

21 A. Yes, sir.

22 Q. Okay. What was the Defendant's attitude when you entered
23 the new room? Did you try to hand him the search warrant
24 again?

25 A. I did not.

1 Q. Okay. Did you -- were you still in the, trying to serve
2 the search warrant at that time?

3 A. Yes, sir.

4 Q. Okay. Did you ask the Defendant to comply with submitting
5 a sample of this blood at that time?

6 A. Yes, sir.

7 Q. Okay. Did the Defendant comply?

8 A. No, sir.

9 Q. Can you describe that and perhaps in greater narrative?

10 A. He -- once we got to that room, he continued to state he
11 wasn't going to allow a search warrant, that his attorney
12 needed to be present. It was against his religion. He's
13 afraid of needles. He's not going to allow us to get a
14 blood sample.

15 We -- I requested that the Defendant get onto the
16 hospital bed at this point so we could secure him to the
17 bed so we could safely get a blood sample from him, and
18 the Defendant began to physically try to prevent us from
19 getting him on a bed.

20 Q. So he would not get on the bed?

21 A. Yes, no, sir, he would not get on the bed, and he stated
22 he was not going to get on the bed, and he was not going
23 to allow us to restrain him.

24 Q. Okay. During that period of time when you first entered
25 the room, were you saying anything to the Defendant other

1 than I need to serve the search warrant?

2 A. No, sir.

3 Q. Were you asking him questions?

4 A. Not that I recall, sir.

5 Q. Is it fair to say that you were giving him commands, he
6 needed to get on the bed?

7 A. Yes, sir.

8 Q. Do you recall giving the Defendant special evidence
9 warnings?

10 A. Yes, sir.

11 Q. Okay. At what point in time did you give him those
12 warnings?

13 A. We initially tried to get a blood draw from him one time.
14 After that first attempt that was unsuccessful, that's
15 when I read him the special evidence warnings.

16 Q. Okay. So perhaps clarify, so initially, you come into the
17 room. He doesn't want to get on the bed?

18 A. Yes, sir.

19 Q. You say you make a first attempt to get him to comply with
20 the blood draw?

21 A. We physically placed him on the bed, and at that point, he
22 balled up his arms and his legs and was kicking and
23 flailing, refusing to let us restrain him to the bed. At
24 that point is where I drew my Taser, placed it on his
25 chest and told him he would be Tased if he continued to

1 physically fight with us and restrict us from getting him
2 restrained. At that point, he allowed us to restrain both
3 of his arms and both of his legs to the hospital bed.

4 At that point, we had the phlebotomist, I think there
5 was approximately 10 people in the room between security,
6 nurses, doctors, and troopers. We tried to hold him down
7 to get a blood sample from him, and he physically was
8 fighting and preventing us from getting a blood sample.

9 The nurse -- the phlebotomist at that point said she
10 did not feel comfortable getting a blood sample from him.
11 She was afraid that the needle would break off or stab
12 into someone else, so we took a break at that point, and
13 that is when --

14 MR. ROCHE: Your Honor --

15 THE WITNESS: -- I --

16 MR. ROCHE: -- I'm going to object. It's nonresponsive
17 at this point.

18 Q. (By Mr. Roche) If I can ask, perhaps we can pars that out
19 a little bit.

20 A. Uh-huh.

21 Q. When you first came into the room, was it just you and
22 Trooper Williams, the Defendant, and the phlebotomist?

23 A. No, when we first walked in the room, it was myself,
24 Trooper Williams, and two security guards.

25 Q. Okay. Hospital security staff was already there?

1 A. Yes, sir.

2 Q. Is that typical in a blood draw scenario?

3 A. I believe they had arrived at Trooper Williams' or the
4 phlebotomist's request when the Defendant said he was not
5 going to allow us to get a blood sample. I'm not sure on
6 that.

7 Q. Okay, and that was based on the statements that the
8 Defendant had made in the prior room?

9 A. Yes, sir.

10 Q. Okay. So the hospital security, yourself, and Trooper
11 Williams, a phlebotomist, and the Defendant?

12 A. Yes, sir.

13 Q. You asked the Defendant to get on the bed. He refused to
14 comply?

15 A. Yes, sir.

16 Q. And you and Trooper Williams and perhaps the hospital
17 security staff tried to put him on the bed?

18 A. Yes, sir.

19 Q. He refused to do that, but you were able to achieve that?

20 A. Yes, sir.

21 Q. And you made an effort to obtain a sample of his blood at
22 that point in time?

23 A. Yes, sir.

24 Q. It was unsuccessful?

25 A. Right.

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1 Q. Okay, did you, did you stop that process?

2 A. Yes, sir.

3 Q. Why did you decide to stop trying to obtain a blood sample
4 at that time?

5 A. The phlebotomist stated she did not feel safe continuing
6 to try to get a blood sample.

7 Q. Prior to the phlebotomist trying to take that blood
8 sample, you read him special evidence warnings during that
9 first attempt?

10 A. Not during the first attempt.

11 Q. Okay. What, what occurred when you decided to stop trying
12 to obtain a sample at that time? What did you do? Did
13 you try to establish a new plan?

14 A. Yes, sir. I was in discussions with the doctor as well as
15 the phlebotomist of a plan.

16 Q. Okay. So the Defendant was still restrained at that point
17 in time?

18 A. Yes, sir.

19 Q. Trooper Williams and the hospital security were with him?

20 A. Yes, sir.

21 Q. And you were conferring with the doctor and the
22 phlebotomist?

23 A. Yes, sir.

24 Q. Was anyone asking the Defendant questions at that point in
25 time, anybody --

1 A. Not that I heard, sir.

2 Q. Had you asked the Defendant any questions that weren't
3 related to serving the search warrant?

4 A. No, sir.

5 Q. Okay. What was the new plan that was formulated to try to
6 continue serving the search warrant?

7 A. The plan was to make another effort in the same manner
8 that we just had.

9 Q. And to try again to just see if you could get a sample
10 from him?

11 A. Yes, sir.

12 Q. So you made another attempt to see if you could obtain a
13 sample?

14 A. Yes, sir.

15 Q. What was the, what was the product of that attempt?

16 A. We were not able to get a blood sample.

17 Q. Okay. What was the reason?

18 A. The Defendant would flail and tense up and kick and move
19 every time the phlebotomist tried to get the needle close
20 to him.

21 Q. Okay. Did you stop, again stop trying to obtain a sample?

22 A. The phlebotomist again stopped and said she didn't feel
23 comfortable continuing.

24 Q. Okay. What did you do at that point?

25 A. I again conferred with the doctor and the phlebotomist.

1 Q. Okay, and did you come up with a -- yet another plan?

2 A. Yes, sir.

3 Q. What was that?

4 A. To sedate the Defendant and then attempt to get a blood
5 sample from him.

6 Q. Okay. Was it at this point that you read him special
7 evidence warnings?

8 A. I read him special evidence warnings before the second
9 attempt to get a blood sample from him.

10 Q. Okay. So between the first unsuccessful attempt and the
11 second unsuccessful attempt, you read him special evidence
12 warnings?

13 A. Yes, sir.

14 Q. Where did you obtain those?

15 A. From the DUI arrest report.

16 Q. Okay.

17 MR. ROCHE: Your Honor, may I approach the witness?

18 THE COURT: You may.

19 Q. (By Mr. Roche) Handing you what's been marked as
20 Plaintiff's proposed Exhibit Number 3, do you recognize
21 that document?

22 A. Yes, sir.

23 Q. Can you tell us what it is?

24 A. It is the special evidence warnings section of the DUI
25 arrest report.

1 Q. Is it specific to the DUI arrest report that you used in
2 this case?

3 A. Yes, sir.

4 Q. How could you tell that?

5 A. Hmm, the case number at the top as well as the Defendant's
6 name is written Brian J. Smith above defendant.

7 Q. Okay. Is that a true and accurate copy of the special
8 evidence warnings that you read to the defense --
9 Defendant in December of 2014?

10 A. Yes, sir.

11 Q. Okay.

12 MR. ROCHE: Your Honor, I move to admit Plaintiff's
13 proposed Exhibit Number 3.

14 MR. RANDS: No objection for the purposes of this
15 hearing.

16 THE COURT: It will be admitted.

17 (Plaintiff's Pretrial Exhibit 3 admitted into evidence.)

18 Q. (By Mr. Roche) Did you read the Defendant the special
19 evidence warnings verbatim off of that document?

20 A. Yes, sir.

21 Q. If you wouldn't mind, could you read those to us?

22 A. "A test of your blood will be administered to determine
23 the concentration of alcohol and/or any drug in your
24 blood. Due to the circumstances of your arrest, this will
25 be done regardless of your consent. You have the right to

1 have additional tests administered by a qualified person
2 of your own choosing."

3 Q. Okay. You read that between the first and second attempts
4 to obtain the Defendant's blood?

5 A. Yes, sir.

6 Q. After two unsuccessful attempts, you in corroboration with
7 the doctor and the phlebotomist decided to sedate the
8 Defendant?

9 A. Yes, sir.

10 Q. Was the Defendant present in the room when that decision
11 was made?

12 A. I don't remember if we were in the room or outside of the
13 room when that decision was made.

14 Q. Okay. Did you notify the Defendant of your intent to
15 sedate him?

16 A. Yes, sir.

17 Q. Did the Defendant have any response to that?

18 A. The Defendant stated he was allergic to every sedative and
19 that we couldn't sedate him.

20 Q. Did the hospital staff have any concerns based on that
21 statement?

22 A. They did, and the doctor attempted to check medical
23 records to see if he could find an allergy.

24 Q. Okay. Did the doctor give you any sort of timeframe as to
25 what kind of time that was going to take for him to assure

1 that he was not allergic to sedatives?

2 A. No, sir.

3 Q. What did you do now with the doctor telling you I have to
4 confirm whether he's allergic? What was the status of the
5 DUI investigation at that point?

6 A. We were just waiting for the doctor to return.

7 Q. Okay. So you couldn't sedate him at that point?

8 A. No, sir.

9 Q. You didn't want to try a third attempt to draw blood?

10 A. The phlebotomist didn't feel comfortable.

11 Q. Okay. So you were just waiting?

12 A. Yes, sir.

13 Q. Did you allow the Defendant an opportunity to make a phone
14 call at that point in time?

15 A. I did.

16 Q. Okay. How did you facilitate that?

17 A. I gave him his cell phone.

18 Q. His own cell phone?

19 A. Yes, sir.

20 Q. Okay. Which you had taken into custody at the time of
21 arrest?

22 A. Yes, sir.

23 Q. You returned it to the Defendant?

24 A. Yes, sir.

25 Q. Was he, was he handcuffed at that point and still

1 restrained?

2 A. I do not recall if he was still restrained or if he was
3 not.

4 Q. Okay. Was he able to make a phone call?

5 A. Yes, sir.

6 Q. Okay, and who did he call?

7 A. His wife.

8 Q. Okay. Were you present at the time, or did you give him
9 some privacy to make a phone call?

10 A. I was outside of the room. We had the door open, but I
11 was outside of the room talking with the doctors and
12 nurses, so I didn't hear the extent of his conversation at
13 all.

14 Q. Okay. Did you -- when you gave him his cell phone, was
15 that an effort to try and give him access to an attorney?

16 A. Yes, sir.

17 Q. Is that something that you typically do in a DUI
18 investigation?

19 A. It, it depends. This was a different situation, but yes,
20 I've -- did plenty of times given people in custody access
21 to their cell phones to contact an attorney.

22 Q. Okay. Do you recall if you offered the Defendant an
23 opportunity to speak with an on-call public defender?

24 A. I don't recall.

25 Q. Is that something that you typically do in DUI

1 investigations?

2 A. Yes, sir.

3 Q. Where do you typically do that?

4 A. Typically, wherever we're processing the DUI, whether
5 that's at a jail or the office or somewhere where we're,
6 there's a BAC machine and a telephone available.

7 Q. Okay. Your standard practice, do you allow the Defendant
8 a choice? Do you say you can call an attorney of your own
9 choosing, or I can call the public defender?

10 A. Yes, sir.

11 Q. Do you recall doing that in this specific case?

12 A. I don't recall.

13 Q. How long did it take the hospital staff to research the
14 Defendant's medical records?

15 A. I'm not exactly sure how long it took. It wasn't a very
16 long period of time.

17 Q. Can you give us an estimate?

18 A. Probably 10, 15 minutes.

19 Q. After the 10 or 15 minute timeframe, were they able to
20 ascertain whether the Defendant was allergic to any
21 sedatives?

22 A. They weren't able to.

23 Q. Okay. What was the decision about sedating the Defendant
24 at that point in time?

25 A. The doctor made the decision that it was -- he would

1 sedate the Defendant.

2 Q. Okay. How long did it take to effectively sedate the
3 Defendant?

4 A. I think it was approximately 30 minutes.

5 Q. Was that 30 minutes facilitating the sedative, or 30
6 minutes for the sedative to take effect?

7 A. For the sedative to take effect.

8 Q. Okay. During that 30 minute period of time, were you
9 asking the Defendant any questions?

10 A. No, sir.

11 Q. Did the Defendant volunteer any statements to you during
12 that period of time?

13 A. Not that I recall.

14 Q. Let's talk about the administration of the sedative. Did
15 the Defendant resist the administration of the sedative?

16 A. Yes, sir.

17 Q. Can you describe that?

18 A. It was similar to the resisting to the blood draw. Every
19 time the needle would get close to him, he would flex his
20 arms and move left and right. He was kicking his legs.

21 Q. How long did that process go on for?

22 A. Probably approximately five minutes.

23 Q. Was the Defendant being questioned at all during that
24 period of time?

25 A. No, sir.

1 Q. Did he volunteer any statements during that period of
2 time?

3 A. Not that I recall.

4 Q. The sedative was effectively administered?

5 A. Yes, sir.

6 Q. After the sedative took effect, were you able to obtain a
7 sample of the Defendant's blood?

8 A. Yes, sir.

9 Q. Who obtained that sample?

10 A. Do you specifically want her name?

11 Q. If you refreshed your recollection from your report, do
12 you think that would aid you in answering that question?

13 A. Yes, sir.

14 Q. If you wouldn't mind?

15 A. Judy Margeson and Carla Holcombe were the two that
16 performed the blood draw.

17 Q. Okay. Do you know what their qualifications are?

18 A. I believe Judy is a registered nurse.

19 MR. RANDS: Objection. Calls for speculation. The
20 question was does he know.

21 THE COURT: Sustained.

22 Q. (By Mr. Roche) They're both members of the hospital
23 staff?

24 A. Yes, sir.

25 Q. Okay. You didn't check their credentials, but one of them

1 appeared to be a nurse?

2 A. Yes, sir.

3 Q. And was the other known to you as the phlebotomist?

4 A. Yes, sir.

5 Q. What time was the Defendant's blood sample effectively
6 taken?

7 A. Could I refresh my memory, sir?

8 Q. Certainly.

9 A. The blood draw was taken at 1:30 a.m.

10 Q. So I would just like to summarize the timeline of your
11 investigation. You spent 26 minutes with the Defendant
12 investigating the DUI roadside before arresting him?

13 A. Yes, sir.

14 Q. You spent 49 minutes at the scene post-arrest waiting for
15 other troopers to arrive?

16 A. Yes, sir.

17 Q. It took you just under 20 minutes to drive to the
18 hospital?

19 A. Yes, sir.

20 Q. I don't think you had a specific recollection of this, but
21 is it fair to say that it took somewhere between 20 and 30
22 minutes for you to facilitate obtaining a search warrant?

23 A. Yes, sir.

24 Q. After you obtained the search warrant, you began a process
25 of trying to serve that search warrant?

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1 A. Yes, sir.

2 Q. And how long did that process take, can you, do you have
3 any estimation?

4 A. Can I refresh my memory?

5 Q. Certainly.

6 A. It was approximately three hours.

7 Q. Okay. During that three hour period at the hospital, were
8 you interrogating the Defendant at all?

9 A. No, sir.

10 Q. The Defendant volunteered statements to you, things like
11 he was allergic to needles?

12 A. Yes, sir.

13 Q. Or had religious bars to wanting his blood drawn?

14 A. Yes, sir.

15 Q. Were those in response to direct questions that you were
16 asking, or were those statements that he volunteered to
17 you?

18 A. Those were volunteered statements.

19 Q. Okay. During the course of the investigation, did you
20 have -- was there a good break in time to stop and put the
21 Defendant in contact with the lawyer other than when you
22 gave him access to his phone waiting for the sedative?

23 A. No, sir.

24 Q. Were there other periods of time where you could have
25 easily facilitated providing the Defendant access to an

1 attorney?

2 A. No, sir.

3 Q. While you were conducting your investigation, did you feel
4 that time was of the essence in serving a search warrant?

5 A. Yes, sir.

6 Q. After you arrested the Defendant on the scene, did you
7 interrogate him at any point?

8 A. No, sir.

9 Q. Did any other troopers to your knowledge interrogate him?

10 A. No, sir.

11 Q. Aside from asking him to comply with service of the search
12 warrant, did you really say anything to the Defendant?

13 A. No, sir.

14 Q. After you completed the service of the search warrant,
15 where did you take the Defendant?

16 A. To the Whatcom County Jail.

17 Q. Okay. When you arrived at the jail, did you provide him
18 access to a phone or to an attorney?

19 A. I did not.

20 Q. Okay, and what did you do with the Defendant when you
21 arrived at the jail?

22 A. I booked him into the facility.

23 Q. Okay. Did you conclude your contact with the Defendant at
24 that time?

25 A. Yes, sir.

1 Q. Okay.

2 MR. ROCHE: No further questions. Thank you.

3 THE COURT: Go ahead, Mr. Rands.

4 MR. RANDES: I have a matter at 9:00.

5 THE COURT: Do you need -- we can take a short recess
6 if you need to do that.

7 MR. RANDES: I just have to confer with the judge that's
8 going to here it Thursday.

9 THE COURT: We can do that. We'll take a short recess.

10 THE CLERK: Please rise.

11 (Brief recess taken.)

12 THE COURT: Trooper, if you'd resume the stand, please.
13 Mr. Rands?

14 CROSS-EXAMINATION

15 BY MR. RANDES:

16 Q. Good morning, trooper.

17 A. Good morning, sir.

18 Q. Trooper, it's been sometime, A, since we were in court on
19 this last, and B, when this incident happened. Would you
20 agree with that?

21 A. Yes, sir.

22 Q. And when this incident happened, you were, what, 11 months
23 on your own? Would that be a fair statement?

24 A. I believe so, sir.

25 Q. Okay, and -- but ultimately, you were a full-fledged

1 trooper at that time and had qualified all the
2 prerequisites that got you to that position, correct?

3 A. Yes, sir.

4 Q. And how long after this incident were you transferred down
5 to Pierce County?

6 A. I transferred down, I've been in Pierce County just over a
7 year.

8 Q. And one of the things that you learn at the academy is
9 complete and accurate report writing, correct?

10 A. Yes, sir.

11 Q. Because a lot of situations like this, time goes by, and
12 your memory fades?

13 A. Yes.

14 Q. And in this particular case, you wrote a lot of stuff into
15 a report, did you not?

16 A. Yes, sir.

17 Q. And some of this stuff that you wrote into the report, it
18 happened in real time, did it not?

19 A. Yes, sir.

20 Q. And other portions of the report, you wrote sometime
21 thereafter; would that be a fair statement?

22 A. Yes, sir.

23 Q. Okay, and the things that you wrote down in what I call
24 real time, are they more accurate than your memory, or is
25 your memory more accurate such as the time things

1 happened?

2 A. Hmm, can you clarify that a little bit?

3 Q. Sure. All right. Well, if you write something in your
4 report, and next to it, you actually write a time next to
5 it?

6 A. Yes, sir.

7 Q. Would that be the time that it actually happened?

8 A. Yes, sir.

9 Q. Versus some questions that you may be asked in court in
10 terms of what time did this happen, and you need to guess
11 or sort of speculate as to what time it likely would have
12 happened?

13 A. I don't remember specific times that things happened, sir.

14 Q. Okay. So the things that are written at a specific time
15 in your report, those are more reliable than your memory?

16 A. Yes, sir.

17 Q. All right. You arrived on scene after Everson had already
18 been on the scene, correct?

19 A. Yes.

20 Q. And what you arrived to was how many officers from Everson
21 on scene, one or two?

22 A. I don't know how many there were on scene, sir.

23 Q. All right. When you arrived -- did they tell you that the
24 road was already closed, or the scene was contained or
25 anything like that?

1 A. I don't recall, sir.

2 Q. Okay. When you arrived, where was Mr. Smith, did you
3 know?

4 A. I did not know, sir.

5 Q. Okay. The circumstances of your first contact with him,
6 did he approach you, or did you approach him?

7 A. I approached him, sir.

8 Q. And about what location did that happen at?

9 A. I believe he was located near the ambulance.

10 Q. Okay, and had you seen him in that ambulance before you
11 arrived?

12 A. No, sir.

13 Q. Okay. Did anybody tell you that he had been in that
14 ambulance before you arrived?

15 A. Some -- I believe the Everson officer had told me that the
16 driver of the SUV was in the rear of the ambulance.

17 Q. Okay, and so is it fair to say that before you spoke with
18 Mr. Smith, you had to wait a moment for him to get out of
19 the ambulance, or was he already out of it when you
20 arrived?

21 A. I don't recall, sir. I was talking with the Everson
22 officer. I don't recall seeing him come out of the
23 ambulance or be inside of the ambulance, so --

24 Q. Okay, and nevertheless you, your first contact with him
25 happens outside near the ambulance?

1 A. Yes, sir.

2 Q. And that's where you have an initial conversation with
3 him?

4 A. Yes, sir.

5 Q. Okay, and during that conversation with him, you asked him
6 a variety of different questions, correct?

7 A. Yes, sir.

8 Q. Such as what happened, where he was going, that sort of
9 thing?

10 A. Yes, sir.

11 Q. At a certain point during that conversation with him, you
12 also asked him to provide some documentation, did you not?

13 A. Yes, sir.

14 Q. Things such as license, registration, and insurance?

15 A. Yes, sir.

16 Q. And up to this point and even past this point, Mr. Smith
17 understood you?

18 A. Yes, sir.

19 Q. You understood him?

20 A. Yes, sir.

21 Q. You didn't have any difficulty communicating?

22 A. No, sir.

23 Q. He was polite?

24 A. Yes, sir.

25 Q. He was cooperative?

1 A. Yes, sir.

2 Q. As were you, I imagine?

3 A. Yes, sir.

4 Q. All right. He takes a few moments and retrieves the
5 documents that you asked him for, does he not?

6 A. He did not retrieve his registration and insurance, sir.

7 Q. But he did produce a driver's license?

8 A. Yes, sir.

9 Q. And he exhibited no problems doing that?

10 A. No, sir.

11 Q. Did he get that from his person, or was that driver's
12 license in the vehicle?

13 A. I don't recall if he handed it to me or one of the
14 officers handed it to me. I don't recall how I got
15 possession of his license.

16 Q. Okay, and at this particular point, you're fairly close to
17 Mr. Smith?

18 A. Yes, sir.

19 Q. And you've had face-to-face conversation with him?

20 A. Yes, sir.

21 Q. And this is where you note some observations about him
22 that you mentioned a while ago, correct?

23 A. Yes, sir.

24 Q. Such as the facial complexion?

25 A. Yes, sir.

- 1 Q. The condition of his eyes?
- 2 A. Yes, sir.
- 3 Q. And did you note an odor of alcohol?
- 4 A. I don't believe I did at that point, sir.
- 5 Q. Okay, and these things would not be inconsistent with a
6 variety of things, the -- I mean the flushed face, and
7 the, and the eyes such as a messy accident collision?
- 8 A. Yes, sir.
- 9 Q. Stress would have an effect on a person's appearance as
10 well, would it not?
- 11 A. Yes, sir.
- 12 Q. And these are things that you actually learned about at
13 the academy as well as experience and training, right?
- 14 A. Yes, sir.
- 15 Q. And Mr. Smith has no difficulty getting his license out in
16 terms of fine motor skills, finger dexterity, things like
17 that?
- 18 A. Again, I don't recall if he got his license out or how
19 exactly I came into possession of his license.
- 20 Q. Okay. How about while he's talking to you, he's standing
21 there normally, not swaying, those types of things?
- 22 A. Yes, sir.
- 23 Q. And at a certain point, something causes you to ask him
24 the perform field sobriety tests?
- 25 A. Yes, sir.

1 Q. And it's the interaction up to this point?

2 A. Yes, sir.

3 Q. Okay, and is it fair to say that any time that you have
4 interaction with a motorist where the person exhibits
5 signs of having consumed alcohol, this would be something
6 that you would ask them to do?

7 A. Yes, sir.

8 Q. At this point of the contact as well, this is right now
9 just, it's a collision DUI investigation, correct?

10 A. Yes, sir.

11 Q. You don't have any knowledge as to the condition of the
12 other party that's involved?

13 A. No, sir.

14 Q. Can you see where that particular person is?

15 A. That person had already been transported prior to me
16 getting to the scene.

17 Q. Okay. So you do at some point start getting radio updates
18 as to what's going on, correct?

19 A. Um, yes -- I -- no, sir.

20 Q. No?

21 A. I didn't.

22 Q. Okay. So at this particular point what you know is that
23 somebody's been taken to the hospital, and this is a DUI
24 investigation?

25 A. Yes, sir.

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1 Q. All right, and as a result, you do three standardized
2 field sobriety tests?

3 A. Yes, sir.

4 Q. And at the conclusion of that -- those, you place
5 Mr. Smith under arrest?

6 A. Yes, sir.

7 Q. I just want to revisit your timeline. Do you have a copy
8 of your narrative report here with you?

9 A. I do, sir.

10 Q. All right, and I think based upon the narrative, that
11 timeline, we have an arrest at 2133; is that correct, and
12 that came from the CAD log that you had looked at earlier?

13 A. Yes, from the CAD log. That's what's listed, sir.

14 Q. Okay, and do you believe that to be an accurate time?

15 A. Hmm, yes, sir.

16 Q. Okay, and then in your report, I see that a portable
17 breath test that you'd talked about, that was obtained and
18 administered at 2140.

19 A. Yes, sir.

20 Q. All right. That's after the arrest as far as time goes?

21 A. As far as the time goes, yes, sir. It was not
22 administered after he was placed under arrest. It was
23 administered prior.

24 Q. So the time of 2140 in your report is not correct?

25 A. Yes, sir.

1 Q. Your arrival time, is that a correct time?

2 A. From the CAD log, sir?

3 Q. Generally speaking.

4 A. As far as I know it's correct, sir.

5 Q. Okay, and this report, it was written after the fact?

6 A. Yes, sir.

7 Q. And I assume it was written from notes that you took
8 during your investigation?

9 A. Yes, sir.

10 Q. We have an arrival at twenty -- a departure for Saint
11 Joe's at 2222 from the CAD is what you testified to, I
12 believe?

13 A. Yes, sir.

14 Q. All right, and Trooper Rogers arrives on scene at 2205?

15 A. Yes, sir.

16 Q. So we have a 17-minute window there where you're
17 presumably asked or were talking to Sergeant Rogers about
18 things?

19 A. I believe, I don't specifically recall if I talked with
20 him, sir.

21 Q. Okay. From the moment of arrest once you arrested
22 Mr. Smith, you placed him in the rear of your patrol car,
23 right?

24 A. Yes, sir.

25 Q. And at that particular point, did you remain outside of

1 your car?

2 A. Yes, sir.

3 Q. Okay. So would it be fair to say that at that particular
4 point, Mr. Smith had privacy in your car?

5 A. Yes, sir.

6 Q. And at that particular point, Mr. Smith could have made a
7 telephone call to an attorney?

8 A. No, sir.

9 Q. He could not of?

10 A. I didn't have access to a telephone for him to be able to
11 contact an attorney.

12 Q. He had a cell phone with him, did he not?

13 A. I believe he did.

14 Q. All right, and when did you find that cell phone?

15 A. I'm not sure at what point I found that cell phone, sir.

16 Q. Okay. Cell phone on him in the back of your car. He
17 could have -- that was an opportunity to speak with an
18 attorney?

19 A. Not in my mind, sir.

20 Q. Because of -- it wasn't physically possible?

21 A. To me, he was in handcuffs. I was still trying to process
22 the scene, be in touch with my communications, be in touch
23 with Trooper Williams. At that point, I didn't have time.
24 I'm not going to take a suspect out of handcuffs. I don't
25 have time to supervise and hold his phone for him or place

1 his -- I have other more pressing important activities
2 that I need to do on scene.

3 Q. Okay. Up to the point of arrest and even thereafter,
4 Mr. Smith was compliant?

5 A. Yes, sir.

6 Q. He was polite?

7 A. Yes, sir.

8 Q. Didn't show any signs of resisting or obstructing?

9 A. No, sir.

10 Q. And at a certain point even during your contact with him,
11 you took him out of handcuffs?

12 A. Once at the hospital.

13 Q. Once at the hospital, right.

14 A. Yes, sir.

15 Q. During your contact with him, he was not always in
16 handcuffs?

17 A. Yes, once we got to the hospital, yes.

18 Q. When a person's in the back of your patrol car, and the
19 doors are shut, can they open those doors and get out on
20 their own?

21 A. I have seen that happen before.

22 Q. All right. Is it normal for that to happen?

23 A. It is not normal.

24 Q. All right. Does a person have to do something spectacular
25 in order to do that?

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1 A. Yes, sir.

2 Q. All right. My point is there was a window of time there
3 where he had privacy, and if he wasn't in handcuffs, he
4 could have made a telephone call?

5 A. Yes, sir.

6 Q. Would it be fair to say that you did not give him -- you
7 chose to not let that happen. You had other things to do.

8 A. And I -- once I place someone under arrest and put them in
9 handcuffs, that people that have been compliant and calm,
10 and that turns into something else. So I always every
11 time I've ever arrested someone had them in my back seat,
12 they're in handcuffs.

13 Q. Okay. So it's a -- would you say that's a personal choice
14 that you've made?

15 A. Everyone I know does the -- uses that practice as well.

16 Q. And during the time that you remain on scene waiting for
17 Sergeant Rogers to arrive, and Mr. Smith is in the back of
18 your car, you're out of the car most of the time?

19 A. I'm in and out of my patrol vehicle.

20 Q. Okay, and you've been instructed to remain there?

21 A. Yes, sir.

22 Q. And did that come from Sergeant Rogers?

23 A. Yes, sir.

24 Q. Okay, and while you were there, do any other Everson
25 officers arrive on scene?

1 A. I don't recall, sir.

2 Q. Okay. You instructed the Everson officers to close the
3 roadway?

4 A. Yes, sir.

5 Q. And to not let any other traffic pass?

6 A. Yes, sir.

7 Q. And did they do that?

8 A. Yes, sir.

9 Q. And once that happened, once no further traffic passed,
10 would the integrity of that area remain intact?

11 A. Yes, possibly there could be foot traffic or people coming
12 from any road.

13 Q. Let me ask you this, to your understanding, did it remain
14 intact?

15 A. Yes, sir.

16 Q. And that's one of the reasons that you stayed was to make
17 sure that that happened?

18 A. Yes.

19 Q. When you headed back into town, your destination was Saint
20 Joe's Hospital and not the jail as originally planned,
21 correct?

22 A. Yes, sir.

23 Q. Let me just back up for a moment, because when you
24 arrested Mr. Smith, you told him specifically he was under
25 arrest for suspicion of DUI, correct?

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1 A. Yes, sir.

2 Q. And then you learned of some information that changed
3 that, correct?

4 A. Yes.

5 Q. And when that changed, you then informed him that he was
6 now under arrest for vehicular assault, correct?

7 A. Yes, sir.

8 Q. And at that point, did you re-Mirandize him?

9 A. No, sir.

10 Q. Did you have any further conversation about his right to
11 speak with an attorney?

12 A. No, sir.

13 Q. Did you tell him that you would not be taking him to the
14 jail where he could make his phone call to an attorney,
15 but rather you would be taking him to the hospital?

16 A. I do not recall, sir.

17 Q. And once you learned of the status of the other person,
18 before you left, that's where you began the process of a
19 search warrant; is that correct?

20 A. Yes, sir.

21 Q. And that was done telephonically?

22 A. Yes, sir.

23 Q. Was it also done by email?

24 A. No, sir.

25 Q. Okay, and by telephonically, we're talking about a cell

1 phone?

2 A. Yes, sir.

3 Q. So there was cell phone service there?

4 A. I applied for the search warrant at Saint Joe's.

5 Q. Okay. What did you begin doing at the scene for
6 preparation purposes?

7 A. Writing, we have a template of a search warrant, so I was
8 writing out the search warrant on my computer.

9 Q. Okay. The one in your car?

10 A. Yes, sir.

11 Q. All right, and that process was interrupted by the arrival
12 of other officers and your departure; is that fair to say?

13 A. Correct.

14 Q. Once you arrived at the hospital, I'm assuming you arrived
15 at the hospital parking lot and were no longer moving, and
16 that's where you made a telephone application?

17 A. Yes, sir.

18 Q. Okay, and the application was a telephone call to the
19 prosecutor's office first?

20 A. Yes, sir.

21 Q. And you were put in touch with Mr. Richey, I believe?

22 A. I don't recall exactly, sir.

23 Q. And that prosecutor, whomever it was, facilitated contact
24 between you and the judge, presumably?

25 A. Yes, sir.

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1 Q. And during that period of time, you remained in your
2 vehicle?

3 A. I don't recall if I was in my vehicle or just outside my
4 vehicle, sir.

5 Q. Okay. Close proximity to your vehicle?

6 A. Yes, sir.

7 Q. And at this time, Mr. Smith was still in the back of your
8 patrol car?

9 A. Yes, sir.

10 Q. And it wasn't until the phone call was completed that
11 Trooper Williams came out?

12 A. Correct.

13 Q. And Trooper Williams' role at this particular point was he
14 took Mr. Smith inside?

15 A. Yes, sir.

16 Q. And Trooper Williams took Mr. Smith inside and began
17 preparation for a blood draw?

18 A. Yes, sir.

19 Q. And this was based upon you telling Trooper Williams that
20 you applied successfully for a search warrant?

21 A. Yes, sir.

22 Q. And while you were working on finishing up the paperwork,
23 if you will, somehow Trooper Williams alerted you that
24 there was issues inside?

25 A. Yes, sir.

1 Q. At the point that the issues began, had a blood draw
2 commenced or the procedures begun for that?

3 A. Not that I'm wear of.

4 Q. And you weren't inside?

5 A. I was not inside, sir.

6 Q. All right. All you know is that Trooper Williams asked
7 you to come inside?

8 A. Yes, sir.

9 Q. And had you already completed your paperwork, or did it
10 take a moment or two longer for you to finish that before
11 you went inside to assist or see what was going on?

12 A. I believe it was printing out when he had contacted me, so
13 I was able to grab the paperwork and go inside.

14 Q. Okay, and the search warrant that we're talking about,
15 does it typically come or is it preloaded as a package?

16 A. Yes, sir.

17 Q. What I mean by that is I just want to show you something.

18 I'm going hand you what's been marked for Exhibit 4.

19 MR. ROCHE: May I approach, Your Honor?

20 THE COURT: You may.

21 Q. (By Mr. Roche) Do you recognize that document, Trooper?

22 A. Yes, sir.

23 Q. What is it?

24 A. It's a return of search warrant.

25 Q. And what is a return of search warrant?

1 A. It lists the property taken from the person.

2 Q. Okay, and is that part of the package that we were talking
3 about?

4 A. Yes, sir.

5 Q. And is that filled out for lack of a better word in real
6 time?

7 A. Yes, sir.

8 Q. And in this particular case, so the information that's
9 written on there in terms of when things happened, I
10 believe that says 1:30; is that true and correct?

11 A. Yes, sir.

12 Q. And that's an indication that at that time, that's what
13 was taken for the description of the, what was described
14 in the search warrant?

15 A. Yes, sir.

16 Q. All right, and then I'm also going to show you what's been
17 marked as 5.

18 MR. RANDS: May I approach, Your Honor?

19 THE COURT: You may.

20 Q. (By Mr. Rands) Do you recognize that?

21 A. Yes, sir.

22 Q. What is it?

23 A. It's from the hospital. It's a form they fill out when we
24 complete a blood draw.

25 Q. Okay. Do you fill out any part of that report?

1 A. Yes, sir.

2 Q. And are you the last person to fill it out, meaning --
3 sorry, do they give it to you filled out with their
4 information, and then you add some final information?

5 A. It depends.

6 Q. Do you know what happened in this particular case?

7 A. I don't sir.

8 Q. Is your name on there?

9 A. Yes, sir.

10 Q. And is the name of the person who drew the blood on there?

11 A. No, sir.

12 Q. Okay. Is the time that the blood is drawn on there?

13 A. Yes, sir.

14 Q. Okay, and does that time on that comport with the time on
15 the return that I showed you moments earlier?

16 A. Yes, sir.

17 Q. Any reason to believe that that time is not correct?

18 A. No, sir.

19 Q. Is that one of those things -- more importantly with the
20 first document that I showed you which is 4, is that one
21 of those things that you're in the field, you look at the
22 clock, you write it down, and you move on?

23 A. Yes, sir.

24 Q. Unlike another time that you would be guessing at, you're
25 pretty sure or confident of those times?

1 A. Yes, sir.

2 Q. I think you have another --

3 MR. RANDS: May I approach, Your Honor?

4 THE COURT: You may.

5 Q. (By Mr. Rands) I think you have another exhibit --

6 MR. RANDS: As to 4 and 5, Your Honor, move to admit.

7 THE COURT: Four and 5 are being offered.

8 MR. RICHEY: I'm sorry?

9 MR. RANDS: I was offering 4 and 5.

10 MR. RICHEY: No objection.

11 THE COURT: Four and 5 are admitted.

12 (Defendant's Pretrial Exhibits 4 and 5 admitted into evidence.)

13 Q. (By Mr. Rands) So what I've just grabbed from you is
14 Exhibit 3, and this has been admitted already. This
15 document, this is what's called special evidence warning.
16 I will hand it back to you and have a look at it. Is that
17 the warning things that we're talking about when you were
18 asked about the special evidence warnings?

19 A. Yes, sir.

20 Q. All right, and that document basically contains some
21 information told to the person at the time or prior to the
22 blood draw, correct?

23 A. Yes, sir.

24 Q. And in this particular case, that form has been altered a
25 little bit. It's got some handwriting on it --

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1 A. Yes, sir.

2 Q. -- at the top in sort of its own little box?

3 A. Yes.

4 Q. And it indicates search warrant?

5 A. Yes, sir.

6 Q. And that's an indication that those warnings were given
7 pursuant to a search warrant versus the other options that
8 the warnings would be given to on the form?

9 A. Yes, sir.

10 Q. All right, and that form has a time on it as well?

11 A. Yes, sir.

12 Q. And that form, would it be fair to say that everything on
13 that form that's handwriting is your handwriting?

14 A. Not everything. There's several --

15 Q. What's not your handwriting?

16 A. Name, title of person who extracted the blood, and
17 signature of person who extracted the blood.

18 Q. Okay, but everything else on there, you filled in?

19 A. Yes, sir.

20 Q. And everything else that you filled in that happened in
21 real time?

22 A. Yes, sir.

23 Q. And that indicates that that form was read to that person
24 at 1:33?

25 A. That indicates that I signed that document at 1:33.

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1 Q. Okay. That's what that time means. It's not -- you're
2 telling me that that's not the time that things happened.
3 That's the time that you signed it?

4 A. That's my interpretation of it. That's how I do it.

5 Q. Okay. So that's not an indication according to your
6 testimony of the time that that blood was drawn?

7 A. No, sir.

8 Q. So with the respect to the time that was on the form that
9 I showed you earlier which I believe is just for the
10 record Exhibits 5 and 4, those both indicate a draw of
11 1:30. That's not the time the draw was done?

12 A. No, that's the time the draw was done, the draw was done,
13 sir.

14 Q. So the time on 4 and 5 in your opinion is correct, but the
15 time on the last one I handed you, the special evidence
16 warning is not the time that things happened?

17 A. So on 3 at the bottom it says time of blood draw --

18 Q. Yes, sir.

19 A. -- as 1:30, under where I sign the document and date it
20 and timed, that's my interpretation on this form that when
21 I signed it, I write the time that I sign that document,
22 so 1:33 is the time that I signed this document.

23 Q. So at what time, since we're writing times down, did you
24 give the special evidence warning?

25 A. I did not write down exactly what time I --

1 Q. Do you have any recollection as to what time that was?

2 A. I don't know specifically what time that was, sir.

3 Q. I want to go back to your timeline for a moment if we
4 could, and I just want to confirm that one of the
5 questions that you were asked towards the end before we
6 took a break was that the process of the search warrant, I
7 guess from Saint Joe's to the point of the blood draw you
8 estimated about three hours?

9 A. Yes, sir.

10 Q. And does that three hours end at the time of the blood
11 draw, or does that three hours end at the time that you
12 book him into jail after Saint Joe's?

13 A. The end of the blood draw.

14 Q. Okay. Mr. Smith in this case ultimately was sedated?

15 A. Yes, sir.

16 Q. And he was sedated with a needle?

17 A. Yes, sir.

18 Q. And he reacted to that needle similarly as he did previous
19 needles?

20 A. Yes, sir.

21 Q. He told you that he didn't do well with needles?

22 A. Yes, sir.

23 Q. And he told you that right upfront, did he not?

24 A. Yes, sir.

25 Q. Did Trooper Williams indicate to you that Mr. Smith

1 indicated he didn't do well with needles?

2 A. I don't recall if Trooper Williams told me that or not.

3 Q. Okay. Would it be fair to say that every time that you
4 described flexing or kicking or things of that nature,
5 that's a reasonable reaction to somebody that's told you
6 they don't do well with needles?

7 A. I would disagree with that.

8 Q. Okay. Did you disagree with his statement to you that, or
9 did you disbelieve his statement that he didn't do well
10 with needles?

11 A. I didn't know.

12 Q. Okay. The timeline in terms of when you did allow
13 Mr. Smith to speak on his cell phone, let's go back to
14 that for a moment. He used his cell phone?

15 A. Yes, sir.

16 Q. And that cell phone came from where?

17 A. I don't recall where it was produced from.

18 Q. Okay. So you don't recall whether you gave it to him?

19 A. I don't recall who gave it to him.

20 Q. Do you recall finding a search warrant on him -- or sorry,
21 finding a cell phone on him when presumably you searched
22 him pursuant to a DUI arrest?

23 A. I don't specifically remember.

24 Q. Okay. He's, he has his cell phone, and you say to him
25 what about the opportunity to make a phone call?

1 A. I don't recall what I specifically said to him.

2 Q. Okay. Whatever it is you see -- said, you then leave the
3 room?

4 A. Yes, sir.

5 Q. And so that I'm clear, this is room number two?

6 A. I'm not sure what room it is.

7 Q. Okay. He's -- because you allow him to make this phone
8 call after this, after the actual draw, correct?

9 A. No, sir --

10 Q. Prior --

11 A. -- before the draw.

12 Q. Prior to the draw, waiting for the decision on the
13 sedative?

14 A. Yes, sir.

15 Q. And the decision we're waiting for is the allergy check
16 from the doctors?

17 A. Yes, sir.

18 Q. And we don't know how long that's going to take, you
19 indicated?

20 A. No, sir.

21 Q. It took somewhere between 10 and 15 minutes?

22 A. I believe so, sir.

23 Q. And during this window, this is the opportunity that he's
24 afforded to make a phone call?

25 A. Yes, sir.

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1 Q. And you overhear the phone call in some way, shape, or
2 form, because you learn that he's talking to his wife?

3 A. Yes, sir. I'm not specifically sure how I learned that it
4 was his wife he was calling.

5 Q. Is he calling her for a phone number for an attorney?

6 A. I do not know.

7 Q. That telephone call to her though is terminated by someone
8 that's with you or by you, correct?

9 A. Yes, sir.

10 Q. How long did that phone call to that other person that we
11 think is his wife last?

12 A. I don't know.

13 Q. And at the time that that telephone call was terminated,
14 it is my understanding that you don't know who he's
15 actually talking to?

16 A. No, sir.

17 Q. I don't understand that answer, sorry. Probably the way I
18 asked it. You don't know who he's talking to when you
19 come in and terminate that phone call?

20 A. Correct, I don't know who he's talking to.

21 Q. In this time that -- what's the timeline of this from the
22 point of you learning in some way, shape, or form that
23 he's not talking to somebody that you would like him to be
24 terminating the phone call?

25 A. I don't know the exact time. He was on the phone for a

1 little bit. I don't know the exact amount of time he was
2 on the phone for.

3 Q. Not the full time that it took to determine the allergies?

4 A. I don't recall.

5 Q. Okay, and we don't know how long he was on the phone at
6 the time that you terminated the call?

7 A. I don't.

8 Q. Sorry for jumping around. Could we go back to the first
9 draw?

10 A. Yes, sir.

11 Q. Or the -- what we call -- is it the first attempt? Is
12 that the best way to describe it?

13 A. Yes, sir.

14 Q. Up to the -- I mean during the whole Saint Joe's
15 commencement, if you will, or the time that you come
16 inside, you're alerted to issues, and the issues that
17 you're alerted, these are verbal, are they not?

18 A. Yes, sir.

19 Q. So Mr. Smith is speaking or saying these things that are
20 these described issues, correct?

21 A. Yes, sir.

22 Q. He's not yelling?

23 A. I don't recall if he was yelling or not. I don't believe
24 he was, sir.

25 Q. He's not like screaming out of control and foaming at the

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1 mouth or anything like that?

2 A. No, sir.

3 Q. He simply is in your recollection saying these things or
4 asking these questions?

5 A. Yes, sir.

6 Q. Okay, and then at this particular point, there's an actual
7 attempt to draw his blood in this first scenario, attempt
8 number one; is that right?

9 A. Yes, sir.

10 Q. And that's when he has a physical response in the form of
11 the way that he's moving and jerking as you said?

12 A. He had an initial response when we were trying to place
13 him on the hospital bed as well.

14 Q. Right, and at this point, for lack of a better word, he's
15 not out of control. He's again saying these things?

16 A. Can you clarify?

17 Q. Sure.

18 A. At what point?

19 Q. That's, that's kind of messy.

20 A. Yeah, no, I understand.

21 Q. You've come in, and you've told him that you have a search
22 warrant.

23 A. Yes, sir.

24 Q. And you have a search warrant, and is it in your breast
25 pocket or in your hand? Where is it?

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1 A. It's in my hand.

2 Q. And you tell him that this is a warrant?

3 A. Yes.

4 Q. And you tell him this is a warrant to draw his blood?

5 A. Yes, sir.

6 Q. And he reiterates presumably as to what he said to Trooper
7 Williams?

8 A. Yes.

9 Q. And he did this, I'm just going to use the word calm.
10 He's not yelling or screaming or flailing around. He just
11 repeats what he says?

12 A. Yes, sir.

13 Q. You ask if he wants to see the warrant?

14 A. Yes, sir.

15 Q. You don't read the warrant to him?

16 A. No, sir.

17 Q. Is the warrant in your hand, is it a folded-up piece of
18 paper half-round, or is it, what does it look like?

19 A. Like this.

20 Q. Okay.

21 A. Looks like this.

22 Q. Something like that --

23 A. Yes, sir.

24 Q. -- you hold up and say I have a warrant?

25 A. Yes, sir.

1 Q. Okay. It's not a very long piece of paper, is it?

2 A. No, sir.

3 Q. And you don't read it to him?

4 A. No, sir.

5 Q. And at this particular point, you also don't read him the
6 special evidence warrants -- special evidence warnings, do
7 you?

8 A. No, sir.

9 Q. And then there's this failed attempt to draw his blood?

10 A. Yes, sir.

11 Q. And then there's a decision to take a break?

12 A. Yes, sir.

13 Q. I believe the, is it the phlebotomist who at this time,
14 one of them says to you I'm uncomfortable, or does, "I'm
15 uncomfortable" happen after attempt two?

16 A. After the first attempt.

17 Q. Okay. So the nurse or whoever is drawing the blood says I
18 don't feel comfortable, I might break a needle?

19 A. Yes, sir.

20 Q. And so there's a new plan which is really the same plan?

21 A. Yes, sir.

22 Q. But a break is taken?

23 A. Yes, sir.

24 Q. And again, this is a failed attempt?

25 A. Yes, sir.

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1 Q. And then there's another meeting of the minds, if you
2 will, and there's a decision to do a sedative?

3 A. Yes, sir.

4 Q. Whose idea was that?

5 A. I'm not sure whose idea it was, sir.

6 Q. Okay. When you first read Mr. Smith his warnings at the
7 time of the arrest, his Miranda rights, he indicated to
8 you that he didn't understand them?

9 A. Yes, sir.

10 Q. And he indicated to you that he wanted to speak with an
11 attorney?

12 A. Yes, sir, he wanted to know when he could contact an
13 attorney.

14 Q. Okay. Were those two related, meaning his request about
15 when he was able to speak with an attorney? Was that the
16 confusion that he had on the warnings, or do you know?

17 A. Yes, sir, that was the confusion he had.

18 Q. And is that because the warnings indicate that at this
19 time you have the right to an attorney?

20 A. Yes, sir.

21 Q. And so when he was placed under arrest at this time, he
22 wanted to speak with an attorney?

23 A. Yes, sir, he was, he asked when can I be in contact with
24 an attorney.

25 Q. Okay, and prior to the first attempt, one of the things

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1 Mr. Smith said to you I believe was that he wanted to
2 speak with an attorney and/or have an attorney present for
3 a blood draw?

4 A. Yes, sir.

5 Q. Both things?

6 A. I don't recall. I specifically recall him repeating he
7 wanted an attorney present to observe the blood draw.

8 Q. Okay, and at that point, nobody let, nobody took a break
9 to allow him to make that phone call?

10 A. No, sir.

11 Q. And I believe your initial statement to him was that he be
12 able to have a phone call when he got to the jail?

13 A. Yes, sir.

14 Q. And he ultimately got to the jail but only after Saint
15 Joe's, correct?

16 A. Yes, sir.

17 Q. And when he got to the jail, he wasn't afforded an
18 opportunity to talk to an attorney then either?

19 A. My understanding is when I book someone into jail, I know
20 that it's standard practice that they give them access to
21 a phone.

22 Q. But you did not provide him access --

23 A. I did not provide him.

24 Q. -- at the booking procedure time?

25 A. No, sir.

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1 Q. Or prior to?

2 A. No, sir.

3 Q. Okay, and when I say or prior to, I don't mean at Saint
4 Joe's. I mean you get to the jail, and you booked him in
5 right away?

6 A. Yes, sir.

7 Q. Now, at the jail, there's a location that he could have
8 had a telephone conversation with an attorney, correct?

9 A. Yes, sir.

10 Q. And that would have been in the breath testing room?

11 A. Yes, sir.

12 Q. And that is right next to the booking window?

13 A. Yes, sir.

14 Q. Okay, and in fact, in other cases unlike this where a
15 person is arrested and transported to the jail, you give
16 them an opportunity to speak with an attorney. They stay
17 in that breath testing room before breath testing, right?

18 A. Yes, sir.

19 Q. And so we know that that's a way that it can be handled?

20 A. Yes, sir.

21 Q. When you told Mr. Smith that he was under arrest no longer
22 for DUI or subsequently for vehicular assault, did you
23 reiterate when he would be able to speak with an attorney?

24 A. No, sir.

25 Q. Trooper, I don't think that I have any other questions,

1 but just one moment.

2 There's other troopers that arrive on scene to this
3 collision, correct?

4 A. Uh, yes, sir.

5 Q. But is Sergeant Rogers the first one?

6 A. Yes sir.

7 Q. And then you leave?

8 A. Yes, sir, he's the only one I observed on scene.

9 Q. So all other troopers that arrived on scene, they arrived
10 after you?

11 A. Yes, sir.

12 Q. I'm sorry. After your departure?

13 A. Yes, sir, yes, sir.

14 Q. Thank you, trooper.

15 RANDES: I don't have any further questions.

16 THE COURT: Redirect?

17 REDIRECT EXAMINATION

18 BY MR. ROCHE:

19 Q. Trooper, how do times get reported on CAD logs?

20 A. They're entered in by our dispatcher.

21 Q. And how does the dispatcher get those times?

22 A. They get them over the radio or phone from us.

23 Q. Okay.

24 A. From troopers.

25 Q. So when you radio back to dispatch, they note the time and

1 then that represents on the catalog?

2 A. Yes, sir.

3 Q. Is it fair to say that that's the most accurate rendition
4 of the timeline of investigation?

5 MR. RANDS: That's leading.

6 THE COURT: Sustained as to form.

7 Q. (By Mr. Roche) In your opinion, what do you think is the
8 most accurate way to track a timeline of any of your
9 investigations, is it your narrative report? Is it the
10 notes that you take on the scene, or is it the dispatch
11 recordings?

12 A. It's dependent on the investigation. There's times I
13 print off the CAD report, and I use the CAD report for my
14 times. There's times where I take notes of the times and
15 all that. In this case, I can't specifically recall. I
16 do use CAD reports consistently to report accurate times.

17 Q. Okay. Are there discrepancies sometimes between
18 narratives and CAD logs based on the time when you enter
19 them versus when you hit the button on your radio?

20 A. Yes, sir, the issue you can have with CAD reports is I'm
21 trying to do different stuff on scene. I might not
22 transmit that I have one in custody or other information
23 right when it happens. I could be taking notes that are
24 going to be different on times from CAD reports.

25 Also, there's times dispatchers are doing different

1 things and entering different things so times could be
2 slightly off between what you're seeing in a CAD report
3 and what I'm entering in my report.

4 Q. All right. Are you surprised when you sometimes look back
5 at your narrative report and see that you've made errors
6 in there?

7 A. No, sir.

8 Q. Okay. That's part of the process of you trying to track
9 the grand scope of information that you're receiving?

10 A. Yes, sir.

11 Q. Okay. You spent, post-arrest, you spent a little over
12 three hours with the Defendant would you say?

13 A. Yes, sir.

14 Q. You read him his Miranda warnings at the time of the
15 arrest?

16 A. Yes, sir.

17 Q. Okay. At any point did you reengage the Defendant in an
18 interrogation without affording him the opportunity to
19 talk to a lawyer?

20 A. No, sir.

21 Q. When the Defendant expressed confusion during Miranda, was
22 that confusion centered solely upon the time when he was
23 going to get to talk to a lawyer?

24 A. Yes, sir.

25 Q. When you were on the scene and had the Defendant in

1 handcuffs, you felt it was inappropriate to unhandcuff
2 him, stop your investigation and provide him access to a
3 lawyer at that time?

4 A. Yes, sir.

5 Q. So you didn't interrogate him. You just left him
6 handcuffed in the back of the vehicle?

7 A. Yes.

8 Q. And you went and -- went and investigated other things?

9 A. Yes, sir.

10 Q. When you initially arrested the Defendant, you told him
11 that the investigation you were -- you had a suspicion of
12 driving under the influence of intoxicants?

13 A. Yes, sir.

14 Q. Later in your contact with the Defendant, you told him
15 that you now had a suspicion that the crime would be
16 vehicular assault?

17 A. Yes, sir.

18 Q. Did you unhandcuff the Defendant and rearrest him at that
19 time?

20 A. No, sir.

21 Q. He's still under arrest at that point in time?

22 A. Yes, sir.

23 Q. The special evidence warnings that you read to the
24 Defendant, you read those after the first unsuccessful
25 attempt to take a blood sample from the Defendant?

1 A. Yes, sir.

2 Q. You read it before you made a second unsuccessful attempt?

3 A. Yes, sir.

4 Q. The special evidence warnings had been read to the
5 Defendant before the third and successful attempt to
6 obtain a sample of his blood?

7 A. Correct.

8 Q. While you were waiting for the sedatives to take effect,
9 you did afford the Defendant an opportunity to make a
10 phone call?

11 A. Yes, sir.

12 Q. Okay. You didn't directly check to make sure that he was
13 going to be on the phone with an attorney. You just gave
14 him access to his phone?

15 A. Yes, sir.

16 Q. Can you tell me why did you choose to do that at that
17 time?

18 A. I remember specifically he was very upset, very aggressive
19 toward us, and we thought if we gave him access to a cell
20 phone that that might help ease the tension and calm him
21 down.

22 Q. So it was similar to when you let him use the bathroom, it
23 was to deescalate?

24 A. Correct.

25 Q. The Defendant expressed to you a desire to have an

1 attorney present during the blood draw. You didn't call
2 up an attorney and facilitate that for him though?

3 A. No, sir.

4 Q. Why didn't you do that?

5 A. Umm, I -- again at that point, hmm, I had the search
6 warrant. I wasn't interrogating him. I've never had an
7 attorney present during a blood draw, and I've never
8 contacted an attorney or facilitated that process. My
9 main concern was getting the blood draw completed.

10 Q. Okay, and why were you concerned with getting that blood
11 draw completed?

12 A. Again, the fleeting evidence, the possible evidence of
13 intoxicants in the blood, especially now with the two
14 failed -- the amount of time it was taking us to get a
15 blood draw, that evidence of potential intoxicants in the
16 blood is going away as more time carries on.

17 Q. Okay. When you have somebody submitting a sample of their
18 breath to determine alcohol concentration in the jail, you
19 afford those people an opportunity to talk to an attorney,
20 don't you?

21 A. Yes, sir.

22 Q. Okay. Is it different in the scenario where you're in the
23 hospital, and you're trying to obtain a sample of
24 somebody's blood? Where is that difference? Where's the
25 discrepancy?

1 A. The difference is in -- I will call it a basic normal DUI
2 where I'm getting a breath sample, there's a list of
3 questions that I'm asking as well as I'm having to read
4 implied consent warnings which can be, to some people can
5 be confusing or daunting, so being able to contact an
6 attorney to explain what the implied consent warnings are
7 and help facilitate their decision whether they should
8 give a breath sample or not.

9 In this case or the case where I bring someone to the
10 hospital, and I have a search warrant for the blood
11 committing that I draw blood from them, there's no
12 interrogation required. There's no questioning required
13 of the person.

14 Q. Is it fair to say that Mr. Smith made an effort to refuse
15 the search warrant in this case?

16 MR. RANDS: Leading.

17 THE COURT: Overruled.

18 THE WITNESS: Yes, sir.

19 Q. (By Mr. Roche) Okay. That doesn't carry some of the same
20 consequences that would attach if he was refusing a breath
21 test though, does it?

22 A. No.

23 Q. Okay. Another difference between in-the-jail breath
24 testing setting versus the in-hospital search warrant
25 setting?

1 A. Yes, sir.

2 Q. You don't feel the Defendant needed access to an attorney
3 for you to effectively serve your search warrant, did you?

4 A. No, sir.

5 Q. When you booked the Defendant into the jail, was it your
6 impression that he would be afforded an opportunity to
7 access the phone at that point in time?

8 A. Yes, sir.

9 Q. When you were going through the booking process, did you
10 reengage the Defendant in an interrogation?

11 A. No, sir.

12 Q. Again, at any point post-Miranda, did you attempt to
13 interrogate the Defendant without affording him an
14 opportunity to speak to a lawyer?

15 A. No, sir.

16 MR. ROCHE: No further questions.

17 THE COURT: Recross?

18 MR. RANDES: Thank you.

19 RECCROSS-EXAMINATION

20 BY MR. RANDES:

21 Q. The decision to, when and where to allow Mr. Smith to talk
22 to an attorney sounds to me like you didn't feel like he
23 needed one; is that true?

24 A. No, sir.

25 Q. Because what I heard you say to -- just a moment ago was

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1 that you didn't feel like he needed access to an attorney,
2 but that's because it's different than breath testing?

3 A. Can you repeat that?

4 Q. I'll try. What I got from the last couple of questions
5 from you was that there's a difference between breath
6 testing and blood testing in the two scenarios, and in one
7 scenario, it seems like a person might have questions that
8 you wouldn't have in a blood testing scenario, and since
9 you weren't in that breath testing scenario, you didn't
10 feel like he needed to speak with an attorney?

11 A. That's not true. I did not feel there was an opportunity
12 for me to give him access to an attorney.

13 Q. Okay. Would it be fair to qualify that with before the
14 time that you did give him access?

15 A. Correct.

16 Q. And that time that you did give him access wasn't the
17 length of his choosing?

18 A. No, sir.

19 Q. Okay, because you ended that telephone call?

20 A. Someone -- I'm not sure if it was me or not, sir.

21 Q. Okay. Someone ended --

22 A. Yes, sir.

23 Q. Someone in law enforcement ended that telephone call?

24 A. Yes, sir.

25 Q. Thank you.

1 MR. RANDS: Nothing further.

2 THE COURT: Since it's been difficult to get this
3 witness here, I'm going to give you each, if you have any
4 other questions, one more opportunity.

5 MR. ROCHE: I just have a few you more questions.
6 Thank you.

7 May I approach the witness, Your Honor?

8 THE COURT: You may.

9 REDIRECT EXAMINATION

10 BY MR. ROCHE:

11 Q. I first direct your attention to what I believe is now
12 admitted Exhibit Number 5. Is that a Washington State
13 Patrol form, or is that something that the hospital keeps
14 on hand?

15 A. That is a hospital form, sir.

16 Q. Okay. That's something that they provide any time you do
17 a blood draw there?

18 A. Yes, sir.

19 Q. Did you fill that form out in its entirety?

20 A. No, sir.

21 Q. Okay. Do we know who did fill that form out?

22 A. No, sir. I filled out the majority of the form.

23 Q. You filled out a portion of that?

24 A. Yes, sir, yes, sir.

25 Q. Can you clarify, what information did you put onto that

1 form?

2 A. I know I put department bringing in patient, patient's
3 full name, date of birth, sex, my name and badge number,
4 the date, and then I signed the bottom of the form.

5 Q. The purpose of that form is for the hospital to create a
6 record of these blood draws and who's administering them?

7 A. Yes, sir.

8 Q. You retain a copy and keep it with your reports as well?

9 A. Yes, sir.

10 MR. ROCHE: Your Honor, may I approach the witness
11 again?

12 THE COURT: You may.

13 MR. ROCHE: Thank you, Your Honor.

14 Q. (By Mr. Roche) I'm going to direct your attention to what
15 I believe is Plaintiff's proposed Exhibit Number 2, and
16 what is that document?

17 A. Washington State Patrol CAD log.

18 Q. Is the CAD log related to this incident number?

19 A. Yes, sir.

20 Q. Okay.

21 MR. ROCHE: Your Honor, the State would move to admit
22 Plaintiff's proposed Exhibit Number 2.

23 MR. RANDS: No objection for this hearing, Your Honor.

24 THE COURT: It will be admitted for this hearing.

25 (Plaintiff's Pretrial Exhibit Number 2 admitted into evidence.)

1 MR. ROCHE: One -- thank you, Your Honor. Perhaps can
2 I track down Plaintiff's proposed Exhibit Number 1? Thank
3 you.

4 May I approach the witness again, Your Honor?

5 THE COURT: You may.

6 MR. RANDS: Which one is it?

7 MR. ROCHE: Your Honor, the State has no further
8 questions.

9 THE COURT: Do you have any further questions,
10 Mr. Rands?

11 MR. RANDS: I don't think so, Your Honor.

12 THE COURT: You may step down, trooper.

13 MR. RICHEY: Your Honor, for access to attorneys, we
14 would like to call Lieutenant Caleb Erickson. I don't
15 think we talked about this prior, but he's from the jail
16 and can address the issues regarding access to an
17 attorney.

18 THE COURT: Any problem with that, Mr. Rands?

19 MR. RANDS: I don't have any objection, Your Honor. I
20 don't have any knowledge of this, but we'll see how it
21 plays out.

22 THE COURT: We can always give you more time if
23 necessary.

24 MR. RANDS: Thank you.

25 LIEUTENANT CALEB ERICKSON, WCSO

1 releasing every day. I was a line level supervisor of the
2 line level staff for approximately two and a half years,
3 and I supervised that area, made sure that, you know, that
4 bookings and releases went according to plan and were
5 approved and so forth, and currently, I administer
6 functions very similarly at both facilities.

7 Q. All right. Can you tell me about how someone might have
8 access to an attorney once they're booked?

9 A. Yeah, generally when people are booked, they're in
10 handcuffs, and we search them, bring them in, take them
11 out of handcuffs, change them into jail uniforms, and then
12 once they're processed through, all the way through, we
13 give them access to a telephone. There's a, there are a
14 couple of telephones in one of the tanks that house free
15 calls. If they're in a single cell on the first floor,
16 there's a roll-around phone that people can make phone
17 calls with.

18 Q. Okay, and are phone numbers provided for attorneys in
19 those rooms?

20 A. I believe there are numbers for the public defender's
21 office posted. I don't know about private attorneys.

22 Q. Okay, and how long does it take for someone to be booked
23 and then given an opportunity to have access to that phone
24 with the phone numbers?

25 A. It depends on the activity level, but generally about 45

1 minutes.

2 Q. Okay, and are there any conditions or situations where
3 someone might not have access to an attorney that quickly?

4 A. Umm, I guess it depends on when they come into the
5 facility, but again, if somebody was isolated on the first
6 floor for a medical condition or observation, it might
7 take longer for them to calm down enough to be able to use
8 the phone, but generally speaking, most folks have an
9 opportunity pretty quickly and --

10 Q. After hours, let's say that somebody came in late at
11 night, does that have an impact on their ability to use
12 the phone and have access to an attorney?

13 A. No, sir, unless -- I mean the public defender's office may
14 not have the staffing in the late night hours, but they
15 still have access to the same phone.

16 Q. Okay, and are you familiar with whether people speak with
17 attorneys from the public defender's office in late night
18 hours?

19 A. Umm, there is a room down on the first floor that they can
20 meet with. There are also attorney booths that public
21 defender offices can access on both floors of the jail.

22 Q. My question is the phone calls. Are you aware of whether
23 or not people are able to reach a public defender late at
24 night?

25 A. I'm not aware.

1 Q. So you don't know?

2 A. No.

3 Q. Late night, they have access to do so, but you don't know
4 if they're able to reach anyone; is that correct?

5 A. Correct.

6 Q. All right. Okay, and specifically if I was to bring your
7 attention to a case, if I give you a case number, would
8 you be able to tell if someone had access to an attorney?

9 A. Hmm, not specifically. Generally, we have the same access
10 for everybody all the time, so I'm not sure why one inmate
11 or another would stand out to me.

12 Q. Okay. All right. Thank you.

13 MR. RICHEY: I have no further questions.

14 CROSS-EXAMINATION

15 BY MR. RANDS:

16 Q. Good morning.

17 A. Good morning.

18 Q. Are these telephone calls monitored?

19 A. The phone calls to the public defender's office are not
20 recorded and not monitored.

21 Q. All other phone calls monitored and recorded?

22 A. Almost all. A number of private attorneys have submitted
23 numbers for exclusion, so if they're on a list for
24 exclusion, they do not get monitored or recorded.

25 Q. And if they're not on that list?

1 A. Then they would be monitored and recorded.

2 Q. And I believe there are signs inside the jail indicating
3 that telephone calls are monitored and recorded?

4 A. There are.

5 Q. Thank you.

6 REDIRECT EXAMINATION

7 BY MR. RICHEY:

8 Q. A question about that. Counsel was just asking you about
9 signs, and do they indicate whether or not the public
10 defenders and certain attorney phone numbers are monitored
11 and recorded or not?

12 A. The signs do not. There is a message that plays on each
13 phone call that says whether it's being monitored or
14 recorded.

15 Q. Okay. So if someone wanted to call their attorney, then
16 they would find out if it was being monitored or recorded
17 at the time they made the phone call; is that correct?

18 A. That's my understanding.

19 Q. Okay. All right. Is there any information given at
20 booking that explains their opportunity to speak with the
21 public defender not recorded?

22 A. Not that I'm aware of.

23 Q. Okay. All right. Thank you.

24 MR. RICHEY: No further questions.

25 RECROSS-EXAMINATION

1 BY MR. RANDS:

2 Q. Just to clarify, an inmate calls a private attorney, and
3 that private attorney's name is not on the list for do not
4 record, that telephone call is recorded?

5 A. Correct.

6 Q. And -- okay. Thank you.

7 MR. RICHEY: Nothing further.

8 THE COURT: You may step down.

9 THE WITNESS: Thank you.

10 MR. RICHEY: Just want to make sure those are --

11 THE CLERK: Thank you.

12 THE COURT: Does the State have further witnesses with
13 regard to these pretrial matters?

14 MR. ROCHE: No.

15 MR. RICHEY: No, Your Honor, not for these. I think we
16 covered what the Court was planning on covering, but I'm
17 not certain of that.

18 THE COURT: It's been almost a year.

19 MR. RICHEY: We -- I'll tell you what, we read the
20 transcripts.

21 THE COURT: As have I.

22 MR. RICHEY: We read the Court's rulings previously,
23 and believe these are the issues.

24 THE COURT: Okay, because it's up to you to bring in
25 who you need to bring in.

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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

IN AND FOR THE COUNTY OF WHATCOM

= = = = =)
 STATE OF WASHINGTON,)
) Cs. No. 14-1-01457-3
 Plaintiff,)
) COA No. 76340-7
)
 vs.)
) CrR 3.5/3.6 Hearing
)
 BRIAN J. SMITH,)
)
 Defendant.) VOLUME III
)
) PAGES 170-360
)

VERBATIM REPORT OF PROCEEDINGS

MONDAY, OCTOBER 24, 2016

**

THURSDAY, OCTOBER 27, 2016

**

MONDAY, NOVEMBER 7, 2016

THE HONORABLE CHARLES R. SNYDER

RHONDA JENSEN, CSR

OFFICIAL COURT REPORTER

WHATCOM COUNTY SUPERIOR COURT

BELLINGHAM, WASHINGTON

(360) 778-5608

1 MR. RICHEY: Yes.

2 MR. RANDS: Makes sense, Your Honor, but I'm not sure
3 that he has anything to add. Trooper Beattie already
4 testified to the circumstances of this. It sounds like
5 the doctor --

6 THE COURT: I don't either, but I haven't heard from
7 him, just like you, but I think it would probably be best
8 to get him in here and see what he has to say.

9 MR. RICHEY: I think he does, based on my research.

10 THE COURT: Let's start with that. Is he available?

11 MR. RICHEY: He is.

12 THE COURT: Good morning.

13 **OLEG RAVITSKY, M.D.**

14 Having been duly sworn, testified, as follows:

15 THE COURT: Have a seat, please.

16 DIRECT EXAMINATION

17 BY MR. RICHEY:

18 Q. Please state your name and spell your last name for the
19 record.

20 A. Oleg Ravitsky, last name is spelled R-A-V-I-T-S-K-Y.

21 Q. Where do you work?

22 A. Saint Joseph's, Bellingham, emergency room.

23 Q. What do you do there?

24 A. I'm an emergency room physician.

25 Q. How long have been employed as such?

1 A. Almost seven years as --

2 Q. Well, so you're an ER Doctor. Is that what you refer to
3 yourself as?

4 A. Correct.

5 Q. As an ER doctor, what kind of things do you work on, and
6 what kind of things do you see in a given day?

7 A. Anything from little babies to old people, traumas, heart
8 attacks, strokes, drugs, mental health.

9 Q. During the course of your work, do you ever sedate people?

10 A. Often, almost every single night.

11 Q. And for what kind of reasons do you sedate people?

12 A. For their safety, for the safety of others, to do a
13 procedure, depending what needs to be done.

14 Q. Are there different ways to sedate people?

15 A. There are medications. If we're dealing with mental
16 health patients or aggressive drug-induced psychosis, we
17 use certain drugs like Haldol, Ativan, Benadryl. If we're
18 doing a procedure, to sedate them for a procedure like an
19 abscess or a loose shoulder, we use other medication like
20 Ketamine and propofol.

21 Q. And you've been trained to use such medication for
22 sedation?

23 A. Correct.

24 Q. Where do you learn how to do that?

25 A. During residency.

1 Q. And approximately how many years have you been doing such?

2 A. After residency, 13 years.

3 Q. Are there side effects that accompany these kinds of
4 medications for sedation?

5 A. There are. They're usually mild and usually easily
6 managed. Whenever we sedate someone for mental health, we
7 will watch them and make sure they're breathing, but
8 usually, they do fine. Sometimes a medication like Haldol
9 can make patients a little built jittery, a little bit
10 agitated, but usually, we give another medication to go
11 along with it like Benadryl to help sedate them and calm
12 them down.

13 Q. Have you found some folks resistant to receiving sedation?

14 A. Sometimes when they're very psychotic or under a lot of
15 drugs, we need to increase the dose and double up the
16 medication, but usually with enough medications, most
17 people do fine.

18 Q. And as far as talking about doubling up doses and things
19 like that, have you ever in the past had trouble applying
20 the sedation medication, in other words, putting the
21 needle in someone's arm?

22 A. Umm, usually not. Usually, if someone is so agitated, we
23 have someone restrain them, security restrains them.
24 Police are there if they are at the scene with the
25 patient, and sometimes we have to kind of trick them, put

1 the needle while they're focusing on the thigh, we go in
2 on their shoulder, but almost always, it's better than if
3 you just try to force a patient down, more trouble can
4 come of that. They can get muscle breakdown. They can
5 injure themselves, and...

6 Q. Okay. So I want to talk to you about Brian Smith. Do you
7 recall working with Brian Smith on a given night?

8 A. I do.

9 Q. Okay. Have you reviewed your reports regarding that
10 incident?

11 A. I did.

12 Q. When did you do that?

13 A. Last night, I reviewed it.

14 Q. Okay. Can you tell us about the scene where Brian Smith
15 was in your hospital?

16 A. He was brought in by the police for a legal blood draw.
17 Usually, that's handled by the phlebotomist, but I heard
18 quite a bit of commotion. They put him in our mental
19 health secure room which is a padded room. I saw a lot of
20 agitation, kicking, punching, him screaming trying to
21 resist having a blood draw.

22 Q. Okay. Who is kicking and punching?

23 A. The patient.

24 Q. Okay. So you came in and you saw that?

25 A. Correct.

1 Q. What did you do?

2 A. Um, at that time point, I was informed by my charge nurse
3 and the house manager that the medical examiner had
4 requested that he be sedated for safety to facilitate a
5 blood draw.

6 Seeing how he was also a trauma, once a patient is
7 registered, it's also my job to make sure they're
8 medically cleared, and there was no way that could be
9 facilitated the way he was behaving. So he had to be
10 sedated for both his safety and the safety of others at
11 that point.

12 Q. All right. Have you ever sedated anyone before for a
13 blood draw?

14 A. No.

15 Q. All right. Now, in this particular case, did you hear
16 that Mr. Smith had concerns about allergies to sedation
17 medication?

18 A. He had first expressed allergies or religion (sic) to a
19 needle stick. Then he expressed allergies to one
20 medication, and then he said to everything. At that
21 point, I had actually reviewed his chart, and there were a
22 couple previous visits that I reviewed at that time that
23 showed no record of any allergies.

24 Q. So you had records that you were able to refer to?

25 A. Correct.

1 Q. So with the, with that information, did you make a
2 determination as to what type of medication to sedate
3 Mr. Smith?

4 A. I did. I decided Haldol, and I believe I used Ativan or
5 Benadryl -- I don't remember the second one -- was the
6 safest approach. Kind of calms them down slowly. Doesn't
7 suppress their breathing. We can watch them, and I
8 thought that was the safest approach to do.

9 Q. Can you tell us how the Haldol was applied?

10 A. It was applied with a needle shot to his shoulder. He was
11 resisting to his leg. It was stiffening it up, almost
12 kicking away the police and the nurse, and another nurse
13 was kind of able when he was distracted to inject it into
14 his shoulder.

15 Q. Okay. How did he react once he received the needle to the
16 shoulder?

17 A. He actually calmed down over the next few minutes. The
18 next 10 or 15 minutes, he calmed down nicely. They were
19 able to draw the blood, and I was able at that point to
20 assess him based on the mechanism, order any kind of
21 testing that would need to be done to clear him medically.

22 Q. Did he show any I guess difficulty breathing or maybe
23 irregular heartbeats, I guess, or any, I don't know, maybe
24 any psychotic event after receiving that medication?

25 A. No, he did fine. He was able to be walked out afterward

1 by the police. I think he left about an hour or two after
2 this.

3 Q. Is that a normal reaction to Haldol in your experience?

4 A. We give this medication at least once or twice a night,
5 and he did exactly what most patients do.

6 Q. Okay. All right. So was he actually unconscious during
7 the time that the blood draw took place?

8 A. He was sedated. He was not to the point that he could
9 breathe or respond. He was sleepy. Sedated I think would
10 be a safe word to use.

11 Q. That's a more medically appropriate term?

12 A. Yes, correct.

13 Q. He was sedated. How long was he sedated, was it --

14 A. An hour or two, I believe. I would have to double check
15 the records, but I believe an hour or two.

16 Q. I'm sorry? An hour or two?

17 A. Correct.

18 Q. Okay. All right, and while he was he sedated, the blood
19 draw you said went along in a normal --

20 A. Yeah.

21 Q. -- I guess a normal way?

22 A. The blood draw went fine. They were able to draw it.
23 Once he was sedated, he wasn't resisting and fighting them
24 as much. Haldol just basically takes the emotion out of
25 the patient. It kind of calms them down.

1 Q. Was the blood draw taken from his arm or some -- can you
2 tell us about that?

3 A. No, I wasn't the one who drew that. We have a
4 phlebotomist. I would assume it was arm, but I cannot --

5 Q. Can you tell me whether or not sedating Mr. Smith required
6 any removal of clothing or any other intrusive measures?

7 A. Hmm, I do not remember, but we can give the shot through a
8 muscle with clothes on if need be. Sometimes the patient
9 is just so psychotic that that is what we have to do, and
10 once that happens, then we can assess the patient and
11 remove the clothes if need be. So I do not remember on
12 him.

13 Q. So in your work, do you often remove clothing --

14 A. Correct.

15 Q. -- when people are being brought into the hospital --

16 A. Yes.

17 Q. -- and staying in the hospital; is that correct?

18 A. Correct, especially with a trauma, a high-speed accident
19 involving any kind of fatality, you definitely want to
20 expose the patient and see what's going on. You don't
21 want to miss somebody that's got a shot to the back or
22 big cut just by not examining them thoroughly.

23 Q. All right, but Mr. Smith was different. He wasn't brought
24 in for that purpose; is that correct?

25 A. No, not originally.

1 Q. But can't recall whether or his clothes were removed; is
2 that correct?

3 A. No.

4 Q. Thank you.

5 MR. RICHEY: Thank you. I have no further questions.
6 Counsel may have some questions for you.

7 CROSS-EXAMINATION

8 BY MR. RANDS:

9 Q. Good morning.

10 A. Good morning.

11 Q. You had mentioned you referred to a report earlier today.
12 You referred to a report or refreshed your recollection
13 with a report that you generated; is that right?

14 A. Last night, I looked at the medical record.

15 Q. What kind of a report is that?

16 A. It's my ER notes.

17 Q. Okay. Did you bring that with you today?

18 A. I did not.

19 Q. Okay. Is it easily accessible?

20 A. It is through medical records.

21 Q. Okay. Is it easily accessible for you?

22 A. Hmm, I would have to log onto a computer, and as long as
23 you have permission to access those, I can access them.

24 Q. Okay. Thank you. You had used the term "psychotic" a
25 couple of times.

- 1 A. Correct.
- 2 Q. Are you using that as an example?
- 3 A. Um, yes. When someone is acting irrational, looks like
4 they're either mental health or drug-induced psychosis,
5 kicking, punching, screaming, something out of normal
6 behavior.
- 7 Q. Okay. Is it fair to say in your use of the term
8 "psychotic," you're referring to unusual behavior?
- 9 A. Unusual behavior, correct.
- 10 Q. Okay, and in this particular case, did you think that
11 Mr. Smith's behavior as you describe it was unusual in
12 these circumstances?
- 13 A. It was.
- 14 Q. Okay. So when you're using the term "psychotic," it's not
15 like what I'm meaning, what I envision, but it means
16 something different to you?
- 17 A. Psychotic can be both mental, and it could be drug
18 induced, and he appeared to me to be a drug induced or
19 alcohol induced at that time.
- 20 Q. He appeared to be that way --
- 21 A. Correct.
- 22 Q. -- by his behavior in your opinion?
- 23 A. Yes.
- 24 Q. You never admitted him for any psychotic issue, did you?
- 25 A. No, not all psychotic patients -- in fact, most end up

1 going home.

2 Q. And it sounds as though it was somebody else's decision
3 other than yours to sedate him is what I heard you say.

4 A. That's what I was told originally, yes.

5 Q. Okay. So somebody decided he was to be sedated, and it
6 then became your job to achieve that; is that right?

7 A. To assess whether that was necessary and to do that.

8 Q. And did you have an opportunity to assess whether it was
9 necessary?

10 A. I did.

11 Q. Okay.

12 A. I tried to talk to him, and I tried to examine him, and he
13 would go from talking to very agitated and aggressive
14 behavior.

15 Q. And did you have an opportunity to see his interactions
16 with the various police officers that were in the room?

17 A. I was able to see when they were trying to draw the blood
18 and him fighting and kicking.

19 Q. And were you able to see their actions in terms of how
20 they interacted with Mr. Smith?

21 A. To me, it looked that they were trying to hold him down so
22 they could draw the blood.

23 Q. And this involved several people?

24 A. I think so.

25 Q. One of the things that you wanted to do is it sounds like

1 that you want to make sure that a person is medically
2 clear for the sedative that you're going to administer,
3 correct?

4 A. Correct.

5 Q. And one of the things that you do for that is, it sounds
6 like you review records?

7 A. Yes, I do.

8 Q. And did you review any records of where his primary
9 physician was in order to achieve this research?

10 A. No, the only thing that I was able to review at that point
11 was the ER or the hospital chart records.

12 Q. Okay. So you didn't have the opportunity to look at his
13 primary physician over in Everson?

14 A. No, not at night. That would not ever be available.

15 Q. My understanding is that there was some concerns that he
16 had about allergic reaction to sedatives. Is that your
17 understanding that that was raised?

18 A. He brought it up first to needles, and then to one
19 sedative, and then he said to any and all sedatives.

20 Q. And my understanding is also that there was some research
21 undertaken to determine whether this was correct or not?

22 A. Yes, by looking at his old chart. I think there was a
23 note from about a year ago that I reviewed.

24 Q. It's also my understanding that at this time that research
25 wasn't completely completed at the time of the sedation?

1 A. I went and looked for the records to see if there was any
2 mention of any allergies in the notes. So...

3 Q. That was the extent of your research?

4 A. Correct.

5 Q. Okay. Would you consider the administration of the
6 sedative in this particular case one of those instances
7 where you try and trick a person, and you indicated that
8 you will distract them and try and trick them. Was this
9 one of those occasions?

10 A. This was, because the patient was just fighting so much
11 that the, the needle could have broken up and broken
12 inside his thigh, and we would have had issues, so that's
13 why we had to distract him.

14 Q. Okay, but that's the way it was administered, by
15 distraction and trickery?

16 A. He was held down by an officer. A nurse tried to
17 administer it on one side, but that was not safely
18 feasible. So that's why he was, while he was focused on
19 another area, another nurse injected on the other side.

20 Q. For this particular procedure, did you see a warrant in
21 order to authorize you to do this?

22 A. No, usually the nurse, charge nurse and the phlebotomist
23 do that.

24 Q. So you didn't see a warrant that authorized you --

25 A. No.

1 Q. -- to stick him with a needle --

2 A. No.

3 Q. -- per se for sedatives? You indicated that most people
4 do quite well with what you decided to sedate him with?

5 A. Correct.

6 Q. Would you agree that there's circumstances where a person
7 falls out of the norm?

8 A. Very rarely, and usually, it's treatable with other
9 medications.

10 Q. When he was sedated, it doesn't sound like he's awake?

11 A. He is sleepy, I think that would be -- he would not be to
12 the point where he can't answer questions. He would be
13 sleepy to the point where he's sedated and not caring as
14 much about what is going on with him, but not to the point
15 that he's not awake and not able to answer anything. He's
16 arousable, and that's usually how this medication works.

17 Q. Is it safe to make important decisions while under the
18 influence of this sedative? I'm sorry. Let me rephrase
19 that. Is it wise to make decisions while under the
20 influence of this sedative?

21 A. Usually, if we were going to do a procedure on someone, we
22 would consent them before, but once you're under sedation,
23 I don't, I would not consent someone at that point.

24 Q. In this particular case, did you have Mr. Smith's consent?

25 A. At that point, no, but when someone comes to the ER, and

1 they're agitated, and their safety is in question, we have
2 to sometimes decide what's best for the patient, and that
3 was one of those circumstances.

4 Q. Okay, and his safety was only really at risk with respect
5 to the blood draw, correct?

6 A. The blood draw and trying to assess whether -- the police
7 also wanted him medically cleared once he was registered
8 to go to jail, so I couldn't assess him to decide if he's
9 medically cleared.

10 Q. The assessment that you did, it came after the sedative,
11 correct?

12 A. Yes, that was to facilitate the assessment to make sure
13 that he's medically cleared.

14 Q. There was no resistance to his physical examination of you
15 (sic) absent a blood draw, was there?

16 A. Absent a blood draw, he did not want any -- part of
17 assessing someone in such a high speed accident, we would
18 have to also get a CAT scan which would also require an IV
19 stick to administer contrast dye.

20 Q. And if you're going to do a medical exam on somebody, you
21 would want their consent for that, would you not?

22 A. You would, except when someone is brought in to the point
23 where they can't consent, and watching him interacting
24 with my nurses, with police, I did not feel that he was
25 safe, and watching him interact with me, I did not feel

1 that he was able to offer a consent to that.

2 Q. Did you ask him?

3 A. We tried to get him to consent. We tried to get him to
4 agree, and just say help us work with you, and but that
5 didn't seem feasible with him.

6 Q. What did you try to get consent to, the medical exam?

7 A. Both, we could put an IV in, so at that time they could
8 draw your blood and get medications and you -- or contrast
9 and get a CAT scan to make sure. Based on his car
10 accident and the way that he was acting, I couldn't rule
11 out a head injury or any kind of internal injury on him at
12 all.

13 Q. Can you tell me who made the decision to sedate?

14 A. The final decision to sedate was mine.

15 Q. I'm sorry?

16 A. The final decision to sedate was mine.

17 Q. When you administer the sedative, you did this with a
18 needle, correct?

19 A. Correct.

20 Q. And that requires piercing the skin and injecting a
21 chemical substance into the blood, correct?

22 A. It does.

23 Q. And this can be done through clothing or through a muscle
24 or both?

25 A. Yeah, it can be done whether the patient is disrobed or if

1 the patient doesn't allow that, we do it through clothing.

2 MR. RANDS: I don't think I have any other questions.

3 Thank you.

4 THE COURT: Mr. Richey?

5 MR. RICHEY: Thank you, Your Honor, a few more
6 questions.

7 REDIRECT EXAMINATION

8 BY MR. RICHEY:

9 Q. You indicated that the final decision to sedate was yours.
10 What did you base that decision on?

11 A. The way he was behaving. It was not safe to proceed with
12 any kind of blood draw without any sedation. At the same
13 time, I would not feel comfortable sending him off to jail
14 based on his car accident without having some kind of more
15 detailed assessment, whether exam or testing.

16 Q. Okay. Did you consult with others when you decided to
17 sedate?

18 A. No.

19 Q. Okay. I think earlier in your testimony, you mentioned
20 that you had heard either -- I think you said you heard
21 from the medical examiner that sedation was proper; is
22 that right?

23 A. I was told by my NTL, nurse team leader, who said that I
24 believe Dr. Goldfogel, although I cannot swear to that,
25 had requested that the patient be sedated for a legal

1 blood draw, and the house manager had agreed this was
2 appropriate.

3 Q. You also talked about an assessment, that, that you needed
4 to do an assessment prior to him going to jail. What is
5 the assessment? What is that all about, can you tell me?

6 A. So the police will sometimes bring a patient in after a
7 car accident or before they take them to jail for medical
8 clearance. Sometimes that involves giving them their home
9 medication. Sometimes they were in a car accident or got
10 assaulted, that will assess examining them and ordering
11 any kind of imaging necessary.

12 If the patient is able to communicate like you and I
13 are able to do right now, and he refuses, that's one
14 thing, but if a patient looks so agitated whether from
15 mental health or from drug induced and cannot make that
16 decision, sometimes we have to proceed in what's the best
17 interest for the patient's safety.

18 Q. And, and you indicated imaging. Was imaging done on
19 Mr. Smith?

20 A. There was. There was a CAT scan done and blood work
21 drawn.

22 Q. So blood work was drawn for the hospital purposes?

23 A. Correct.

24 Q. As well as for the, I guess, criminal purposes?

25 A. Correct.

1 Q. When was that done?

2 A. I believe it was done at the same time, but that would
3 have been done by the nurse or the phlebotomist, so I was
4 not the one doing that.

5 Q. That would be something that you want to do for the
6 assessment for the fit-for-jail?

7 A. Yes, correct.

8 Q. Okay. All right. So I asked you earlier about whether or
9 not he was wearing his own clothing and whether his
10 clothing was removed, and you indicated that you did not
11 know. I'm going to show you some photographs that were
12 taken of the Defendant while he was sedated.

13 A. Okay.

14 Q. And maybe you can tell me --

15 MR. RICHEY: Why don't you go ahead and mark those? I
16 would appreciate it.

17 Q. (By Mr. Richey) Maybe you can tell me whether or not
18 these are hospital gowns, or whether or not they would be
19 street clothing.

20 A. Okay.

21 THE CLERK: Plaintiff's Exhibits Number 7 and 8 marked.
22 (Plaintiff's Exhibit Nos. 7 and 8 marked.)

23 MR. RANDS: I've seen these. No objection for purposes
24 of this hearing.

25 THE COURT: All right.

1 Q. (By Mr. Richey) So I show you Exhibits 7 and 8. Can you
2 take a look at those and tell me if you believe those are
3 street clothing or hospital gowns?

4 A. That is definitely street clothes.

5 Q. How can you tell?

6 A. It looks like it's a shirt and jeans or some kind of
7 pants. A hospital gown looks completely different. It
8 looks like a gown. There's no buttons to it. There's a
9 tie. That is not our typical hospital gown at all.

10 Q. Okay. All right. Thank you.

11 MR. RICHEY: We submit for this purpose 7 and 8.

12 THE COURT: There -- they already stated no objection.
13 They will be admitted for this hearing.

14 (Plaintiff's Exhibits 7 and 8 admitted into evidence.)

15 MR. RICHEY: Thank you, Your Honor.

16 I have no further questions.

17 THE COURT: Anything else for this witness?

18 MR. KAIMAN: I would just like to ask a couple of
19 follow-up questions, Your Honor.

20 RE-CROSS-EXAMINATION

21 BY MR. KAIMAN:

22 Q. Doctor, you testified earlier that Mr. Smith was agitated
23 when you saw him in the emergency room --

24 A. Correct.

25 Q. -- on the night in question, was he competent?

1 A. Competent to make a decision?

2 Q. Yes, competent to make a medical decision.

3 A. I do not believe so at the time.

4 Q. You don't believe so?

5 A. Yes.

6 Q. What do you base that belief upon?

7 A. His behavior, his actions, trying to have a conversation
8 with him, tried to examine him.

9 Q. What did he tell you in conversation that led you to
10 believe he was mentally incompetent?

11 A. I do not remember specific words. I just remember the
12 scenario as it happened.

13 Q. And how did he behave that led you to believe he was
14 mentally incompetent?

15 A. He was acting what I would describe as someone who looked
16 under the influence of some medication or drug. He was
17 kicking. He was punching. He was not -- normally, when
18 someone tries to restrain you or hold you down, unless
19 someone is either psychotic or mental health, or drugs,
20 they are somewhat cooperative with the police or the
21 nurses. Usually in my experience, it's only when they are
22 so psychotic that they cannot comprehend or allow it that
23 they start fighting. The way that he was fighting is one
24 of the most aggressive I've seen in awhile.

25 Q. So if I understand your testimony, Doctor, somebody that

1 resists being restrained in your view is either psychotic,
2 or under the influence, or both?

3 A. In my experience in the ER, most patients who are -- we
4 always train them unless they need to be restrained, and a
5 lot of patients we're able to either talk to them kind of,
6 but they're usually psychotic when we have to restrain, at
7 least in my emergency room experience setting.

8 Q. And you make the decision who needs to be restrained?

9 A. Correct, and that's why we have a whole process. We have
10 orders for that. We have to have a face-to-face
11 assessment, and we have to document, and the nurses have
12 to assess, and so there's a whole process for that.

13 Q. So somebody who simply doesn't want to be restrained,
14 that's enough for you to be restrain them?

15 A. No, we have to look at the whole picture of the patient.

16 Q. And the whole picture here was what?

17 A. An agitated person who was kicking, punching --

18 Q. Does every agitated person who comes into your emergency
19 room get restrained?

20 A. No, depending on the situation. If we could talk to them,
21 if we could assess them, if we could have a meaningful
22 conversation.

23 Q. Do you force treatment on every agitated person that comes
24 into your emergency room?

25 A. No, only when they're a threat to themselves or others.

1 Q. Was Mr. Smith making suicidal threats?

2 A. No, but the way he was --

3 Q. So he wasn't a threat to himself then, was he?

4 A. The way that he was behaving could have lead to --

5 Q. Was he threatening to kill you?

6 THE COURT: Could you please allow the witness to
7 finish his --

8 Q. (By Mr. Kaiman) I'm sorry, Doctor. Go ahead and finish
9 you're your answer.

10 A. The way that he was behaving when they were trying to
11 sedate him, when they would hold him down, restrain him,
12 he was to the point where I thought his arm was going to
13 be broken.

14 Q. Was he threatening to kill you?

15 A. No.

16 Q. Was he threatening to harm any of the nursing staff?

17 A. No, but his behavior was to the point of trying to
18 restrain him, hold him down, could have led to their
19 injury as well.

20 Q. So if I understand your testimony, he wasn't making any
21 suicidal threats. He wasn't threatening you. He wasn't
22 threatening any of the staff, but you deemed that he was a
23 threat to himself or others?

24 A. Based on his actions.

25 Q. Okay.

1 A. And the point also that when someone gets so agitated
2 they're fighting, they can get muscle destruction leading
3 to rhabdomyolysis and kidney failure, so that's why we
4 sedated him -- and also get excited delirium.

5 Q. Was he in danger of kidney failure that night?

6 A. If he kept fighting the way he was, yes, he could get
7 muscle destruction, and also get on that based on excited
8 delirium.

9 Q. You're testifying that if he continued struggling and
10 resisted being restrained, he was in danger of kidney
11 failure?

12 A. He was in danger of muscle destruction which can lead to
13 rhabdomyolysis, and essentially that can lead to kidney
14 failure. That's why we sedate patients as well so they
15 don't keep fighting against restraints.

16 Q. I'm sorry. I'm not a physician. Muscle destruction would
17 lead to what?

18 A. Rhabdomyolysis which is medical term for muscle
19 destruction. That can clog up the kidneys, and that can
20 cause a patient to go into kidney failure, and that's when
21 patients, when they're even in restraints, they're pushing
22 against restraints for hours, that can lead to excessive
23 muscle destruction.

24 Q. Muscle destruction is a pulled muscle, right?

25 A. No, it's different. Rhabdomyolysis is if you're punching

1 and kicking and restraining, or even if you run a
2 marathon, you can have muscle destruction from that.

3 Q. Do people who run marathons get kidney failure?

4 A. Rarely, yes.

5 Q. Okay.

6 A. Rarely, but yes, it can happen.

7 Q. Did you review reports in the preparation of your
8 testimony here today?

9 A. I reviewed my notes from the event.

10 Q. And we've heard you testify that you disclosed some of
11 Mr. Smith's health records and his information in the
12 course of your testimony this morning?

13 A. I looked up his previous records in our computer system.

14 Q. Did you get his consent to access those records today?

15 A. It was part of preparing for the court, and that was
16 something that I did at that time to --

17 Q. So the answer would be no?

18 A. Not at that time, but it was part of what I looked at at
19 that time, also.

20 Q. Did you get his consent to disclose his private health
21 care information today?

22 A. No, I did not.

23 MR. KAIMAN: Thank you, sir.

24 THE COURT: Anything else?

25 MR. RICHEY: No, Your Honor.

1 THE COURT: Thank you, Doctor. You may step down.
2 You're free to go for this morning, I think.

3 I don't know how long Mr. Richey is going to be. Do
4 you want to go forward, Mr. Roche?

5 MR. ROCHE: I think Mr. Richey will be back quickly,
6 Your Honor, but I know the State based on the new filing
7 of the motion that Dr. Ravitsky has testified to, the
8 State would also like to recall Trooper Beattie, and he's
9 available, Your Honor.

10 THE COURT: What do you need to do that for?

11 MR. ROCHE: I think when we had him present testimony
12 based on the motions that were filed previously, there
13 were portions that we didn't put a lot of focus on his
14 testimony. We were, I think we were faced with five
15 different motions at that time, and now we have a sixth
16 motion.

17 THE COURT: I understand, but what he's going to
18 provide that we didn't just hear from the doctor?

19 MR. ROCHE: Decisions about the use of force that was
20 used by Washington State Patrol in executing the court's
21 search warrant in this case.

22 THE COURT: All right.

23 MR. RANDS: Your Honor, Trooper Beattie has already
24 given full testimony in my opinion as to the circumstances
25 and what led to his decision. Additional information I

1 don't think is forthcoming.

2 THE COURT: I think we'll go ahead and hear from him
3 while we've got this opportunity. Otherwise, we may not
4 be able to.

5 MR. ROCHE: The State would recall Trooper Brad
6 Beattie, Your Honor.

7 THE COURT: Please raise your right hand.

8 **TROOPER BRAD BEATTIE**

9 Having been duly sworn, testified, as follows:

10 THE COURT: Have a seat, please.

11 DIRECT EXAMINATION

12 BY MR. ROCHE:

13 Q. Trooper Beattie, perhaps you could refresh our
14 recollection. Who are you employed by?

15 A. The Washington State Patrol.

16 Q. Okay, are were you employed by state patrol on December
17 5th, 2014?

18 A. Yes, sir.

19 Q. Okay. You were the primary investigating officer in this
20 particular case?

21 A. Yes, sir.

22 Q. Okay. Do you recall being at the hospital with Mr. Smith
23 on December 5th, 2014?

24 A. Yes, sir.

25 Q. Okay. Can you describe Mr. Smith's behavior at the

1 hospital to us?

2 A. It was very erratic. He was -- once we had him
3 restrained, he was attempting to punch and kick to prevent
4 the blood draw.

5 Q. Okay. Let's talk about the blood draw. I know you
6 testified previous to this. Can you walk us through
7 chronologically your attempts to execute the search
8 warrant in this case?

9 A. In this case, I secured the search warrant. At that time,
10 Trooper Williams had brought Mr. Smith into the hospital.
11 When I went in, Trooper Williams stated that Mr. Smith was
12 saying he was not going to allow a blood draw. I
13 contacted Mr. Smith. He stated the blood draw was against
14 his religion. He also stated he was afraid of needles.

15 At that time, he also stated he was not going to allow
16 us to get a sample of his blood. We, we then walked him
17 to a separate room where he was asked to sit on a hospital
18 bed, and he refused. At that time --

19 Q. Can I stop --

20 A. Yeah, go ahead.

21 Q. The separate room that you walked him to --

22 A. Yes, sir.

23 Q. -- is that the mental health room in the emergency room at
24 Saint Joseph's?

25 A. I don't specifically know that that's a mental health

1 room. It was a separate room.

2 Q. Can you tell us a little bit about what the difference is
3 in that room compared to the room that you had originally
4 been in?

5 A. That room was towards the back of the hospital more
6 isolated. It was empty. There was nothing in it. It
7 appeared that the walls had some padding on them.

8 Q. Okay. What, what do you think some of the decision to
9 move to that room was based on?

10 A. It was based off of Mr. Smith's statements that he was not
11 going to allow us to get a blood draw.

12 Q. Okay. Did you decide to move to that room, or did the
13 hospital ask you guys to take the blood draw process and
14 move it over to that location?

15 A. The hospital asked us to move it.

16 Q. Okay. Did they indicate to you why they were asking you
17 to move to that second room?

18 A. I don't recall.

19 Q. Okay. Let's go to the second room now. Did Mr. Smith's
20 behavior change at all when you went into that room?

21 A. Yes, sir.

22 Q. Can you describe how it changed?

23 A. Again, we requested him to sit on the hospital bed, and he
24 refused, and then he, he had an aggressive stance with us.
25 He began to tense up his muscles.

1 Q. Can you -- I know this is probably a difficult thing to
2 describe in words, but can you describe "tense up his
3 muscles"? What does that mean?

4 A. It means that he was standing in front of me. He began
5 to, you could see the flexion in his biceps, shoulders.
6 You could tell he was starting to get, I don't know how
7 other to describe it, tense, than tensing the upper body
8 muscles.

9 Q. Was the hospital staff concerned by him tensing up his
10 muscles?

11 A. I don't recall.

12 Q. Okay. At that point, did you again try to have a blood
13 draw process?

14 A. Yes, sir. At that time, we were trying to get him onto
15 the hospital bed, and due to the aggressive stance and him
16 stating he wasn't going to get on the hospital bed, myself
17 and Trooper Williams, I don't recall if there was another
18 trooper in there, and several security guards, we
19 attempted to forcefully place him on the bed.

20 Q. Maybe you can break that down for us a little bit? How
21 many of you exactly were trying to get Mr. Smith onto this
22 bed with the use of force?

23 A. I believe there was four or five of us. I don't recall
24 the exact number.

25 Q. Okay. How, how big are you, Trooper Beattie?

- 1 A. I'm about six three, 220.
- 2 Q. Okay. How about the other three people that were
3 assisting you, were they, were they large people?
- 4 A. Yes, sir.
- 5 Q. Physically fit people?
- 6 A. From what -- I don't specifically remember the security
7 guards. Myself and Trooper Williams, yes.
- 8 Q. How did the process of restraining Mr. Smith on the bed go
9 for you?
- 10 A. It did not go well. He immediately began to attempt to
11 prevent us from putting him on the hospital bed. He was
12 pulling his arms away. He was pulling his arms in close
13 to his chest kind of huddling over making it difficult for
14 us to get his arm stretched.
- 15 Q. Was Mr. Smith saying anything to you while this was
16 happening?
- 17 A. He was saying he was not going on the hospital bed, and we
18 were not going to get him on the hospital bed.
- 19 Q. Okay. Was his behavior concerning to you?
- 20 A. Yes, sir.
- 21 Q. Okay. Was Mr. Smith successful in resisting your efforts
22 to restrain him?
- 23 A. Yes, sir.
- 24 Q. Even with the four of you, he was still having success in
25 fighting you off?

- 1 A. Yes, sir.
- 2 Q. Did you ultimately get him onto the bed?
- 3 A. At this point, I drew my Taser, and he complied with me at
4 that point and got on the hospital bed.
- 5 Q. Okay. What happened once he was on the bed? Were you
6 able to further restrain him?
- 7 A. We restrained his wrists. One, his left wrist to the --
8 the hospital bed had bars on the side of it. We
9 restrained both wrists and both ankles to the bar on the
10 side of the bed.
- 11 Q. Okay. As this was happening, were you concerned about
12 your own safety?
- 13 A. Yes, sir.
- 14 Q. Were you concerned about the safety of Trooper Williams?
- 15 A. Yes, sir.
- 16 Q. Were you concerned about the safety of the Saint Joe's
17 Hospital staff that were there?
- 18 A. Yes, sir.
- 19 Q. Did you still attempt to attain a sample of Mr. Smith's
20 blood despite that?
- 21 A. Yes, sir.
- 22 Q. And were you successful at that time at obtaining a sample
23 of his blood?
- 24 A. No, sir.
- 25 Q. Okay. What prevented you from obtaining a sample of his

1 blood once he was restrained to the bed?

2 A. Once he was restrained to the bed, any time the nurse or
3 phlebotomist would get a needle close to his arm or
4 anywhere on his body, he was restrained, but there was a
5 little bit of slack. So he would pull his arms. He was
6 kicking his legs. He was flailing his arms, moving back
7 and forth, physically moving the hospital bed.

8 Q. Okay. Do you recall whether you had an opportunity to
9 speak with Dr. Ravitsky in this case?

10 A. Yes, sir.

11 Q. Did you talk to him in that hospital room on December 5th,
12 2014?

13 A. I believe it was in the hallway.

14 Q. Okay. Who suggested the use of sedatives to help secure
15 and execute the search warrant?

16 A. The doctor did.

17 Q. Okay. Did you support that decision?

18 A. Yes, sir.

19 Q. Okay. Did you feel that that decision was necessary to
20 secure the safety of the Washington State Patrol troopers
21 and the hospital staff?

22 A. Yes, sir.

23 Q. Okay. I would like to ask you, were you concerned about
24 securing evidence in this case?

25 A. Yes, sir.

1 Q. Why were you concerned about securing evidence?

2 A. Evidence in this case is fleeting. There's possibly
3 evidence in his blood, and the longer period of time it
4 takes to obtain that evidence, the more evidence that is
5 going away potentially.

6 Q. Okay. Were you concerned about the nature of the charges
7 in this particular case?

8 A. Yes, sir.

9 Q. Why were you concerned about the nature of the charges?

10 A. It's a very serious case and incident.

11 Q. Okay. While you were at the hospital, were you informed
12 by hospital staff that the victim in this case had
13 succumbed to his injuries and passed away?

14 A. Yes, sir, I believe the medical examiner told me that over
15 the phone.

16 Q. Did you feel confident at that point that your
17 investigation was investigating a vehicular homicide?

18 A. Yes, sir.

19 Q. How many blood draws do you think that you've done in your
20 career as a trooper?

21 A. I've arrested approximately 180 DUIs, and probably
22 probably 40, 50 of them have been blood draws.

23 Q. So in the 40 or 50 blood draws experience that you have,
24 would you have described December 5th, 2014, as an
25 atypical blood draw process?

1 A. Yes, sir.

2 Q. And can you explain why was this different than your
3 average blood draw?

4 A. I've never had to restrain someone to a hospital bed, and
5 I've never witnessed anyone being sedated to get a blood
6 sample from them.

7 Q. Okay. Have you ever encountered people who were resistant
8 to the process of having their blood drawn?

9 A. Not to this extent.

10 Q. Okay. I would like to ask you, was Mr. Smith's behavior
11 radical in your, in your impression?

12 A. Yes.

13 Q. Okay.

14 MR. ROCHE: No further questions. Thank you.

15 THE COURT: Cross-examination?

16 CROSS-EXAMINATION

17 BY MR. RANDS:

18 Q. Was Mr. Smith's behavior consistent with somebody that was
19 afraid?

20 A. Not in my opinion.

21 Q. You don't actually know what's going on in his head at
22 this time, do you?

23 A. No.

24 Q. So you don't know what his fears are?

25 A. No, sir.

- 1 Q. You don't know what his phobias are?
- 2 A. No, sir.
- 3 Q. So you don't really know what's driving him?
- 4 A. No, sir.
- 5 Q. At the time of this blood draw, you were 11 months on your
6 own, correct?
- 7 A. I believe I had more time than that. I would have to
8 check though.
- 9 Q. Okay. We talked about your time before in another
10 hearing, correct?
- 11 A. Yes, sir.
- 12 Q. At that time, it was your best recollection that it was
13 about 11 months?
- 14 A. Yes, sir, and since then thinking about it, I know I had
15 more than 11 months on.
- 16 Q. Any idea how much more?
- 17 A. I don't know exactly.
- 18 Q. Okay. Not six months more, but maybe a month or two more?
- 19 A. I think it was significantly more time than 11 months.
- 20 Q. Okay, but you don't know how much?
- 21 A. No, sir.
- 22 Q. You -- in the course of your employment to-date, 180 DUI
23 arrests, right?
- 24 A. Yes, sir.
- 25 Q. Not a hundred and eighty at the time of this case?

1 A. No, sir.

2 Q. Certainly not 40 or 50 blood draws at this time of this
3 case?

4 A. No, sir.

5 Q. This was number what blood draw for you?

6 A. I don't recall, sir.

7 Q. Among your first?

8 A. I don't recall.

9 Q. We also talked about this sequence of events a little
10 while ago. I would like to go back to that conversation,
11 if we could. Mr. Smith was perfectly polite and
12 cooperative up even through arresting him, correct?

13 A. Yes, sir.

14 Q. In fact, the first, let's call it uncooperativeness, that
15 happens at the hospital, correct?

16 A. Yes, sir.

17 Q. And in fact, it doesn't even happen with you. It happens
18 with Trooper Williams, correct?

19 A. Yes, sir.

20 Q. And it happens when Trooper Williams and him are
21 interacting in a room where he's being told that his blood
22 is going to be drawn?

23 A. I don't know exactly what was said in that room, sir.

24 Q. You do know that it was at that time that your assistance
25 was called for to help do the blood draw?

1 A. Yes, sir.

2 Q. You do know that when you came in, you had conversation
3 with Mr. Smith about the fact that his blood was going to
4 be drawn --

5 A. Yes, sir.

6 Q. -- and you do recall that he said to you that he didn't do
7 well with needles?

8 A. Yes, sir.

9 Q. And it was about that time that you first saw
10 uncooperativeness, yourself?

11 A. Yes, sir.

12 Q. And the uncooperativeness started with not getting on a
13 bed in a particular room, correct?

14 A. Yes, sir.

15 Q. And I just want to be clear about the sequence, because
16 it's a little muddled from my experience, but we begin in
17 a room, and there's a bed that he is not wanting to get
18 onto?

19 A. Yes, sir.

20 Q. And he's not wanting to get onto this bed because you guys
21 tell him that he needs to get on in order to draw his
22 blood?

23 A. Yes sir.

24 Q. Ultimately, he gets on this bed?

25 A. Yes, sir.

- 1 Q. That's in the first room that we're in?
- 2 A. That's the second room, sir.
- 3 Q. Okay. So in the first room, he doesn't get in any bed?
- 4 A. I believe he was seated in a chair.
- 5 Q. Okay, and he's asked to get on a bed in the first room?
- 6 A. In the second room.
- 7 Q. In the second room?
- 8 A. Yes, sir.
- 9 Q. All right. So there's this -- seated in the chair, he's
- 10 not flexing, fighting, punching, any of those things,
- 11 correct?
- 12 A. No, sir.
- 13 Q. We then move to the second room?
- 14 A. Yes, sir.
- 15 Q. And is that the room that the doctor described?
- 16 A. Yes, sir.
- 17 Q. Okay, and again, there's a bed there?
- 18 A. Yes, sir.
- 19 Q. And it's that bed that again he states he doesn't want to
- 20 get on?
- 21 A. Yes, sir.
- 22 Q. And you tell him that he needs to get on the bed because
- 23 it's for blood draw purposes?
- 24 A. Yes, sir.
- 25 Q. And it's also to strap him down?

- 1 A. I don't believe at that time my intention was to strap him
2 down to the bed, sir.
- 3 Q. Okay. So he gets on the bed?
- 4 A. Eventually.
- 5 Q. Eventually, but he gets on the bed only after you place
6 your Taser on his chest, correct?
- 7 A. Yes, sir.
- 8 Q. And you tell him that you will Tase him unless he gets on
9 the bed?
- 10 A. Yes, sir.
- 11 Q. Okay, and in response to that, he capitulates. He gets on
12 the bed?
- 13 A. Yes, sir.
- 14 Q. And then the first blood draw attempt is made in this
15 room?
- 16 A. Yes, sir.
- 17 Q. And during the first blood draw attempt, he is not tied
18 down at this point?
- 19 A. He was, sir.
- 20 Q. All right. So first blood draw attempt, and he's already
21 tied down, or does the first blood draw attempt lead to
22 the tie down?
- 23 A. No, he was tied down once he got onto the bed.
- 24 Q. And he did not want to be tied down?
- 25 A. No, sir.

1 Q. And in doing the tie down, it took fair -- some people to
2 help with that?

3 A. Yes, sir.

4 Q. Okay, and the purpose of the tie down was -- at this
5 particular point, he hadn't flinched, kicked, or punched
6 prior to being tied down, did he?

7 A. Yes, he did, sir.

8 Q. Seated in the chair in the other room or first blood draw?

9 A. When he was standing in the room, and when we were
10 requesting for him to get on the bed.

11 Q. Okay. So he resisted in terms of getting on the bed?

12 A. Yes, sir.

13 Q. Okay, and do you remember when we talked about this a
14 couple of weeks ago as well?

15 A. Not specifically, sir.

16 Q. Do you remember my question when I asked you if he was
17 yelling and screaming, your answer was no, he wasn't?

18 A. I don't recall that. I don't recall him yelling or
19 screaming.

20 Q. Okay.

21 A. At which point are you talking about, I guess?

22 Q. Well, I'm trying to go through it --

23 A. Yes, sir.

24 Q. -- chronologically. So my understanding from your
25 previous testimony is that while there might be some

1 physical movements and actions, he isn't yelling,
2 screaming, or acting crazy?

3 A. At what point?

4 Q. The very first attempt.

5 A. No, during the blood draw process, all three attempts, he
6 was screaming, yelling, flinching, flailing.

7 Q. I'm more concerned about what he was saying, the volume of
8 his voice. So your testimony today is that he was
9 screaming and yelling?

10 A. Yes, sir. During the blood draw attempts, the first one
11 and the second one, he was yelling.

12 Q. Okay. Yelling doesn't affect a person's ability to draw
13 blood, does it?

14 A. No, sir.

15 Q. It was his flinching and moving that bothered you and the
16 medical staff, correct?

17 A. Correct, sir.

18 Q. In fact, it was the nurse who specifically said if he
19 keeps moving, this is a problem?

20 A. Yes, sir.

21 Q. From the point of the arrest to the point of arriving at
22 the hospital, how much time had elapsed?

23 A. I don't specifically recall, sir.

24 Q. Okay. Would your previous answer and testimony stand?
25 Would you rely on that?

1 A. Okay. Thank you.

2 Q. Previously, you had mentioned that it was a group decision
3 to sedate Mr. Smith. Are you now changing that testimony
4 to it was the doctor's decision?

5 A. What -- can I explain?

6 Q. Is your answer different now than it was before is all I'm
7 asking you?

8 A. I need to explain what my answer was.

9 Q. If it's not that straightforward, I guess explain it to
10 me.

11 A. What I meant by a group decision was the doctor initially
12 brought up the sedation. It was not my idea. I did not
13 approach the doctor with let's sedate him. He said I'm
14 thinking the next step is sedation, and I agreed with him.
15 I, if that's what we need to do, I agree we need to sedate
16 him.

17 Q. So you endorsed this decision?

18 A. Yes, sir.

19 Q. Okay. Just one moment. When the needle was not closer,
20 when an attempt to draw his blood was not active, for lack
21 of a better word, Mr. Smith acted differently than during
22 the blood draw process, didn't he?

23 A. Yes, sir.

24 Q. He acted calmer?

25 A. Yes, sir.

1 Q. Thank you.

2 REDIRECT EXAMINATION

3 BY MR. ROCHE:

4 Q. You had done some field sobriety tests with Mr. Smith,
5 hadn't you?

6 A. Yes, sir.

7 MR. RANDS: Relevance at this point as to the blood
8 draw, Your Honor. My understanding was the testimony was
9 for the execution of warrant.

10 MR. ROCHE: It goes to Mr. Smith's state of mind at the
11 time of the execution of the warrant.

12 THE COURT: There was a question as to how he was
13 behaving at one point as opposed to another. If that's
14 what you're inquiring to, you can do that.

15 Q. (By Mr. Roche) Actually, let's go back to just before
16 that. Before you performed field sobriety tests, you
17 asked Mr. Smith to get some paperwork out of his car; is
18 that correct?

19 A. Yes.

20 Q. What did Mr. Smith do when you asked him to retrieve --
21 was it license and insurance information?

22 A. I believe it was registration and insurance.

23 Q. What did Mr. Smith do when you asked for those things?

24 A. He went in the vehicle, locked all the doors to the
25 vehicle, and then exited the vehicle.

1 Q. Was that consistent with what you had asked him to do?

2 A. No, sir.

3 Q. Had your requests to him been unclear in any way?

4 A. No, sir.

5 Q. Why do you think he locked his car doors? Did you ask
6 him?

7 MR. KAIMAN: Speculation.

8 MR. RANDS: Speculation.

9 THE COURT: Sustained.

10 Q. (By Mr. Roche) Did you ask him why he locked his car
11 doors?

12 A. Yes, sir.

13 Q. What was his response?

14 A. I can't specifically remember how he responded, sir.

15 Q. Did you consider that to be unusual behavior at that time?

16 A. Yes, sir.

17 Q. Is that the beginning of your investigation for driving
18 under the influence?

19 A. Yes, sir.

20 Q. Was it something that you considered in your decision
21 making process?

22 A. Yes, sir.

23 Q. You asked him to submit to a portable breath test,
24 correct?

25 A. Yes, sir.

- 1 Q. How did that process go?
- 2 A. As far as -- can you be more specific?
- 3 Q. Did it take multiple attempts for you to actually secure a
4 portable breath test reading from Mr. Smith?
- 5 A. Yes, sir.
- 6 Q. Did he twice fail to blow into your portable breath
7 testing machine?
- 8 A. Yes, sir.
- 9 Q. Did he mimic offering you a breath sample?
- 10 A. Yes, sir.
- 11 Q. But you got no reading?
- 12 A. Correct, sir.
- 13 Q. How did you, how were you aware that he was mimicking
14 breathing into it?
- 15 A. Experience. I've had a lot of people who have done
16 similar actions.
- 17 Q. Okay, and your PBT didn't get a reading on those two
18 attempts?
- 19 A. Yes, sir.
- 20 Q. You had a successful third attempt?
- 21 A. Yes, sir.
- 22 Q. Did you show Mr. Smith what the breath alcohol
23 concentration reading from your PBT was? Did you turn
24 your PBT around and show him what your result was?
- 25 A. I don't recall if I did.

1 Q. Did you tell him what the result was?

2 A. I don't recall.

3 Q. Did you place him under arrest immediately after he
4 submitted, and you got a reading?

5 A. Yes, sir.

6 Q. Okay. Okay. At the hospital, based on the experiences
7 that you were having with Mr. Smith, do you think it would
8 have been possible to have completed the execution of the
9 search warrant securing his blood without a sedative?

10 A. No, sir.

11 MR. ROCHE: No further questions.

12 THE COURT: Anything else for Trooper Beattie?

13 MR. RANDES: No, Your Honor.

14 THE COURT: Thank you. You may step down.
15 Any further testimony?

16 MR. RICHEY: No, Your Honor.

17 THE COURT: Okay. I guess we should probably establish
18 just some sort of protocol here. Which order do we want
19 to do the motion arguments in, and do you want to take, I
20 would prefer to take them one at a time. I think that
21 would make it easier for everybody if we just have to
22 focus on one issue at a time.

23 MR. RICHEY: That's fine, Your Honor. I was just going
24 to ask if you had already made some decisions on the
25 previous rulings. I know that you asked to be provided an

1 argument in writing.

2 THE COURT: I'm prepared to give both sides an
3 opportunity to address those things, if you want. If you
4 just want to rely on your briefing, that's fine, too.

5 MR. RICHEY: All right. Thank you, Your Honor.

6 THE COURT: Does the Defense have a particular
7 preference as to which order we go in?

8 MR. RANDS: No, Your Honor. I think chronological
9 probably makes sense. I had suggested originally
10 submitting arguments in writing. I spent a significant
11 amount of time writing thoughts out. I don't have much to
12 add.

13 THE COURT: That's fine.

14 MR. RANDS: I had come to this hearing expecting Your
15 Honor to give us certainly an opportunity, but I don't
16 think that there's anything that I need to add in any way,
17 shape, or form unless Your Honor has specific questions
18 that might have bearing on the argument on your decision.

19 THE COURT: I have read the written submissions, so I
20 think if that's what your argument is, then we can go from
21 there.

22 MR. RICHEY: I would take the same position, Your
23 Honor.

24 THE COURT: All right. Well, this is probably going to
25 be pretty close to chronological, I guess. If it isn't,

1 just bear with me.

2 The first issue raised is that of the field sobriety
3 tests, whether they were performed in a proper manner,
4 whether they met current or certain standards, and whether
5 or not they should be admissible at trial. There was
6 discussion and argument made about the nature of the
7 tests, whether they met certain standards set out by a
8 federal agency, and whether they had to be done in a
9 particular way, or a particular mechanism, method, and
10 whether or not it was followed.

11 I have looked at the cases that were cited. I reviewed
12 most of those, and it's my belief in this case, the field
13 sobriety tests as given are all generalized as acceptable
14 tests in this field. They are generally given by law
15 enforcement officers in various jurisdictions. They are
16 accepted by the courts as evidence of a person's physical
17 condition at the time, and I think that any issues as to
18 whether or not the tests were administered in a way that
19 is determined to be the appropriate way or in a way that
20 is consistent with some sort of agency, federal agency's
21 determination are matters of fact, and are matters that go
22 to the weight of the evidence rather than its
23 admissibility.

24 I see nothing in the nature of the field sobriety tests
25 performed here, the physical tests including up to and

1 including the administration of the horizontal gaze
2 nystagmus test that is such that it would be subject to
3 those tests being excluded as evidence.

4 They are admissible. The weight to be given to that
5 evidence and those tests would be that to be determined by
6 the jury, and counsel may, I think, cross-examine pretty
7 effectively as to whether or not the tests should be
8 considered reliable in this particular case, and so I
9 think that they would not be suppressed.

10 There's a motion to suppress any statements made
11 pursuant to CrR 3.5, essentially statements against
12 interested made by Mr. Smith. Now, in my reading of the
13 record as I've seen it and heard it, basically, the only
14 statements Mr. Smith made were those made at the hospital
15 about his resistance to the tests. There's no
16 interrogation. There was no testimony that I heard at any
17 point during the pretrial hearings that he made any
18 admissions, other than to state that he had gone, left the
19 Christmas party at his place of employment, gone to the
20 Rusty Wagon with his family for dinner and was on his way
21 home. All of those, I think, occurred prior to the time
22 that he was read his Miranda Rights, but they are also, I
23 think, the sort of basic inquiries made by an officer in
24 just determining what's happened here when he got to the
25 scene of the offense and the event. There's a car.

1 There's a person who has been seriously injured. There's
2 a person who has been identified to him as the driver.
3 He's asking questions just to figure out what has occurred
4 here, and so those statements are, first of all, not
5 necessarily incriminating, and not at all incriminating,
6 because he denied having consumed alcohol, and secondly,
7 they are just the initial responses to inquiries made by
8 the officer not as investigating the crime, but merely to
9 determine if Mr. Smith was, in fact, the operator of the
10 vehicle, and what had occurred on that evening in that
11 location.

12 Beyond that, it appears to me that all of the
13 statements were made in a voluntary manner. Mr. Smith was
14 not interrogated according to all of the testimony I've
15 heard. Nobody sat down and asked him questions or
16 discussed the events with him or talked about any of the
17 specifics of the potential charges.

18 The statements were those made at the hospital about
19 not being comfortable with needles, being allergic to
20 sedatives, not being willing to allow the blood draw to
21 occur. Those were all made after he had been given his
22 Miranda warnings at the scene by the officer. He had
23 expressed a desire to speak with counsel, and this is
24 going to overlap a little into the CrR 3.1, and so having
25 made that expression to the officer, it seems to me that

1 the troopers that I heard from in these pretrial hearings
2 did not indicate that they had asked him any questions
3 about the event or about his condition at that time, and
4 so I don't think that any of statements made by Mr. Smith
5 would be suppressed in this case because they are not
6 subject to any violation of Miranda Rights that were given
7 to him, and the statements that he would have made, did
8 make or would have made to the officers in the hospital
9 are really related to his resistance to the blood draw,
10 and there will be ample testimony about that.

11 The more difficult question for the Court was that
12 raised by CrR 3.1 as to whether or not Mr. Smith was
13 denied his opportunity to talk, to have counsel. He
14 indicated he wished to do so. He was told by the trooper
15 that that would happen when he got to the jail.

16 He was in the back of the patrol car for a period of
17 time by himself. It's not clear to me whether he had his
18 cell phone. It sounds as though he may have had it on his
19 person at the time, but he may have also been restrained
20 so that it wasn't easy for him to use it.

21 There's no evidence as to whether or not cell phone
22 service was available at this location. I can't make an
23 assumption that it was or it was not. So I don't know if
24 it would have been possible for him to make a phone call
25 from the back of the patrol car.

1 He was then taken ultimately once the other trooper
2 arrived to the hospital for the blood draw, because the
3 field sobriety tests indicated to Trooper Beattie that he
4 had a potentially impaired driver, and he wished to gather
5 the evidence necessary with regards to that.

6 He had the physical tests. He had the PBT which
7 indicated to him that Mr. Smith may have been consuming
8 alcohol, and therefore, because it was a vehicular assault
9 and possibly a vehicular homicide, because it was known
10 that the victim was not in very good condition, that he
11 chose to exercise the rights under the statute and to have
12 a blood draw rather than a breath test done.

13 When they got to the hospital, there was a point in
14 time where Mr. Smith asked to make a phone call and was
15 allowed to. He did not call an attorney. He called his
16 wife according to the testimony that I had.

17 He was not given a list of attorneys. There was no
18 list there of public defenders. There was no list of
19 phone numbers for attorneys or a telephone book given to
20 him that would allow him to try to find some attorney who
21 would take late-night calls regarding DUI or other events.

22 On the other hand, he was not at the place where those
23 lists are generally kept. He was at the hospital, Saint
24 Joseph Hospital, and what we have here is a circumstance
25 where the event occurred in a fairly remote location, some

1 distance from the police station where he would have been
2 taken, such as the jail most likely; some distance from
3 the location of the hospital where the blood draw was to
4 be done; some distance from the traditional places where a
5 person could be put in touch with counsel.

6 It is also difficult to know what the circumstances
7 were about the phone call that Mr. Smith actually made and
8 what attempts he made, whether he called his wife and
9 asked for a number for an attorney and didn't get a chance
10 to call the attorney after he got the number or what
11 happened. We don't have any evidence about that.

12 So the question is was he unnecessarily and
13 inappropriately delayed from having an opportunity to talk
14 to counsel about the issue of what was going to happen,
15 particularly, in this case about the blood draw, and in
16 researching this matter and looking at the cases cited to
17 me, I found many references to the case of State v.
18 Schultz, and I looked at State v. Schultz, and State v.
19 Schultz is a case very much on point with the one that we
20 have here.

21 In those circumstances, the case was that Mr. Schultz
22 was not allowed to speak with counsel prior to the blood
23 draw which was done pursuant to a search warrant. The
24 court stated there, and the law appears to continue to be
25 that the evidence that might have been obtained, in this

1 case the blood draw results by virtue of actions by the
2 state, without the defendant having the opportunity to
3 speak with counsel, that that evidence can only be and is
4 only to be excluded if the failure to provide counsel in
5 any way tainted the evidence that was gathered, and I
6 think that's the word used in Schultz. Was it tainted by
7 the delay? Was it tainted by his inability to contact
8 counsel? And in that case, the court said there was a
9 warrant. There was a warrant pursuant to the statute
10 exactly as we have here, and the warrant was granted to
11 allow for a blood draw, and that all that could have
12 happened had Mr. Schultz, and in this case Mr. Smith
13 talked to an attorney was the attorney had said there's a
14 warrant. You have to let them take the blood draw.
15 That's all the advice he could have received, because the
16 warrant overrides any other choice.

17 When it comes to the breath test, the attorney can say
18 you don't have to take it. Here are the consequences.
19 Here's what happens if you don't take it. You do it or
20 don't do it, it's your choice, but at least the person can
21 make a decision based on choice.

22 When it comes down to a warrant issued under this
23 statute, there is no choice. The warrant controls, and
24 the blood draw will occur, and so under this circumstance,
25 I find this to be very much like the State v. Schultz case

1 in that there is no practical advice that could have
2 helped Mr. Smith, and the controlling factor here is the
3 warrant, and therefore, I would not find that his rights
4 under CrR 3.1 were violated to the extent that the
5 evidence of the blood draw or the evidence of his behavior
6 at the hospital cannot be considered by the jury. That
7 will not be excluded from the trial.

8 There are other issues around the blood draw that were
9 raised by Defense. One is the failure to present the
10 warrant or to serve the warrant on Mr. Smith prior to the
11 blood draw. The testimony as I heard it from the trooper
12 was that the warrant was actually presented to Mr. Smith
13 and refused. He was asked if wanted to see it, and he
14 said no, and he was asked -- the trooper offered, here,
15 I'll give it to you, and he said no, I don't want it.
16 That's paraphrasing, of course, but that's essentially
17 what happened. He refused it. He had the opportunity,
18 was offered the warrant and was given the opportunity to
19 see it and to have it and chose not to.

20 The warrant was presented then as required and was
21 attempted to be served on him. If he refused to take it,
22 that's Mr. Smith's issue and not a violation by the
23 officers. Therefore, there is no reason to suppress the
24 blood draw because of the failure to present the warrant,
25 itself.

1 Failure to provide access to counsel I have already
2 addressed. The question of special evidence warnings,
3 whether or not he was told that he would have the
4 opportunity to have tests done on his own, having
5 independent tests done if he wished. It wasn't done
6 before the blood draw, and it isn't required to where
7 there's a warrant in place. The warrant is the
8 controlling factor. It is then necessary for the officers
9 and appropriate for the officers to inform him afterwards
10 that he may do so, and the testimony I had from the
11 trooper was that he was told after the blood draw that he
12 could have his own test done. He didn't do so. The
13 trooper did testify that he gave him those additional
14 special evidence warnings, but he didn't do it prior to
15 the blood draw. He did it subsequent to the blood draw.

16 As far as the Court is concerned, that is consistent
17 with the requirements of the statute and is appropriate,
18 and there are cases in the cases cited to the Court that
19 say that specifically, that that's the case. It may be
20 done after the blood draw, because once -- if we're
21 talking about blood tests, if a person wishes to have
22 their own done, they have that opportunity even though the
23 state has already drawn blood.

24 There were substantial arguments about the use of
25 retrograde extrapolation, and whether or not it is

1 admissible in court. It is clear to me from the testimony
2 that retrograde extrapolation always relies upon certain
3 assumptions and certain calculations, and that those
4 assumptions are not, what's the word, precise, because
5 they can't be precise because individuals have different
6 body chemistries.

7 It is recognized by the folks who do the extrapolation
8 as the testimony indicated here with, we had the
9 toxicologist and Dr. Goldfogel. The evidence is that the
10 assumptions that are made are made in favor of a faster
11 burn-off rate, and therefore, are made in favor of the
12 defendant.

13 But it is clearly the testimony from both the
14 toxicologist and Dr. Goldfogel that this is generally
15 recognized in the scientific community as admissible and
16 acceptable calculations and methodology. The cases and
17 the other materials cited to the court indicate that there
18 are places in this country where perhaps that is not
19 considered to be the case, but in Washington, the case law
20 that I saw, and the testimony of the experts here is that
21 this is generally accepted and recognized in the
22 scientific community and may therefore, be admitted as
23 evidence.

24 The question again is not whether it is admissible but
25 what weight is to be given to it, and the extent to which

1 the experts can be cross-examined about their assumptions
2 and the validity of their assumptions and when the
3 assumption may not be valid and whether other people may
4 see it differently all goes to the issue of weight the
5 jury will give to the evidence, and whether or not the
6 evidence should therefore, be believed rather than
7 admitted. So I think all of that is, again, a matter that
8 goes to the weight of the evidence rather than its
9 admissibility, and therefore, the Court would not be
10 suppressing evidence of retrograde extrapolation.

11 The issues that have most recently been raised, I'm
12 looking for the more recent documents that I received here
13 just to make sure I cover everything, because as counsel
14 knows, there are a lot of briefs and memoranda. I think
15 the most recent one that was submitted was on the basis
16 that the seizure of the evidence from the blood draw, and
17 the use of that evidence should be excluded from the jury
18 because Mr. Smith was sedated, and the language of the
19 motion, "knocked unconscious," which I think the testimony
20 today clearly refutes, and that the execution of the
21 search warrant goes beyond the standard of reasonableness,
22 and is such outrageous governmental conduct that shocks
23 the conscience and is a violation of Mr. Smith's due
24 process rights; that the warrant was void for vagueness,
25 because it sets no limit on the parameters of the search.

1 Nobody has provided me with a copy that I can remember
2 seeing of the warrant, itself, as to the content. I think
3 I saw a transcript of the testimony provided to the judge
4 who granted the warrant, and it does say that it will be
5 drawn. It will be tested is what I think the standard in
6 this state requires, that such warrants require that the
7 blood be drawn, and it gives the circumstances, and
8 indicates generally, it's two vials of blood that can be
9 drawn. It has to be preserved and tested by the state
10 toxicologist. That I recall seeing in the warrant and the
11 testimony regarding the warrant. I didn't have a copy of
12 the warrant, itself.

13 MR. RICHEY: Your Honor, would you like copy?

14 THE COURT: If you have one, that would be helpful. So
15 I think that that -- if the warrant reflects that, then it
16 will be within the scope of the testimony provided, and it
17 would not be vague. It would be pretty clear as to what
18 is expected to be done.

19 I understand the argument and -- okay. This is pretty
20 standard search warrant language to extract a sample of
21 blood consisting of one or more vials from Mr. Smith who
22 was properly identified; that it would be submitted to the
23 Washington State Toxicology Laboratory for appropriate
24 forensic testing to determine blood alcohol level and/or
25 determine and detect the presence of levels of any drugs,

1 which is I think specific enough under the circumstances.
2 That's what the request was for.

3 But I understand the argument about whether or not the
4 mechanism of the sedation and the essentially forceable
5 draw of the blood is the sort of thing that should take it
6 out of the scope of whether it's an appropriate test or
7 not.

8 The issue was raised at one point about whether or not
9 he should have been given the opportunity for a breath
10 test rather than a blood test. In looking at the cases,
11 again *Schultz* and other cases, it's clear that when you
12 have the kind of incident we have here which was an
13 investigation for a vehicular homicide; Trooper Beattie
14 testified this morning that at the time he was at the
15 hospital before the blood draw was done, he was advised
16 that it was a vehicular homicide case. He was aware at
17 the time that he left the scene that it might be such, as
18 I believe that was his testimony in the early hearing.

19 Therefore, the statute can be invoked, and the statute
20 once invoked if it is determined that a blood draw needs
21 to be done, that covers it. There is no need under those
22 circumstances to offer a breath test first. The statute
23 is the controlling force here.

24 It was determined that this was necessary. It was
25 pursuant to the statute, and when you read the statute

1 about, I think it's 46.51.308, it talks about blood -- the
2 breath test and blood draws and when you do which, it
3 specifically states that in this type of case, they may
4 take the -- it is a search warrant, and they may take a
5 blood draw, and it is not a consensual matter. It is a
6 matter that is provided for by statute. It is beyond the
7 implied consent. It goes to a different set of
8 circumstances, and the cases that I read indicate that it
9 is different when you have this type of an investigation
10 or this type of an offense, and when it is sought via a
11 warrant to draw blood.

12 So I would have to say that the question then becomes
13 not whether or not, whether it is appropriate to have done
14 such, to have executed the search warrant, to have gotten
15 a search warrant, but the question is was it appropriate
16 to have done it by sedation?

17 And the testimony that I've heard here this morning
18 makes it pretty clear to me that Mr. Smith in the eyes of
19 not just the trooper, but in the eyes of the doctor who is
20 there to obtain this, do this in a safe manner, and who is
21 there making sure that his phlebotomist is capable of
22 doing her job, that the doctor indicated it is his belief
23 based upon his many years of experience in ER medical care
24 that Mr. Smith was acting and behaving in such a way that
25 the only safe way for the warrant to be executed was for

1 him to be sedated.

2 It is clear to me from the testimony that Mr. Smith
3 both resisted as much as he could physically in every
4 possible way, and that he put himself at risk of having a
5 needle broken off in his body should he resist at the
6 wrong time when the blood is to be drawn, or at the time
7 that the sedation is to be imposed, and that the only way
8 that this could properly be done was for sedation to be
9 done, and that the mechanism used by the ER doctor to
10 essentially distract him from one site of his body and
11 make the injection in another is a reasonable and rational
12 way to respond and to deal with this.

13 I don't believe it is beyond the standards of
14 reasonableness or such outrageous government conduct that
15 it shocks the conscience simply because the reasons for it
16 are not caused by the officers. They are caused entirely
17 by Mr. Smith and his resistance and his violent and
18 physical resistance to a search warrant which was legally
19 and validly obtained, and which was being served on him
20 pursuant to the court's ruling.

21 Under those circumstances, I would have to find that
22 the need to impose the sedation which as the testimony
23 indicates today did not make Mr. Smith unconscious. It
24 merely sedated him and calmed him down enough to allow the
25 blood to be drawn, that that was appropriate and necessary

1 under these circumstances.

2 I'm convinced from the doctor's testimony that it was
3 the only option available, and he was pretty clear that
4 Mr. Smith was the resisting party and always had been the
5 resisting party and was not in any way being manhandled or
6 inappropriately treated by the officers. They were merely
7 trying to get him calm enough or keep him restrained
8 enough so that the blood could be drawn pursuant to the
9 search warrant.

10 So I would find that the warrant, itself, is
11 appropriate. It was properly limited, sets forth the
12 necessary acts for the trooper and the phlebotomist to
13 carry out, and that those were carried out pursuant to
14 that warrant, and that the way in which it was done was
15 the only safe and necessary way that it could have been
16 done. So I would not be inclined to exclude any of the
17 evidence of the blood draw on that basis as well. The
18 evidence should be admissible at trial, and the jury can
19 take from that what they wish.

20 Are there any motions that were not addressed, counsel?

21 MR. RANDS: I don't believe so, Your Honor.

22 THE COURT: Okay.

23 MR. RICHEY: No, Your Honor.

24 THE COURT: What else do we have pretrial that you want
25 to take up? Motions in limine, do you want to take a

1 restrain him.

2 Q. Were you being successful in restraining him?

3 A. No, sir.

4 Q. Could the sedative be administered to him safely?

5 A. No, sir.

6 Q. So what did you do?

7 A. Hmm, I was continuing to try to restrain his right arm. I
8 observed Trooper Williams ask Trooper Krieg for his asp
9 baton.

10 Q. What's an asp baton?

11 A. On your belt, it's a little baton that expands out
12 farther.

13 Q. What's it made out of?

14 A. It's made out of metal.

15 Q. What do you typically use that for in law enforcement?

16 A. It could be used for, it's an impact tool, what we call an
17 impact tool. It can be used on, we primarily use it to
18 break windows on cars, activities like that. You can use
19 it, and we are trained to use it on individuals that are
20 being combative with us.

21 Q. Where do you get that kind of training?

22 A. The state patrol academy.

23 Q. Did you observe Trooper Williams use the A-S-P baton?

24 A. Yes, sir.

25 Q. How did he use it?

1 A. He used it in the closed position. It's approximately --

2 Q. Can you tell us what that means?

3 A. Yes, sir. So when it's on your belt, it's in the closed
4 position. It's approximately this large. It expands out
5 further. He didn't expand it out further. He left it in
6 that closed position, and he grabbed the middle of it with
7 his fist.

8 Q. Okay, and what did he do with it?

9 A. He administered several strikes. I'm not sure exactly how
10 many. I was still preoccupied with the arm. I didn't
11 observe all of them. I observed him strike the Defendant
12 in the thigh.

13 Q. Okay. Were you able to affect a change with the
14 Defendant's arm when that happened?

15 A. Yes, sir.

16 Q. Describe that.

17 A. I was able to get better control of it. I was able to pin
18 his right arm somewhat underneath the hospital bed in an
19 awkward angle where he wasn't able to use his strength to
20 fight me anymore.

21 Q. What happened once his arm was pinned to the bed?

22 A. The nurse went from his leg up to his right shoulder and
23 was able to administer the sedative.

24 Q. How was that administered?

25 A. Through a needle.

1 A. You're welcome.

2 MR. ROCHE: Your Honor, may I approach the witness
3 again?

4 THE COURT: You may.

5 Q. (By Mr. Roche) Handing you what's marked as Plaintiff's
6 proposed Exhibit Number 17.

7 A. Thank you.

8 Q. What, I know I asked you this, but what is that again?

9 A. This is a copy of the toxicology report for the Defendant
10 in this case.

11 Q. Okay. Does that report reflect the average blood alcohol
12 concentration that was reflected from your testing?

13 A. Yes.

14 Q. What was the conclusion of that testing?

15 A. The testing result had an ethanol result of 0.050, plus or
16 minus 0.0041 grams per 100 mL.

17 MR. ROCHE: Your Honor, I move to admit Plaintiff's
18 proposed Exhibit Number 17.

19 MR. RANDS: No objection.

20 THE COURT: Seventeen will be admitted.

21 (Plaintiff's Exhibit 17 admitted into evidence.)

22 Q. (By Mr. Roche) I would like to ask the value, the average
23 value that you reported, at what specific point in time
24 did that, was that alcohol concentration test for?

25 A. I performed my testing for the ethanol for alcohol content

1 see that? Do you want a little more?

2 THE WITNESS: Okay. So the factors I'm taking into
3 account are that the accident occurred at 8:44 p.m., and
4 given that two hour window, I would then back calculate to
5 10:44 p.m., and I'm using the factor that at 1:30 a.m.,
6 the blood alcohol concentration is measured at 0.05. So
7 that's about three hours.

8 Is that going to be sufficient going back about three
9 hours for you instead of doing down to the minute?

10 Q. (By Mr. Roche) Yes, three hours works.

11 A. Yeah, three hours, two and a half hours. So I'm going to
12 go back three hours. I'm going to multiply both ends of
13 my range for burn off. So I'm going to multiple .01 times
14 three, and I'm going the multiply .02 times three. So
15 this gives us a result of 0.03. This gives us a result of
16 0.06, and I'm basically going to add these back onto our
17 result from 1:30. I guess I need my calculator after all.

18 So the retrograde extrapolation went back to 10:44
19 p.m., roughly going back three hours would be a range of
20 .08 to .11.

21 MR. ROCHE: Perhaps for identification purposes, Your
22 Honor, could we mark what --

23 THE COURT: Yes.

24 MR. ROCHE: -- Ms. Mitchell-Mata has made?

25 THE CLERK: Plaintiff'S Exhibit Number 43.

APPENDIX K

REVISED CODE OF WASHINGTON

46.61.520. Vehicular homicide — Penalty.

(1) When the death of any person ensues within three years as a proximate result of injury proximately caused by the driving of any vehicle by any person, the driver is guilty of vehicular homicide if the driver was operating a motor vehicle:

(a) While under the influence of intoxicating liquor or any drug, as defined by **RCW 46.61.502**; or

(b) In a reckless manner; or

(c) With disregard for the safety of others.

(2) Vehicular homicide is a class A felony punishable under chapter 9A.20 **RCW**, except that, for a conviction under subsection (1)(a) of this section, an additional two years shall be added to the sentence for each prior offense as defined in **RCW 46.61.5055**.

46.61.502. Driving under the influence.

(1) A person is guilty of driving while under the influence of intoxicating liquor, marijuana, or any drug if the person drives a vehicle within this state:

(a) And the person has, within two hours after driving, an alcohol concentration of 0.08 or higher as shown by analysis of the person's breath or blood made under [RCW 46.61.506](#); or

(b) The person has, within two hours after driving, a THC concentration of 5.00 or higher as shown by analysis of the person's blood made under [RCW 46.61.506](#); or

(c) While the person is under the influence of or affected by intoxicating liquor, marijuana, or any drug; or

(d) While the person is under the combined influence of or affected by intoxicating liquor, marijuana, and any drug.

(2) The fact that a person charged with a violation of this section is or has been entitled to use a drug under the laws of this state shall not constitute a defense against a charge of violating this section.

(3)

(a) It is an affirmative defense to a violation of subsection (1)(a) of this section, which the defendant must prove by a preponderance of the evidence, that the defendant consumed a sufficient quantity of alcohol after the time of driving and before the administration of an analysis of the person's breath or blood to cause the defendant's alcohol concentration to be 0.08 or more within two hours after driving. The court shall not admit evidence of this defense unless the defendant notifies the prosecution prior to the omnibus or pretrial hearing in the case of the defendant's intent to assert the affirmative defense.

(b) It is an affirmative defense to a violation of subsection (1)(b) of this section, which the defendant must prove by a preponderance of the evidence, that the defendant consumed a sufficient quantity of marijuana after the time of driving and before the administration of an analysis of the person's blood to cause the defendant's THC concentration to be 5.00 or more within two hours after driving. The court shall not admit evidence of this defense unless the defendant notifies the prosecution prior to the omnibus or pretrial hearing in the case of the defendant's intent to assert the affirmative defense.

(4)

(a) Analyses of blood or breath samples obtained more than two hours after the alleged driving may be used as evidence that within two hours of the alleged driving, a person had an alcohol concentration of 0.08 or more in violation of subsection (1)(a) of this section, and in any case in which the analysis shows an alcohol concentration above 0.00 may be used as evidence that a person was under the influence of or affected by intoxicating liquor or any drug in violation of subsection (1)(c) or (d) of this section.

(b) Analyses of blood samples obtained more than two hours after the alleged driving may be used as evidence that within two hours of the alleged driving, a person had a THC concentration of 5.00 or more in violation of subsection (1)(b) of this section, and in any case in which the analysis shows a THC concentration above 0.00 may be used as evidence that a person was under the

influence of or affected by marijuana in violation of subsection (1)(c) or (d) of this section.

(5) Except as provided in subsection (6) of this section, a violation of this section is a gross misdemeanor.

(6) It is a class B felony punishable under chapter 9.94A RCW, or chapter 13.40 RCW if the person is a juvenile, if:

(a) The person has three or more prior offenses within ten years as defined in [RCW 46.61.5055](#); or

(b) The person has ever previously been convicted of:

(i) Vehicular homicide while under the influence of intoxicating liquor or any drug, [RCW 46.61.520\(1\)\(a\)](#);

(ii) Vehicular assault while under the influence of intoxicating liquor or any drug, [RCW 46.61.522\(1\)\(b\)](#);

(iii) An out-of-state offense comparable to the offense specified in (b)(i) or (ii) of this subsection; or

(iv) A violation of this subsection (6) or [RCW 46.61.504\(6\)](#).

9A.76.020. Obstructing a law enforcement officer.

(1) A person is guilty of obstructing a law enforcement officer if the person willfully hinders, delays, or obstructs any law enforcement officer in the discharge of his or her official powers or duties.

(2) "Law enforcement officer" means any general authority, limited authority, or specially commissioned Washington peace officer or federal peace officer as those terms are defined in [RCW 10.93.020](#), and other public officers who are responsible for enforcement of fire, building, zoning, and life and safety codes.

(3) Obstructing a law enforcement officer is a gross misdemeanor.

§ 46.20.308. Implied consent -- Test refusal -- Procedures

...

(3) Except as provided in this section, the test administered shall be of the breath only. If an individual is unconscious or is under arrest for the crime of felony driving under the influence of intoxicating liquor or drugs under RCW 46.61.502(6), felony physical control of a motor vehicle while under the influence of intoxicating liquor or any drug under RCW 46.61.504(6), vehicular homicide as provided in RCW 46.61.520, or vehicular assault as provided in RCW 46.61.522, or if an individual is under arrest for the crime of driving while under the influence of intoxicating liquor or drugs as provided in RCW 46.61.502, which arrest results from an accident in which there has been serious bodily injury to another person, a breath or blood test may be administered without the consent of the individual so arrested pursuant to a search warrant, a valid waiver of the warrant requirement, or when exigent circumstances exist.

[Version of statute effective Dec. 2014]